REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By CHARLES HAMLIN,

REPORTER OF DECISIONS.

MAINE REPORTS,

VOLUME LXXXV.

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JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

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HON. WILLIAM WIRT VIRGIN.*
HON. ARTEMAS LIBBEY.
HON. LUCILIUS A. EMERY.
HON. ENOCH FOSTER.
HON. THOMAS H. HASKELL.
HON. WILLIAM PENN WHITEHOUSE.
HON. ANDREW P. WISWELL.†

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* Died, January 23, 1893.
† Appointed, April 10, 1893.

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. FREDERIC A. POWERS.

CHARLES HAMLIN, REPORTER OF DECISIONS.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

STATE OF MAINE, BY INFORMATION OF ATTORNEY GENERAL,

vs.

THE OLD TOWN BRIDGE CORPORATION.

Penobscot. Opinion August 6, 1892.

Corporation. Charter. Ouster. Waiver by State. Special Act, February 9, 1827; January 29, 1829; August 6, 1846; August 8, 1846.

By special Act of February 9, 1827, the defendant was chartered to erect and maintain a toll bridge over the Penobscot river "at or near the village of Old Town," the legislature reserving the right to revise and change the tolls at any time after ten years. By an additional Act of January 29, 1829, the right to take tolls was extended to forty years, provided, that, at the end of said term, said bridge shall revert to the State. In 1831-2, the defendant completed and opened its bridge under the original charter and several subsequent acts. It was located nearly one half mile below the head of Old Town Falls, and was maintained there until March, 1846, when the easterly span, the largest part, was swept away by a freshet. By special Act of August 6, 1846, before the rebuilding of defendant's bridge, another corporation, the Old Town and Milford Bridge Company, was chartered to erect and maintain a toll bridge over the river "at the Old Town Falls."

Section eleven of this new charter provided that some one of its corporators should within fifteen days after its approval furnish a copy thereof to the defendant; and if before September 10, following, the defendant should give any two corporators of the new company written notice of the defendant's election "to build a bridge at Old Town Falls, and on or before October 1, following, shall actually commence the erection, and, within a reasonable time thereafter, complete the bridge,— then the new charter should be null and void," &c. Such notice was accordingly given and defendant rebuilt its bridge at the old location. By special Act of August 8, 1846, it was pro-

vided that, "so much of the Act of January 29, 1829, as relates to the reversion of the bridge to the State, be repealed,— provided that this Act shall not take effect unless the proprietors [defendant] shall elect to build a bridge at the Old Town Falls," . . . "according to the provisions of the new charter."

Upon an information filed by the Attorney General to enforce the reversion of the bridge to the State and forfeiture of the charter, upon the ground of usurpation by the defendant since 1872, the court having been aided by jury findings, *it was held*: that the phrase, "at or near the village of Old Town," in the defendant's charter, and that of "at the Old Town Falls," selected for the new one, designate different localities; that the bridge was not rebuilt at the place intended by the Legislature; and that the defendant's tenure of forty years was determined by its own limitation.

The doctrine of waiver on the part of the State of the breach of a condition is not applicable when, as in this case, by the terms of the defendant's charter the franchise absolutely determined upon failure to perform the condition therein contained.

An application by citizens to the Legislature, reciting the charter of the corporation and the clause of forty years' limitation, asking the State to take possession and make it a free bridge, will not revive the defendant's tenure of the bridge where there is no legislative action beyond the report of a committee with leave to withdraw granted to the petitioners.

In proceedings of the above nature there may be judgment of ouster of a particular franchise, and not the whole charter.

ON REPORT.

This was a proceeding in *quo warranto*, brought in behalf of the people through the Attorney General to declare and enforce the reversion to the State of the defendant's title to the Old Town toll-bridge, in accordance with the provisions of the defendant's charter.

The cause was submitted to the jury under instructions from the Court to determine whether the bridge had reverted as claimed. The verdict of the jury determined that the bridge had reverted to the State.

Before submission to the jury, it was stipulated by the parties as follows: This cause is submitted to the jury upon the evidence presented, under such instruction as the court sees fit to give them; and, after their verdict shall have been returned, the case is to be submitted to the Law Court for the Law Court to enter such judgment as the legal rights of the parties may require.

The defendant filed a motion for a new trial and excepted to the instructions at the trial.

The following portions of the presiding justice's charge, and marked with brackets, exhibit some of the instructions to which the defendant took exceptions:

"So, then, you will determine whether or not the present structure, which was built in 1846 by the defendant corporation, was built 'at the Old Town Falls' in the town of Old Town? If it was, within the meaning of the law as I shall further give it to you, then, gentlemen, your verdict will be for the defendant. If not, then, gentlemen, your verdict will be for the plaintiff, provided the legislature has not waived the right.

"So, then, let us see whether the defendant corporation did build the bridge 'at the Old Town Falls' in the town of Old Town. In the first place, was the locality, the falls, the Old Town Falls? Now, gentlemen, you will determine what locality was meant by the Legislature in that charter. You will take into consideration the natural meaning of the words in the first place, and, what is common knowledge, that a fall of water, or falls of water, is where water is falling in contradistinction to running. The tail of a fall may be said to be in certain cases where the water ceases to fall and begins to run. Now falls, in the common acceptation of the term, may be a series of cascades; cascades, a fall of water, running water, a further fall, running water mixed with stones and rips, and finally another fall. So after all, you will determine, as a matter of fact, from whatever evidence you have heard in this case and from your own observation, where the Old Town Falls are; what piece of territory, what extent of territory up and down the river the name at that time was understood to refer to and to include. The plaintiff says it was only the pitch of water above the islands, and so much of it as was falling water down to the top, or to the upper part of Eagle Island. The defendant says it refers to the quick water in and about the river there, from the first pitch to below Webster's Island and below the Dwinel mills — that the Dwinel mills were located upon the lower falls and that all that water was known as the Old Town Falls. You have seen it; now, gentlemen, you will judge.

"The Legislature provided that the bridge must be erected 'at

the Old Town Falls.' Now, gentlemen, the word 'at' does not mean 'on.' It is a more indefinite word than that. The words 'in' and 'on' are more definite words than the word 'at.' The primary meaning of the word 'at' is near to. As given in Webster's dictionary it is this: 'Primarily, this word expresses the relations of presence, nearness in place; as at the house. . . It is less definite than 'in' or 'on.' At the house may be in or near the house. So, gentlemen I instruct you that in this case the word 'at,' in that act of the Legislature would authorize or imply that the bridge might be built either over the falls, on the falls, above the falls or below the falls, if it was in the immediate proximity, within such reasonable distance of the fall as the exigencies of the case might require, taking into consideration the formation of the land, all the situation about there, the water, the expense of building, the facilities for building and the cost of placing it either a little above the falls, on the falls, or a little below the falls. You have observed the locality; you have seen what facilities there are for the bridge; you have had detailed to you what need there was long years ago, in 1846, when this bridge was built, what necessity there was for a bridge there and where the business in the village was located, and you will say whether or not this bridge complies with the description in that act. You are not to be governed by that act so far as literally to require the construction of the bridge on the falls; but if the bridge was built at, that is, reasonably near the falls, taking into consideration all the exigencies of the time and the case and the situation, then, gentlemen, it is your duty to say it is complied with; and if you find under those facts, that the provisions of the act of the Legislature have been complied with, then gentlemen, your verdict must be for the defendant.

"Now, if you are of opinion that it had not been complied with, the defendant says further that the State has waived its right to insist upon any forfeiture because the matter was once before the Legislature by petitioners asking that the State enter and take possession of this bridge by reason of its forfeiture, and that the Legislature voted the petitioners leave to withdraw,

thereby indicating the design and intention of the Legislature not to enforce this forfeiture, but to allow the bridge corporation to still retain it. You will bear in mind that the charter of the bridge corporation did not expire in forty years, but, at most, that at the end of forty years the bridge should become forfeited to the public. Now, I instruct you, as matter of law that, if these petitioners asked the State to interpose and take possession of this property by reason of the forfeiture incurred, because the bridge was not built in a proper place, and the Legislature heard the parties and decided the question, and decided that they would not take possession, would not interfere, this waived the public right and the Attorney General cannot prevail in this case; but if, on the other hand they had a hearing before a committee, and the corporation through its officers, induced those petitioners to withdraw their petition from any inducement held out to them, if they induced the petitioners to inform the committee that the matter had been arranged and that no judgment of the Legislature was asked in the premises, and the committee, thereupon, without adjudicating upon the merits of the case, but finding that the parties had come to an agreement, simply reported to the House leave to withdraw, and leave was so granted, then, gentlemen, the State would not have waived its right; because, in order for the State to have waived its right it must have acted deliberately, it must have decided the question in this case upon the merits, and if it did not do that, then it has not waived its right.

"Now, gentlemen, in this case I ask you to consider all the evidence and determine whether or not there has been a compliance with the terms of the act requiring the bridge to be built at the Old Town Falls. If, under the instructions I have given you, the old bridge, as originally built, was a substantial compliance with the terms of this act, then, though it had stood there before, if it was a substantial compliance with the terms of the act, I instruct you that it was not necessary for them to abandon that site and to build a new bridge at a new place. But if, on the other hand, it was not, then, gentlemen, it was necessary, in order for them to avoid this forfeiture, to have

abandoned that place and come so near the falls or at such a place as would be a substantial compliance with the terms of the act, to wit: At the falls, which means either on the falls, or reasonably near the falls under all the circumstances of the case and the exigencies and necessities that existed at the time." . . .

The Court:— (to Mr. Woodard, counsel for defendant,) "You wish me to instruct the jury 'as to what weight should properly be given to the contemporaneous construction of the phrase in question, Old Town Falls, as evidenced by the acts of interested parties.' I do not know to what class of evidence you refer."

Mr. Woodard:—"I refer to the fact of the action of the defendant corporation in giving notice and electing to build the bridge and the acquiescence and doing nothing on the part of the Old Town and Milford Bridge Company."

The Court:—"Well, gentlemen, the fact that the old bridge corporation gave notice to the new corporation of its intention to build the bridge, in fact notified them that it already had done so, and the fact that they did nothing, are facts for you to take into consideration in determining really what was meant and understood to be meant at that time by the phrase 'The Old Town Falls.' [It is evidence that is not of great weight. It cannot signify anything more than what those parties may have understood or may not have understood. They may have understood it rightly; they may have understood it wrongly. It is a fact for you to take into consideration in determining, after all, what you think from all the evidence as to their acts in relation to there being a substantial compliance with the act of the Legislature requiring the bridge to be built at the falls."]

Counsel for the defendant also requested the presiding justice to instruct the jury that the State may have waived its right by non-action and long continued acquiescence in the possession of the bridge by the respondent corporation after the reversion, if the attention of the Legislature was called to the matter, full information of the forfeiture or reversion was given, and no action was taken. This instruction was denied and the defendant excepted.

Baker, Baker and Cornish, and *J. F. Gould*, for plaintiff.

Exception as to waiver: 2 Wat. Corp. pp. 742-3, note; *Att'y Gen'l* v. *Petersburg R. R.* 6 Ired. 456; *People* v. *Manhattan Co.* 9 Wend. 351. Mere non-action by the Legislature cannot give vitality to a charter which has expired by limitation and already reverted. There must be some actual judgment of determination reached by the Legislature.

General law of the case: Purpose of proceeding is to obtain judgment of ouster from the illegal exercise of the usurped right of exacting tolls, and not a judgment *in rem* for a transfer of title of possession to the bridge. Remedy: R. S., c. 77, § 5; *Reed, Att'y Gen'l* v. *Canal Co.* 65 Maine, 132; *Goddard* v. *Smithett*, 3 Gray, 122-3, 125; *Att'y Gen'l* v. *Del. R. R.* 33 N. J. 282; *Com.* v. *Walter*, 83 Pa. St. 105; *State* v. *Vail*, 53 Mo. 97; High Ex. Leg. Rem. § 707; 2 Beach Priv. Corp. § § 436, 840; 2 Wat. Corp. § 385 and cases, § 744, note; *Rex* v. *Amery*, 2 T. R. 515; *People* v. *Rensselaer R. R.* 13 Wend. 113; *Att'y Gen'l* v. *Salem*, 103 Mass. 139-140; *State* v. *Lyons*, 31 Iowa, 432; *State* v. *Turnpike Co.* 8 R. I. 182; *Att'y Gen'l* v. *Ins. Co.* 2 Johns. Ch. 371; *People* v. *Same*, 15 Johns. 358; *State* v. *Fid. Co.* 77 Iowa, 648. Defendant's title by limitation: *Fifty Associates* v. *Howland*, 11 Met. 102; *Props.* v. *Grant*, 3 Gray, 146-7; 1 Wash. R. P. p. 459; Tiedeman R. P. § 281, and cases; *Little* v. *Watson*, 32 Maine, 219. Form of judgment: 2 Kent Com. 312, note; 2 Beach Priv. Corp. § § 435, 841; *Att'y Gen'l* v. *Salem*, 103 Mass. 139; *People* v. *R. R.* 15 Wend. 113; *Ins. Co.* v. *Needles*, 113 U. S. 574; *People* v. *Dashaway Ass.* 84 Cal. 114; *Central Bridge Corp.* v. *Lowell*, 15 Gray, 106.

Wilson and Woodard, for defendant.

Suit can be maintained, if at all, at common law only. *Terret* v. *Taylor*, 9 Cranch, 51. Duration of corporation charter not limited, although the bridge or structure may have reverted to the State. There must be a judicial determination before dissolution of corporation. *Matter of N. Y. Elev. R. R. Co.* 70 N. Y. 337-8; 2 Mor. Priv. Corp. § § 1003, 1015; *Penob. Boom Corp.* v. *Lamson*, 16 Maine, 224-231.

No grounds of forfeiture. Legislative action to be had is implied in the right to revise tolls and right to take the bridge, and then a determination which right to exercise. State's right under Act of 1829, as modified in 1846, became a condition subsequent. Nothing done to revest title. *Spofford* v. *True*, 33 Maine, 283; *Birmingham* v. *Lesan*, 77 Maine, 494, 498. Title still remains in corporation. *Little* v. *Watson*, 32 Maine, 214-219.

Bridge at "Old Town Falls" under act of 1846: Consider the situation. Defendant had prior right to build and under its own charter as well as at Old Town Falls. Its old charter was not amended or altered as to location and could build in no other place. Phrase to be interpreted generally. Contemporaneous interpretation and defendant's acts entitled to great weight. New company abandoned all their rights on getting notice of re-building this bridge. Officers of both companies understood what was intended and so governed their acts. *Knowles* v. *Toothaker*, 58 Maine, 172; *Edward's Lessee* v. *Darby*, 12 Wheat. 206-210; *Packard* v. *Richardson*, 17 Mass. 122-144; *Opinion of the Justices*, 3 Pick. 518; *U. S.* v. *Hill*, 120 U. S. 169, 182-3.

Verdict of jury advisory only. Question, whether defendant's title can be taken for breach of condition subsequent. *Hooper* v. *Cummings*, 45 Maine, 359-365; 4 Kent Com. (12th Ed.) p. 129; *Birmingham* v. *Lesan*, 77 Maine, 494, 498. State has waived its right to the reversion. *Goodright* v. *Davids*, Cowp. 803; *State* v. *Fourth N. H. Turnpike*, 15 N. H. 162, 168; *Com.* v. *The Tenth Mass. T. Corp.* 11 Cush. 171; *Willard* v. *Henry*, 2 N. H. 120. State estopped to claim reversion, when, in 1874, with knowledge of all facts, it declined taking action in the Legislature, and permitted defendant afterwards to expend a large sum of money, and justified the belief that the right of reversion was gone.

VIRGIN, J. By special act of February 9, 1827, the respondent,—"Old Town Bridge Corporation,"—was chartered to erect and maintain a bridge over the Penobscot river, "at or near the village of Old Town," "to connect Marsh Island with the main land" on the east side of the river, now known as Milford; and

to take specified rates of toll which the legislature reserved the right to revise and change "at any time after ten years."

By an additional act of January 29, 1829, the right to change the rates of toll was extended to "forty years, provided, that at the end of said term, said bridge shall revert to the State."

Pursuant to the original charter and several subsequent additional acts, the respondent, in the fall of 1831 or spring of 1832, completed and opened its bridge consisting of two separate structures, one extending from Old Town to the island, and the other from the island over the eastern channel to Milford, on the east side of the river.

The bridge was located nearly one half of a mile below the head of "Old Town Falls" and was maintained there until March, 1846, when its larger part,—the span over the easterly channel to Milford,—was swept away by a freshet, leaving the pier and abutments standing.

By a special act of August 6, 1846, before the re-building of the respondent's bridge, another corporation, called the "Old Town and Milford Bridge Company," was chartered to erect and maintain a toll-bridge of specified dimensions over the Penobscot River "at the Old Town Falls," "to connect Old Town with the town of Milford."

Section 11, of this new charter, provided in substance that some one of its corporators should, within fifteen days after its approval, furnish a copy of the new charter to the respondent; and if, before September 10, following, the respondent should give to any two corporators of the new company written notice of the respondent's election "to build a bridge at Old Town Falls, and on or before October 1, following, shall actually commence the erection, and, within a reasonable time thereafter, complete the bridge"—then the new charter should be null and void, otherwise remain in full force.

As a counterpart of the foregoing provisions of the new charter, the Legislature, two days thereafter, viz: on August 8, 1846, passed an act additional to that of January, 1829, which provided that "so much of the act of January, 1829, as relates to the reversion of the bridge to the State be repealed—provided that this act

shall not take effect, unless the proprietors of said bridge [respondent] shall elect to build a bridge at the Old Town Falls, and shall on or before October 1, next, actually commence building such bridge, according to the provisions of the new charter."

The Attorney General, *ex officio*, in behalf of the State files this information in the nature of a *quo warranto*, for the purpose of enforcing the reversion of the bridge and the forfeiture of the chartered privileges, upon the alleged ground that the respondent ever since the expiration of the forty years' limitation mentioned, to wit, since 1872, has usurped upon the State the various powers, privileges and immunities incident to its corporation.

The respondent's answer denies the usurpations alleged and asserts that it is lawfully exercising the franchises and privileges mentioned; and that in accordance with the provisions of section 11, of the new charter, the respondent, on September 5, 1846, gave to two of the corporators of the new charter written notice of its election to "build a bridge," and did actually commence and complete the erection of it, "at the Old Town Falls," and opened the same to the public, on or before October 1, 1846.

Thus is presented the principal issue in the case.

By agreement the case was submitted to the jury under instructions by the presiding justice, and after verdict, to be submitted to the law court for the rendition of such judgment as the legal rights of the parties require.

After the verdict, the respondent filed a motion to set it aside as being against law and evidence, and filed exceptions to certain rulings. Thereupon the cause, by agreement, was reported to the law court which was to render such judgment as the legal rights of the parties require; pleadings, verdict, motion, exceptions, charge, and report of the evidence making part of the case.

On recurring to the reported evidence, it appears that, on September 5, 1846, the respondent, by vote of its proprietors "directed its clerk to notify, in writing, two of the corporators [named] of the new charter that it had elected 'to re-build its

bridge,' and had already so far completed the same that it would be open for public accommodation in ten or fifteen days;" which notice in writing was, on the same day, duly served on the new corporators named.

The preliminary question is, was written notice of the respondent's election "to re-build its bridge" and a seasonable completion of it upon its old pier and abutments, a compliance with the provision of section 11, of the new charter which expressly required the respondent to "build a bridge at Old Town Falls?"

The answer to the preliminary question of notice, as well as that of location, depends upon the fact whether the phrase "at or near the village of Old Town," designates the same place as the phrase "at the Old Town Falls," and was so intended by the Legislature.

The evidence shows that the respondent's bridge was originally built—and subsequently re-built on a spot 2384 feet,—nearly one half mile,—below the head of "Old Town Falls." The concurrent testimony of nearly a score of elderly residents, lumbermen, river-drivers and others is, that there is and for many years has been a place on the river, distinctively known as "Old Town Falls," commencing at the head of the fall near the "Veazie Piers," and ending a short distance below the head of Eagle Island; and that no other place on the river has, to their knowledge, ever been known by that name. There is also much documentary evidence of similar import. The distance covered by the falls is about eighty rods; and from the foot of the falls to the respondent's bridge is something like seventy rods. And we cannot exclude from our minds that the same facts as to the location of the falls are fully recognized in the opinion of the court in *Dwinel* v. *Veazie*, 44 Maine, 173.

The jury, after hearing the evidence and viewing the premises, must have found that the two descriptions were intended to designate two distinct localities.

The definition, of which the words "at" and "at or near" are susceptible, has quite frequently been the subject of legal adjudication; and their signification has been determined to depend largely upon the subject matter in relation to which they are used and the circumstances under which it becomes necessary

to apply them to surrounding objects. Thus, where a statute requires a notice to be delivered to the defendant, or a member of his family "at his dwelling-house," a delivery in the yard one hundred and twenty-five feet distant therefrom was held insufficient. *Kibbe* v. *Benson*, 17 Wall. 624. So "at a town" means some place "within the town rather than without or even at the utmost verge but not in it." *Ches. & O. Can. Co.* v. *Key*, 3 Cranch, 606. "At or near" a certain spot upholds the location of a terminus of a railroad 2475 feet distant therefrom. *Fall River Co.* v. *Old Col. R. R. Co.* 5 Allen, 221. So "near" a town may mean two hundred rods therefrom. *Boston & Prov. R. R. Co.* v. *Midland R. R. Co.* 1 Gray, 340, 367. So "at and near" may be considered synonymous. *Bartlett* v. *Jenkins*, 22 N. H. 63. See also numerous cases collected in 1 Am. & Eng. Ency. 840 *et seq.*

But whatever signification may be given to those words under various, particular circumstances, we are fully satisfied that the phrase "at or near the village of Old Town" used in the respondent's charter, and that of "at the Old Town Falls" selected for the new one, were intended to designate totally different localities. And the fact that the Legislature adopted the latter phrase in the respondent's additional act of August 8, 1846, makes it morally certain that the intention was, if the respondent elected to build, it must do so at a place other than its old one.

The circumstances attending the promotion and passage of the two latter acts all point in the same direction—that the intention was not that the new charter should become void if the respondent re-built upon the old piers and abutments which escaped the flood. The persons who sought and obtained a charter for another bridge, carried on business on and along both banks of the river opposite the Falls. They wanted a bridge in their more immediate vicinity. New buildings had been erected and new industries had been and were centering there. Railroad accommodations were extending to that neighborhood. Two bridges were not needed within one half mile of each other, they would not both pay. And as soon as the principal part of the old bridge was swept away in March, 1846, those imme-

diately interested in having a bridge at the Falls applied, at the succeeding summer session of the legislature, for a charter which was provisionally granted. In seeming consideration of the loss of its bridge before the expiration of its term for taking tolls, the preference of building was given to the respondent, not absolutely, but upon two conditions: (1,) That it would forthwith "build a bridge at the Old Town Falls," (where the new corporation wanted it and were authorized to build one if the respondent did not elect to do it,) and (2,) That it should build it "under its own charter," but, "according to the provisions of the" new one, which are somewhat different from the old one.

Moreover, if the intention had been that the new charter should be annulled by the respondent's re-building upon the old location, the Legislature would have said so in terms, instead of adopting the precise language for definitely fixing the location, which, only two days before, had been selected for and used in the new charter for a like purpose. The evident intention was to accommodate the local as well as public business. Hence, in a spirit of compromise, the Legislature, by passing these two special acts, in substance said: One bridge only is needed in that vicinity. That one located "at the falls" will better accommodate all concerned than at the old location. And inasmuch as the old one went away twenty-six years before the term fixed for revising its tolls and the reversion of its bridge expired, the respondent, if it choose to, and will seasonably "build a bridge, under its own charter, according to the provisions of the new one at the falls," where the new company wish it, then the latter must be content.

It was not done. Our opinion, therefore, is that the respondent did not comply with the requirements of section 11, of the new charter, nor with the corresponding provision of its own amended charter.

What consequence resulted from such non-compliance?

The two acts of 1829 and 1846, both parts of the respondent's charter, must answer. The act of 1829 expressly limits the respondent's tenure to the fixed term of "forty years;" for

as it peremptorily declares, "at the end of said term said bridge shall revert to the State." Therefore, unless that limitation has been repealed, it continues in full force, and the respondent's tenure, without any notice, entry or claim whatever, terminated in 1872, "because it was determined by its own limitation." 4 Kent, 126-7; *Stearns* v. *Godfrey*, 16 Maine, 158, 160; *Ashley* v. *Warner*, 11 Gray, 43, 44; *Prop'rs*, &c. v. *Grant*, 3 Gray, 142, 147; 2 Wash. R. P. 21-2. Will. R. P. § 133.

Was the limitation repealed? Potentially, but not absolutely. To the repeal was annexed a condition, the performance of which alone was expressly made the *sine qua non* of its becoming effective.

To be sure, the Legislature formed a lifeless body of a repeal out of the dust of words; but the "building of a bridge at the Falls" was its only breath of life which was never breathed into it, and hence it never became a living repeal. No bridge at the Falls, no repeal. The limitation, therefore, remained in as full force as if the conditional repealing clause had never been passed.

It is contended, however, that assuming the repealing clause never became effective, even then the bridge did not revert by reason of an alleged waiver on the part of the State. We do not think this contention is tenable.

To be sure a charter of a private corporation, when accepted, is generally considered to be a contract between the State and the corporation. 2 Kent, 306; *Yarmouth* v. *No. Yarmouth*, 34 Maine, 418; *State* v. *Noyes*, 47 Maine, 189; *Hathorn* v. *Calef*, 2 Wall. 10. And a State as well as a private person may waive the breach of a condition contained in its contract. *State* v. *Fourth N. H. Turnpike*, 15 N. H. 162, 168. And if the State had seasonably claimed a forfeiture of the respondent's right to take toll at the old rates without revision, by reason of an actual breach of the condition contained in the act of 1829, viz: "that the said corporation shall, at all times, keep said bridge in good repair," then the same rule of waiver might apply to the State as to a private person in an analogous case. But as already seen, no condition was annexed to the reversion

of the bridge. It was an absolute limitation which has never been repealed or otherwise modified. The tenure of the respondent absolutely determined by its own terms. The statute fixing the limitation executed itself. And hence the doctrine of a waiver of a breach of a condition is in no wise applicable.

Thus, in *State* v. *Fourth N. H. Turnpike*, *supra*, where on an information by the Attorney General, a forfeiture of the franchise was claimed, the court said: "The doctrine of a waiver of a forfeiture by the legislature by subsequent legislative acts does not apply, if by the terms of the charter the franchise absolutely determines on failure to perform the conditions; for as in such case the corporation has ceased to exist, the doctrine of a waiver is inapplicable."

So in *People* v. *Manhattan Co.* 9 Wend. 351, it was held that a forfeiture, incurred by non-compliance with the terms of a condition contained in a charter, may be waived by the legislature by subsequent legislative acts recognizing the continued existence of the corporation. The doctrine of a waiver, however, is not applicable, when by the terms of the charter the franchise absolutely determines upon the failure to perform the condition. See also, *In re Brooklyn W. & N. Ry. Co.* 72 N. Y. 245; S. C. 75 N. Y. 385; 81 N. Y. 69; especially *Brooklyn S. T. Co.* v. *Brooklyn*, 78 N. Y. 524, 529. *A fortiori* it is not applicable where the corporation's tenure of a bridge absolutely determines at the end of a fixed term of years in consideration of the unrestricted right of taking toll for so long a period.

It is further urged that the respondent's tenure of the bridge was revived by the action of the Legislature, in 1874, upon the petition of Hilliard and others, which after reciting the charter and its supplements and the clause relating to the forty years' limitation, prayed the State to take possession and make it a free bridge.

Assuming that the Legislature might, by some affirmative act, revive, extend and continue in force the respondent's tenure for another fixed or indefinite term; or by some supplemental act actually recognizing its present tenure, (*Farnsworth* v. *Lime Rock R. R. Co.* 83 Maine, 440,) might thereby bring

about the same practical result; this record contains no evidence that any such action on the part of the Legislature ever took place. Practically the Legislature took no action.

A denial of the prayer of the petition, based upon a hearing before the committee and declared as a judgment which was intended to reach the merits of the case, might possibly be effective. But we are fully satisfied that the simple report of "leave to withdraw," considered in the light of the circumstances under which such leave was granted, neither had nor was intended to have any such effect as is contended. For the undisputed evidence shows that, after the petition was referred to the "Committee on Ways and Bridges," the respondent's president,—who had faithfully served his company more than thirty years,—and the representative of Milford and other towns of the class, had an interview, which resulted in an agreement that the committee might simply report "leave to withdraw." The merits of the case were never called to the attention of the Legislature by any formal report of facts or otherwise. No supplemental act was reported and no intelligent action whatever was taken for or against the prayer of the petition. Under such a state of facts, it would be idle to hold that the Legislature thereby intended to revive or to recognize the continued existence of the respondent's title after it expired by its forty years' limitation.

Notwithstanding the president's personal presence at the capitol, when and where the interview was had and the agreement made, he testified that he had no authority from his corporation for whatever he did or said in relation to the agreement. The full answer is that, whether he acted in the premises with or without authority, it is entirely immaterial, inasmuch as the committee based its action upon the agreement; and hence the Legislature took no action upon the petition by which it was intended to revive or in anywise recognize the respondent's tenure of the bridge.

As the case, by special agreement of the parties before as well as after verdict, comes forward on report, to the end that this court may "render such judgment as the legal rights of the parties may require," it is thereby placed substantially upon the

same rule as an equity suit, under which the "misrulings of the judge or the improper reception or rejection of evidence," are not considered of much moment, "if the court decides, upon the whole facts and circumstances, that the verdict is satisfactory." *Larrabee* v. *Grant*, 70 Maine, 82; *Carleton* v. *Rockport Ice Co.* 78 Maine, 49, 52. Forasmuch, therefore, as upon the whole facts and circumstances, the verdict is satisfactory, we, in the language of the respondent's brief "have not regarded the exceptions as very important;" although we have given them such examination as to become satisfied that the respondent has no just cause for complaint.

We are of opinion, therefore, that the bridge, together with the fixtures, appurtenances, and approaches necessarily incident thereto, reverted to the State in 1872, when the legal right of the respondent therein ceased. Also that the respondent's right to levy tolls against the public for passing over the bridge ceased at the same time. *Central Bridge* v. *Lowell*, 15 Gray, 106; *State* v. *Olcott*, 6 N. H. 74. Such was the contract between the respondent and the State in 1829. And the tolls for so many years have undoubtedly amply remunerated the respondent for all costs of building, maintaining and repairing the bridge.

"The right to build and maintain the bridge and the right to levy tolls, with the incidental and implied powers and privileges, constituted the entire franchise and qualified property of the respondent." *Central Bridge* v. *Lowell*, *supra*.

But as there may be a judgment of ouster of a particular franchise and not the whole charter, (*King* v. *London*, 2 T. R. 522; *People* v. *Renssellaer*, &c., *R. R. Co.* 15 Wend. 113, 128; *Att'y General* v. *Salem*, 103 Mass. 138; 2 Beach Corp. § 841; 2 Moraw. Corp. § 1030) we only award,

A judgment of ouster of the bridge and its appurtenances and of a seizure into the custody of the State of the franchise to levy tolls.

WALTON, FOSTER, HASKELL and WHITEHOUSE, JJ., concurred.

LIBBEY, J., did not sit.

AUGUSTUS S. LIBBY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion August 13, 1892.

Railroad. Negligence. Road-bed. Inspection.

The law requires common carriers of passengers to do all that human care, vigilance and foresight can, under the circumstances, considering the character and mode of conveyance, to prevent accident.

While they are held to the utmost care which is consistent with the business in which they are engaged, they are not to be held as against every possible danger, nor are they to be held accountable for not taking every possible precaution against danger and accident.

They are bound to use greater than ordinary care; it must be such care as is used by very cautious persons.

So, in the construction of their road-bed, track and culverts, railroad companies are held to that degree of care and foresight which will avoid such dangers as can be reasonably foreseen or ascertained by competent and skillful engineers, as liable to result from rainfalls and freshets incident to the particular section of country through which they are constructed.

But it is not culpable negligence on the part of a railroad company in the construction of its road-bed, track and culverts, if it has failed to provide against such extraordinary and unprecedented storms, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of such railroad.

Moreover it is the duty of a railroad company, in order to be assured that its line is in a reasonably safe condition, to make as frequent inspection of its road-bed and track as can be done consistently with the conduct of its business.

Under circumstances of more than ordinary peril, the company should inspect its line with more than ordinary promptitude, particularly those portions which are the most liable to injury by storm or flood.

The greater the peril, the greater the vigilance demanded.

ON MOTION.

This was an action on the case by the plaintiff, a postal clerk and route agent, to recover damages received by the negligence of the defendant. The second count in the writ alleges as follows:

"Also for that the defendant on the 10th day of June, A. D., 1889, was the owner of a railroad extending from the city of

Portland in the county of Cumberland to the town of Skowhegan in Somerset county, by the way of the city of Lewiston in Androscoggin county and the town of Oakland in Kennebec county, and the defendant on said 10th day of June, was running a train over said railroad route carrying passengers and United States mail, which mail then and there required the attendance of postal clerks or route agents, and it was then and there the duty of the defendant to keep the road-bed and track of its said road, including all its culverts and water passages under said road, in a proper condition so that all the defendant's trains passing over said road-bed would be safe to all persons riding or passing thereon. But said defendant on said 10th day of June, 1889, did not properly discharge its duty in this respect, but carelessly and negligently allowed said railroad bed, track and culverts under said road-bed, to be defective and unsafe, and particularly the culvert at Crowell's Brook, so-called, in said Oakland, so much so that said culvert at said Crowell's Brook was then unfit to carry or vent the water naturally in said brook running under said road-bed, and said culvert had been in said defective condition for a long time prior thereto, whereby and by means whereof the water naturally flowing to said culvert did not pass under said culvert freely, but said water then and by the aforesaid carelessness of said defendant washed through the road-bed of said railroad at said culvert causing a deep cut or wash-out through said road-bed into which said train then and there plunged and fell.

"The plaintiff further declares that in said train and a part of it there was a postal car in which was being carried the United States mail, and the plaintiff was then and there a postal clerk and route agent in the employment of the United States government, in charge of said mail, and in said postal car, and said postal car was then and there thrown into said cut or wash-out, and by means thereof the plaintiff then and there was crushed between the cars and engine of said train and five ribs of the plaintiff were broken, his right lung was punctured, causing great loss of blood, his skull was injured, his nose broken and he received numerous other serious wounds and

injuries in other parts of his body, whereby he has suffered great pain and incurred great expense in attempting a cure of his injuries thus by him sustained."

The plea was the general issue.

The verdict was for the plaintiff for nine thousand five hundred and fifty-eight dollars, which the defendant moves to set aside on general motion and because of excessive damages.

The other facts appear in the opinion.

S. S. Brown, N. & H. B. Cleaves, and S. C. Perry, for plaintiff.

Webb, Johnson and Webb, for defendant.

Defendant used a commendable degree of skill, prudence, and vigilance in the construction and management of its road; plaintiff's misfortunes were the result of inevitable accident of which passengers assume the risk, and for which defendant is not liable. Defendant not liable for the act of God, or *vis major*.

Counsel cited: *Crosby* v. *Fitch*, 12 Conn. 410; *Bowman* v. *Teall*, 23 Wend. 306; *Swetland* v. *B. & A. R. R.* 102 Mass. 276; *McPadden* v. *R. R. Co.* 44 N. Y. 478; *R. R. Co.* v. *Reeves*, 10 Wall. 176; *R. R. Co.* v. *Halloren*, 53 Tex. Rep.; 3 Am. & Eng. R. R. cases, 343; *Cooley* Torts, § 642; *R. R. Co.* v. *Fay*, 16 Ill. 558; *Bowen* v. *R. R. Co.* 18 N. Y. 441; Shear. and Red. on Neg. § § 206, 445, 266, 269, 270, 444; Angell Car. § § 538, 540; *Livezey* v. *Phila.* 64 Penn. 106; *R. R. Co.* v. *Thompson*, 56 Ill. 138; *Gleeson* v. *R. R. Co.* 28 Am. and Eng. R. R. cases, 202; *Denny* v. *R. R. Co.* 13 Gray, 481; *Gillespie* v. *R. R. Co.* 6 Mo. 554; Pat. Ry. Acc. Law, § 286; *Gates* v. *R. R. Co.* 2 Am. and Eng. R. R. Cases, 237; *R. R. Co.* v. *School District*, *Ib.* 166; S. C. 96 Pa. St. 65.

Damages are excessive. The charge was very clear. It especially warned the jury not to give excessive damages if they found for the plaintiff, for if they did, it would be the duty of the court to set it aside. But the jury utterly disregarded the advice of the court, and became partisan as between an individ-

ual as plaintiff and a corporation as defendant. The plaintiff may soon be a well man. He is unable, with great research, to find a physician who will say that he will not soon be well. We submit that the verdict should be set aside; that the culvert was properly constructed, and was in proper condition.

The jury did not discriminate between the condition of the culvert before the accident and its condition after.

The evidence is very strong, and by disinterested witnesses, that the culvert was in good repair before the accident.

The defendant, or its agents, had no knowledge of any improper construction or dangerous condition, or want of repair, and maintain that none such existed. There was no failure on part of defendant to provide a suitable and reasonably safe culvert. The accident could not have been prevented by ordinary care on part of defendant. The defendant is only held to ordinary care. It is not an insurer.

FOSTER, J. This is an action to recover damages for injuries sustained by the plaintiff through the alleged negligence of the defendant corporation, in the construction and maintenance of a culvert upon the line of its road at Crowell's Brook, between North Belgrade and Oakland. Negligence is also alleged on the part of the defendant in the inspection of its road and road-bed in that vicinity; and that in consequence of the negligence and carelessness of the defendant, on the tenth day of June, 1889, the culvert at the place named together with a portion of the defendant's road-bed was washed out, thereby causing a deep cut, ditch or wash-out in the road-bed into which the defendant's train, upon which the plaintiff in the discharge of his duty as postal clerk, was thrown, and in consequence thereof the plaintiff received severe injuries.

A verdict was rendered for the plaintiff for the sum of $9558, which the defendant moves to set aside.

To understand more accurately the legal position of the parties to this suit, the following summary of facts is gleaned from the evidence.

On the day in question, the defendant's regular passenger and

mail train left Portland for Skowhegan at 1.15 P. M., was due at North Belgrade at 3.59 P. M., and Oakland at 4.08 P. M. The distance between North Belgrade and Oakland is four and one-tenth miles, and the culvert at Crowell's Brook is about equally distant from each place.

Soon after the train left Portland it began to rain, and showers were frequent from Portland to North Belgrade, and when the train reached the latter place the rain had nearly ceased.

Between North Belgrade and Oakland the track runs along the border of Snow pond, from which the land rises gradually to the northwest for a distance of about one mile, forming a water-shed of nearly four miles in length on the pond and extending back on an average for about one mile. The land is mostly tillage and pasture. In this space of four miles between North Belgrade and Oakland, there are five natural brooks draining this territory and emptying into Snow pond. Over these brooks the Androscoggin and Kennebec Railroad company built culverts when it constructed its road in 1849. These five culverts have stood from the time they were constructed to the present time, except the one at Crowell's brook, which, on the day this accident occurred, was washed out and sixty feet of the road-bed carried away, by an unprecedented rainfall in that immediate locality. The evidence shows that there appeared to be a conjunction of clouds going in opposite directions, emptying volumes of water upon this brook, causing it to overflow its banks, the quantity of water being greater than could have been discharged through three culverts of the size of this one, which had vented the water of this brook for more than forty years. The water thus restrained formed a pond from ten to fourteen feet in depth, and instantly washed out the embankment and culvert, tearing down more or less of the wall and removing some of the covering stones. This occurred but a short time before the regular train was due, and there was no notice of the wash-out by any employee of the railroad or any other person. The section men were at work within twenty rods of the culvert at the time the shower commenced, and returned to the car house near the station at Oakland, where

they remained until it had passed. There was nothing unusual in the character of the shower at Oakland where the men were, nor did the train men observe along the route any unusual signs indicating any more than an ordinary rainfall. The path of the rain torrent seemed to pass from the northwest to southeast, down this brook and over the pond.

No serious controversy arises in reference to the general principles of law by which the liability of the railroad company is to be tested.

It is not denied that the defendant company owed the same degree of care to this plaintiff while riding in the postal car in charge of mails that it did to passengers upon the train. *Blair* v. *Erie Railway Co.* 66 N. Y. 313; *Baltimore & Ohio Railroad Co.* v. *State*, 72 Md. 36.

A carrier of passengers, however, is not, like a common carrier of goods, an insurer against everything but the act of God and public enemies. The law requires common carriers of passengers to do all that human care, vigilance and foresight can under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers. To require anything less would be to leave the lives of persons in the hands of the reckless, and unprotected against the negligent and incautious. *Tuller* v. *Talbot*, 23 Ill. 357; *Ingalls* v. *Bills*, 9 Met. 1, 15; *Bowen* v. *New York Central Railroad Co.* 18 N. Y. 408, 410. But while public policy and safety require of common carriers of passengers that they be held to the utmost care which is consistent with the business in which they are engaged, they are not to be held as against every possible danger, nor are they to be held accountable for not taking every possible precaution against danger and accident. If they were required to do that, it would be to hold them insurers to the same extent as carriers of goods, and compel them to adopt a course of conduct inconsistent with the economy and speed which are essential to the dispatch of their business in serving the public. *Simmons* v. *New Bedford and Nantucket Steam Boat Co.* 97 Mass. 361, 367; *Pittsburg, Cinn. & St. Louis R. R. Co.* v. *Thompson*, 56 Ill. 138; *Warren* v. *Fitchburg Rail-*

road Co. 8 Allen, 227, 233. These authorities and the decisions therein referred to, sustain the doctrine that railroads and steamboat companies which are common carriers of passengers are held to that degree of care which prudent men would make to guard against all dangers, from whatever source arising, which may naturally and according to the usual course of things be expected to occur. They are not insurers of the safety of their passengers further than can be required by the exercise of such a high degree of foresight and prudence in reference to possible dangers and in guarding against them as would be used by very cautious, prudent, and competent persons under similar circumstances. The rule, though somewhat differently expressed, is thus stated in *Warren* v. *Fitchburg R. R. Co.* 8 Allen, 227, 233: "But they are bound," say the court, "to exercise reasonable care, according to the nature of their contract; and as their contract involves the safety of the lives and limbs of their passengers, the law requires the highest degree of care which is consistent with the nature of their undertaking." In our own state the rule was stated in *Edwards* v. *Lord*, 49 Maine, 279, that they are bound to use greater than ordinary care — such care as is used by very cautious persons. In *Tuller* v. *Talbot*, 23 Ill. 357, the rule is fully stated in the following language: "While courts, in announcing the rule governing common carriers of persons, have said, that they must be held to the utmost degree of care, vigilance, and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted and render it impracticable. Nor does it require the utmost degree of care which the human mind is capable of imagining. Such a rule would require the expenditure of money and the employment of hands, so as to render it perfectly safe, and would prevent all persons of ordinary prudence from engaging in that kind of business. But the rule does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted." Elementary writers and the general current of decided cases sustain this doctrine. Shear. and Red. Neg. § 265; Angell on Carriers, §

§ 568, 570; Red. on Railroads, c. XXVII; 2 Am. and Eng. Enc. of Law, 746, 758; *Simmons* v. *New Bedford & Nantucket Steamboat Co. supra*; *Ingalls* v. *Bills, supra*; *Taylor* v. *Grand Trunk Railway Co.* 48 N. H. 304; *Warren* v. *Fitchburg R. R. Co. supra*; *Hall* v. *Conn. River Steamboat Co.* 13 Conn. 320; *McElroy* v. *Nashua & Lowell R. R. Co.* 4 Cush. 400; *Readhead* v. *Midland Railway Co.* L. R. 4 Q. B. 379; *Stokes* v. *Eastern Counties Railway Co.* 2 Fost. and Finl. 691.

Great care is required from railroad companies in the construction of their roads, but absolute liability for defects has never been charged upon them. Not only must the road be properly constructed, but it must be kept in good condition. In this respect, as well as all others, they are bound to provide against dangers which can reasonably be foreseen. Accidents may happen, notwithstanding the utmost care and diligence are exercised to prevent them. They are bound to exercise that degree of care and skill which cautious persons would use, in the construction, by competent engineers and workmen, of the road-bed, track, culverts and all the appliances and means of transportation to carry on the business of the road and operate its trains; to make frequent, careful examinations and inspections of the same, in order to avoid accidents as far as human skill and foresight can reasonably secure such a result. *Bowen* v. *New York Central Railroad Co. supra; International & Great Northern R. R. Co.* v. *Halloren*, 53 Texas, 343. And in the construction of their track, road-bed, and culverts they should be required so to construct them as to avoid such dangers as could be reasonably foreseen or ascertained by competent and skilful engineers, as liable to result from rain-falls and freshets incident to that particular section of country through which they are constructed. Dangers which might reasonably be expected to occur from these sources, though rarely, should be guarded against. *Great Western Railway Co.* v. *Fawcett*, 1 Moore, P. C. (N. S.) 101. Thus, in the last cited case, which was appealed from the province of Canada, and heard before the judicial committee of the Privy Council, it was held that a railway company, in the formation of its line, is bound to construct

its works in such a manner as to be capable of resisting all extremes of weather, which in the climate through which the line runs might reasonably be expected, though rarely, to occur. But that where the company had employed skilful engineers, and used all ordinary precautions in the construction, to have the work done properly, and the giving way of the road-bed was caused by a storm of unusual magnitude, these facts should be brought to the attention of the jury upon the question whether the company was negligent in the construction of the road.

But a company would not be guilty of such culpable negligence as to make it liable in damages, if it failed to provide against such extraordinary and unprecedented storms, floods or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by that degree of engineering skill and experience required in the prudent construction of such railroad. In such case the injury cannot be held to be attributable to any fault or negligence of the company; it results from inevitable accident—*vis major*—the act of God.

This is now too firmly established by the highest courts in this country and in England to require any extended citation of authorities.

It was in accordance with this principle that in the English court of Exchequer, *Withers* v. *North Kent Railway Co.* 3 Hurlst. & N. 969, was decided.

In that case, it was shown that the railroad was laid on an embankment built of sandy soil, in a marshy country subject to floods, and that the culverts were insufficient at times to carry off the water. But it did not appear that the embankment had ever been affected by floods, although it had been in use for five years, until the night upon which the plaintiff was traveling, in which an extraordinary flood had carried away the soil from under the track, and the cars were thrown off. It was held that this was no evidence of negligence, and that the verdict was unwarranted. "It is contended on the part of the plaintiff," says Bramwell, B., "that the company's servants were bound to know the consequences which were likely to follow from the flood. That is

not so. They were bound to know only that which could be known by the exercise of ordinary skill and prudence, otherwise they would be made insurers of the safety of the passengers. There was no engineering or other skilled evidence to show that water would wash away the soil of which the embankment was made. So far from there being any evidence to show that there was negligence, there was evidence to negative the negligence imputed. The very existence of the line for five years, notwithstanding that the district was subject to floods, tended to negative the only negligence which was set up. There was nothing to show that until the accident occurred there had been anything to indicate danger, or to warn the company's servants to cease running the trains." In support of the doctrine laid down in this case may be cited cases both English and American, a few of which are the following: *Readhead* v. *Midland Railway Co.* L. R. 2 Q. B. 412, affirmed by the Exchequer Chamber, L. R. 4 Q. B. 379, and overruling the earlier case of *Sharp* v. *Grey*, 9 Bing. 457; *Stokes* v. *Eastern Counties Railway Co.* 2 Fost. & Finl. 691; *Christie* v. *Griggs*, 2 Camp. 79; *Grote* v. *Chester & Holyhead R. Co.* 2 Exch. 255. In this country, *Simmons* v. *New Bedford & Nantucket Steamboat Co. supra*; *Gillepsie* v. *St. Louis & Kan. City R. Co.* 6 Mo. 554, where the road-bed washed out from under the ties in consequence of an extraordinary flood, whereby the road gave way and an injury resulted; *Baltimore & Ohio R. R. Co.* v. *School District*, 96 Pa. St. 65; *Gulf C. & S. F. R. Co.* v. *Pomeroy*, 67 Texas, 498; *Same* v. *Pool*, 70 Texas, 713; *McPherson* v. *St. Louis I. M. & S. R. Co.* 97 Mo. 253; *Sawyer* v. *Hannibal, &c., R.* 27 Mo. 240.

We have already stated some of the important facts in this case bearing upon the defendent's liability. The rain-fall was not only extraordinary, but unprecedented. It came suddenly and the shower lasted about two hours. Nothing like it, as the testimony shows, had occurred for more than fifty years. It was much more severe at this particular locality, than at the stations of North Belgrade or Oakland, only two miles distant from it.

The culvert, built at the time the road was constructed in

1849, had stood for more than forty years, and never, in all that time, had it failed to discharge all the water flowing to it. While the testimony of engineers differs as to what should have been the proper capacity of the culvert, one fact is pertinent and significant, that its capacity has been sufficient for the purposes for which it was built for a very long number of years. To be sure, it was not built of dimension stone split from the quarry, but of large split bowlders. But the testimony not only of the engineer in charge of the work at the time of its construction, but of others, skilled in such works, shows that the material used was suitable and proper, everything considered, and that the culvert was properly built. The evidence, it is true, on this point, as well as in reference to the proper capacity of this culvert, is not in harmony. Engineers, skilled in their profession, differ in their judgment upon these questions. We cannot say from all the evidence before us that the railroad company must be considered in fault in respect to the construction of this culvert. Human judgment may err. We think the care exercised in the construction of the culvert brings it within the rules of law to which we have referred.

The test of liability is not whether the company used such particular foresight as is evident, after the accident happened, might have averted it, had the danger been known, but whether it used that degree of care and prudence which very cautious and prudent persons would have used under apparent circumstances of the case to prevent the accident, without reasonable knowledge that it was likely to occur. *Bowen* v. *New York Central Railroad Co.* 18 N. Y. 408. "In such a case," says Bramwell, B., in *Cornman* v. *Eastern Counties Railway Co.* 4 Hurlst. & N. 781, 786, "it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event."

When we come to consider the question whether there was proper inspection of the road-bed and culvert at that point before the accident, we enter upon more debatable ground. There were five section men who had started out at one o'clock and were at work surfacing and lining up the track within twenty or

twenty-five rods of this culvert, and they remained there till about half-past two o'clock, and then returned to the Oakland car house. It had begun to rain. They saw the shower come up. They remained in the car house till four o'clock. It was not raining hard at that time. The regular passenger train was due in a very few minutes. The foreman of the crew started out saying he would go down and look at the switches at the lower end of the yard, and see if it had washed out around them. He soon came back and the crew were still in the car house. It was then he first learned from the station agent that there was trouble at Crowell brook.

In order that a railway company may be assured that its line is in a reasonably safe condition, the duty devolves upon it of causing as frequent inspection of its road-bed and track as can be done consistently with the conduct of its business. A neglect of such duty renders the company liable to any one injured by reason of any defect which might have been discovered by such inspection. Moreover, under circumstances of more than ordinary peril, as in case of violent storms, the company should inspect its lines with more than ordinary promptitude, particularly those portions which are the most liable to injury by storm or flood. The greater the peril, the greater the vigilance demanded. The authorities certainly go to this extent. Some impose a more stringent rule, holding that inspection should be made both during and after extraordinary storms in order to prevent accidents. *International & Great Northern R. Co.* v. *Halloren*, 53 Texas, 343; *Hardy* v. *North Carolina Central R. Co.* 74 N. C. 734.

Whether there was such promptitude of inspection, by those whose duty it was to make it, as the exigencies of the occasion demanded, is a question upon which the court is not unanimous in its opinion.

It is asserted on the part of the defendant company that there was nothing either in the nature or severity of the shower at Oakland where the section men were, to attract their attention. They certainly knew it was a severe shower, — the hardest, the foreman says, he ever knew, — so hard he thought it necessary

to go out and examine the switches in the yard to see if they were not washed out. They knew that there were several culverts upon that part of their section, and that there was an extensive watershed which emptied into this particular culvert. They knew the regular passenger train was due about the time they left the car house. Notwithstanding all this they remained in the car house an hour and a half, and until it was too late to avert the disaster which happened.

The case is one not absolutely free from doubt in some of its bearings. The damages are large. Yet, after a very careful examination of the evidence, a majority of the court are of the opinion that the verdict may stand if the plaintiff will remit all above six thousand dollars within thirty days after decision announced; otherwise a new trial is to be granted.

Judgment accordingly.

VIRGIN, LIBBEY, HASKELL and WHITEHOUSE, JJ., concurred.

FARMINGTON VILLAGE CORPORATION, in equity,

vs.

SANDY RIVER NATIONAL BANK, and others.

Franklin. Opinion August 13, 1892.

Equity. Multiplicity of suits. Cancellation.

A bill in equity, in which an injunction is sought against numerous respondents, in a case where the rights of all depend upon identically the same question, both of law and fact, may be sustained upon the ground of the inherent jurisdiction of equity to interpose for the purpose of preventing a multiplicity of suits.

It is in the nature of a bill of peace, where, if entitled to relief, it may be sustained in order to prevent a multiplicity of suits by parties whose rights depend upon the same question involved in the general controversy.

This court, as a court of equity, in a proper case, has full power to order the cancellation of bonds or other written instruments.

But it is a power which the court in its discretion will exercise with care, and only in accordance with what it believes to be proper and right under the circumstances.

Nor will this power be exercised where the legal remedy, either affirmative or defensive, would be adequate, certain and complete.

And before this power will be exercised, it must be made to appear that a

necessity exists to prevent irreparable injury which a court of equity alone can avert.

See *Farmington Village Corporation* v. *Dyar*, 70 Maine, 515.

ON REPORT.

Bill in equity, heard on report to the full court upon bill, pleadings and proofs, to compel the surrender into court for cancellation of certain bonds and coupons issued by the complainant in aid of the construction of the Androscoggin railroad from West Farmington into Farmington Village in 1870-1.

A principal ground for relief was based by the complainant on its right of cancellation to prevent a multiplicity of suits. The first case in which litigation arose, out of the issue of the bonds, is *Dyar* v. *Farmington Village Corporation*, 70 Maine, 515.

The facts are stated in the opinion.

J. C. Holman and *W. L. Putnam*, for complainant.

S. Clifford Belcher, *H. L. Whitcomb*, *E. O. Greenleaf*, *A. F. Belcher*, and *George and Charles E. Wing*, for defendants.

FOSTER, J. This is a bill in equity brought by the Farmington Village Corporation against sixty respondents, asking the court that they may be perpetually enjoined from negotiating or delivering to any person certain bonds and coupons issued by said corporation and owned by the respondents, and that the same shall be surrendered, cancelled and destroyed.

The amount of these bonds is $19,800, besides the semi-annual interest coupons thereon for more than nineteen years.

Considerable litigation having grown out of the issuing of these bonds, and the fact that the court is now asked to have them cancelled and destroyed, it may not be improper to give a brief history in relation to their issue, and of the litigation pertaining to them.

In 1869, the citizens of Farmington Village Corporation believing their interests were suffering from the fact that the railroad did not extend to their village, but terminated at West Farmington on the west side of Sandy River, about one mile distant, took action with a view of having the railroad extended

across the river to their village. In order to accomplish this, it was thought expedient that the village corporation should bear a portion of the expense of this extension. Inasmuch as it was believed that the village corporation had not power under its charter, to loan its credit, or negotiate in any way with the railroad company, application was made to the legislature for authority. Accordingly, in 1870, an act was passed (Special Act, 1870, c. 292,) entitled "An act to authorize the Farmington Village Corporation to raise money to aid in the extension of the railroad terminating at Farmington, known as the Androscoggin Railroad, and to contract for said extension." This act was approved February 1, 1870, and took effect on its approval. By this act the corporation was authorized to raise by tax or loan such sums of money as the corporation might deem expedient, not exceeding thirty-five thousand dollars to aid in the extension.

At a legal meeting of the corporation held on February 21st, 1870, the citizens of the corporation voted to aid in the extension of the railroad, appropriated a sum not exceeding $35,000 for that purpose, chose a committee to contract with the railroad company for such extension, authorized the assessors and treasurer to issue the bonds of the corporation for a sum not exceeding the amount before named, and to deliver the same to their committee to be used in effecting such extension.

The committee on the 15th day of April, 1870, entered into a contract with the railroad company for the extension of the road. The railroad company in compliance with its contract located and constructed the extension of its railroad, erected depots and other buildings within the limits of the village corporation, and in all respects fully performed its covenants and agreements in a reasonable time, the quarterly payments of $3750 each being made to the railroad company under its contract, as follows,—July 18th, August 24th and November 24th, 1870, and February 15, 1871.

The committee of the corporation disposed of the bonds placed in their hands to the amount of $19,800. This sum represents the total amount of bonds sold and still outstanding against the corporation.

The following is a history of the litigation. On June 27, 1870, before the committee had received any of the bonds from the assessors and treasurer of the village corporation, and prior to July 1, 1870, on which day all the bonds bear date, a bill in equity was brought by Jonas Burnham and eleven others, all citizens, owners of property subject to taxation, and taxpayers in the village corporation, praying that the corporation should be enjoined from issuing the bonds, and that the committee should be enjoined from negotiating the same, and from carrying out the contract already entered into with the railroad company; and that the railroad company should be enjoined from enforcing its contract with the corporation. The land for the extension had already been taken, and the railroad company had expended $12,000, were bound by contracts to nearly $17,000, and had completed nearly one fourth of its work. A hearing was had on the bill and a temporary injunction denied. The case was then carried to the full court on an agreed statement, and on August 5th, 1872, the following decision was rendered: "Bill dismissed without prejudice," for the reason, as it is understood, that the statute in relation to proceedings in equity for relief in matters of this kind did not apply to village corporations.

In the mean time the extension had been completed, stations built, and the road been in operation for a year and a half. The bonds had all been negotiated except $2000.

Seven days after this decision was rendered,—August 12, 1872,—Joseph Dyar and thirteen others, all residents of the village corporation, tax payers in the corporation, and owners of property therein, brought another bill in equity, in all its essentials like the previous one which has been dismissed "without prejudice." Since the commencement of the first suit, the powers of the court, as a court of equity, had been enlarged by c. 29, Laws of 1872, which provided relief by injunction in favor of village corporations. To this bill the village corporation filed its answer, and the railroad company filed a demurrer. It was entered and heard at the July Law term,

1873, and continued for advisement. No temporary injunction was issued in this suit.

At a legal meeting of the village corporation, held on the 27th day of January, 1872, and at another, held on the 28th day of September, 1872, the corporation voted to raise certain sums of money to meet the outstanding indebtedness of the corporation in relation to the coupons then over due.

After these meetings, on the 5th day of October, 1872, another bill in equity was filed by Joseph Dyar and sixteen others, residents and taxpayers, praying for an injunction to issue restraining the village corporation, the assessors, collector and treasurer, from assessing, collecting and receiving and paying out the tax so voted. To this last bill in which only the corporation and its officers were made defendants, a temporary injunction was granted, answers filed, and the case came on to be heard at the July Law term, 1873, the same term at which the preceding bill was heard. This case, like the other, was continued for advisement; and on the 27th day of August, 1878, decision was received and filed from the Law court in both suits, sustaining both bills, and granting the injunction prayed for in each case. The opinion of the court is found in 70 Maine, 515. The question there presented and which was considered and passed upon, was in relation to the constitutionality of the special act of the legislature, approved February 1, 1870, authorizing the village corporation to aid the extension of the railroad. The court held the act to be unconstitutional, and all parties were restrained from acting under it.

These decrees and decision in these several suits are the only judgments rendered by this court in relation to this controversy.

The question of the validity of these bonds has never been directly before this court.

In a suit brought in the circuit court of the United States for the district of Maine directly on the coupons, by a citizen of Massachusetts, at the September term, 1880, this question was directly in issue, and the court held the coupons valid, and rendered judgment for the amount sued. This judgment was afterwards reversed by the Supreme Court of the United States

upon the ground that the circuit court had no jurisdiction. *Farmington Village Corporation* v. *Pillsbury*, 114 U. S. 138.

Nothing was afterwards done by the holders of these securities either to enforce their collection or to dispose of them, until February, 1889, when some of the defendants in the present suit, determined to sell their bonds for what they could get, employed Dr. Parmenas Dyer to negotiate a sale of them. He went to Boston and there sold them for five per cent of their face value. Dyer had full authority to sell the bonds which had been entrusted to him for that purpose. He made sale, as his testimony shows, to a party by the name of Tingley. Suit was afterwards brought upon the bonds and coupons which Dyer had sold, in the circuit court of the United States, by one George G. Smith of Cambridge,— the writ bearing date March 21, 1889.

It is alleged that this transfer or sale was collusive, and made for the purpose of bringing another suit against this complainant corporation in the circuit court of the United States; that the sale was not made *bona fide*, but was collusive and fraudulent, and conveyed no title to Smith.

The evidence does not support this allegation, but, on the contrary, negatives any collusion or fraud on the part of the owners of the bonds who sold them for a very small per cent of their face value. If the sale was absolute and they parted with their entire interest in the bonds, it matters not what their purpose was in making the sale.

The bill, in this case, further sets out as one of the grounds for asking the relief prayed for, that there is a determination and expectation, on the part of the defendants, to make from time to time other collusive, fraudulent and apparent transfers of the bonds and coupons, or a part of them, with a view of bringing suits thereon in the names of different persons assuming to be the owners thereof, against the complainant, from time to time, for the purpose of harassing and vexing the complainant.

No evidence is offered in support of this allegation, and all the defendants who have answered deny such determination, arrangement or expectation. Not one of these defendants has

ever brought suit. No evidence has been adduced that any of them has threatened or has any intention of bringing any suit. They deny it in their answers. True, the defendants may sell their bonds, and suits be brought by other parties. But these bonds have been issued twenty-one years; coupons for the past nineteen years and the principal of fifty of these bonds have been due and payable for more than six years. During all these years but two suits have been brought on all this overdue and dishonored paper. During the same period, four suits in equity have been brought by those opposed to the payment of the bonds, to prevent their payment.

The bill also alleges that so long as these bonds and coupons are outstanding and uncancelled, being payable to bearer, and of great number, the complainant is subject to innumerable unjust suits in reference thereto, and to be vexed, harassed and put to great expense by reason of the multiplicity of suits, without just or lawful cause.

And the complainant, therefore, prays that the court by its decree shall order these securities to be delivered up and cancelled, claiming that the question depends entirely upon the constitutionality of the act to which we have referred, and the validity of the proceedings under the same, and upon the effect of the decision of this court in which that act was held to be unconstitutional.

One thing is certain, that these defendants paid the full face value of these bonds,— the community received the benefit of the extension, and that the money was honestly expended in the extension of the railroad to Farmington village.

A question that first arises in this case, before considering whether the court is authorized or ought to order the cancelation of the bonds, is whether this bill can be sustained against these numerous respondents, in case it is to be sustained upon other grounds, or whether a separate suit should be brought against them individually.

We have no doubt that, in a case like this, where the rights of all depend upon identically the same question, both of law and fact, the bill may be sustained upon the ground of the

inherent jurisdiction of equity to interpose for the purpose of preventing a multiplicity of suits. It is in the nature of a bill of peace, where, if the complainant is entitled to relief, it may be sustained in order to prevent a multiplicity of suits by parties whose rights depend upon the same question involved in the general controversy. In the development and growth of equity practice with reference to the number of parties may be cited the case of *Woodruff* v. *North Bloomfield Grand Mining Co.* 8 Sawyer, U. S. C. C. 628, where this principle was discussed by Sawyer, J., who said: "The rights of all involved depend upon identically the same question, both of law and fact. It is one of the class of cases, like bills of peace, and bills founded on analogous principles, where a single individual may bring a suit against numerous defendants, where there is no joint interest or title, but where the questions at issue and the evidence to establish the rights of the parties and the relief demanded are identical." Further discussion on this point is unnecessary inasmuch as this court in the recent cases of *Lockwood Co.* v. *Lawrence*, 77 Maine, 297, 305, 306, 307, 308, and *Carleton* v. *Newman*, *Id.* 408, has settled this doctrine of equity practice in this State. Other authorities to the same effect are: *Sheffield Waterworks* v. *Yeoman*, L. R. 2 Ch. App. 8, 12; *Brown* v. *Truesdale*, 138 U. S. 389; *Winsor* v. *Baily*, 55 N. H. 218, 221; Pom. Eq. § § 269, 1394.

Nor can there be any question that, in a proper case, this court has full power to order the cancellation of bonds or other written instruments. But it is not a matter of absolute right. It is a power which the court will exercise with care, and only in accordance with what it believes to be proper and right under the circumstances. It certainly will not exercise it where the legal remedy, either affirmative or defensive, would be adequate, certain and complete. Pom. Eq. § 914. And so it has been held that the mere fact that a defense exists as against a written instrument, or that evidence may be lost, is no ground for its cancellation. It must be shown that a necessity exists to prevent irreparable injury which a court of equity alone can avert. *Globe Mutual Life Ins. Co.* v. *Reals*, 79 N. Y. 202; *Venice* v.

Woodruff, 62 N. Y. 462; *Noah* v. *Webb*, 1 Edw. Ch. 604, 608, 615; *Shotwell* v. *Shotwell*, 24 N. J. Eq. 378.

In the case of *Noah* v. *Webb*, *supra*, it was held that before a bill for canceling an instrument will be sustained, it must appear from the particular facts and circumstances of the case to have been expedient and proper. The court there say: "The habit of this court is not to cancel bonds, or other instruments, because they have no validity as matters of legal obligation or cognizance. On the contrary, it is an essential part of equity jurisdiction, and which this court is constantly in the practice of exercising, to treat such instruments as agreements, and lend its aid in enforcing them as such, whenever they appear to be fair in all respects and founded on a sufficient consideration. Instances, however, may occur in which the court may be called upon to exert its authority in an opposite direction and order instruments of this kind to be given up and canceled. But the justice, propriety or necessity for the measure must be very apparent. The party claiming it should show clearly and beyond all reasonable doubt, not only that the instrument is void at law and can never be enforced there, but that in equity also it never ought to be enforced or attempted to be made use of for any purpose against him."

The case of *Venice* v. *Woodruff*, *supra*, was where an action was brought to have certain bonds, issued by the supervisor and railroad commissioners of the town of Venice, delivered up and cancelled, and to restrain defendants, the holders of said bonds, from transferring them. The court, after stating the general principles applicable to such cases, that the circumstances must be such that a resort to equity is necessary to prevent an injury which might be irreparable, say: "If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury. . . .

"The real purpose of the litigation seems to be to prevent a resort to the courts of the United States for the collection of these bonds; and the question is, whether it is the province of a court of equity in a state to interfere for the purpose of preventing a resort to the Federal courts for the enforcement of obligations on the ground that they may be held in those courts to be valid, while, according to the decisions of the state courts, the same obligations are held to be void. I apprehend that the power of a court of equity to decree the surrender and cancellation of instruments has never before been appealed to or exercised for such a purpose. Equity will interfere to control the actions of parties, and restrain them from transferring negotiable obligations, on the ground that it is against conscience to allow them to create in their transferee a right or equity which they themselves do not possess. But where the effect of the transfer is not to change in any respect the rights or equities of the parties, I am not prepared to hold that the allegation that the transferee might resort to a tribunal in which a rule of decision prevails, or may prevail, differing from that of the court which is asked to enjoin the transfer, is sufficient to justify the interference asked. The wrong sought to be prevented by such a proceeding is not any wrongful act of any party, but a decision of another court."

In the present case, there is not sufficient reason shown for resorting to an equitable action for the cancellation and destruction of these securities. If the bonds are illegal and void then there is a complete defense at law, and equity will not and should not interfere. The real purpose of this litigation seems to be to prevent a resort to the Federal courts for the determination of the validity of these bonds. Certainly it is not the province or desire of this court to interfere for the purpose of preventing a resort to those courts, either for a decision upon that question, or for the enforcement of these obligations, on the ground that they may there be held to be valid or otherwise. As the authorities to which we have referred show, the power of a court of equity to decree surrender and cancellation of instruments for that cause has never been resorted to. Neither justice

nor propriety would warrant this court in restricting parties holding obligations for which they have paid full consideration, from seeking their legal rights before any competent tribunal.

Nor do we consider the facts in this case sufficient to support the claim to equitable relief upon the other ground urged, — that of preventing a multiplicity of suits. The evil complained of is based more upon fear then reality. No vexatious litigation by any of these respondents has been shown. No evidence has been adduced of threats, even of vexatious suits. The mere allegation of a belief that the holders intend to harass the complainant is not sufficient. *Wilkes* v. *Wilkes*, 4 Edw. Ch. 630. The litigation that has taken place has been more strenuous to prevent the collection of the bonds than for the enforcement of them. The result of that ligitation has left no judgment that could legally be pleaded in bar, or as an estoppel, in a suit directly upon the bonds. At best, it is only by a course of reasoning that any judgment has affected the validity of them. With this result can it be said that any defendant in this suit is unreasonable and litigious because he still hopes eventually to collect the amount due? How can it be said that these defendants are in fault? On the other hand, from the complainant's own showing it was itself the author of the mischief complained of. It put in circulation the very bonds of which it now complains. The respondents, believing in their validity, paid their money for them. And this court is asked to shield and protect the complainant from the expense and annoyance of proving the invalidity of its own acts in a suit at law, where such invalidity, if it exists, may properly be shown, by a cancellation and destruction of these obligations. The relief sought is discretionary with the court; the complainant is not, as we have already observed, entitled to it as a matter of absolute right.

It is urged, in conclusion, that notwithstanding the court may decide adversely to the prayer of the bill, yet it should not be dismissed, but that having jurisdiction of the cause for any purpose it should be retained and a final determination made of all matters, and the rights of all parties be settled in this suit.

While this undoubtedly might be desirable for all parties, we

deem it preferable to leave them to their legal rights rather than review or call in question the decisions of this court upon the litigation which has arisen in relation to this controversy.

Bill dismissed as to all the respondents who have appeared and answered, with costs.

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

VIRGIN and HASKELL, JJ., having been of counsel, did not sit.

LEWIS J. TOWNSHEND, Appellant from Judge of Probate allowing WILL OF GEORGE H. TOWNSHEND.

Cumberland. Opinion August 13, 1892.

Probate. Appeal. Notice. R. S., c. 63, § 25.

In probate appeals, service of the reasons thereof upon the attorney of the adverse party, appearing in the probate court, does not work a compliance with the provisions of the statute that require the same to be made upon the party himself.

ON EXCEPTIONS.

This was an appeal from a decree of the probate court for the county of Cumberland, approving the last will and testament of George H. Townshend.

After the appeal was entered in this court, E. W. Freeman, Esq., attorney for Oliver Otis Howard, appeared specially for the purpose of objecting to the sufficiency of the service of the reasons of appeal on his client, and moved that the appeal be dismissed, because the appellant did not serve the reasons of appeal on the parties who appeared in the probate court and especially did not serve said reasons of appeal on the said Oliver Otis Howard, as provided by law.

It appeared that said Howard appeared in the probate court by attorney only, and that the reasons of appeal were served on said attorney only, the said Howard himself being out of the State, and so far away that a seasonable and personal service upon him could not be had.

The presiding justice being of opinion that the service was insufficient, and that the excuse offered was insufficient to supply the want of a legal service, sustained the motion and ordered the appeal dismissed and the case remanded to the probate court.

The statute regulating the appeal in this case is as follows: "Fourteen days at least before the sitting of the appellate court he [the appellant] shall serve all the other parties, who appeared before the judge of probate, in the case, with a copy of such reasons attested by the register." R. S., c. 63, § 25.*

The appellant took exception to the ruling.

George Walker, for appellant.

If statute receive a strictly literal construction, the right of appeal is practically denied to appellant. He cannot serve his appeal on appellee because he was not a party "who appeared before the judge of probate in the case." He cannot serve it on appellee's attorney because the attorney is not the party. Statute should be construed so as to make it effective for its designed purpose. It cannot stand literally, since an appellee could prevent the appellant from prosecuting appeals by appearing in probate by attorney only. A literal construction of the statute would require appellants to make personal service themselves of reasons of appeal and not by an officer as is customary and usual. The statute designates no officer to make such service. The mode of service is undefined. No provision made for service when the appellee is out of the State. Reasonable service sufficient, such as shall give appellee notice that appellant intends to prosecute his appeal and inform him of his reasons of appeal. Notice and knowledge of appeal are constructively served on a "party" when duly served on his attorney of record. *Newbit* v. *Appleton*, 63 Maine, 491; *Adams* v. *Robinson*, 1 Pick. 461. Here the appellee has by his own voluntary act, residence beyond the State, made it impossible for appellant to serve on him his reasons of appeal. To save forfeitures, a liberal construction

* This statute as amended by c. 243, Public Laws of March 21, 1893, now reads: "When a non-resident party appears by an attorney residing in this State before the judge of probate in any case, and an appeal is taken, the service of a copy of the reasons of appeal upon such attorney shall be sufficient."

should be given a statute if remedial. *Perley* v. *Jewell*, 26 Maine, 101.

E. W. Freeman for appellee.

Right of appeal purely statutory. Statute being in derogation of common law must be strictly construed. End. Stat. § 127; *Dwelly* v. *Dwelly*, 46 Maine, 377. So, where it is directory and prescribes forms of procedure (Sedg. Stat. pp. 319, 320), especially statutes of frauds, wills, and limitations. Every requirement must be followed to give jurisdiction. No other method of service prescribed except on appellee in person.

The requirements as to proper parties to give and receive service, time and forms of service, forms of reasons, and even record of service, must be accurately followed in order to give jurisdiction to the appellate court. The right to appeal is lost by a failure to comply with the requirements. Sedg. Stat. p. 348; (1883) *Knight* v. *Werskoff*, 20 Fla. 140; (1883,) *Okam* v. *Daly*, 63 Cal. 317; (1882,) *Reed* v. *Allison*, 61 Cal. 461; *State* v. *Conkling*, (Ia.), 44 N. W. 247; (1890,) *Pender* v. *Lancaster*, (S. C.), 11 S. E. 634; (1890,) *Coffin* v. *Edgington*, (*Id.*), 23 Pac. 80; (1874,) *Hewitt* v. *Wetherby*, 57 Mo. 279; (1887,) *Fuller* v. *McClure*, 25 Mo. App. 418; (1858,) *Peacock* v. *The Queen*, 4 C. B. N. S. 267; *Rowberry* v. *Morgan*, 9 Exch. 730; *Q.* v. *The Justices of Middlesex*, 7 Jur. 396; S. C. 17 L. J. M. C. 111; (1887,) *Hyde* v. *Goldsby*, 25 Mo. App. 29; (1883,) *Madison County Bank* v. *Suman*, 79 Mo. 530; (1875,) *Wait* v. *Demeritt*, 119 Mass. 158.

Where the statute is directory, the forms to be followed and the acts to be done become conditions precedent to jurisdiction, and non-compliance is fatal. End. Stat. § 443; *Knight* v. *Norton*, (1839,) 15 Maine, 339.

Hardship to a defaulting appellant, is removed by R. S., 1883, c. 63, § 25, which provides: "If any person from accident, mistake, defect of notice, or otherwise without fault on his part, omits to claim or prosecute his appeal as aforesaid, the supreme court, if justice requires a revision, may, upon reasonable terms, allow an appeal to be entered and prosecuted with the same effect, as if it had been seasonably done."

The legislature, when placing these sections together, provided for two classes of cases. Section twenty-five is in the nature of an equitable provision for certain cases which cannot be legally comprehended in the preceding section. The latter section seems to include in its enumeration the characteristics of the principal case; the former section plainly does not; and the strict construction that is called for will not admit this appeal under section twenty-four.

The theory of strict construction is favored in this State because where other than actual personal service is allowed, it is so specified by statute. The following are instances of express provisions for service on an attorney: Writ of review, R. S., c. 89, § 8; citation to poor debtor's disclosure, c. 113, § § 21 and 27; notice to take depositions, c. 107, § 6; writs against non-residents, c. 81, § 21; demand and service on executors out of the State, c. 64, § 41; notice on appeal from insolvency commissioners, c. 66, § 12. Notice to ward of proposed sale of real estate may be served upon his heirs, c. 71, § 25.

Counsel also cited: *U. S.* v. *Monson*, 1 Gall. 14; 3 Bl. Com. 455; *State* v. *Meeker*, 19 Neb. 444; Stats. Gloucester, 6 Edw. I, c. VI, 2 Coke Inst. 308; Wilb. Stat. p. 107; 1 Kent Com. 464; *Esterley's Appeal*, 54 Pa. St. 195; *Guar. &c. Co.* v. *Burlington*, 23 Fla. 514; *Clark* v. *Snyder*, 20 Hun, 330; *Jordan* v. *Bowman*, 28 Mo. App. 608 (1890); *St. Louis* v. *Grubel*, 32 Mo. 295; *Morgan* v. *Edwards*, 5 H. & N. 418.

HASKELL, J. The learned brief of the appellee's counsel makes it clear that service of the reasons of appeal upon the attorney of a party, in the probate court, cannot work a compliance with the provisions of the statute, R. S., c. 63, § 24, that require the same to be made upon the party.

More mischief is likely to come from allowing service in such cases to be made upon the attorney, in a court where appearances are often not entered of record, than convenience; especially, as R. S., c. 63, § 25, provides ample remedy, when service upon the party cannot be made in season to comply with the statute, or fails from mistake without fault.

Exceptions overruled.

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

Dissenting Opinion by

EMERY, J. Mr. Justice VIRGIN, Mr. Justice WHITEHOUSE, and myself are unable to concur in the opinion of the majority of the court, and we think the importance of the right of appeal justifies us in expressing our dissent.

An appeal in a probate cause is not the beginning of proceedings by which the court is to acquire jurisdiction over the parties. It is the continuation of proceedings already begun, the parties being already in court either voluntarily or by proper citation. The service of a copy of the reasons of appeal is not the service of an original citation, but is simply an intermediate step in procedure, such as frequently occurs in procedure at law or in equity. In these other cases the notice of the step to be taken is given to the attorney or merely entered upon the docket. It seems a narrow, technical construction of the statute to hold that the legislature intended that probate appeals should be so much more difficult than law or equity appeals.

It will be often exceedingly difficult, and sometimes impossible to find the person himself who has not personally appeared in court, but only by attorney, especially where, as in this case, he was a resident of a distant western state. Such person may be continually changing his abode, or may have left the country and gone to parts unknown. Pursuit of him may be costly and sometimes ineffectual. It is evident that in some cases service upon the person himself, who has never appeared personally in court, or come within its jurisdiction, would be practically impossible. We cannot think, therefore, that the legislature intended to require it.

Section 25 of chap. 63, R. S., does not meet the emergency above suggested. Under section 24, the appellant appeals as of right as in other procedures. Under section 25 he can only prosecute his appeal by the consent of the court. That consent may be mistakenly denied by a single justice without remedy by exceptions or otherwise. We do not think the legislature intended that an appellant who could not find the person of a party, who never appeared in person, should lose his right of appeal and become a mere suppliant.

But recurring to the language of the statute and reading it by itself apart from the general law of appeals, it does not require such inequitable conclusions. The copy of the reasons of appeal is to be served only on those "parties who appeared before the judge of probate in the case." Strictly, this appellee did not appear before the judge. He was not within the State. The attorney was the only party in the presence of the judge. The attorney was the party that appeared. A service, therefore, upon the appearing attorney of a non-resident and non-appearing person is a service upon the appearing party. The language of the statute does not require an appellant in probate proceedings to pass by the present, visible, appearing party, because he is an attorney, and search perhaps in vain for the non-resident client, distant, difficult to find, and it may be undiscoverable or even mythical.

VIRGIN and WHITEHOUSE, JJ., concurred.

EDWARD B. NEAL, and others, PETITIONERS FOR CERTIORARI,

vs.

DAVID N. MORTLAND, and others, RAILROAD COMMISSIONERS.

Lincoln. Opinion August 13, 1892.

Railroads. Eminent Domain. R. S., c. 51, § 16.

Railroad commissioners have authority, on the petition of railroad companies, to condemn land for the specific purposes mentioned in the statute only, and not for the general purposes of the corporation, and their certificate should state the special purposes for which such land is needed.

ON REPORT.

This was a petition for a writ of certiorari to vacate the proceedings of the Railroad Commissioners in condemning lands of the petitioners, in Wiscasset, upon petition of the Knox and Lincoln Railroad. The railroad had applied under R. S., c. 51 § 16, to the commissioners for authority to take the lands; and in its petition alleged, "that the purchase or taking and holding of all of said land is required and necessary for necessary tracks, side tracks and station for said company; but that the owners of said land do not consent thereto, and that the parties do not

agree as to the necessity therefor, or the area necessary to be taken."

After due notice and hearing thereon the commissioners made a report and decision and gave a certificate of the taking, allowed by them, to the railroad, the essential part of which is as follows: "It appeared to us and we so find, determine and certify that so much of the premises, as is hereinafter definitely described, is necessary for the use of said Knox and Lincoln Railroad company for necessary tracks, side tracks, stations and for the reasonable accommodation of the traffic and appropriate business of said corporation." . . .

In their report and decision preliminary to the granting of the certificate, the commissioners say: "It appeared by evidence adduced at the hearing on said application, that the lands described in said application consisted of one narrow strip of land about a rod in width, situated next southerly of the freight depot and adjoining the railroad location, not now used for any purpose except for the deposit of rubbish, etc.; that the railroad company desired said strip of land, for the purpose of making an approach from Main street, along a side track there situated, to said freight depot.

"The other described parcel of land is a strip fifteen feet wide, on the easterly or shore side of said railroad location and depot grounds, consisting of flats and a portion of an old wharf. The reasons assigned by the petitioners for the taking of this last mentioned strip of land, were to enable them to place a retaining wall for the support of the railroad embankment, and to give them the right to remove a portion of an old and unoccupied building situated on said wharf, which obstructed a view of a switch near the passenger station, to approaching trains. Counsel, claiming to represent all of the parties interested in said lands, having waived proof and admitted notice to all, as the law requires, insisted that the reasons given by the petitioners, for taking the several parcels of land before mentioned, were not sufficient in law to empower the board to order a condemnation of said land; because it did not appear that the objects for such condemnation, were embraced in those enumerated in the statute, for which land might be taken.

"While we admit that there is some force in the argument to sustain the position taken by counsel for the respondents, we think the statute is sufficiently broad to give the board jurisdiction. The objects mentioned by statute, for which railroad corporations may take and hold land, are 'land for borrow and gravel pits, necessary tracks, side tracks, stations, woodsheds, repair shops, and car, engine and freight houses.' To limit the extent of the land, which might be taken, strictly to the land covered by these structures mentioned, would be absurd. Such structures without means or right of approach to them, would be useless. Such lands in connection and in addition to the lands for objects above mentioned, necessary 'for the reasonable accommodation of the traffic and appropriate business of the corporation,' may we think, under the provisions of statute, be taken.

"We, therefore, find that the objects for which the petitioners seek to take and hold the parcels of land mentioned, are included in the provisions of statute above mentioned." . . .

Among the reasons alleged by these petitioners for vacating the proceedings of the commissioners are the following: . . .

"Because it appears by said report and certificate that the lands so attempted to be condemned and taken, were not taken or required by said railroad company, for any of the purposes authorized by law; but were taken for purposes wholly unauthorized, viz: for the purpose of opening a public street or 'approach' from Main street to the freight depot of said railroad in Wiscasset, and for the further purpose of enabling the said railroad company to place and retain a wall for the support of an existing railroad embankment, and to give the said railroad the right to remove the portion of a building situated on a part of said land, which, it is alleged in said report, obstructed a view of a switch near the passenger station, to approaching trains.

"And hereupon your petitioners say that the said public street or approach from Main street to said freight depot was not one, or either, of the purposes for which land might be so taken and condemned; that said proposed street or 'approach' covered a large tract of land, part of which was owned by said

railroad company, and parts of which were owned by some one or more of your petitioners, and none of which was owned by all of your petitioners jointly or as tenants in common.

"And that the said wall for the support of the existing railroad embankment, and the taking of land and flats and wharves therefor, was not a purpose authorized by law but was for the mere convenience of said corporation and for the furtherance of mere economical consideration.

"And that the building situated on a part of said land, which the said corporation desired to remove because it obstructed the view of the switch as mentioned in said report and certificate, stood and existed where it now stands at the time of the original location and building of said railroad and of the erection of said passenger station and switch, and that the removal of said building for the purpose stated is not a purpose authorized by law.

"Because said railroad commissioners were not authorized and had no legal authority to determine generally, as they have by said report and certificate attempted to do, that the said lands were necessary for the reasonable accommodation of the traffic and appropriate business of the said corporation, their authority being limited to the determination of how much, if any, of the land described in the petition, is necessary for borrow and gravel pits, necessary tracks, side tracks, stations, woodsheds, repair shops and car, engine and freight houses, as are specified and individually named and designated with the land deemed necessary for each."

George B. Sawyer, for petitioners.

The statute requires the commissioners to state specifically, in their certificate, for which of the several purposes mentioned in the statute the land is condemned; and if for more than one of those purposes, what and how much land for each, and who is the owner of it. It is impossible to ascertain how much of the land described in the certificate was taken for side tracks and how much for general use. There is no sufficient description in the certificate of the area taken or boundaries or separate owner-

ship. We are entitled to a distinct statement of the uses and purposes for which, and the extent to which, each piece is taken; so that, as to all other uses and purposes, our rights may be preserved, as in the case of other easements.

Henry Ingalls, for respondents.

Certiorari lies only to correct errors in law. *Lapan* v. *Co. Com.* 65 Maine, 160; *Levant* v. *Co. Com.* 67 *Ib.* 429. Facts in *Spofford* v. *R. R. Co.* 66 Maine, 26, are different. Petition of railroad complies with the principles established in that case. Commissioners' certificate shows lands were taken for purposes authorized by statute. Description definite and certain and follows petition. Statute does not require separate descriptions for separate owners,—only in the application. This petition addressed to the discretion of the court, and no substantial injustice done. Decisions and findings of the commissioners in matters of fact are binding and conclusive, and not subject to be reviewed.

HASKELL, J. The petition of the Knox and Lincoln Railroad Company to the railroad commissioners shows that the purchase or taking and holding of three several parcels of land are "required and necessary for necessary tracks, side tracks and station for said company, but that the owners of said land do not consent thereto, and that the parties do not agree as to the necessity therefor or the area necessary to be taken." The names of all the owners are given in the petition and all of them appeared at the hearing on sufficient notice.

The petition avers all the necessary facts to give the railroad commissioners jurisdiction in the premises, and the only question to be decided is, whether they exceeded their authority in the decision they rendered. The material parts of it are these: "We, the undersigned, railroad commissioners, hereby certify," &c., "that so much of the premises mentioned in said application as is hereinafter definitely described, is necessary for the use of said Knox and Lincoln Railroad Company, for necessary tracks, side tracks, stations, and for the reasonable accommodation of the traffic and appropriate business of said corporation."

Statutes authorizing the taking of land as for public uses must be construed strictly. The statute here invoked, R. S., c. 51, § 16, authorized the commissioners to condemn "land for borrow and gravel pits, necessary tracks, side tracks, stations, wood sheds, repair shops, and car, engine and freight houses" . . . "necessary for the reasonable accommodation of the traffic and appropriate business of the corporation." The purposes for which the land may be taken are specifically named; and it can only be so taken when necessary for the reasonable accommodation of the traffic and appropriate business of the corporation.

Now the commissioners have not only condemned land necessary for "necessary tracks, side tracks, and stations," but also land "necessary for the reasonable accommodation of the traffic and appropriate business of said corporation," a purpose not within the authority of the statute. *Spofford* v. *Railroad*, 66 Maine, 26. If it be said that the last expressed purpose for which the land was taken, viz., "for the reasonable accommodation of the traffic," &c., is included in the three preceding expressed purposes, viz., for necessary tracks, side tracks, and stations, the inquiry comes in which of the three is it included? The land taken is a strip about a rod wide on each side of the railroad, south of the station grounds. It is not pretended that land was taken for a station; nor upon which to build tracks or side tracks, unless a part of the strip on the east side, necessary for a retaining wall to the road-bed, be necessary for the purpose; but, on the westerly side, it was taken for a way along side of the tracks, so as to make a passage from the toll-bridge to the freight station, a more convenient way than to follow around the remaining three sides of the square. In other words, the real purpose of taking this land, as appears from the record, was for a street or new approach to the freight house. It was not for strictly railroad uses; that is, to give room for their tracks or stations; but for a public use to be determined by another tribunal than the railroad commissioners, — a use incident and convenient for the traffic and business of the road, and perhaps necessary therefor; but that necessity must be adjudged elsewhere. The railroad commissioners realized the doubt of their authority; and their

certificate is drawn in accordance with truth, if not authorized by law.

The purpose for which a large part of the strip of land taken on the easterly side of the railroad was, not for tracks, side tracks or stations, but to give approaching trains a view of the station switch. If that is within the purpose of the statute, little is left of its provisions limiting the roadway to four rods. Simply obstructing the view of train men by buildings, around which railroads have been located, is no good cause for allowing railroads to acquire land to gain views of their roads. The statute is comprehensive enough to give railroads all necessary land for the construction of their roads and stations. It is not for the court to extend its provisions beyond their strict import.

The certificate of the commissioners in these cases should state the special purpose for which the land is needed. We do not mean to hold that all such certificates are invalid for omitting to do so, but that such method would more certainly secure the rights of the parties and remove the opportunity for doubtful construction of language.

Spofford v. *Railroad*, *supra*, settles the decision of this case.

Writ to issue.

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

BANGOR SAVINGS BANK

vs.

NIAGARA FIRE INSURANCE COMPANY.

Penobscot. Opinion August 13, 1892.

Arbitration. Umpire. Fire Insurance.

An umpire, appointed by two appraisers mutually chosen and who were unable to agree upon the amount of loss under a policy of fire insurance, after making an examination of the premises and estimates of his own, inquired of an experienced and disinterested painter respecting the cost of painting. In his report he certified that such painter's cost correctly represented his own judgment. All three joined in a unanimous award and appraisal. In an action upon the policy, *Held;* That an appraiser, in such case, has the right on any special branch of the appraisal, as an appraiser, to make use of the

judgment of another skilled in that special branch, upon whom he can depend, and the valuation of that person is his if he chooses to adopt it.

Also, That an appraiser, or arbitrator, may call in the aid of a third person skilled in a special branch embraced in the appraisal, and may give to the estimate of such third person such weight and credence as he sees fit, even to the point of founding his judgment upon that estimate, provided he adopts that as his real judgment.

Of valuers and appraisers as distinguished from referees and others acting in a judicial capacity.

ON MOTION AND EXCEPTIONS.

This was an action on a policy of insurance in which the principal question was that of the damages and its mode of adjustment. There was a preliminary question whether the plaintiff could maintain its action until a reference had been had according to the stipulation therefor in the policy; but the presiding justice held that, as the award contained no evidence of a compliance with the conditions of the agreement (the latter being an independent submission), the appraisal was not in accordance with the stipulation, and therefore not a bar to the action; and also held, as matter of law, that it was competent for the defendant to prove by parol that the appraisers in their proceedings had complied with the stipulations in the agreement by which they were bound and by which their powers were defined. The plaintiff contended, among other things, that the umpire was to adjust differences only. The defendant claimed that this contention was not supported by the evidence. The validity of the award was submitted to the jury. The jury gave a verdict of $1095.39. The damage as estimated by the appraisers was $927.40.

Other facts appear in the opinion.

C. P. Stetson, for plaintiff.

Arbitration clause not a bar. R. S., c. 49, § 21; *Stephenson* v. *Piscat. F. & M. Ins. Co.* 54 Maine, 55; *Clement* v. *British Am. Ass.* 141 Mass. 298; *Reed* v. *Ins. Co.* 138 Mass. 572; *Rollins* v. *Townsend*, 118 Mass. 224; *Soars* v. *Home Ins. Co.* 140 Mass. 343. Award: *Tudor* v. *Gilchrist*, 20 N. H. 174; *Caldwell* v. *Dickinson*, 13 Gray, 365; *Walker* v. *Simpson*, 80 Maine, p. 148; *Wyman* v. *Hammond*, 55 Maine, 534; 2 Pars. Cont. *689; Morse Arbit. § § 177, 181, 182, 246,

562; *Houston* v. *Pollard*, 9 Met. 164; *Rider* v. *Fisher*, 5 Scott, 86; 3 Bing. N. R. 874; 2 Greenl. Ev. § 73; *Doherty* v. *Doherty*, 148 Mass. 367-8; *Hubbell* v. *Bissell*, 13 Gray, 298. Arbitrators consulting other persons: Morse Arbit. 165-9; *Brown* v. *Bellows*, 4 Pick. 179; *Shipman* v. *Fletcher*, 82 Va. 601; *Whitmore* v. *Smith*, 5 H. & N. 826; *Hills* v. *Home Ins. Co.* 129 Mass. 348; *Phillips* v. *Marblehead*, 148 Mass. 326; *Com.* v. *Sturtevant*, 117 Mass. 137.

Baker, *Baker and Cornish*, for defendant.

Where the policy distinctly makes the ascertainment of the damage by appraisers a condition precedent to the bringing of the suit and where the appraisal is confined to the amount alone, the condition is valid and the action cannot be supported without proof that an award has been had, or has been prevented by the fault of the company.

The distinction between valid and invalid stipulations as to arbitration is this: that where the policy requires all matters including the question of liability, to be arbitrated, the condition is void as ousting courts of their jurisdiction, but where the amount only must be arbitrated, this requirement is valid. *Avery* v. *Scott*, 8 Exch. 500; *Scott* v. *Avery*, 5 H. L. cases, 811; *Livingston* v. *Ralli*, 5 E. & B. 132; *Trott* v. *Ins. Co.* 1 Cliff. 439; *Wolff* v. *Ins. Co.* 50 N. J. L. 453, 14 Atl. Rep. 562; *Utter* v. *Ins. Co.* 8 Am. St. Rep. 922-3, note 2; *Old Saucelito Co.* v. *Ins. Co.* 66 Cal. 253; *Reed* v. *Ins. Co.* 138 Mass. 575-6 (independent stipulation); *Hood* v. *Hartshorn*, 100 Mass. 111; *Herrick* v. *Belknap*, 27 Vt. 673; *Davenport* v. *Ins. Co.* 10 Bailey, 535; *D. & H. Canal Co.* v. *Canal Co.* 50 N. Y. 250, 261-70; *Perkins* v. *Elec. Lt. Co.* 21 Blatch. 308, 16 Fed. Rep. 515; *Haughton* v. *Sayer*, 4 Hurl. & N. 643, 650; *Eliott* v. *Assurance Co.* L. R. 2 Exch. 237, 245; *Braunstein* v. *Ins. Co.* 1 Best & S. 782; *Tredwen* v. *Holman*, 1 Hurl. & C. 72; *Wright* v. *Ward*, 24 L. T. 439; *Edwards* v. *Ins. Co.* L. R. 1 Q. B. Div. 563; *Babbidge* v. *Coulburn*, L. R. 9 Q. B. Div. 235; May on Ins. § 493; Wood on Fire Ins. § 467, and cases; 2 Chit. Plead. 259, note and cases; *Hall* v. *Fire Ins. Co.* 57 Conn. 106. The same distinction has been

clearly and early stated in *Stephenson* v. *Ins. Co.* 54 Maine, 70 (whole question of liability,); *Birminghan Ins. Co.* v. *Pulver*, 18 N. E. Rep. 807, (Ill.); *Scottish Ins. Co.* v. *Clancey*, 8 S. W. Rep. 630 (Tex.); *McMaster* v. *Ins. Co.* 55 N. Y. 22, 14 Am. Rep. 265. The settled law of England, and in this country, of Maine, Massachusetts, Connecticut, New York, New Jersey, California, and Texas.

Arbitration clause not void under R. S., c. 49, § 21. "Preliminary proofs" there required do not dispense with other general evidence like actual loss, &c., nor prescribe the amount and kind necessary for recovery. Technical terms only, well defined in insurance, relating only to notice of loss, &c. *Bailey* v. *Ins. Co.* 56 Maine, 481; *Lewis* v. *Fire Ins. Co.* 52 Maine, 496, 8, 9; *Heath* v. *Ins. Co.* 1 Cush. 264-5; *Graves* v. *Ins. Co.* 12 Allen 394; *Walker* v. *Ins. Co.* 56 Maine, 380-1; *Fox* v. *Ins. Co.* 53 Maine, 109; *Martin* v. *Ins. Co.* 20 Pick. 392-6; *Bartlett* v. *Ins. Co.* 46 Maine, 502; Endl. Stat. § § 2, 74-5; Smith Stat. Con. § § 483, 535; *Merchant's Bank* v. *Cook*, 4 Pick. 411; *Ex parte Hall*, 1 Pick. 261.

Insured bound to do all reasonably in his power to procure appraisal. *Hood* v. *Hartshorn*, *supra*; *U. S.* v. *Robeson*, 9 Pet. 327; *Uhrig* v. *Ins. Co.* 4 N. E. Rep. 745-6 (N. Y. Court of Appeals.)

Award valid: *Hall* v. *Ins. Co.* 57 Conn. 156; *Billington* v. *Sprague*, 22 Maine, 44.

Right of umpire to consult: *Emery* v. *Wase*, 5 Vesey, Jr. 546, s. c. 8 Vesey, Jr. 504 a; *Anderson* v. *Wallace*, 3 Cl. & F. 26; *Caledonian Ry. Co.* v. *Lockhart*, 3 McQueen, 808; *Ins. Co.* v. *Goehring*, (Pa.) 11 Law Jour. 93.

WHITEHOUSE, J. Assumpsit on a policy of insurance against loss or damage by fire to an amount not exceeding $2000 on the hotel building known as the "Bangor House." The contract in suit was one of eight policies issued by different companies on the same property, amounting in the aggregate to $15,000.

The house was damaged by fire on the fifth day of May, 1889, and it was not in controversy that the policy in suit was valid,

and that the defendant corporation was liable to pay the plaintiff its proportional part of the damage, according to the terms of its contract. The amount of damage which the plaintiff was entitled to recover, and the mode of its adjustment, were the only subjects of contention between the parties.

The policy in suit contains the following, among other stipulations: "This company shall not be liable beyond the actual cash value of the property at the time, if loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided, and the amount of loss or damage having thus been determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss having been received by this company in accordance with the terms of this policy."

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

"The loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

Having reference to these provisions of the policy, but before any disagreement had in fact arisen with respect to the amount of the damage, the parties entered into a written agreement in which it was stipulated that two appraisers named, duly

selected, one by each party (together with a third person to be appointed by them if necessary, to decide upon questions of difference only) should "appraise and estimate at the true cash value the damage by fire to the property," &c. Failing to agree, these apprisers selected an umpire and the three performed the duty to which they were appointed and made and signed a unanimous report appraising the aggregate damage at $6953.50. Proofs of loss were accordingly signed and sworn to by the insured and delivered to the agent of the defendant company, claiming from the company the sum of $927.40, being its proportional part of the aggregate damage as fixed by the report of the appraisers. Subsequently, however, notice was sent to the defendant by the insured that these proofs of loss were withdrawn.

Thereupon the defendant pleaded in defense a "legal and valid award in writing" respecting the amount of damage and introduced in evidence the written agreement for submission, the report or award signed by the original appraisers and the umpire, and the "proofs of loss" above described. A draft sent by the defendant company in payment of the sum claimed in the proofs of loss was also offered in evidence by the defendant's counsel, for the purpose of showing its acceptance of the proofs of loss and compliance on its part with the provisions of the policy.

But it was contended that the award was not valid and binding upon the plaintiff because it was apparent on the face of the report that it did not conform to the terms of the submission, and because it further appeared from extrinsic evidence, as it was claimed, that the umpire did not confine himself to the decision of questions of difference only in the manner contemplated by the submission; and that with respect to certain branches of the appraisal he had not acted on his own judgment, but on the judgment of other persons consulted by him without the knowledge of the plaintiff.

Although the award made by the appraisers may be regular and sufficient in form, it may undoubtedly be impeached for fraud or misconduct on the part of the appraisers, or on other

grounds which vitiate all awards. On the other hand, it is obviously competent for the parties to modify or waive any provisions of their written contract by a subsequent mutual agreement not in writing. *Wiggin* v. *Goodwin*, 63 Maine, 392; *Goss* v. *Nugent*, 5 Barn. & Ad. 65; *Hall* v. *Ins. Co.* 57 Conn. 105. The last named case is precisely in point, and the court say: "The provision in the policy referred to was not designed to prescribe and it does not intend to prescribe any form of submission. It only gives certain leading features of the submission which were in fact substantially complied with. . . But the capacity of the parties to contract could not be restricted by the policy so that they could not waive its requirements and make a submission to suit themselves, provided of course it was not otherwise unlawful." So far, therefore, as there is any material difference respecting the duties of the appraisers or the umpire, between the provisions of the policy and the terms of the written agreement for a submission, the former is presumptively superseded by the latter, and in such a case the duties of the appraisers and of the umpire are to be ascertained and their conduct examined with reference to the terms of the submission actually signed by the parties.

With respect to the conduct of the appraisers it appears that Willard Cutter, of Bangor, the umpire, had resided in that city for more than forty years, had been a contractor and builder for thirty years, and was familiar with the prices of labor and materials in Bangor. In regard to his action as an appraiser he testified as follows: "I come to painting now. I partially figured that myself, and then I thought I would get a painter to figure it. . . To a certain extent this is what I got from Marston & Gorham. These are the figures which I adopted as my own." He further testified expressly that the figures made up by him after obtaining this information were his own judgment of the actual damage to the property. There was no claim that Mr. Cutter had not acted throughout with entire disinterestedness, and from an honest purpose and desire to reach a just and correct appraisal. His estimate of the aggregate damage had been adopted by the original appraisers as the amount of the unanimous award which was made and published.

Upon this branch of the case the presiding judge said to the jury:

"I am requested to give you this instruction: 'That an appraiser in the case here has the right on any special branch of the appraisal, as an appraiser, to make use of the judgment of another skilled in that special branch, upon whom he can depend, and the valuation of that person is his if he chooses to adopt it.' I cannot give you that instruction. I do not think I can change the instruction I gave you upon that subject. If after getting an opinion, if after getting an estimate, the appraiser does not treat it as his own judgment, but acts upon it as the judgment of the other party, I have said to you it would not be binding. But he may, after getting the opinion of another, act upon his own judgment, *uninfluenced perhaps, unaffected entirely* by the opinion of another. But what I call your attention to is the adoption by a referee, or an appraiser, of an estimate or judgment of a third party where he has none of his own, and where he acts upon the judgment of a third party as the basis of his own action without forming an intelligent judgment of his own."

This instruction was also requested: "That an appraiser, or arbitrator, may call in the aid of a third person skilled in a special branch embraced in the appraisal, and may give to the estimate of such third person, such weight and credence as he sees fit, even to the point of founding his judgment upon that estimate, provided he adopts that as his real judgment." And the court said: "I do not see any necessity of instructing you further upon this branch of the case."

Touching this question the early case of *Emery* v. *Wase*, 5 Vesey, Jr., 846, is a leading and important one. It involved an agreement to sell an estate at a price to be fixed by arbitration, and it was objected that the arbitrator did not exercise his own judgment in regard to the value of certain timber. But the Master of the Rolls said: "That alone is not sufficient to prove an award bad; for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he chooses to adopt it." On appeal Lord Eldon concurred in this view, 8 Vesey, Jr., 504. In *Soulsby* v. *Hodson*,

3 Bur. 1474, the arbitrators being unable to agree, chose an umpire and acted with him. The only question was whether the umpirage was duly made according to the power given to the umpire, or whether it was vitiated by the arbitrators joining in it. The court were said by Lord Mansfield to be "unanimous and clear that this was the umpirage of the umpire only. He was at liberty to take what advice or opinion of assessors he pleased." In *Anderson* v. *Wallace*, 3 Clark & Fin. 26, it was held that by adopting in terms the opinion of a third person consulted by them the arbitrators do not constitute him an umpire, but make his opinion their own, and their award cannot be impeached on that ground. In his work on arbitration (3d ed. p. 199,) Mr. Russell says: "The cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another, and after hearing his opinion adopt it as his own upon the credit which he gives to the judgment and skill of the person to whom he refers."

In Morse on Arbitration, p. 169, after citing numerous authorities the author says: "The theory is sufficiently plainly developed in these English cases that the arbitrator may, for his own information and guidance, ask information from persons whose capacity to form an accurate opinion concerning the subject matter he relies upon; that the statements thus obtained by him are to be treated as evidence or as aids by which he may make up his own opinion. He may give them such weight and credence as he sees fit, even to the point of founding his judgment upon them; but it is essential that he *should* form his judgment, and not adopt and follow them absolutely, blindly, or in contravention of an actual opinion of his own."

Referees may also "make inquiry abroad to ascertain for their own satisfaction the price of work or the truth of any other matter which may be said comparatively to be of a public nature. This it is said, so far from being irregular, would be highly commendable." Morse Arbitration, 137. See also *Vannah* v. *Carney*, 69 Maine, 221.

But it is unnecessary to the decision of the question here raised to adopt in its full extent the doctrine apparently es-

tablished by these authorities relating to the ordinary submission of an existing controversy to referees. The question here does not arise in connection with a general submission to arbitration.

It was a proceeding for the ascertainment of a single fact or the settlement of a particular question in the chain of evidence, and not originally designed to terminate the whole controversy. In the absence of definite knowledge as to the extent of the loss and in anticipation of a possible disagreement, it was mutually agreed that the damage should be "ascertained and estimated" by competent and disinterested appraisers selected with special reference to their knowledge, skill and experience in regard to the subject matter. This duty is to be performed by the appraisers mainly by the aid of a personal examination of the premises and an application of their personal knowledge. They are not expected to hold a formal session of court to determine an entire controversy after hearing pleadings, evidence and argument. Their proceedings resemble more the process of taking expert testimony. Whether mere valuers or appraisers thus appointed for such a purpose, can be deemed arbitrators in any proper sense or for any purpose, there is no occasion to decide. The authorities are not in harmony upon the subject. See Morse on Arbitration, 38, 42, and cases cited. It is not necessary to follow the different courts in their ingenious efforts to trace, for all cases, a line of distinction between a mere appraisement and an ordinary submission to arbitration. The result may be that such appraisers are properly considered arbitrators for some purposes but not in all respects. All are invested with *quasi* judicial functions, which must be discharged with absolute impartiality, without the improper interference of either party, or undue influence from any source. But appraisers may be said to act in the two-fold capacity of arbitrators and experts. In their character of experts they not only give effect to opinions based directly on their personal experience and knowledge, but also opinions founded in some measure upon information which may not be so direct and original as to be competent in itself as primary evidence. A witness called as an expert is expected before testifying to refresh his memory and confirm his judgment by

an examination of authorities and conference with other experts. The umpire did precisely this and no more in the case at bar. After making an examination of the premises and certain estimates of his own, he made inquiry of an experienced and disinterested painter respecting the cost of painting. His conclusions may have been affected and modified to some extent by the information thus obtained, but he declares that his report correctly represented his own judgment. He was not only unconscious of any impropriety in seeking this information but was evidently engaged in a careful and conscientious effort to reach a just and correct appraisal. So far from being improper and illegal, his conduct was entirely praiseworthy. Any rule which would prohibit an appraiser from thus qualifying himself to do justice between the parties, so far from being an aid in the ascertainment of truth, would be an essential obstacle to it. Two or three appraisers with personal knowledge so definite and comprehensive as to embrace all the details of the damage, could not ordinarily be found. Either a court must be held to hear evidence, or a separate appraiser appointed for each of the numerous special branches of an appraisal. Such a rule would be inconsistent with the approved and established methods of conducting important departments of business, and tend to defeat the very object contemplated by the parties in providing for an appraisement.

The instructions requested by the defendant's counsel upon this point were evidently drawn with direct reference to the authorities cited and appear to be in harmony with the principles here enunciated; but the language of the charge upon this branch of the case, which was doubtless inadvertently used, taken in connection with the refusal to give the requested instructions, was calculated to give the jury an erroneous impression of the law respecting the conduct and duty of an appraiser under the circumstances disclosed by the evidence in this case.

Exceptions sustained.

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

INHABITANTS OF ANSON, and others, PETITIONERS FOR THE APPOINTMENT OF TRUSTEES UNDER MORTGAGE OF SOMERSET RAILROAD COMPANY.

Kennebec. Opinion August 13, 1892.

Equity. Parties. Trustee. Mortgage. Railroad. R. S., c. 51, § § 85, 86; c 68, § § 5, 6; R. S., 1871, c. 51, § § 47, 48, 70; Stat. 1878, c. 8.

Upon a proceeding in equity for the appointment of trustees under a mortgage made by the Somerset Railroad Company, July 1, 1871, two of the three original trustees having deceased, and there being no provision in the mortgage for the appointment of new trustees, *the court holds* as follows:

An express trust validly created shall not fail for the want of a trustee; and the power of the court over the removal and appointment of trustees independently of any statute authority, or any directions in the instrument of trust, is well established.

The special provisions of our statutes respecting the election of trustees, being cumulative and not restrictive, must be regarded merely as auxiliary regulations designed to aid the court in the discharge of its duty, and to facilitate the action of bondholders who may desire to co-operate in securing a more efficient execution of the trust. These provisions are not designed to prohibit bondholders from directly invoking the aid of the equity court in behalf of themselves and others entitled to the protection of the same security.

The power of the court to make such appointment is not defeated by the formation of a new corporation, under R. S., c. 51, by a majority of the bondholders, who have exchanged their bonds for stock in the new corporation; nor by a foreclosure, promoted by the bondholders, the trustees not being parties thereto, and a sale of the equity of redemption on execution to the new corporation; nor by the creation of a new debt, secured by mortgage, for the extension of the road; nor by estoppel through laches and because a majority of the bonds was represented at the organization of the new corporation.

In this proceeding, the court will not consider the validity of the alleged foreclosure, nor the question of estoppel; or determine the relative equities between the outstanding bonds and those surrendered for stock; or the status of the new corporation and its new issue of bonds.

Held, also, that the original mortgagor and the surviving trustee are necessary parties.

ON REPORT.

The facts are sufficiently stated in the opinion.

D. D. Stewart, N. and H. B. Cleaves, and *H. M. Heath,* for petitioners.

Counsel argued:

(1.) That the attempted foreclosure by bill in equity is void, both as against the trustees under the mortgage of July 1, 1871, and as against the original mortgagors, the Somerset Railroad Company. (2.) That it is void as to all bondholders who have never cancelled and surrendered their bonds and converted them into stock of the new company. (3.) That it is void as to all stockholders of the Somerset Railroad Company who have taken neither stock nor bonds of the new company. (4.) That the mortgage of July 1, 1871, remains in full force as a first lien for securing the payment of all bonds originally secured by it, and still outstanding and uncancelled. (5.) That the new corporation, so far as its formation depends upon the alleged foreclosure by the bill in equity, has no legal existence. (6.) That if it has any legal existence, either under any other provisions of the statute, or as a *de facto* company, it holds, at most, only the right of redeeming the mortgage of July 1, 1871; and must of course pay the bonds still outstanding secured by that mortgage. And whether it holds that right depends upon the legality of the sale of the equity on July 8, 1884. (7.) That the new corporation has never acquired the legal title vested in the trustees under the mortgage of July 1, 1871, and could not. There is no conveyance from those trustees, *Stratton* v. *E. & N. A. Ry.* 74 Maine, 426. That the act of March 11, 1887, was as ineffectual to transfer that title as the proceedings under the bill in equity—both being equally unconstitutional and void; and no other mode of acquiring it is pretended.

The Somerset Railway do not connect themselves with the title of the trustees under the mortgage of July 1, 1871, except by virtue of the act of the legislature of March 11, 1887. No man's property can be transferred to another by an act of the legislature. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Trustees of New Gloucester* v. *Bradbury*, 2 Fairf. 118; *Knapp* v. *Railroad Co.* 20 Wall. 122, 123; *Denny* v. *Mattoon*, 2 Allen, 380-381; *Railroad Co.* v. *Elliot*, 52 N. H. 387.

Even the act of March 11, 1887, did not profess to apply unless there had been a legal foreclosure of the mortgage.

The vested priority of a mortgagee is beyond the power of the mortgagor or the legislature to disturb. *Toledo R. R. Co.* v. *Hamilton*, 134 U. S. 296. In *Smith* v. *Green*, 41 Fed. Rep. 455, it was held that no subsequent act of the legislature can affect or change the rights acquired under a mortgage according to the laws then existing. That the law as it stood when the mortgage was made must be followed—not that in force at the time of the foreclosure. Same doctrine in 2 Jones on Mort. § § 1821 to 1827; *Hillebert* v. *Porter*, 38 Minn. 499; *Champion* v. *Hinkle*, 45 N. J. Eq. 162; *Hoffman* v. *Quincy*, 4 Wall. 552; *Cargill* v. *Power*, 1 Mich. 369; *Edwards* v. *Kearzey*, 96 U. S. 608.

A mortgagee being the trustee in the mortgage, and as such the holder of the legal title, is an indispensable party to a suit for foreclosure. *Hambrick* v. *Russell*, 86 Ala. 199.

The objection is available at any time and in any form. S. P.: *Robertson* v. *Carson*, 19 Wall. 106; *Hidden* v. *Hidden*, 103 Mass. 59; *Clark* v. *Reyburn*, 8 Wall. 318; *Pierce* v. *Emery*, 32 N. H. 522, 523; *Sturgess* v. *Knapp*, 31 Vt. 53; *Secor* v. *Singleton*, 41 Fed. Rep. 728.

The alleged decree of foreclosure does not determine the amount to be paid by the Somerset Railroad Company in order to redeem. It is for that reason also fatally defective. *Chicago R. R. Co.* v. *Fosdick*, 106 U. S. 71; *Clark* v. *Reyburn*, 8 Wall. 318.

If it is contended that the bonds of the town of Anson were used in the formation of the new company, the reply is that no authority was ever given by the town to so use them. And the selectmen had no authority by virtue of their office to so use them. Nothing less than the vote of the town could confer it. *Willard* v. *Newburyport*, 12 Pick. 227; *Goff* v. *Rehoboth*, 12 Met. 26; *Walpole* v. *Gray*, 11 Allen, 150; 1 Dill. Mun. Corp. § 30, note and cases.

If it is contended that S. S. Thompson and W. H. Brown agreed to convert their bonds into stock of the new corporation, the answer is that it was an unexecuted agreement. They never

cancelled and surrendered their bonds, or received any certificates of stock. *Chaffee* v. *Middlesex R. R. Co.* 146 Mass. 238; *Miller* v. *Rutland R. R. Co.* 40 Vt. 399; *Richardson* v. *Noble*, 77 Maine, 390.

And the parties now owning the bonds purchased them in the market for value, without the slightest knowledge of such agreement, or that even Thompson ever owned the bonds. They thereby acquired a good title to them. *Miller* v. *Rutland R. R. Co.* 40 Vt. 399; *Galveston R. R.* v. *Cowdrey*, 11 Wall. 459, 478; *Shaw* v. *Norfolk Co. Railroad Co.* 16 Gray, 407; *Montclair* v. *Ramsdell*, 107 U. S. 147; *Knox* v. *Aspinwall*, 21 How. 539; *Mercer Co.* v. *Hackett*, 1 Wall. 83; *Bronson* v. *R. R. Co's*, 2 Wall. 283.

Bonds actually converted into stock of the new company and cancelled and surrendered to that company, are no longer existing obligations and secured under the mortgage of July 1, 1871. *Miller* v. *Rutland*, 40 Vt. 399; *Shaw* v. *Norfolk Railroad Co.* 16 Gray, 415; *Poland* v. *R. R. Co.* 52 Vt. 145.

Respondents have no interest in questions arising under this petition, or any right or occasion to be heard. *Greene* v. *Borland*, 4 Met. 330, 332-3; *Bradstreet* v. *Butterfield*, 129 Mass. 340, 341-2. Pierce, surviving trustee, not a necessary party. *Pillsbury* v. *E. & N. A. Ry. Co.* 69 Maine, 394.

Counsel also cited: *Att'y Gen'l* v. *Barbour*, 121 Mass. 568, 570-1-2-3; *In re Eastern Railroad Co. Lawrence, Pet'r*, 120 Mass. 412; 1 Perry Trusts, § 294; Hill Trustees, pp. 49, 190-1; 2 Story Eq. § 1287; *Red Rock* v. *Henry*, 106 U. S. 596; *Bainbridge* v. *Blair*, 1 Beav. 495; *Miller* v. *Knight*, 1 Keen, 129; *Wood* v. *Brown*, 34 N. Y. 341; *Gooch* v. *Stephenson*, 13 Maine, 371; *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 59 Maine, 9.

Webb, Johnson and Webb, for Somerset Railway and its trustees.

Mortgage of July 1, 1871, is *functus officio*. Defendant's right to appear (*Hamlin* v. *E. & N. A. R. Co.* 72 Maine, 83). May be obliged to yield possession of extension as well as old road. Demurrer should be sustained. 1 Pom. Eq. § § 114, 115,

232, and cases cited. Pierce should be made a party. He represents all the *cestuis que trustent*. Bondholders should under R. S., c. 51, § 85, elect trustees to fill vacancies. *In re Bondholders of Y. & C. R. R. Co.* 50 Maine, 552; *Pillsbury* v. *R. R.* 69 Maine, 394. Petitioners estopped by decree in foreclosure suit. Act of 1877, c. 151 (R. S., c. 51, § 94), and c. 103 of 1887 are valid and constitututional. *Coffin* v. *Rich*, 45 Maine, 507; *K. & P. R. R. Co.* v. *P. & K. R. R. Co.* 59 Maine, 10; *Berry* v. *Clary*, 77 Maine, 482; *Phinney* v. *Phinney*, 81 Maine, 450; *Bambach* v. *Bade*, 9 Wis. 559, (76 Am. Dec. 283); *Bronson* v. *Kinzie*, 1 How. 311; *Holloway* v. *Sherman*, 12 Iowa, 282 (79 Am. Dec. 537,); *Griffin* v. *McKenzie*, 50 Am. Dec. 389.

Estoppel by laches: The new corporation, the Somerset Railway, was organized in 1883, and in 1888, issued its bonds to the amount of $225,000, and appointed trustees, who accepted the trust, and the bonds so issued were sold in the market and are held by individuals and savings banks in the state of Maine, and the proceeds thereof have been applied to the building of the seven and one-half miles of extension from Carratunk Falls to Bingham; and this at the instance, knowledge, consent and co-operation of all the bonds represented by the petitioners, except $18,000.

The petitioners stood by from the time of the organization of the Somerset Railway in 1883 until after it had issued its bonds, and until 1890, and saw and assisted the new company in its formation and knew it was making contracts and doing business and running its railroad and issuing its bonds, and building with the proceeds thereof an extension; and these petitioners have slept so long upon their rights that they cannot now object to the validity of the organization and the foreclosure of the old mortgage of 1871.

The bonds described in the plaintiff's petition, (excepting $18,000) participated in the foreclosure of the old mortgage and the organization of the new company and in the issuing of the bonds by the Somerset Railway, and they are now estopped to deny the validity of the foreclosure. They are estopped *en pais*. *Briggs* v. *Hodgdon*, 78 Maine, 514; *Phillips* v. *Moore*, 71

Maine, 78; *Caswell* v. *Fuller*, 77 Maine, 105; *Allen* v. *Goodnow*, 71 Maine, 420; *Grant* v. *Carver*, 75 Maine, 524.

The general rule is that a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of another. *Piper* v. *Gilmore*, 49 Maine, 149; *Wood* v. *Pennell*, 51 Maine, 52; *Stanwood* v. *McLellan*, 48 Maine, 275; *White Mountain Bank* v. *West*, 46 Maine, 15.

These same bonds held by Thompson, $28,800, by Anson, $27,500, and by Brown, $4,100, attended a meeting on the 15th of August, 1883, of the holders of said bonds to see if the holders of said bonds would determine to form a new corporation as provided by law; to adopt a code of by-laws for such corporation; to elect a board of directors for such corporation; and at a legal meeting they did so vote to form a new corporation and issued by-laws. They voted that the officers of the new corporation be instructed to take possession of the railroad and other mortgaged property on the first day of September, 1883, and thereafter to operate said railroad for the benefit of this new corporation; and that the directors be authorized and requested to purchase the equity of redemption of the old Somerset Railroad Company and to take a conveyance thereof to this new corporation, and this was done; they voted to take the necessary action to conform the organization of the company to the foreclosure of the mortgage securing the bonds upon which said corporation was formed, and to fix the capital stock, and to repeal the old code of by-laws and to adopt a new code; and instructed the directors of the new Somerset Railway to extend its road from Anson to Bingham and to issue its bonds. The bonds of Anson, Brown and Thompson participated in these proceedings.

It is idle for these petitioners to claim that they had no knowledge that these bonds had participated in the new organization, because when they bought them in 1890 the coupons had matured and they were loaded down with overdue coupons. The inhabitants of Anson signed the petition for the meeting and then voted for it.

When the Somerset Railway mortgaged its property to trustees, that mortgage was authorized by a stock vote and the most of the bonds held by the petitioners voted in favor of that mortgage.

These bonds are now held and owned by parties who in law, consented to the foreclosure, and the present bondholders took them with full notice of the fact. *Barnes* v. *C. M. & St. P. R. R.* 122 U. S. 1.

WHITEHOUSE, J. This is a proceeding in equity asking the court to appoint trustees under a railroad mortgage to fill vacancies occasioned by the death of two of three trustees originally named in the deed.

July 1st, 1871, the Somerset Railroad Co. duly authorized an issue of bonds to the amount not exceeding $500,000 and made a mortgage to Lewis Pierce, Daniel Holland and Stephen D. Lindsey conveying to them or their successors in joint tenancy "the railroad of said company from its junction with the Maine Central Railroad in Waterville to its terminus in Solon," . . . "with the franchise of said company and all its real estate and all its personal property of every nature used in connection with said railroad now possessed or to be hereafter acquired," in trust to secure the payments of its bonds and coupons thereunto annexed and for the benefit of all the holders thereof. Thereupon the company actually issued its bonds to the amount of $450,000 payable in twenty years from July 1st, 1871, with interest at the rate of seven per cent per annum payable semi-annually according to the coupons attached to each bond. The larger part of these bonds were sold by the company and the proceeds applied to the construction of its road. The plaintiffs are purchasers and owners of these bonds to an aggregate amount of $78,100, and of coupons annexed in the payment of which the company has made default during the last twelve years amounting to $84,921. It is expressly stipulated in the mortgage that the omission of the company to pay any of the bonds or coupons as they become due shall constitute a breach of the conditions of the deed.

But it appears that, since the execution of the mortgage and the purchase of the bonds by the plaintiffs, two of the trustees, namely, Stephen D. Lindsey and Daniel Holland, have deceased; and there being no provision in the mortgage for the appointment of new trustees, the plaintiffs bring this bill asking the court to exercise its general equity power and appoint suitable persons as trustees to fill the vacancy.

After notice of the pendency of the bill had been given to "all persons and corporations interested," a new corporation called "The Somerset Railway" appeared to object to the appointment of such trustees and being admitted as party defendant, demurred specially to the plaintiffs' bill on the ground, first, that Lewis Pierce, the survivor of the trustees, was not made a party to the bill and, second, because the bondholders did not elect new trustees to fill the vacancies as provided by law. This defendant also filed an answer representing that on the 1st day of April, 1883, the Somerset Railroad Co. the mortgagor named in the deed of July 1st, 1871, was insolvent and unable to meet its indebtedness as it matured and that it was hindered and delayed in the transaction of its business; that the holders of the bonds secured by the mortgage in question on which interest had been due and payable for more than three years prior to that time, to an amount exceeding one half of such bonds, on the 15th day of August, 1883, formed the new corporation called the Somerset Railway, composed of the holders of the bonds, in the manner provided by c. 51, R. S., and acts amendatory thereto; that the majority of the bonds were surrendered to the Somerset Railway in exchange for the stock of that corporation; that the mortgage described in the plaintiffs' bill was foreclosed by a decree of the Supreme Judicial Court, April 1, 1887, and the equity of redemption sold on execution and purchased by the defendant; and that the mortgage has therefore become *functus officio* and has ceased to be security for said bonds; that October 1, 1887, the new corporation created another bonded debt and issued its bonds to the amount of $225,000, secured by a mortgage of its road from Oakland to Bingham, the proceeds of which have been applied in constructing the extension of the road

from North Anson to Bingham. The trustees under the last named mortgage were also admitted as parties defendant and filed an answer in substance the same as that of the defendant railway company.

It is admitted that there was a breach of the condition of the mortgage of July 1, 1871, and that it was never foreclosed by the trustees. It is also uncontroverted that the new company was in fact organized under the name of "the Somerset Railway" and that since the date of its organization it has been in actual possession and management of the road and its rolling stock, receiving all the income from its operation.

The defendant also interposes the further objection that the plaintiffs are now equitably estopped to maintain this bill because they have been guilty of laches, and because a majority of the bonds owned by these plaintiffs were represented in the organization of the new corporation. But we are not required by the scope and purpose of this proceeding upon the evidence now before us to pass upon the legality of the alleged foreclosure, or to determine this question of estoppel, with respect to the numerous owners of the outstanding bonds. The court is now asked to appoint trustees for the benefit of all the bondholders, if any, who may be interested in the security promised by the first mortgage. There is no evidence that the holders of these bonds to the amount of $18,000, who are parties to the bill, ever participated in the scheme for reorganization, and no evidence that they had any knowledge of it until after it was consummated. The history of the remaining $40,000 which remain uncancelled in the hands of those not parties to the bill, is not fully disclosed by the evidence. For all that appears they may be still held by those who originally purchased them of the railroad company.

The rights of the different bondholders are not now to be distinguished; for all the facts which might have a tendency to create differences are not now before us, and any attempt to settle all the conflicting claims, suggested by the history of this enterprise, would be premature. We do not now undertake to declare the relative equities between the outstanding bonds and those which were surrendered and cancelled in exchange for the stock of the

new corporation, nor to decide the status of the new organization and its new issue of bonds.

The provisions of the mortgage manifestly contemplated joint action on the part of the trustees. They are expressly constituted the sole judges *prima facie* of the breach of the conditions of the mortgage. The majority are authorized to take action when it appears that the others had notice and declined to act; but as two of the trustees are dead, it is obvious that no measures can be taken by the board of trustees for the enforcement of this mortgage contract until these vacancies are filled. *Shaw* v. *Norfolk Co. R. R.* 5 Gray, 162.

But the defendant finally contends that, if the situation requires the appointment of trustees to fill these vacancies, the court has no authority to take action in the premises until the trustees have been elected by the bondholders at a meeting for that purpose called by the trustees, as provided by § § 47 and 48, c. 51, R. S., 1871 (§ § 85 and 86, c. 61, R. S., 1883). True, the mortgage itself contains no provision for filling a vacancy and the bondholders have not designated any trustees in the manner specified by this statute. But the pendency of this bill reminds us that the basis for the initial step toward such a meeting of the bondholders is now wanting. There are no trustees to call the meeting; therefore compliance with this statute is impracticable.

But the equity power of this court is not thus restricted respecting the appointment of trustees under express trusts. In addition to the general equity jurisdiction over trusts possessed by the court under general statutes existing at the date of the mortgage, § 70, c. 51, R. S., 1871, expressly confers jurisdiction over trustees under railroad mortgages. Still further by the act of 1878, c. 8 (R. S., c. 68, § 5), it is provided that, if in a deed of trust no adequate provision is made for supplying the vacancy, the Supreme Court shall appoint a new trustee to act alone or jointly with the others as the case may be. *Pillsbury* v. *E. & N. A. R. R.* 69 Maine, 397. It is a familiar principle of equity that an express trust validly created shall not fail for the want of a trustee; and the power of the court of equity over the removal and appointment of trustees independently of any statute author-

ity, or any directions in the instrument of trust, is well established. It is to be exercised with sound judicial discretion, with due regard to the interests of all the beneficiaries and the effectual performance of the trust. 2 Pom. Eq. § § 1086 and 1087. "The appointment of new trustees," says Judge Story, "is an ordinary remedy enforced by courts of equity in all cases where there is a failure of suitable trustees to perform the trusts." 2 Story Eq. § 1287. In the exercise of its inherent jurisdiction the court will interpose upon proper application and make the appointment whenever necessary or desirable. "The jurisdiction exists and will be equally enforced whether the instrument creating the trust does or does not contain a power to appoint new trustees." Hill on Trustees, 190 and 191.

The special provisions of our statutes, respecting the election of trustees, must be regarded merely as auxiliary regulations designed to aid the court in the discharge of its duty and to facilitate the action of the bondholders who may desire to co-operate to secure a more efficient execution of the trust. They were not designed to prohibit any bondholder from directly invoking the aid of the court of equity in behalf of himself and others entitled to the protection of the same security. For it is well settled by all the authorities that, under some circumstances, a suit may be instituted by one for himself and others in like condition for an object common to them all. *Mason* v. *York & C. R. R. Co.* 52 Maine, 107, and cases cited; *March* v. *Eastern R. R.* 40 N. H. 556. And this, although the mortgage in express terms prohibits the trustees from attempting to foreclose except upon the written request of one half in amount of the bondholders. *First National Ins. Co.* v. *Salisbury*, 130 Mass. 303; *Alexander* v. *C. R. R. Co.* 3 Dill. 487; Jones on Corp. Bonds and Nego. Secu. § § 389 to 392 and cases cited. See also, *Guaranty Co.* v. *R. R. Co.* 139 U. S. 137. The statute invoked by the defendant is cumulative and not prohibitory or restrictive.

It will be remembered that there is no provision in this mortgage which prohibits any bondholder from enforcing his rights according to the usual course of equity proceedings. There is nothing in the mortgage authorizing a majority of the

bondholders to act for the minority in matters respecting the mortgage.

The plaintiffs are accordingly entitled to the intervention of the equity powers of this court for the appointment of new trustees as prayed for. "But the appointment of a new trustee is not complete till the property is vested in him; therefore a court usually embraces, in the decree appointing a new trustee, a direction for a proper conveyance to be executed to him." Perry on Trusts, § 284. And § 6, c. 68, R. S., and § 85, c. 51, R. S., expressly authorize the court to make and enforce any decrees necessary for the transfer of the trust property to the new trustee. In view of this duty to execute a proper conveyance to his co-trustee, and to co-operate with him in the performance of the trust, we think it would be more in harmony with the familiar principles of equity pleading if Lewis Pierce, the surviving trustee, should become a party to this bill; jointly with the plaintiffs, if he prefer; otherwise he should be made a party defendant. It is also the opinion of the court that the bill should be amended by making the original mortgagor a party defendant.

Case remanded; bill to be dismissed unless amended in accordance with this opinion.

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

SARAH J. DAY *vs.* HORACE PHILBROOK.

Cumberland. Opinion August 13, 1892.

Deed. Way. Incumbrance. Evidence. Action.

An original farm was divided into two parcels by a town road running easterly from the county road to defendant's land. The defendant claimed title to the north half under the earliest deed of the same grantor, which made the town road his south line.

This deed contained these words: "Reserving the town road leading through the farm." The plaintiff acquired title to the south half of the farm under a later deed making the town road his north line. The town road was subsequently discontinued. *Held;* That the fee of the road was not reserved in

the first deed, but only in its use as an incumbrance; and that in a real action the defendant had the better title to the whole of it.

The plaintiff further claimed title to the south half of the road as assignee of a mortgage given by the original owner, but without an assignment of any part of the mortgage debt. *Held;* That he cannot maintain a writ of entry against the defendant, a grantee of the mortgagor in possession, without first showing an existing mortgage debt.

A lost deed, never recorded, and whose contents are in dispute and which can not be proved by witnesses who saw and read it, is not sufficient evidence upon which to base a judgment of title to real estate not in the possession of any grantee under it.

ON REPORT.

The case is stated in the opinion.

Weston Thompson, for plaintiff.

George D. Parks, for defendant.

EMERY, J. This is a real action to recover seizin of a narrow strip of land one and a half rods wide, over which a town road had been laid out and afterward discontinued. The road was laid out three rods wide but the plaintiff only seeks to recover the southern half.

The history of events is briefly this: One Coombs owned a farm in Brunswick, on the east side of the Freeport road. A town way three rods wide was laid out across this farm from the highway (the Freeport road) to the farm next east called the Philbrook farm. Afterward, in 1867, Coombs conveyed his farm by deed of warranty to one Rowell. At the end of the description in this deed were the following words: "Reserving the town road leading through the farm." Rowell, as a part of the same transaction mortgaged the farm back to Coombs to secure certain notes given for part of the purchase money. This mortgage contained the same words of reservation.

Rowell, the mortgagor in possession, afterward in 1868, conveyed to one Hathaway by deed that part of the farm north of the town road in question. In this deed, the conveyed land is described as bounded "southwesterly by the road leading from the first named road [the Freeport road], to the home of Horace Philbrook." This boundary road is the town road referred to. Hathaway's title afterward came to the defendant.

The defendant also, in 1868, after the conveyance of Rowell to Hathaway, received from Rowell a quit claim deed of the remainder of the farm.

In 1869, Coombs (the mortgagee) conveyed the southerly part of the farm to one Brown. In this deed, the northern boundary is described as follows: "Beginning on the easterly side [of the Freeport road] at the corner of the Philbrook road; thence south thirty-one and one half degrees east by the said road to the land of Horace Philbrook," &c. The "Philbrook road" thus made the northern boundary is the town way or road above referred to. This title of Brown afterward came to the plaintiff. Brown took possession under his deed, and his grantees have remained in possession since.

We thus find the original Coombs farm was divided into two parcels with the said "town road" for a common boundary.

In 1878, this town road was discontinued. The defendant, assuming to be the owner of the land on the north side, thereupon claimed the whole strip formerly occupied by the road as belonging to his lot and entered into possession. The plaintiff, assuming to be the owner of the land on the south side, claims that, at least, the south half of the strip belongs to his lot; and in 1884 brought this action to recover possession, though the case did not come into the hands of the court till late in 1891.

The plaintiff relies upon the familiar principle that adjoining owners, bounded by a road as a common boundary, each takes to the middle line of the road. The defendant, however, challenges the plaintiff's title to any part of the land on the south side of the road, and denies that the plaintiff is an adjoining owner. This casts the burden on the plaintiff to show a better title than that of the defendant.

The plaintiff traces title directly back to Coombs the acknowledged original owner. But prior to giving the deed under which the plaintiff claims, Coombs had given another and, of course, earlier deed under which the defendant claims, to wit: the deed to Rowell in 1867. The plaintiff, however, contends that this prior deed to Rowell did not convey but excepted the strip of land occupied by the road, and relies upon the language of

reservation above quoted from that deed, viz: "Reserving the town road leading through the farm."

As to this contention, it seems clear to us that Coombs did not intend by those words to except from his conveyance of the whole farm the soil or land under this town road. He did not intend to interpose a barrier between different parts of the farm. We cannot see any motive. It is evident, we think, that he merely intended to exclude from his covenants of warranty, &c., the incumbrance of the town road. We think the words used have no other effect, and that, in spite of them, the fee in the strip occupied by the road passed to Rowell and hence not to the plaintiff, who does not claim under Rowell. *State* v. *Wilson*, 42 Maine, 9; *Kuhn* v. *Farnsworth*, 69 Maine, 404.

But Rowell, before his conveyance to the defendant's grantors, mortgaged the farm including this strip back to Coombs. Coombs afterward made the conveyance to Brown under which the plaintiff claims as above stated. The executor of Coombs, after his decease, gave a deed of all Coombs' real estate. Under this last deed the plaintiff also claims. The mortgage still appears of record undischarged and unforeclosed. The plaintiff, thereupon, contends that the mortgagee's title being superior to that of the mortgagor, he, claiming under the former, has the better title.

The case is silent as to whether Coombs, the mortgagee, was in possession at the time of his conveyance as mortgagee. The conveyance was of the land only. It was not accompanied by any assignment, legal or equitable, of any part of the mortgage debt. On the other hand, Coombs had surrendered to the mortgagor the notes representing the mortgage debt, intending thereby to release and discharge the indebtedness. This surrender of the notes and release of the indebtedness was upon consideration, though the case does not make it very clear what the consideration was. We think, however, the consideration was a release to Coombs by the mortgagor, or his grantor of the equity of redemption in some part of the mortgaged premises.

Under the foregoing circumstances, whatever may be the equitable rights and remedies of the plaintiff, in this action at law, he cannot show an existing mortgage debt, and hence can-

not maintain this writ of entry against a grantee of the mortgagor in possession. *Ellsworth* v. *Mitchell*, 30 Maine, 247; *Williams* v. *Thurlow*, 31 Maine, 392; *Lunt* v. *Lunt*, 71 Maine, 377; *Jordan* v. *Cheney*, 74 Maine, 359.

The plaintiff urges still another claim. It will be remembered that Rowell, the mortgagor, gave a quit claim deed of the southern part of the farm of the defendant. The plaintiff claims that the defendant afterwards gave a deed of this land, including the strip in question, to Coombs, in return for the surrender by Coombs of the mortgage notes. As above intimated, we think the evidence shows that the defendant, the mortgagor's grantee of the whole premises, did execute to Coombs a release of the equity of redemption in part of the premises, in payment and discharge of the mortgage debt. It is because of this that we adjudged the debt no longer existing. But did this deed of release include the demanded strip? The deed itself was lost before being recorded; and unfortunately the plaintiff was unable to produce any witness who ever read, or even saw the deed. The defendant denies that the deed included the strip. How can we then adjudge that the deed did include the strip? The plaintiff asks us to infer that the description in the lost deed was the same as that in the deed from Coombs to Brown. It may be so, and morally speaking we think very probable that it is so; but it is hardly a legal inference upon which we can safely base a judgment of title to real estate. The demanded strip was never in the possession of any grantee under the lost deed. On the contrary, as soon as the road was discontinued in 1878, the defendant took possession and has held it ever since. The inference from this would be that the lost deed did not include the strip.

Whatever the probabilities, we are reluctantly compelled by lack of legal evidence to refrain from declaring that the defendant has conveyed the demanded strip, whatever else he may have conveyed. *Kimball* v. *Morrill*, 4 Maine, 368.

Plaintiff nonsuit.

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

STATE *vs.* GEORGE LANDRY.

Kennebec. Opinion September 10, 1892.

Witness. Evidence. Indictment. Intoxicating Liquors. R. S., c. 134, § 19.

If a respondent in a criminal prosecution requests it, he is entitled to an instruction to the jury that, in determining their verdict, they should entirely exclude from their consideration the fact that such respondent does not elect to testify; substantially as if the law did not allow a respondent to testify.

An averment in an indictment that liquors were illegally transported from a place in Fairfield, in Somerset county, to the house of Thomas Libby in Waterville, in Kennebec county, does not charge the commission of any offense within Kennebec county; Waterville being a border town in Kennebec county and adjoining Fairfield in Somerset county.

ON EXCEPTIONS.

The respondent was convicted by a jury of the Superior Court, for Kennebec County, of the illegal transportation of intoxicating liquors under § 2, c. 132, of the statutes of 1891, and took exceptions as appears in the opinion.

L. T. Carleton, County Attorney, for the State.

G. W. Heselton, for defendant.

PETERS, C. J. On the trial of an indictment for illegally transporting intoxicating liquors from place to place within the State, the presiding judge was requested by the counsel for respondent to instruct the jury "that, in determining their verdict, they should entirely exclude from their consideration the fact that the defendant did not elect to testify, substantially as if the law did not allow him to be a witness." The judge declined to grant the request excepting as should appear in his charge. The only allusion to the subject in the charge was a statement at its close that the testimony of the government stood uncontradicted.

The requested instruction should have been given. It was in exact verbal accordance with the rule as laid down in *State* v. *Banks*, 78 Maine, 490. The legal proposition was relevant to the issue. It was founded on the statutory provision (R. S., c.

134, § 19) that the fact that the person accused does not testify in his own behalf shall not be taken as evidence of his guilt. The respondent was entitled to have the jury know of the existence of the statute and understand the effect of it. If not so, then a statute, expressly created for the benefit of a class of persons is wholly useless to them. The natural inclination of jurors would lead them to adopt the very presumption which the statute was designed to prevent. The refusal of the judge to give the instruction asked for in the present case must have led the jury to believe that the principle invoked by the counsel for the defense was incorrect; and that belief would naturally be intensified by the remark of the judge that the government's case was uncontradicted. This view of the law and of the duty of courts respecting it is strongly supported in many positive cases. See Whar. Cr. Ev. 8th ed. § 435, and cases in note cited by the author in support of his text.

Another objection taken in the defense goes to the validity of the indictment. The allegation is that the transportation was from the Maine Central railroad depot in Fairfield, in Somerset county, to the house of Thomas Libby in Waterville, in the county of Kennebec; and there is no other allegation or intimation of any act done in the latter county. In *State* v. *Bushey*, 84 Maine, 459, it was held that an allegation of transportation from the same depot "to Waterville in Kennebec county," was not an averment that any part of the offense was committed in that county, and that the omission could not be supplied by any intendment, inference or argument whatever. We are inclined to think that the description of the local extent of the offense in the present case is no greater than it was in that. The city of Waterville and the county of Kennebec have a common boundary. We cannot know from the indictment that Thomas Libby's house is not situated on the boundary line, so as to be accessible without crossing into Kennebec county.

Indictment quashed.

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

OWEN WHITE *vs.* PHŒNIX INSURANCE COMPANY.

Androscoggin. Opinion November 7, 1892.

Insurance. Vacant Buildings. Presumption. Evidence. R. S., c. 49, § 20.

When an insured, occupied building becomes unoccupied, the risk of its destruction by fire is presumed to be increased.

This presumption alone is sufficient to sustain the burden imposed upon the insurers, unless it is rebutted by the peculiar condition, construction and surrounding circumstances of the building.

The condition, construction and surrounding circumstances of the buildings in this case, support, rather than rebut the presumption.

See *White* v. *Phœnix Insurance Company*, 83 Maine, 279.

ON MOTION.

This was an action of assumpsit on a policy of fire insurance. The defense was that the premises had remained unoccupied for ten months previous to the fire without notice to the company, or its consent indorsed on the policy as by it was required; and that the non-ocupancy had materially increased the risk. The verdict was for the plaintiff for the full amount of the policy and interest, and was the second trial of the same case. See 83 Maine, 279.

Savage and Oakes, for plaintiff.

Baker, Baker and Cornish, for defendant.

VIRGIN, J. When this case was formerly before the court it declared in substance that when an insured, occupied building becomes unoccupied, the risk of its destruction by fire is presumed to be thereby increased. And while, by force of R. S., c. 49, § 20, the burden of showing that the risk was thereby increased is upon the insurers, the presumption alone which follows the fact of vacancy, unless rebutted by the peculiar condition, construction and surroundings of the buildings, is sufficient to sustain that burden. *White* v. *Phœnix Ins. Co.* 83 Maine, 279.

We seek in vain through this report for any evidence what-

ever of any "peculiar conditions, construction or surroundings of the buildings insured," which tend to diminish the risk arising from non-occupancy. On the contrary they all seem rather to strengthen and support instead of rebut the general presumption.

On the east side of the highway running southerly from the village of one hundred and twenty-five inhabitants, known as "Litchfield Corner," and sixty-one rods therefrom, were the buildings in question. They consisted of a small story and one half dwelling-house, connected by ell and woodhouse to the west end of a barn thirty-eight by fifty-two feet, containing sixteen tons of hay, the larger part in a mow on the north side, and the remainder on a scaffold on the south. A shed formerly extended along the entire length of the barn on the north side; but, some years before the fire, the roof was crushed by the snow and it had never been repaired, but remained still open.

For well understood reasons, the likelihood of the destruction of a vacant building by fire from accident resulting from voluntary or involuntary acts of trespassers and tramps visiting it, would seem to increase with the distance intervening between it and occupied buildings. The extinguishment of fires, accidental or intentional, in the absence of any fire system, must depend upon the acts of neighbors and the facilities adapted to the purpose, added to those furnished within the premises on fire. Hence poor buildings on a cheap farm in a remote neighborhood, without neighbors, are much exposed to the peculiar dangers mentioned. *Lancy* v. *Home Ins. Co.* 82 Maine, 492.

The surroundings of the plaintiff's buildings can hardly be duplicated in this State. They were situated in the extreme outskirts of the village. They had been vacant "nearly a year," and within a radius of fifty rods therefrom there were only twelve buildings,— six houses, two barns, a blacksmith shop, an old mill, an academy and a church,— all vacant at the time of the fire, with the exception of two of the houses and one of them in doubt.

There was no fire system in the village. The only water about the premises destroyed was a well in which was a pump, in the cellar of the house, and a well in the barn. No buckets, ladders, or other facilities for extinguishing fires.

The fire was near mid-day and was first discovered where there was the most hay, near the tumble-down shed. It could hardly have been caused by sparks from neighboring buildings — no fires were there. The increased risks which spring from the knowledge of idlers, loungers, tramps, vagrants and marauders that it was unoccupied was fatal to its safety, and the verdict is against law.

Motion sustained.

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

ELMER E. RICHARDS, Administrator,

vs.

MAINE BENEFIT ASSOCIATION.

Androscoggin. Opinion November 7, 1892.

Life Insurance. Forfeiture. Restoration. Fraud.

A member of the Maine Benefit Association, by intentional non-payment of overdue assessments, forfeited his membership, all interest therein and benefits to be derived therefrom. In his application for re-instatement by payment of such assessments, in consideration that the association would accept them, he stated he was then in good health, and that there was nothing in his habits or condition, which was likely to impair his health or shorten his life; and that if "this statement be found to be in any respect untrue, the policy shall be treated in the same manner as if the assessment had not been accepted;" *Held*, that the stipulation was unqualified; and that an instruction that if the statement, though untrue in fact, were honestly made, the member's personal representative might recover, is erroneous.

ON MOTION AND EXCEPTIONS.

This was action of debt on a policy, or certificate, issued by the defendant on the life of one Albert B. Elwell after whose death by suicide, the defendant contended, *first*, that the certificate was void by the assured's misstatement in his application that he was a widower when in fact he was unmarried but had been divorced; *second*, that he had forfeited his membership by intentional non-payment of overdue assessments; and *third*, by procuring a re-instatement by fraud.

The case appears in the opinion.

J. C. Holman and I. E. Pearl, for plaintiff.

Applicant's answers not warranties. "Untrue" limited in its

meaning by words, "to best of my knowledge and belief." *Clapp* v. *Mass. Ben. Ass.* 146 Mass. 519; *Flynn* v. *Same*, 152 *Id.* 288; *Ala. L. Ins. Co.* v. *Johnston*, 80 Ala. 467; *Fitch* v. *Ins. Co.* 59 N. Y. 557. Materiality, a question of fact. *Sharp* v. *Ponce*, 74 Maine, 470, and question for the jury. *Campbell* v. *Ins. Co.* 98 Mass. 395. Right of restoration according to by-laws which are part of contract. *Dennis* v. *Mass. Ben. Asso.* 120 N. Y. 496; *Van Houten* v. *Pine* 11 N. J. Eq. 72. False representations: *Brown* v. *Brown*, 72 Maine, 415.

George C. Wing, *White and Carter*, for defendant.

Applicant's answer, "widower," a material representation. *Mut. Aid Soc.* v. *White* 100 Pa. St. 12; *Jeffries* v. *L. Ins. Co.* 22 Wall. 47; *Jeffries* v. *Ins. Co.* 1 Fed. Rep. 450; Bacon, Ben. Soc. § 226. Not a question of fact to be submitted to the jury but with proper instructions. *Campbell* v. *N. E. Mut. Co.* 98 Mass. 401; *Anderson* v. *Fitzgerald*, 4 H. L. C. 484; Cook, L. Ins. § 17 and notes.

Re-instatement: *Burden* v. *Mass. Ben. Asso.* 147 Mass. 360; *Bosworth* v. *Western Soc.* 75 Iowa, 582; *Crossman* v. *Mass. Ben. Asso.* 143 Mass. 435; *Lyon* v. *Royal Soc.* 153 Mass. 83; *Swett* v. *Citizens Mut. Relief*, 78 Maine, 541; *Metrop. L. Ins. Co.* v. *McTague*, 49 N. J. 587; S. C. 60 Am. Rep. 661.

VIRGIN, J. Assuming without deciding that, to the question in the application,— "are you married, single, widower or widow?" the applicant's answer, "widower" to have been substantially true, although the bonds of matrimony between him and his wife had been severed by a divorce *a vinculo* and not by death, and that, therefore, he was, on the date of his certificate, a legal member of the defendant association, we turn attention to the questions — whether he forfeited his membership and the benefits derivable from it, and was subsequently restored and re-instated.

The application and certificate constituted a completed contract of life insurance. *Bolton* v. *Bolton*, 73 Maine, 299. The contract did not absolutely entitle him to the benefits therein mentioned; for it was expressly "issued by the [defendant] and

accepted by the assured on the condition" therein contained as follows: "Failure . . to pay any assessment made, . . within thirty days, or after notice, given in accordance with the by-laws of said association, shall render this policy null and void, and the holder forfeits to the association all his interest herein and to any benefits to be derived from this association."

Neither Elwell's failure to pay certain assessments within the time limited therefor, nor his receipt of the proper notices thereof is disputed. While the non-payment on or before April 2, did not simply operate a mere suspension or temporary cessation of his interest, but *per se*, without any affirmative act or proclamation by the defendant, worked an absolute forfeiture of "any benefit to be derived from the association," nevertheless, the second and third notices contained an announcement in terms that the time having expired for the payment of the overdue assessments named, "his [your] policy No. 6583 is not in force."

The language of the condition is peremptory and unqualified. It contained no such clause as is found in some certificates, as that a "failure to pay shall be taken as sufficient evidence of an intention to terminate his connection with the association," "or for valid reasons to the officers of the association [such as a failure to receive notice of an assessment] he may be re-instated," as in *Dennis* v. *Mass. Ben. Asso.* 120 N. Y. 494. In such a case, intention on the part of the insured seems to have been deemed one of the essential elements of forfeiture. But even if the certificate, in the case at bar, had contained that clause and Elwell's intention to terminate his connection with the defendant association had been considered essential, then the proof of such intention is not wanting, for in his letter, of May 5, 1890, after acknowledging his failure to pay, he adds: "Why I have let it go by is because I thought I should go into another company." We are of opinion, therefore, that all his right to any benefits under his policy had become forfeited. *Dennis* v. *Mass. Ben. Asso.* 120 N. Y. *supra*; *Crossman* v. *Same*, 143 Mass. 435.

Was he subsequently restored or re-instated in accordance with

the by-laws of the association, § 4, of which provides: "Any member having forfeited his membership may be restored, within one year, on furnishing a satisfactory certificate of good health and paying all intervening dues and assessments?"

As seen by his letter of May 15, having changed his mind in relation to "going into another company," he applied for re-instatement to membership. Accordingly, on May 17, (within the one year) he received a notice stating — "upon payment of assessments 18, 19 and 20, on your policy and the furnishing of enclosed certificate of good health, we shall be able to re-instate the same,"— meaning to re-instate his membership by reviving his policy, — adding, "the medical examiner of the company in Farmington [where Elwell resided] is Dr. Hitchcock."

As seen, the by-law made a "satisfactory certificate" essential, that is, satisfactory to the officers of the defendant. The "enclosed certificate of good health" mentioned in the foregoing notice of May 17, was a blank form for the "examining physician's certificate," at the upper margin of which was the notice — "only certificates of regular appointed physicians, or when none are appointed, such as hold the degree of M. D., are acceptable." On the lower margin of this blank was the notice — "this examination, in addition to personal health certificate on opposite side of this sheet, is necessary for re-instatement after sixty days from date of notice of any assessment," — which included Elwell's case.

On the opposite side of the sheet containing the "examining physician's certificate" blank was the "personal health certificate" blank. This stated, *inter alia*, "in consideration that the company shall accept the over due assessments specified . . . "I hereby state that I am in good health and that there is nothin my habits or condition which is likely to impair my health or shorten my life. And if this statement is found to be in any respect untrue, the said policy shall be treated in the same manner as if said premium had not been accepted." The terms "said premium" meaning the overdue assessments.

The examining physician's blank was filled out and signed by a physician (Richards) other than the company's medical exam-

iner (Hitchcock) named therein; and the personal health certificate was signed by Elwell, and both sent to the company inclosed in a letter from Elwell, dated May 24, saying — "I had to get Mr. Richards to examine me, for I went to Hitchcock and he was away, so I send this, and if it is all right please send me the amount due and I will send it Monday."

On the same day (May 24) the company acknowledged the receipt of the certificates, declaring them to be satisfactory, adding — "on receipt of the three assessments due, viz., $12.12, we shall be able to re-instate [revive] the policy." On June 7, following, the money was paid, and subsequently — June 10 — another assessment (No. 21) dated June 1, was paid by Elwell.

Thus, so far as the face of the papers discloses, Elwell, by intentional failure to seasonably pay his assessments, had, by force of the unqualified stipulations in his certificate of membership, "forfeited all interest to any benefits to be derived from the association;" but by a formal compliance with the by-law, he had apparently become restored to membership and his rights to benefits revived.

This result, however, was only apparent, for it was brought about by his own gross fraud. Instead of submitting to an examination by, and procuring a certificate of good health from, the defendant's known examiner resident in the same town with himself, the certificate of another physician was palmed off upon, and accepted by the defendant, because, it relied upon Elwell's assurance contained in his letter of May 4, inclosing it, that he "had to get it from Richards because he went to Hitchcock and he was away." This statement was false, if any credit is to be given to Hitchcock who testifies that Elwell came to him with a blank certificate, saying he wished to be re-instated as a member of the company, asking for an examination, which the doctor declined to make and kept the blank. And the reason assigned for declining was that, in the preceding February, he was called to visit Elwell professionally and found him suffering from an attempt to commit suicide by taking laudanum, the dregs of which were in a bottle at his side; that Elwell had apparently taken an overdose which his stomach had expelled, but that he

gave the doctor to understand that he was discouraged and had taken the laudanum for the purpose of taking his life. A careful reading of the evidence affords us no reason to question the truthfulness of the latter statement, although the woman present failed, in the excitement incident to the occasion, to recollect —even if she heard Elwell's statement.

Moreover, Elwell's own statement in his personal certificate, of May 23, that —"I am now in good health and that there is nothing in my habits or condition which is likely to impair my health or shorten my life," was also false, especially if he had attempted to take his life as before stated, of which no reasonable doubt is entertainable. For that a suicidal tendency possessed him seems morally certain by the fact that, on the very day on which he paid the last assessment, viz., June 10, following his formal re-instatement, he disappeared and two days afterward, in the pasture back of, and a few rods from the house in which he had been boarding, he was found dead with a bullet hole through his head and the rifle lying across his ankles.

Does the fact that the statement, concerning his health in Elwell's personal certificate, was untrue constitute a complete defense to this action?

The plaintiff contends that it would not if Elwell honestly made it believing it to be true when made; and the presiding justice substantially so instructed the jury.

Such has been held to be the rule of law applicable to statements contained in original applications for membership wherein the applicant "warranted them to be true to the best of his knowledge and belief." *Clapp* v. *Mass. Ben. Asso.* 146 Mass. 519, and cases there cited.

Motion and exceptions sustained.

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

ALBERT H. GILMAN *vs.* WARREN INMAN, and Trustees.

Androscoggin. Opinion November 7, 1892.

Wages. Assignment. Record. R. S., c. *111*, § *6.*

River-drivers are not "commorant" in the respective towns through which they pass while earning wages on a drive of logs; and the assignments of their wages, in order to be valid under R. S., c. 111, § 6, need not be recorded in such towns.

ON EXCEPTIONS.

The case is stated in the opinion.

Savage and Oakes, for plaintiff.

White and Carter, for claimant.

VIRGIN, J. Assumpsit on an account annexed for necessaries sold and delivered to the principal defendant. The plaintiff seeks to hold the defendant's wages in the hands of the trustee.

The wages were earned, in the spring of 1891, by the defendant as one of a boat's crew of river-drivers, with camp outfit, upon the trustee's drive which, beginning at Dummer, New Hampshire, moved along down the Androscoggin river, the drivers camping on the shore and ordinarily changing their place of encampment from day to day, and ending in Turner, in this State.

The sum due is claimed by one Johnson, of Veazie, in Penobscot county, by virtue of the defendant's written assignment of his wages, made on April 8, 1891, before they were earned but in contemplation thereof, and recorded the same day by the clerk of the town of Veazie in which the defendant also resided and where his family continued to live while he was earning the wages.

The plaintiff contends that the assignment is not valid because it was not recorded in the respective towns through which he passed and in which he "was commorant while earning the wages."

The word "commorant" has been held to apply to laborers in "logging swamps" and living during the logging season in camps erected and fitted for the purpose. *Wright* v. *Smith*, 74 Maine,

495; *Wade* v. *Bessey*, 76 Maine, 413. And to one working by the month, under contractors constructing a railroad, and living for a year or more in a camp near his work. *Pullen* v. *Monk*, 82 Maine, 412. But we are of opinion that the Legislature did not intend to include river-drivers who have no fixed location for any regular seasons, but whose camp is as frequently pitched and struck as soldiers in the army.

The etymological signification implies an abiding or tarrying for some appreciable though temporary duration less than a permanent residence, *Pullen* v. *Monk*, *supra*. The English justices who annually made their circuits through the various counties, were known not as commorant, but "itinerant justices." 1 Steph. Hist. Cr. L. 100. Boatmen on the Erie or Chesapeake and Ohio canals could hardly be called commorants in the various towns through which they labor; nor can brakemen or other trainmen on the large railroads in this State be said to be commorants,—as the Legislature intended that term to be used,—in the various towns in which they earn their wages. We are of opinion therefore that the statute does not apply to this case.

Exceptions overruled.

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

STATE *vs.* JOHN J. MULKERN.

Cumberland. Opinion November 7, 1892.

Rape. Complaint. Practice.

The mere lapse of time between the commission of a rape and the complaint of the act by the prosecutrix, is not the test of the admissibility of the complaint.

The prosecutrix testified that the "alleged assault" took place on Sunday night, and was thereupon allowed to testify that she made the complaint the next night; *Held*, that the defendant has no cause for exception based upon the ground that the nature of the complaint was not more distinctly specified,—no other than the one set out in the indictment having been mentioned.

ON EXCEPTIONS.

The case is stated in the opinion.

Frank W. Robinson, County Attorney, for State.
C. P. Mattocks and *D. A. Meaher*, for defendant.

VIRGIN, J. In the trial of one indicted for the crime of rape the prosecutrix is allowed to testify that she, subsequently to the commission of the offense, made complaint of the injury; she cannot enter into its details. This practice is permissible upon the grounds that it tends more or less to corroborate her testimony as to the alleged crime. Mere lapse of time between the perpetration of the act and the complaint is not the test of its admissibility. The time that intervenes is a subject for the jury to consider in passing upon the weight of her testimony; and the degree of credit to be given it on account of the delay in making it depends upon the particular circumstances of the case. *Clarke's Case*, 2 Stark. 241; *Reg.* v. *Osborne*, 1 Carr. & M. 622; 3 Greenl. Ev. § § 212, 213; Whart. Cr. L. 440.

The defendant's bill of exceptions recites that, "the prosecutrix, having testified that the *alleged assault* took place on Sunday evening, was asked on direct examination: 'Q. Did you make any complaint? Ans. Not that night. Q. When did you? Ans. The next Monday night. Q. To whom? Ans. To the marshal. Q. State whether that complaint was that you had been ravished?' [Counsel for defendants.] 'We object because the complaint was too late.' After testifying why she did not make it sooner, she was further interrogated by the county attorney: 'Q. Now state what the complaint was that you made to the marshal?' [Counsel for the defendant.] 'We renew the objection.' [The court.] 'The fact that she made a complaint is already in, the terms of it I will exclude.'"

The defendant now urges, as one ground of objection to the testimony that, while the prosecutrix was allowed to testify that she made "a complaint" the next night, the nature of the complaint does not appear.

The bill of exceptions does not show that any such hypercritical question was raised at the trial, either in argument to the jury or by any request for an instruction to the jury, of that purport. But as seen, the bill of exceptions shows that the prosecutrix having testified that "*the* assault" took place, etc., thereupon

also testified that she *made complaint* to the marshal, which the marshal corroborated. "The assault" mentioned was the only one under investigation, viz., the one set out in the indictment for the commission of which the defendant was being tried. The judge so understood it as appears from his remark above mentioned,—"that the fact that she made a complaint is already in, and that he would exclude its terms," as well as his repeated mention of the "complaint" in his charge to the jury, which is printed in the bill of exceptions, and the jury must have so understood it.

Moreover, if he would take advantage of a want of evidence to support the verdict, or contend that it was against law, he should have raised the question by motion to that effect addressed to the judge before whom the case was tried.

2. The second objection is that the complaint was made too long after the alleged offense to be admissible. This as before seen is not tenable.

The charge was quite as favorable to the defendant in all other respects, as he was entitled to.

Exceptions overruled.

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

AUGUSTA I. BAIN *vs.* ELIZABETH WALSH, Administratrix.

Knox. Opinion November 7, 1892.

Evidence. Lost Documents. Practice.

The evidence of the loss of a document adduced to lay the foundation for introduction of secondary evidence of its contents, is addressed solely to the discretion of the presiding justice; and his decision upon its sufficiency, in the absence of any apparent abuse of his authority, is not revisable.

ON EXCEPTIONS.

The case appears in the opinion.

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

Kalloch and Meservey, for defendant.

VIRGIN, J. Assumpsit on a promissory note alleged to have been given on October 13, 1883, to the plaintiff by the defendant's intestate who deceased April 9, 1890.

The non-production of the note at the trial was attempted to be accounted for by the contention that it had been lost.

The evidence of the loss adduced to lay the foundation for introduction of secondary evidence of its contents, is addressed solely to the discretion of the presiding justice; and his decision upon its sufficiency, in the absence of any apparent abuse of his authority, is not reviewable. *Camden* v. *Belgrade*, 78 Maine, 204, 209.

The only evidence of its loss came from the plaintiff herself, who simply testified that she had not been able to find the note since the date of the maker's decease in April, 1890; nor had she assigned or transferred it since that date. She omitted to testify by affidavit whether or not it was lost prior to that date.

Exceptions overruled. Nonsuit confirmed.

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

NANCY E. JOY, Appellant,

vs.

THE GRINDSTONE-NECK WATER COMPANY.

THE GRINDSTONE-NECK WATER COMPANY, Appellant,

vs.

NANCY E. JOY.

Hancock. Opinion November 8, 1892.

Eminent Domain. Water Company. Damages. Special Laws, 1891, c. 117.

Upon appeal from the decree of County Commissioners, fixing the damages for land taken, it appeared that its charter authorized the water company "to locate, lay and maintain its sluices, aqueducts, pipes, hydrants, and other necessary structures in, over and through any lands, and to excavate in and through such lands for such locations; and required the company to file in the registry of deeds plans of such locations." Pursuant thereto the company duly filed its plan designating thereon a strip of land twenty feet wide across the appellant's land, as its "pipe-line;" *Held*, that an instruction that the "company having taken that strip has the right to locate, lay and maintain its sluices, aqueducts, pipes, hydrants and other necessary structures in, over and through the same," affords the company no ground of exception.

So long as the appropriation of the land is kept within the scope of the original sequestration, compensation is made once for all, and is to be estimated

according to the full measure of the right acquired under the charter and not merely according to the mode and time of the exercise of that right in the first instance.

On motion and exceptions.

These two actions were tried together. They were appeals from an award of damages made by the county commissioners, for Hancock county, for a strip of land twenty feet wide and extending a distance of two hundred and forty-eight feet over the land of said Joy, taken by the Grindstone-Neck Water Company under its charter.

On the 18th day of April, 1891, the water company filed in the registry of deeds of Hancock county, a written statement of the property taken, together with plans of said property and its location.

The water company contended at the trial that it was limited, by its written statement so filed, to the use of the strip of land for its pipe line only; and would not be entitled to build structures thereon, and that damages should only be assessed for the taking of the land for the purposes specified in said written statement.

The presiding justice instructed the jury as follows:

"They have taken that strip with the right, and have the right therein, to locate, lay, and maintain, their sluices, aqueducts, pipes, hydrants and other necessary structures, in, over, and through that land and with the right to excavate in, over and through such land for such locations, constructions, and maintenance. They have that right, and they have it permanently. It is not for ten years, nor for a hundred years; it is permanent. So long as they see fit to perform their duties as a water company, so long as they have occasion and undertake to supply water to the people of Grindstone-Neck and Winter Harbor, and to maintain their works for that purpose, so long they can keep that twenty-foot strip of land. But when they give up their business, and cease to do their duty, then their right ceases; it may be one hundred years, and it may be one thousand years. They have the right to use it so far as is necessary and reasonable for the purposes of their business. If it is

reasonably necessary for their business to build a stone aqueduct above the ground, they can do that; if it is reasonably necessary to sink their pipes still further into the soil they can do that; or to lay their pipes on the surface, they can do that; they can do all things that are reasonably necessary for the purposes of their business in supplying water. They cannot act whimsically; they cannot act wilfully; they cannot do anything there except what is reasonably necessary for the purposes of their legal business."

To this instruction the water company seasonably excepted. The verdict was for the said Nancy E. Joy to the amount of five hundred and sixty-two dollars and fifty cents. The water company also filed a general motion for a new trial.

Deasy and Higgins, for Joy.

Wiswell and King, for water company.

VIRGIN, J. For the purpose of supplying certain specified places with pure water, "Grindstone-Neck Water Company," by § 6 of its charter (Priv. L. 1891, c. 117), was empowered to do certain things, the doing of which required certain other things to be done by it. It was empowered:

1. To "take and hold any lands necessary for flowage, dams, reservoirs, locks, gates, hydrants and other necessary structures."

2. To "locate, lay and maintain its sluices, aqueducts, pipes, hydrants and other necessary structures in, over and through any lands."

3. To "excavate in and through such lands for such locations, construction and maintenance."

If the company, on making its surveys, was desirous of exercising the power conferred, it was required by the same section:

1. To "file in the registry of deeds . . plans of such locations and lands showing the property taken," and

2. To "publish notice of such filing three weeks successively."

Pursuant thereto, the company, on April 16, 1891, executed, and on May 18, and 23 following, duly filed a detailed plan —

with an explanatory note thereon "of its locations and lands, showing the property taken." Its eastern terminus represents one half acre of land, the external lines of which are marked with their respective courses and distances, situated "at the outlet of Birch Harbor Pond." Thence protracting westerly is what purports to be a delineation of a continuous strip of land, uniformly twenty feet in width, extending in part along a highway and in part across private lands, to the western terminus. The side bounds are represented by red parallel lines, midway between which is a continuous black line, "indicating,"—in the language of the explanatory note,—"the pipe-line." And wherever these lines extend across private lands, their respective courses and the length of each one's land taken are noted, including the appellant's, thus: "S. 71 degrees, 45 minutes W. 214 ft."

Prefixed to the plan proper, is a statement or certificate, purporting to have been executed in the name of the company "by its president thereunto duly authorized." After certifying that, the company thereby "files the annexed plan . . showing the property and lands taken for the purposes of the corporation," the certificate continues: "The lands so taken consist of one half acre of land . . at the outlet . . taken for the purpose of erecting thereon dams, locks, gates, and gate houses and other necessary structures, a strip of land, twenty feet wide, taken for the location of its pipe-line, extending from the said half acre . . through the lands of . . Nancy Joy. The exact location of said pipe-line . . and the courses of said pipe-line, and the length thereof upon the lands of each of the several owners are accurately shown upon the plan."

In respect to the "twenty-foot strip," on which the "exact location of the pipe-line is accurately shown on the plan," the presiding justice, after calling the jury's attention to the correlative rights of the owner of the easement and of the fee, instructed the jury as follows:

"The company has taken that strip and has the right therein to locate, lay and maintain their sluices, aqueducts, pipes,

hydrants and other necessary structures in, over and through that land."

The company contends that this language is too broad — that, in substance, while it was empowered "to take any lands necessary" for the general purpose of constructing thereon their entire system of water works which might call into requisition, not only dams and any and all other things specified, but also certain others not specified but included under the general description — "other necessary structures;" and that while it had the authority also, in carrying out its general scheme, "to locate, lay and maintain sluices" and any other mode of conducting water specified, as well as others of like nature and for like purpose embraced within the same general terms — "other necessary structures;" still as each and all of them were not necessary to the full accomplishment of its purpose, the company had the right to elect which of all the various kinds of conduit should be adopted. And when it once made its election of a "pipe" instead of a "sluice" or "other necessary structures," reduced its election to an accurate "plan of its locations of lands, showing the property taken" duly executed and placed on file in the public registry — then all concerned were bound by it. Thereby it became permanent record evidence. The company and owners could resort to it ever after; the former to ascertain the extent of its easement in the lands condemned, the latter to learn how far their rights were restricted by the easement, fell short of a complete dominion over the respective lands in which they still retained the fee.

But however plausible this view may at first seem we think it is too narrow; and no authority has been cited and we have seen none to support it. The extracts in the brief of the company's counsel, taken from various reports contain nothing in point. Thus *Hazen* v. *B. & M. R. R.* 2 Gray, 580, simply holds that the filed location constitutes permanent record evidence of land set off by metes and bounds which is subject to the easement whether covered by railroad structures or not. Neither is there any question in respect of the elementary rule

concerning the respective rights of parties, in land subject to an easement, enunciated in *Propr's, &c.*, v. *Nash. & Low. R. R. Co.* 104 Mass. 1, 10. In *O'Neal* v. *Shannon*, 77 Tex. 182, the court in enjoining the city from appropriating, for a system of water works, land granted to it "for street purposes only," adopted a general abstract remark from a case cited which while deciding that appropriating the land of a highway to railway uses, imposes such new servitude thereon as entitles the owner of the fee to fresh compensation—said, "When land is condemned for a special purpose on the score of public utility, the sequestration of the land is limited to that particular use." *Imlay* v. *Union Br. R. R. Co.* 26 Conn. 249.

We have not seen the case said to be reported in 10 N. Y. Supp. cited from Am. Dig. 1890, p. 1223, but so far as we can gather from the abstract, we do not think it reaches the point in issue.

In New Jersey, in deciding that a market-place cannot be established in a public street without compensation to the proprietors of the contiguous lands who own to the center, the court said: "The true rule is, that land taken by the public for a particular use cannot be applied, under such a sequestration, to any other"—*i. e.*, materially different and incongruous—"use, to the detriment of the land owner." *State* v. *Laverack*, 34 N. J. L. 201, 205.

So in *Imlay* v. *Union Br. R. R. Co. supra*, the court said, if land once taken and still held for highway purposes, may be used for a railway without exceeding the limits already acquired by the public, "then the new use is within the scope of the original sequestration"—which it denied. But in *Elliott* v. *Fair H. &c., R. R.* 32 Conn. 579, the same court decided, as did our own court in *Briggs* v. *L. & A. H. R. R. Co.* 79 Maine, 363, and the numerous cases cited on the defendant's brief, that to lay and use a horse railroad track in a public street is not a new servitude and incongruous use imposed upon the contiguous lands.

Neither does the occupation of a highway by an incorporated

turnpike company's road. *Douglass* v. *Boonsborough T. R. Co.* 22 Md. 219.

Thus it would seem, that a change of the particular mode of use, for instance from a pipe to a sluice, is not a change of the use itself, any more than is a change of the motor on a street railway. *Briggs* v. *L. & A. H. R. R. supra.* But when the original use itself is changed and the new does not come within the scope of the original sequestration, or is so inconsistent with or foreign to the old as to impose a materially different servitude upon the owner's soil, then he is entitled to fresh damages and a new condemnation is essential.

The language of the charter requires "plans of locations and lands showing the property taken." "Plan of locations and lands" is essential to show whether more land was taken than was necessary for the works. For only property reasonably necessary for the full accomplishment of the general purposes of the company and the design of the legislative grant can be taken. *N. Y. & H. R. R. Co.* v. *Kip*, 46 N. Y. 546. And while the company is to some extent judge of what is required, its judgment is reviewable. *N. Y. C. & H. R. R. Co.* v. *Metrop. L. L. Co.* 63 N. Y. 327. "Showing the property taken," refers to the external limits, so that no present or future misunderstanding may arise among the present parties or their assigns, as to the precise lands of which the company has its incorporeal right of use, and the owners of the soil a beneficial right though subordinate to and not inconsistent with the easement.

The company condemned the "twenty-foot strip," "in, over and through" which to construct some reasonable, necessary conductor for the passage of water from the pond along a main line from which it could be distributed among its "water takers," and in the plan of its works denominated it by the generic name of "pipe-line," *i. e.*, main conduit line. The charter does not confine the appropriation to a "hollow tube," neither does the plan, by giving the land a name. If, to meet the existing wants, such an appropriation be deemed sufficient and made, that will not prevent the addition or substitution of any other conductor, tubular or otherwise, reasonably necessary to respond

to increased and increasing future public demands, so long as such change be kept within the external limits of the land and the scope of the original sequestration; for then no new and different servitude will be imposed upon the land.

Neither did the company understand it to be thus limited, or it would not have taken a strip of land of that width for a mere pipe of the dimensions suitable and sufficient to supply the wants of that locality at the present time. Even if, as held in *Ham* v. *Salem*, 100 Mass. 352, the company, in the absence of any reservation of rights to the owners of the soil, only lay a pipe and may place it above, on or below the surface, vary its depth from time to time, leave the ditch open or close it and make the surface smooth, as shall best suit its convenience—then twenty feet can hardly be needed. The company obviously had an eye to the future — perhaps not distant — when it might become necessary to add or substitute "other structures" of different form and larger capacity, in order to satisfy the calls of the public.

And while the company might not, perhaps, be justified in appropriating the "twenty-foot strip" to the erection of any structures not reasonably suitable as a conductor, it may, at any time, as future public needs require, change the particular kind of conduit adopted in the first instance to any other reasonable and necessary one, so long as it does not encroach upon the owner's rights.

The rule governing the assessment of damages is based upon a like consideration. For compensation is made once for all, and is to be estimated according to the full measure of the right acquired by the company, and not merely according to the mode and time of the exercise of that right in the first instance. *Hamor* v. *Bar Harb. Wat. Co.* 78 Maine, 127, 135, and cases there cited; *Edmands* v. *Boston*, 108 Mass. 535, 547, and cases.

So what the judge said to the jury about the right of the company "to build a stone aqueduct above the ground," was unexceptionable, modified as it was by the next preceding clause in the same sentence — "if it is reasonably necessary for their busi-

ness"—that is, the business defined in § 1 of the charter, viz., "supplying Grindstone-Neck, the village of Winter Harbor and the Schoodic Peninsular with pure water for domestic, sanitary, private and public uses, including the extinguishment of fires." Exceptions therefore, must be overruled.

Motion. Was the verdict for $562.50 excessive? A thorough examination of the reported testimony satisfies us that it was most manifestly so. The lot is situated midway between the village of Winter Harbor and Grindstone-Neck with its score of cottages, tenantless except in the summer, and belonging to non-residents. The whole lot consists of two and one half acres, of which one eighth of one acre only was taken. To be sure, the average estimated value of the whole lot, as fixed by the nine witnesses called by the appellant, was $2500, or $1000 per acre; and the average damage by the taking, at $1259. But this estimate of value was of the most speculative, not to say visionary character, based upon the very remote probability that, the territory, of which this is a part, may become a noted watering place, similar to Bar Harbor—ten miles distant. But one swallow does not make a summer, neither does one cottage make a very extensive summer resort. Without unprofitably entering into the details which have led us to the conclusion, it is sufficient to announce the opinion that, the sum fixed by the county commissioners who viewed the premises and who have not infrequent occasion to pass judgment on like questions, was ample. Hence, if the appellant (Joy), within thirty days after the announcement of this opinion, remit all of the verdict in excess of $300, then the motion is to be overruled—otherwise, sustained and a new trial granted.

Exceptions overruled. Motion sustained.

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

OLIVER C. DONNELL, and another,

vs.

CURTIS R. JOY, and another.

Hancock. Opinion November 8, 1892.

Fish. Waters. Weirs. R. S., c. 3, § 63; Stat. 1885, c. 334.

By R. S., c. 3, § 63, no fish weir shall be erected in tide waters "below low water mark" in front of another's shore or flats without his consent, under a penalty of fifty dollars, to be recovered in an action of debt.

Below low water mark in front of another's flats in a bay, does not necessarily mean that the soil in which the offending weir is erected shall be under water at all stages of the tide; but it may become the subject of the penalty if erected on public flats situated "beyond" or nearer the middle of the channel than the low water line of the private flats intended to be protected.

The State has authority over fisheries so far as the public and common rights are concerned.

ON EXCEPTIONS.

The case appears in the opinion.

Wiswell and King, for plaintiffs.

B. T. Soule, for defendants.

VIRGIN J. Action of debt to recover the penalty prescribed in R. S., c. 3, § 63, as amended by stat. 1883, c. 334, for erecting and maintaining in tide waters a weir alleged to be "below low water mark in front of the shore or flats of the plaintiffs, without their consent."

It is not disputed that the plaintiffs own the section of flats on which their weir is located, down to low water mark, on the south side of Hog Bay, and that the defendant did not, but the State did own the soil on which the defendants' weir was situated.

The defendant admits his weir to be "in front of the plaintiffs' shore or flats," and that it was erected there, "without their consent." But he contends that it is not situated within the locality described by the statutory phrase, — "below low water mark" inasmuch as it is on land which is exposed at low water; and that to be subject to the penalty it should be attached to land from which the tide does not wholly recede — or in other words "under" or "beneath" the water.

To be sure, these definitions accord with those given by lexicographers; but in seeking for the intention of the legislature, courts are not necessarily confined to exact synonyms of words or to the accurate definitions given by lexicographers (*Smith* v. *Chase*, 71 Maine, 164); but the object which the lawmakers had in view, the mischief sought to be remedied together with the remedy itself are to be considered (*Winslow* v. *Kimball*, 25 Maine, 493) as well as the common use of the words of the statute when applied to its subject matter. *Opinion of the Judges*, 7 Mass. 524.

In turning through the elementary books and the reports of decisions, relating to tide waters, for the purpose of ascertaining the common acceptation of the word "below" in the phrase in question, it is almost invariably found to be used synonymously with "beyond." Among the numerous instances is the case of *Gerrish* v. *Propr's of W. Wharf*, 26 Maine, 384, in which the reporter, in his head note, the accomplished counsel for the plaintiffs, and SHEPLEY, J., in the opinion of the court, all used the word "beyond" low water mark.

Moreover, it is made morally certain that the Legislature adopted the same use when their object in view, the mischief to be remedied and the remedy applied, are considered.

The plaintiff owned his flats down to low water mark, as land and not a mere easement therein. *Com.* v. *Alger*, 7 Cush. 53, 70-81; *Parker* v. *Cutter M. D. Co.* 20 Maine, 353; *Lowe* v. *Knowlton*, 26 Maine, 128. As an incident of such ownership he had the exclusive right to erect a fish weir thereon. *Duncan* v. *Sylvester*, 24 Maine, 482; *Matthews* v. *Treat*, 75 Maine, 597. Within its limits, the State owned the land under the sea below low water mark as well as the flats on which the defendants' weir was located, and had the authority to regulate the time and manner of the taking of fish by the public in the waters thereon. *Sparhawk* v. *Bullard*, 1 Met. 95; *Gray* v. *Bartlett*, 20 Pick. 186; *Duncan* v. *Sylvester*, *supra*; *Matthews* v. *Treat*, *supra*. If one of the public could erect a weir so immediately in front of the owner's flats as to naturally obstruct fish in their habitual passage with the flow and ebb of the tide to the latter's weir, it

would be of but little value. The former's weir might as well be placed alongside of the latter's. And it would make but slight if any difference whether the obstructing weir be on land permanently or periodically submerged by the tides.

In view of such an obvious mischief, and for the purpose of protecting the owner of flats in the full, practicable enjoyment of his proprietary rights, the Legislature took the subject matter in hand, and provided, among other things, in substance that no one of the public should, upon land whether constantly or periodically overflowed by the tides, in which he had no proprietary interest but over which the State had control, plant a weir the natural operation of which would interfere with the rights of owners of flats. And to make the statute efficient a penalty of $50 for each offense (statute 1885, c. 334) was provided, not, however, in the nature of a *qui tam* remedy — giving the penalty in part to whomsoever would sue therefor (Bouv. L. D.),—but wholly to the owner as a compensation for the injury to his proprietary rights. Statute 1883, c. 334.

Moreover, the defendant had no right to erect any weir upon the land where it is. He did not own it. There is no pretense that he ever made any application for or obtained any license in accordance with the provisions of statute of 1876, c. 78, incorporated into R. S., c. 3, § § 60, 61, 62; without which no fish weir could be erected or maintained. R. S., c. 3, § 63.

2. But exception is taken to the instruction in relation to the plaintiffs' right to have fish come to their weir unobstructed by any weir that might be erected in front of their shores or flats, which materially interfered with their rights, &c. We perceive no prejudicial error in this instruction,— for it was simply giving to the jury the spirit and intended effect of the statute in question to which it was confined. It in nowise conflicts with the doctrine enunciated in *Matthews* v. *Treat*, *supra*, which discussed the common law rights of owners of flats. In the same connection the jury were further instructed that, if the defendants' weir did not materially interfere with the plaintiffs' rights, then this action could not be maintained; and the jury found that it did,— the correctness of which finding is not challenged by any motion on the part of the defendants.

The two provisos relating to the "obstruction of navigation' and the "interference with the rights of others," which in the revision as appended to R. S., c. 3, § 63, were originally applied only to "weirs extended by owners of flats, bordering on the sea, into tide waters below low water mark" (St. 1883, c. 239, § 3, incorporated in R. S., c. 40, § 26), and not the unqualified penal provisions of St. 1883, c. 239, § 2, upon which this action is now founded. But the committee on revision to incorporate the public laws of 1883 with the new revision, applied those provisos to both sections (R. S., c. 40, § 26, and R. S., c. 3, § 63), and they so stand now. But as the jury settled the fact of interference, we have no occasion to express an opinion whether or not the provisos affect the construction of c. 3, § 63.

We need not allude to the question of constitutionality suggested but not argued. There is no doubt that the State has authority over the whole subject matter, so far as the public and common rights are concerned. *Barrows* v. *McDermott*, 73 Maine, 450. *Exceptions overruled.*

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

HOWARD W. DODGE, and another, *vs.* ALPHEUS HUNTER.

Kennebec. Opinion November 15, 1892.

Writ. Change of return term. Waiver. R. S., c. 77, § § 68, 69; c. 82, § 82.

Where a writ was dated December 19, 1890, made returnable at the June term of the Superior Court, instead of at "one of the next two terms after date," and real estate was attached thereon; and in February following, before personal service upon the defendant, the erroneous return day was changed to the April term, a new attachment made and final service completed; and it was entered at the April term, when the defendant appeared generally, and at the June term pleaded the general issue, filed an offer to be defaulted on the count on the account annexed and a brief statement of statute of limitations on the count on the promissory note; *Held*, that the omission to seasonably raise the technical objection was a waiver of it.

ON EXCEPTIONS.

This was an action of assumpsit on account annexed and a promissory note. The case was tried in the Superior Court for Kennebec County.

This case was withdrawn from the jury and submitted to the presiding justice upon the following agreed statement of fact: A default is entered on the account annexed to the writ.

The note in suit would have been barred by the statute of limitations, December 20, 1890. The writ was made and dated December 19, 1890, and originally returnable at the June term, 1891; an attachment of real estate was made and returned in December, 1890. After said attachment and before service on the defendant, about February 7, 1891, the return day was changed to the April Term, 1891, and a new attachment of real estate made. Service was made on the defendant March 24, 1891. At the return term the defendant answered generally by counsel and filed no plea. On the twelfth day of the following term (June), the defendant pleaded the general issue with special plea of the statute of limitations, the pleadings to be considered as if seasonably filed.

On this statement of fact, the case was submitted to the presiding justice with right of exception.

Upon the foregoing the presiding justice made ruling: Action maintainable. Default to include amount of note declared on.

To this ruling the defendant excepted.

F. J. Martin, for plaintiffs.

George G. Weeks, for defendant.

VIRGIN, J. An action on the note in suit would be barred on December 20, 1890, unless commenced prior to that date.

The writ was made and dated on December 19, 1890, and real estate attached, but no personal service on the defendant made.

The writ was made returnable at the June term, 1891, instead of at "one of the next two terms" after date, viz., February or April, as required by R. S., c. 77, § § 68, and 69. *Blake* v. *Wing*, 77 Maine, 170.

On or about February 7, before personal service on the defendant, the plaintiff's attorney, on discovering the erroneous return day, changed it to the April term; and thereupon a new attachment was made and final service subsequently completed.

The action was entered at the April term when the defendant appeared generally by attorney. On the twelfth day of the June term, the defendant pleaded the general issue, filed an offer to be defaulted on the first count (account annexed) and a brief statement of the statute of limitations to the count on the note.

The court below held that the judgment should include the amount due on the note.

The defendant now renews his contention that the date of the writ should be changed to February 7, 1891, when the return day was changed and the new attachment made. Such is not our view.

The time of actually making a writ with an intention of service is the time when an "action is commenced" within the meaning of the statute of limitations. R. S., c. 82, § 82. *Johnson* v. *Farwell*, 7 Maine, 370. There can be no doubt that when this writ was made and dated on December 19, 1890, it was with the intention of service and for the purpose of preventing the intervention of the limitation bar. The new attachment did not necessitate a change of date of the writ, for more than one attachment of real or personal property may be made on it any time before personal service on the defendant. It could not be said to have performed its office until service is completed; for until then the defendant does not become a party and no action is really pending. *Clendenven* v. *Allen*, 4 N. H. 386; *Bray* v. *Libby*, 71 Maine, 276, 279.

Neither did a change of return day necessitate a change of date of the writ; for the new return day was a legal one and in full compliance with the statute. If the same statute governed the Superior Court as does this, and the writ had been made returnable at the next term after reasonable time for service, but failed of service and the return day was changed and then served, the date of the writ would then have been erroneous; and the writ on its face would have shown that it was returnable after an intervening term at which it should have been returnable and hence would have been abatable. *McAlpine* v. *Smith*, 68 Maine, 423.

But in the case at bar no such error appears. The date was

right. The return day was erroneous, and changed to the proper one, was entered at the proper time, was answered to generally and at the subsequent term the general issue was pleaded.

In the absence of any suggestion of intended wrong, or of any injury to the defendant save that his promissory note will not be barred, we think by his omission to make the technical objection at the time prescribed by the rule governing such matters, he must be considered as having waived the technicality which he now indirectly sets up. In fact the point is *res judicata*. *Pattee* v. *Low*, 35 Maine, 121, is on all fours with this case. See also *Bray* v. *Libby*, 71 Maine, 276, 280.

Exceptions overruled.

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

CHANDLER M. WOODS *vs.* FRED RONCO, MARK PHETERS, Trustee, and SAUNDERS AND SON, Claimants.

Piscataquis. Opinion November 15, 1892.

Wages. Assignment. Record. R. S., c. 111, § 6; Stat. 1891, c. 73.

An assignment of wages earned while the assignor was commorant in any city or organized plantation and since Stat. 1891, c. 73, took effect, is not valid as against the employer unless he had actual knowledge of the assignment.

If earned in an unorganized plantation, the assignment is valid though not recorded.

ON EXCEPTIONS.

The case is stated in the opinion.

J. F. Sprague, for plaintiff.

Henry Hudson and *J. S. Williams*, for claimants.

VIRGIN, J. The only trustee named in the writ or summoned disclosed that, when service was made upon him (December 23, 1891), the partnership comprising himself and two sons (McPheters and Sons) owed the principal defendant (Ronco) for "work in the woods in an unincorporated place," $43.40; that on December 25, 1891, he received a letter, dated December 24, 1891, from the claimants (Saunders and Son) wherein they claimed to hold the amount due from McPheters and Sons to

Ronco, by force of his written assignment, dated October 16, 1891, and recorded, on the same day, in Greenville, where all the parties reside.

The assignment is full and complete in form and substance and based upon a subsisting contract for labor. Its registration in Greenville, although the parties are residents therein, gives no validity to it, as the assignor was not commorant therein while earning the wages. R. S., c. 111, § 6.

Under the foregoing statute, an assignment of wages, in order to be valid against third persons, is required to be recorded in the town or plantation in which the assignor was commorant while earning them. The object seems to have been to give constructive notice to others interested and thus prevent the uncertainty of assignments and the mischief of double assignments. *Wright* v. *Smith*, 74 Maine, 495, 497. But when the assignor, while earning the wages, was commorant in an unorganized place, in which there is no recording office or officer, then the provisions of the statute did not apply. *Wade* v. *Bessey*, 76 Maine, 413.

Since the decision of the case last cited, the statute has been amended by adding: "and no such assignment of wages shall be valid against the employer, unless he has actual notice thereof." Stat. 1891, c. 73. This amendment was not intended to apply to assignments of wages earned while the wage earner was commorant in an unorganized place, but simply to give more protection to the employer, than he would generally acquire from a registration of the assignment. In other words, if the wages were earned while the assignor was commorant in any "city, town or plantation organized for any purpose," the record of the assignment, under the original statute, would render it valid against persons other than the parties thereto, including employers, for they would have at least constructive notice thereof. The amendment now adds in substance that such constructive notice shall not be sufficient as against the employer, but that to bind him he must have "actual notice."

Exceptions overruled.

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

CITY OF BANGOR *vs.* INHABITANTS OF FRANKFORT.

Penobscot. Opinion November 15, 1892.

Pauper. Divorce. R. S., c. 20, § 3.

A ruling that the divorce of a pauper's wife and her marriage with another man while her husband was in prison in another State did not work an abandonment on his part of his residence, affords the city in which he resided when he went away no cause for exceptions.

ON EXCEPTIONS.

This was an action for pauper supplies, furnished one Abiatha Grant, amounting to $123.87. The case was tried by the court without a jury.

It was admitted that seasonable notices and denials were given, and that Abiatha took a settlement derived from his father in Frankfort, and after his majority, moved to Bangor and acquired a domicil there in 1871.

The court found that the pauper, having a family and domicil in Bangor in 1872, shipped as a seaman on a voyage to Boston, with the intention of returning to his family, but while there was convicted of crime and sentenced to the Massachusetts state prison for the term of fifteen years, from which he was released after eleven years' imprisonment and returned to Bangor in March, 1884, and since that time had not acquired a pauper settlement in any place by continuous residence of five years.

The court found that, during the pauper's absence in Massachusetts, pauper supplies were furnished his family by Bangor during the years 1873, 1875 and 1876, that in 1876 his wife became divorced from him, and in 1877 married another man and that thereafterwards, until his return to Bangor in 1884, he had no wife or children resident there.

The court found that the pauper had a domicil in Bangor from 1872 to March, 1884, unless the divorce of his wife and her subsequent marriage worked an abandoment of it in 1876 and 1877, whereby his residence then became lost and prevented his gaining a pauper settlement in Bangor by five years' continuous residence thereafterwards during the time that he was imprisoned in Massachusetts.

The court ruled as matter of law, that the pauper's domicil in Bangor at the time of his wife's divorce and subsequent marriage, in 1876 and 1877, was not thereby destroyed; but continued until his return to Bangor in 1884, more than five consecutive years, whereby he gained a pauper settlement in Bangor, and ordered judgment for the defendant. To this ruling the plaintiff excepted.

H. L. Mitchell, City Solicitor, for plaintiff.

As it was admitted by the defendant town that the pauper had his derivative settlement in the town of Frankfort, the burden of proof at once shifted from the plaintiff to the defendant to establish his settlement in Bangor. *Hampden* v. *Levant*, 59 Maine, 558. No evidence introduced into the case to show what this man's intentions were or what he did in 1872 up to and including 1884; and defendant failed to come within the rules laid down by the courts and establish the fact that the pauper ever had any intention of continuing his home in the city of Bangor after he committed this felony and was arrested and committed therefor. *North Yarmouth* v. *West Gardiner*, 58 Maine, 221; *Fayette* v. *Livermore*, 62 Maine, 232; *Detroit* v. *Palmyra*, 72 Maine, 258. Presumption: *Greenfield* v. *Camden*, 74 Maine, 65; *Belmont* v. *Vinalhaven*, 82 Maine, 531. Counsel also cited: *Reading* v. *Westport*, 19 Conn. 564; *Washington* v. *Kent*, 38 Conn. 249; *Northfield* v. *Vershire*, 33 Vt. 115.

Vose and McLellan, for defendant.

VIRGIN, J. Assumpsit for pauper supplies. The pauper had a derivative settlement in Frankfort, which continued there, unless he acquired another. R. S., c. 20, § 3.

The main question before the presiding justice who tried the case without the aid of the jury — was — whether the pauper acquired a settlement in Bangor by having "his home therein five successive years" between 1877 and 1884 when he was released from his eleven years' imprisonment in Massachusetts, whither he went for a temporary purpose with the intention of returning to his family.

The presiding justice found that, the pauper continued to have his residence or home in Bangor, during his imprisonment, unless the divorce of his wife in 1876 and her marriage to another man in 1877, "worked an abandonment of it, whereby his residence then became lost and prevented his gaining a settlement in Bangor by his five years' subsequent continuous residence there during the time of his imprisonment."

He must have found, therefore, as a matter of fact, that during his entire term of imprisonment, he had at least a latent intention to return to Bangor when discharged. *Detroit* v. *Palmyra*, 62 Maine, 258. The fact that he did so return is evidence of such intention to be weighed by the judge in connection with the other evidence before him. *Richmond* v. *Vassalborough*, 5 Maine, 396, 400.

But while her divorce and subsequent marriage obviously established an abandonment, on her part, of the pauper's residence in Bangor, they did not necessarily *per se* interrupt his. *Greene* v. *Windham*, 13 Maine, 225. The power of changing the husband's residence, against his will, does not belong to the wife — public policy forbids it. *Richmond* v. *Vassalborough*, 5 Maine, 398. Otherwise a married woman could disfranchise her husband. His home, however, is in the town where he supports and maintains his wife, even if he actually lives in another where he transacts his business. *Opinion of the Justices*, 7 Maine, 497.

We think, therefore, that the ruling that the pauper's residence or home was not thereby destroyed, was proper. For there might have been various other evidence which led the judge to the conclusion that the mere imprisonment alone did not interrupt the continuity of his residence in Bangor. *Topsham* v. *Lewiston*, 74 Maine, 237. And in the absence of any report of the evidence his finding of facts cannot be reviewed.

Exceptions overruled.

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

CITY OF BANGOR, Trustee, in equity,

vs.

FLAVIUS O. BEAL, and others, Trustees, and BANGOR MECHANICS' ASSOCIATION.

Penobscot. Opinion November 16, 1892.

Revised Statutes, c. 3, § § 51, 52; c. 45, § 1; c. 77, § 6, par. VII.

A testator bequeathed to the city of Bangor $100,000, "the principal to be held in trust, and the income thereof applied and appropriated by said city for the promotion of education" and other charitable purposes. This fund came into the control and management of a board, Trustees of the Hersey Fund, appointed by the city under an ordinance, who, in accordance therewith, invested the fund in securities and devoted the net annual income for a public library composed in part of books and funds contributed by others, pursuant to an agreement made under the provisions of the ordinance.

By a subsequent ordinance of the city council, the city voted to withdraw from its trustees the care and control of the principal of the fund, but leaving to them all their other powers, including the control and direction of the library and the care and control of the income of the fund; and directed the trustees to pay over and deliver the principal to the city treasurer.

Upon a bill filed by the city, seeking to enforce the latter ordinance, *Held;* That the city council, representing the city of Bangor, the beneficiary and trustee under the will of the testator, has the right to resume the possession and active, direct control of the principal of the fund; *And*, that the city under the statute (R. S., c. 3, § § 51, 52) being authorized to accept the fund can appoint agents or trustees to manage it, being responsible for them and its security.

A trustee by investing trust funds in his own business, or for his own benefit or accommodation, becomes an insurer of the fund and its productiveness; and in such case cannot have the previous opinion of the court, under R. S., c. 77, § 6, par. VII, upon the expediency of the investment; or the determination of hypothetical questions, such as the rate of interest the city is liable to pay.

ON REPORT.

Bill in equity heard on bill, answers and testimony, and was certified to the law court under R. S., c. 77, § 43.

This was a bill of interpleader filed by the city of Bangor to obtain the direction of the court upon the facts, which are sufficiently stated in the opinion, relating to the Hersey fund. The managers of the fund appointed under an ordinance of the

city and the Mechanics' Association were made parties. The prayer of the bill asked the court for instructions as to the respective rights and duties of the parties, and particularly: *first*, to decide and instruct the parties whether, under the conditions of the will and other facts, the city under the circumstances detailed or proved has the right to appropriate the principal of the Hersey fund for the erection of such a permanent building as is proposed; *second*, whether the city had or has the right as claimed after the agreement, as set forth by the respondent Association, had been made in 1883, and acted upon until 1892, to amend and alter the terms of the ordinance as was done by the amended ordinance without the assent of said Association,— and under said amended ordinance to require the respondent (managers) trustees to pay and deliver to the city treasurer the bonds, stocks, securities and money forming the principal of said fund.

H. L. Mitchell, City Solicitor, for City of Bangor.
A. W. Paine, for Trustees of Hersey Fund.
Appleton and Chaplin, for Mechanics' Association.

EMERY, J. The following narrative of facts abridged from the bill, answers and evidence, will sufficiently indicate the question to be determined.

Samuel F. Hersey bequeathed to the City of Bangor $100,000 "the principal to be held in trust, and the income thereof applied and appropriated by said city for the promotion of education," etc. This sum was accordingly paid over to the city by the executors, and the city duly accepted the same by a vote of its City Council passed March 6, 1883.

The city by an ordinance of its City Council passed March 13, 1883, placed the funds so received in the care and custody of a board of five men, styled "Trustees of the Hersey Fund." By this ordinance, these trustees were directed to keep the fund distinct from any other moneys held by the city; to keep the principal up to the full sum of $100,000; and to devote the remainder of the net annual income of the fund to the establishment and perpetual maintenance of a public library in Bangor,

either independently, or in connection with some existing library.

There was at this time existing in Bangor a library owned by the Bangor Mechanic Association. The books were worth nearly $20,000, and the association also had a library fund of some $12,000 held by the city in trust. This association and the trustees under the city ordinance made a contract, dated May 21, 1883, in which it was stipulated that all the books of the existing library of the association, and all such new books as might be purchased with the proceeds of the funds of the association, should be transferred to the city to hold in trust for a "Public Library," to be used in common with such books as might be purchased by the income of the "Hersey Fund." It was also stipulated that the income of the association funds, and the income of the "Hersey Fund," should be perpetually devoted to the maintenance of the public library so established.

It was further stipulated that the whole library should be exclusively and entirely under the control and direction of a "Board of Managers" to consist of five trustees of the Hersey Fund, and such officers of the association, not exceeding four, as the association should appoint. The association made the transfer immediately thereafter in accordance with the contract, and the city by a vote of the City Council, passed June 5, 1883, ratified the contract and accepted the transfer on the terms and conditions therein named.

The Public Library thus established has been maintained ever since by the income of the Association Fund and by the income of the Hersey Fund and has been controlled and directed by the board of managers provided for in the contract. The principal of the Hersey Fund has been in the control of the trustees of the Hersey Fund as provided in the ordinance of March 13, 1883, and the net income has been exclusively devoted to the library.

In August, 1892, the City Council of Bangor amended the ordinance of March 13, 1883, so as to withdraw from the trustees of the Hersey Fund the care and control of the principal of the fund, but leaving to them all their other powers, including the control and direction of the library and the care and control

of the income of the fund, to be by them devoted to the perpetual maintenance of the library. The City Council thereupon passed a vote directing the trustees of the Hersey Fund to pay and deliver to the city treasurer all the money and securities constituting the principal of the Hersey Fund to the amount of $100,000. The trustees have declined to do so. The city thereupon has filed this bill against the trustees and the Bangor Mechanic Association and prays for a decree that such transfer be made.

Were it not for the contract made with the Bangor Mechanic Association, no question would probably be made. Mr. Hersey selected the city as his trustee. He bequeathed the fund to the city. The city under our law (R. S., c. 3, § 51) was authorized to accept such funds and execute such trusts. Like other trustees, the city took the legal title in the fund. Like other trustees the city had the task and responsibility of its safe and fruitful investment. Like other trustees, the city had the consequent right and power to manage the fund, at least within the lines laid down in the instrument creating the trust. The City Council stands for the city in all these respects. It could appoint agents or trustees to manage the fund, and be responsible for them. (R. S., c. 3, § 52.) It could discharge such agents and appoint others, or could dispense with them altogether, and manage the fund directly by its own votes. The power accompanies the responsibility.

Has the city by the contract with the Bangor Mechanic Association freed itself from this responsibility and deprived itself of this power as to the principal of the fund? We do not find in the contract, even read in connection with the ordinance, any stipulation to that effect. There are stipulations as to the application of the income, and as to the government of the library, and these are left in full force by the new ordinance and vote of August, 1892. There is, however, no stipulation that the city shall make no change in the management or investments of the principal. The city retains the title and ownership of the fund and remains responsible for its proper investment. (R. S., c. 3, § 52.) The loss of the funds from improper investments

would fall primarily on the city the trustee which had accepted the trust and undertaken its execution. All proceedings by the Attorney General in behalf of the public in relation to the fund, would be against the city. The city could not avoid such litigation and liability by pleading the ordinance of March 13, 1883, or the contract with the Mechanic Association. If, therefore, the ordinance and the contract have not lifted from the city its original responsibility for the safety and fruitfulness of the fund, they have not taken away from the city its original power over the principal of the fund. The power remains with responsibility.

The bill further states that the City Council, upon recovering possession of the principal of the fund, proposes to invest it in the construction of a public building in the city to be called "The Hersey Memorial Building," and to be owned, controlled and largely occupied by the city with its various departments and boards or committees. The bill then asks that the court approve the proposed investment, under R. S., c. 77, § 6, par. VII.

We see no occasion for the court to express any opinion on the propriety or wisdom of the proposed investment. A trustee by investing trust funds in his own business, or for his own benefit or accommodation, becomes an insurer of the fund and of its productiveness. In such case no question can arise as to the wisdom or folly of the investment.

The statute also (R. S., c. 3, § 52,) makes the city an insurer in such cases. It is only in making investments entirely outside of, and apart from his own property or interests, that a trustee can have the previous opinion of the court.

It is still further suggested in the pleadings and the briefs of counsel that, in the event it is held that the city can resume the possession and direct control of the principal of the fund, and upon the hypothesis that the city will use the fund as proposed, the court will determine what rate of interest, or income, the city shall allow therefor to the trustees of the Hersey Fund and managers of the Public Library.

The court clearly should not answer hypothetical questions. The actual controversy has not yet arisen. It may never arise.

The full contingency stated may never happen. If it does happen there may still be no controversy. The amount the city might voluntarily offer might be satisfactory. Again, the public may have an interest in that question and the Attorney General may claim the right to intervene.

We may remind the parties, however, of the general principle that a trustee making use of trust funds is accountable at least for legal interest thereon (Perry on Trusts, § 468); and that in this State the legal rate of interest, when not otherwise expressed in writing, is six per cent per annum. The statute declaring that interest shall be allowed if the trust fund is used by the municipality (R. S., c. 3, § 52,) does not name any other rate. See also case *Ludwick* v. *Huntzinger*, 5 Watts and Serg. 51, cited with approval in *Eaton* v. *Boissonnault*, 67 Maine, 540.

But we only decide the single question imposed on us by the pleadings and evidence. We only decide that the City Council, representing the city of Bangor, has the right to resume the possession and active, direct control of the principal of the "Hersey Fund."

Bill sustained and decree to be made according to the opinion.

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

INHABITANTS OF WATERVILLE *vs.* INHABITANTS OF BENTON.

SAME *vs.* INHABITANTS OF FAIRFIELD.

Kennebec. Opinion November 17, 1892.

Pauper. Non compos. R. S., c. 24, § 1, par. 2, par. 6.

The circumstance that a pauper is *non compos mentis* does not necessarily prevent the operation of rule 6 of the pauper statute.

If an intent is necessary to fix a pauper's home in another town upon a change of residence, such intent may be supplied by his surviving parent and natural guardian having the care and control of the child.

A pauper who was *non compos mentis* from birth, after coming of age and after her father's death resided for five consecutive years in the family and under the care of her mother in the town of Benton without receiving supplies. *Held*; That under R. S., c. 24, § 1, par. 6, her settlement had been established in that town.

AGREED STATEMENT.

Webb, Johnson and Webb, for plaintiffs.
George G. Weeks, for Fairfield.
Heath and Tuell, for Benton.

EMERY, J. The only question mooted in these actions for pauper supplies is whether the settlement of the pauper is in Fairfield or Benton. The material facts may be stated as follows:

The pauper, Emma Goodwin, was *non compos mentis* from birth. At the time of her birth in 1850, her father resided and had his pauper settlement in Fairfield. She lived in Fairfield with her father until his death when she was eight years old. She continued to live in Fairfield for some years of her minority with her mother. While the pauper was yet a minor, her mother removed to Vassalborough keeping the pauper with her in her family, and in Vassalborough the pauper came of age. In 1874, the mother removed to Benton, still keeping the pauper with her, and there married Mr. Randlett whose pauper settlement was in Benton. The pauper lived with her mother in Mr. Randlett's family in Benton until some time in 1882, more than five consecutive years and without receiving pauper supplies. In 1882, the mother was divorced from Mr. Randlett, and neither she, nor her daughter, the pauper, have since resided in any other town for five consecutive years. The pauper from the death of her father was entirely dependent upon her mother, and was under her care and control until the death of her mother in 1885.

By virtue of R. S., c. 24, § 1, par. 2, the settlement of the pauper at the time she became of age was in Fairfield, that being the settlement of her father at the time of his death. It is urged that by the same section and paragraph her settlement must continue to be in Fairfield since she became of age and wherever she may have lived, because though of age she has, by reason of her idiocy, no capacity to acquire another settlement. The argument is that mental capacity to form or have an intention as to residence, is made by § 1, par. 2, essential to the acquisition of another settlement than that of the deceased father.

But par. VI of the same section explicitly declares that "a person of age having his home in a town for five successive

years without receiving pauper supplies directly or indirectly, has a settlement therein." This pauper was "a person of age," and she had "her home in Benton for five successive years without receiving pauper supplies directly or indirectly." There is no statement in this par. VI that the person of age so having his home must be of sound mind, or have any mental capacity in order to acquire a settlement. It has also been repeatedly held in a series of judicial decisions in this State, that such mental capacity is not necessary, that a person *non compos mentis*, if of age, can acquire a new pauper settlement under par. VI. *Lubec* v. *Eastport*, 3 Maine, 220; *Augusta* v. *Turner*, 24 Maine, 112; *New Vineyard* v. *Harpswell*, 33 Maine, 193; *Gardiner* v. *Farmington*; 45 Maine, 537; *Auburn* v. *Hebron*, 48 Maine, 432; *Corinth* v. *Bradley*, 51 Maine, 540. The degree of mental unsoundness was not considered in any of the cases cited, and in some of them the pauper was absolutely *non compos*, utterly without mind. The rule that such a person of age can acquire a new pauper settlement under par. VI is thus firmly established in this State.

The act of placing the *non compos* pauper in the town,— the fixing his home there and the keeping it there, may be done by the individual having the care of the pauper's person. In *Lubec* v. *Eastport*, it was done by an uncle; in *Augusta* v. *Turner*, by the mother; in *New Vineyard* v. *Harpswell*, by a brother; in *Gardiner* v. *Farmingdale*, by a brother and sister; in *Auburn* v. *Hebron*, by the guardian. A *non compos* pauper thus intentionally placed to live, and kept living in a town for five successive years, may be properly said to have his home in that town for that time. In matters of domicil outside of the pauper statute, "the domicil of an idiot may be changed by the direction or assent of his guardian express or implied." Wilde, J., in *Holyoke* v. *Haskins*, 5 Pick. 26.

The question of the degree of the mental capacity of a pauper has only arisen in cases where it was sought to determine whether an adult pauper was emancipated, or was still under his living father's control,— whether the adult pauper had sufficient mental capacity to fix his own home independent of his father's

will, or had his home fixed for him by his father. Such was the issue in *Fayette* v. *Chesterville*, 77 Maine, 28, and kindred cases. Where the father is dead, as here, or had abandoned his family, as in *Augusta* v. *Turner*, *supra*, no such question can arise.

It is again urged, however, that the pauper in this case being *non compos* passed under the control of the mother after the father's death, and so continued unemancipated though of age, and hence incapable of acquiring another settlement than that of her deceased father. It must be clear, however, in the light of the principles above stated that the question of emancipation is immaterial. The father is dead. The daughter was thus emancipated from him. The mother succeeded to his care and control of the daughter's person. She intentionally fixed and made the daughter's residence and home with herself in Benton. That home continued in Benton in accordance with that intention for five successive years without any pauper supplies being received directly or indirectly. The daughter being of age thus acquired a pauper settlement in Benton under par. VI. It was so held in *Augusta* v. *Turner*, *supra*, where the father was still living but had abandoned the daughter.

In *Waterville* v. *Benton*, *Defendant defaulted.*

In *Waterville* v. *Fairfield*, *Plaintiff nonsuit.*

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

STEPHEN L. KINGSLEY *vs.* ALDEN H. JORDAN, JR., and others.

ALDEN H. JORDAN, JR., and others, in equity,

vs.

STEPHEN L. KINGSLEY.

Hancock. Opinion November 25, 1892.

Deed. Guardian. Minor. Estoppel. Limitations. R. S., c. 71, § 30.

When a guardian of minors under a license therefor, sells land of his wards in good faith and for a full value without taking the oath required by law, the wards having full knowledge of the fact, may affirm or disaffirm the sale within a reasonable time after they become of age.

When one of the wards, with full knowledge of the facts, before of age, receives his share of the proceeds of the sale and retains it, and before of

age dies, and his estate descends to a brother and sister of full age, who have full knowledge of the facts and as to their shares of the land sold by the guardian at the same time, have ratified it, and for two years and a half thereafter make no attempt to disaffirm the sale or return the money received by their decedent, they are estopped from setting up title to the land.

ON REPORT.

The facts appear in the opinion.

Deasy and Higgins, for plaintiffs.

Hale and Hamlin, and *G. P. Dutton*, for defendants.

LIBBEY, J. The first of these cases is a writ of entry for a lot of land in Mount Desert. The second is a bill in equity by the defendants in that suit against the demandant, praying for an injunction restraining him from prosecuting his suit at law, and for a decree requiring him to release to the complainants his pretended title. By agreement of the parties, the cases are submitted on the same statement of facts and are to be decided together.

The facts agreed, so far as material to the contention between the parties, are as follows: September 25, 1875, Franklin B. Roberts was the owner in fee simple of the demanded premises, and on that day died intestate, leaving three children as his only heirs: Josephine M., Abbott L., and Ralph V.

April 17, 1876, Abbott L. Roberts, being of full age, conveyed his interest, an undivided third, to Mercy Jordan and Alden H. Jordan, Jr.

June 27, 1876, Deborah M. Roberts, widow of the said Franklin B. Roberts, having been duly appointed and qualified guardian of the said Josephine M., and Ralph V. Roberts, minors, on her own petition, and having been duly licensed to sell the estate of her wards, and given the bond required by law, sold the same to said Mercy Jordan and Alden H. Jordan, Jr., for $700, and executed to them a guardian deed with the usual covenants, in due form, which deed was duly recorded December 5, 1876.

The only objection made by the demandant, Kingsley, to the validity of the guardian's sale is, that it does not appear she took the oath required by law before making the sale.

June 16, 1886, Ralph V. Roberts died a minor, and intestate being nearly sixteen years old, without issue, leaving as heirs his said brother and sister, Abbott L. and Josephine M.

August 27, 1888, Deborah M., who had become the wife of William W. Sumner, Josephine M., who had married Otis M. Ober, and Abbott L. Roberts, by their deed of quitclaim without covenants conveyed to the demandant, Kingsley, their interest in the land, for the consideration hereafter stated.

April 13, 1877, Alden H. Jordan, Jr., by deed of quitclaim conveyed all his interest in the locus to Mercy Jordan. Mercy Jordan died prior to the commencement of this action, and the defendants are her heirs at law.

It is admitted that said Deborah M. Roberts made the said guardian's conveyance in good faith and for the benefit of the estate of her said wards; that the said wards received the benefit of the proceeds of said sale; that plaintiff, when he took the said deed from Deborah M. Sumner and others took with full knowledge of said guardian's deed, and that the consideration thereof is an agreement by Kingsley to prosecute this suit to final judgment at his own expense and risk, and in case of recovery to buy the land on terms agreed upon.

The tenant's ancestor, Mercy Jordan, went into the occupation and improvement of the premises on the purchase of the guardian, and she during her life, and the tenants after her death were not disturbed by any claim till the commencement of this action.

By this statement, it is apparent that if the sale by the guardian is sustained the plaintiff has no title. It is admitted by his counsel that he has no title to two-thirds; the third conveyed to the Jordans by Abbott L. Roberts in 1876, and the third inherited by Josephine M., as she became twenty-one years of age in 1878 and made no claim till the commencement of this action, March 5, 1889; and hence her claim is barred by R. S., c. 71, § 30. Can he recover the third which Ralph V. inherited from his father? The claim may not be barred by the statute above cited, as Ralph V. died a minor June 16, 1886, less than three years before the date of the writ. But we think other principles of law prevent his recovery.

When a sale by guardian under license is invalid for a want of compliance with some requirement of law by the guardian, it is competent for the ward when he becomes of age to ratify and affirm the sale, or he may avoid it within a reasonable time. If he affirms it, he becomes bound by it. *Williamson* v. *Woodman*, 73 Maine, 163, had the same defect in the proceedings of the guardian, relied on by the plaintiff here,—a failure of proof of the oath of the guardian. There was also another objection raised. The guardian was licensed to accept an offer made by John Wyman, and the deed was made to Rubie M. Wyman. It was held that a receipt and retention of the consideration from the guardian by the ward after of age, with knowledge of the facts, was an affirmation of the sale and bound them. APPLETON, C. J., in the opinion says: "It is a general rule, that when the ward arriving at age, with a knowledge of the facts, and in the absence of fraud, receives and retains the purchase arising from the guardian's sale of his land, he cannot afterwards question its validity."

Here it is admitted by the plaintiff that the sale by the guardian was in good faith, for the benefit of the estate of the wards, and they received the benefit of the proceeds of the sale. On the decease of Ralph V. his heirs took his estate and stood as he would stand if of age. There was nearly three years between his death and the commencement of this action. The heirs had full knowledge of the facts. Abbott L. conveyed his third inherited from his father in 1876, about the time of the sale of the guardian, to the same parties, for $200,—$150 less than the price received by the guardian. Josephine M. was so well satisfied by the sale that she affirmed it as to her third. To set aside the sale and reclaim the land they must pay back the consideration received and retained, which has not been attempted. We think the inference is clear that they elected not to do so. As to the mother,—guardian of Ralph V.,—she is estopped by the covenants in her deed to Mercy Jordan from now alleging the illegality of her sale. *Williamson* v. *Woodman*, 73 Maine, 163.

As bearing upon the questions decided here, see *Davis* v.

Dudley, 70 Maine, 236; *Robinson* v. *Weeks*, 56 Maine, 102; *Nott* v. *Sampson M'g Co.* 142 Mass. 479; *Brazer* v. *Schofield*, 124 U. S. 495; *Penn* v. *Heisy*, 19 Ill. 295.

It is not claimed that the demandant stands any better in court than his grantors would. The result is, the demandant has no title and cannot recover.

The entry must be, in the action at law,

Judgment for the tenants.

There being no occasion for the exercise of the equity jurisdiction of the court,

Bill dismissed.

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

CATHALENA E. LANDER *vs.* CITY OF BATH.

Sagadahoc. Opinion November 30, 1892.

Way. Culvert. Town. Railroad. R. S., c. 18, § 27; Stat. 1889, c. 282.

In an action against a city for flooding the plaintiff's premises by means of an insufficient culvert along an open water way or course under the street, it appeared that a railroad had included that portion of the street in its location; and that the duty of maintaining both street and culvert had passed from the city to the railroad which built the culvert and ever since maintained it; and that the acts complained of were those of the railroad and not of the city. *Held*, that the action could not be sustained.

AGREED STATEMENT.

The case is stated in the opinion.

J. M. Trott, for plaintiff.

Counsel cited: *Estes* v. *China*, 56 Maine, 407; *Welcome* v. *Leeds*, 51 Maine, 313; *Bates* v. *Westborough*, 151 Mass. 174.

W. E. Hogan and F. L. Staples, for defendant.

HASKELL, J. Case against the city of Bath to recover damages for flooding the plaintiff's premises, caused by an insufficient culvert under Centre street.

It is agreed that the plaintiff may recover, unless the fact that, prior to the plaintiff's injury, the Maine Central Railroad included the culvert within the limits of its location, having before that time

rebuilt the same, and ever since exercised exclusive control and maintenance of it, is a defense.

The trend of modern decisions is to give railroad companies exclusive control of their roadways within the limits of their respective locations. This has become necessary to insure safety for the public as well as protection for the corporations. Railway traffic has phenomenally increased, both in volume and dispatch. By their charters, railroads acquire the right of way over land not owned by them. This easement they should control so as to fully secure the purposes of it. It requires that they should hold and enjoy the exclusive possession of their respective roadways. It would be extremely dangerous to railroad travel, if strangers were allowed to enter upon their roadways and repair crossings, dig drains, construct culverts, or do any act that might interrupt the regularity of transit or threaten the safety of passing trains.

In this case, therefore, it is considered that defendant had no right to repair the defective culvert or drain passing under its street within the limits of the railroad. *Hayden* v. *Skillings*, 78 Maine, 417; *Railroad* v. *Commissioners*, 79 Maine, 392.

The culvert was a condition necessary for the maintenance of the street and a part of it. The city had no right to obstruct the flow of water through the "open water way or course" or "open drain or sewer" that had existed "from time immemorial," and of course long prior to the construction of the street. If it did so, to the injury of any one, it would have become liable in damages. *Parker* v. *Lowell*, 11 Gray, 353.

When the railroad company included that portion of the street containing the culvert within the limits of its railroad, the duty of maintaining both passed from the city to the railway corporation. The duty of maintaining the former, is imposed by the letter of the statute, R. S., c. 18, § 27, amended in 1889, c. 282, and of the latter, as incident to it and necessarily included in it.

The agreed statement shows that the culvert complained of was built by the railway company prior to the plaintiff's injury, and has ever since been maintained by it, and that the city has

in no way meddled therewith. If the new culvert has become the cause of a private nuisance, how can the city be chargeable therefor? All acts that contribute to the present condition of things, were the acts of the railway company and not of the city.

This action is not grounded upon the breach of legal duty imposed upon the city, like the duty to keep its ways in repair so that they shall be safe and convenient for travelers, imposed by statute, under which a town has been said to be liable for injuries to a traveler, received at a defective railroad crossing. *Welcome* v. *Leeds*, 51 Maine, 313. It is grounded upon the unlawful obstruction of an ancient "water way or course" into which both sewage and natural drainage flows; and the agreed statement shows that the city did not, in fact, cause the obstruction. It did not create the nuisance. It was not bound by law to see that no one else did it. It was never under any legal obligation to maintain the water way. Its common law duty was not to obstruct it; *Estes* v. *China*, 56 Maine, 407; and it did not. No complaint is made that the culvert was ever insufficient while in the control of the city.

Plaintiff nonsuit.

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

JAMES DONNELL, and others, *vs.* REBECCA M. WYLIE.

Lincoln. Opinion November 30, 1892.

Contracts. Consideration. Gift. Delivery. Mortgage. Assignment.

Both legal and equitable rights arise from a consideration, or from conditions that are equivalent to it, but never from mere voluntary unexecuted promises which have not induced action or change of condition so as to work a consideration for them.

Title to real estate may be conveyed by deed; it passes by devise or inheritance, and sometimes by judicial conveyance or operation of law, but never by parol gift only.

Delivery is essential to a valid gift *inter vivos*.

A promise to make a gift to another of mortgages on his property, the promisor being under no legal obligation to do so, is but an executory gift,—a mere intention to give without doing so. So long as the transaction remains executory and the promisor retains the title and the muniments of it himself, no gift becomes executed and no equity passes to the promisee; but if there

is a contract founded on a consideration that the promisor will pay the mortgages for the promisee, then, upon his doing so, an equitable title will pass to the promisee although the promisor takes an assignment of them in his own name.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

W. H. Fogler, and *W. H. Hilton*, for plaintiffs.

George B. Sawyer, for defendant.

HASKELL, J. Writ of entry to recover land from the possession of defendant, a widow, whose husband once owned the same and mortgaged it. These mortgages were foreclosed and assigned to Samuel Donnell, the plaintiffs' ancestor. The defendant contends that they were paid and redeemed by him for her and not purchased on his own account; that he gave them to her, and that plaintiffs are estopped by his acts from disputing the fact.

Exceptions are taken to rulings at the trial, in substance, that Donnell purchased the mortgages for himself, and has been guilty of no fraudulent acts that estop the plaintiffs from asserting title under them; that a promise by Donnell to give the mortgages to the defendant (he being under no legal obligation to do so) would be but an executory gift, a mere intention to give without doing it; not an executed gift that might vest the equitable title in defendant; that "saying that he had paid them or taken them up, or that he had made a gift of them" to her, "even if he supposed the assignments would have the effect of payment instead of purchase" "would not alter the case;" that so long as the transaction remained executory and he retained the title and the muniments of it himself, no gift became executed and no equity passed to the defendant; but that if there was a contract between Donnell and the defendant, made in consideration of money that he owed her or was to owe her, that he would pay the mortgages for her, then, upon his doing so, the equitable title passed to her, although he took the assignment of them in his own name, and the plaintiffs cannot recover. The other exceptions are not pressed, and are of too vague a character to require consideration here.

A motion for a new trial is made by plaintiffs, because the verdict is not supported by the evidence.

The evidence discloses that the defendant, a widow, threatened with trouble from outstanding mortgages upon her homestead and perhaps with ejectment from her home, requested Samuel Donnell, her friend, to take them up. He did so, and during ten years, the remainder of his life, allowed the defendant to continue to occupy the property and deal with it as if it were her own; he, meantime, holding the legal title and the muniments of it, and, being a sea-faring man, staying periodically at her house, when ashore at Boothbay, as convenience might require him to do. The testimony of several witnesses indicates that he, at various times, expressed the intention of giving her the property. Some of them say that he had said that the property was hers; but he never did give it to her, and died without executing any such purpose. The mortgages and assignments of them at his death were found in his safe among his other valuable papers at Bath, where his home was, and the title descended to the plaintiffs, his legal heirs.

The defendant neither furnished funds nor securities, nor any valuable consideration, to procure a redemption of the mortgages, nor does the evidence show any contract between Donnell and the defendant, whereby he engaged to assume the mortgages in her behalf. His conduct was purely voluntary; no doubt incited by a desire to make her comfortable in the continued enjoyment of her home. She has neither a valid claim at law nor in equity to be the real owner of the property. For ten years she has had the use and income of it, but she has never acquired any title to it. The verdict is fully sustained by the evidence and the motion must be overruled.

Complaint is made that equitable defenses were shut out from the consideration of the jury. On this score, the defendant has no cause for complaint. Defendant's equity can only arise, in this case on three grounds. First: that, by contract, Donnell engaged to redeem the mortgages for the defendant. That question was submitted to the jury and settled in the

negative. Second: that Donnell, pretending to have paid the mortgages, secretly purchased them himself, and fraudulently allowed the defendant, by substantial improvements or otherwise, to increase the value of the property, supposing it to be her own, when equity might take him at his word and estop him from claiming the contrary, or in the absence of fraud give her a lien for her expenditures on the same, *King* v. *Thompson*, 9 Pet. 204, or where improvements have been made, working a consideration for the gift, decree specific performance. *Neale* v. *Neales*, 9 Wall. 1. But the evidence shows no such state of affairs. Third: that Donnell had given the mortgages to defendant. This he never did do. He always retained the notes, mortgages and assignments, himself. He may have intended to do it, may have promised to do it, even may have supposed he had done it; but so long as he did not do it, no equitable right vested in the defendant. Title to real estate may be conveyed by deed, passes by devise or inheritance, and sometimes by judicial conveyance or operation of law, but never by parol gift only. *Duff* v. *Leary*, 146 Mass. 533. Mortgages of real estate may be equitably transferred by gift and delivery, the same as notes, bonds or chattels. *Borneman* v. *Sidelinger*, 15 Maine, 429; S. C. 21 Maine, 185; *Duffield* v. *Elwes*, 1 Bligh, N. S. 497. But see, *Dalton* v. *Woburn A. & M. Association*, 24 Pick. 257.

Both equitable and legal rights arise from a consideration, or from conditions that are equivalent to it, never from mere voluntary unexecuted promises that have not induced action or change of condition, so as to work a consideration for them. *Northrop* v. *Hale*, 73 Maine, 63; *Parish* v. *Stone*, 14 Pick. 197; *Wilson* v. *Clements*, 3 Mass. 1; *Fowler* v. *Shearer*, 7 Mass. 14; *Gould* v. *Belcher*, 119 Mass. 257; *Bank* v. *Copeland*, 77 Maine, 263; *Basket* v. *Hassell*, 107 U. S. 602.

Delivery is essential to a valid gift *inter vivos*. *Wing* v. *Merchant*, 57 Maine, 383; *Dunbar* v. *Dunbar*, 80 Maine, 152; *Augusta Savings Bank* v. *Fogg*, 82 Maine, 538; *Drew* v. *Hagerty*, 81 Maine, 231; *Sessions* v. *Mosely*, 4 Cush. 87;

Miller v. *Pierce*, 136 Mass. 20; *Mahan* v. *United States*, 16 Wall. 143.

Certainly the instructions excepted to were as favorable to the defendant as she would be entitled to have, in any form of action.

Motion and exceptions overruled.

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

STATE *vs.* WILLIAM P. ROBINSON.

Washington. Opinion December 1, 1892.

Indictment. Pleading. Caption. Date.

An erroneous date in the caption of an indictment is harmless when the clerk's certificate shows that it was properly returned and filed.

ON EXCEPTIONS.

The case appears in the opinion.

C. E. Littlefield, Attorney General, and *F. I. Campbell*, County Attorney, for the State.

G. M. Hanson and *I. G. McLarren*, for defendant.

HASKELL, J. The only exception in this case worthy of consideration is, whether an erroneous date in the caption of an indictment, showing it to have been found in January, 1891, instead of January, 1892, as appears from the clerk's certificate upon the back of it, is a fatal defect, the offense being charged and proved to have been committed in November, 1891.

It is settled law in Massachusetts that such an error is harmless. *Commonwealth* v. *Hines*, 101 Mass. 33; *Commonwealth* v. *Smith*, 108 Mass. 486; *Commonwealth* v. *Brown*, 116 Mass. 339. We see no reason why the same doctrine should not be held in this State.

Exceptions overruled.

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

LEWIS D. GREENE, in equity,

vs.

WILLIAM M. NASH, and others.

Washington. Opinion December 8, 1892.

Agent. Transfer of Stock. Public Policy. Maine Shore Line Railroad.

An agent acting under general authority binds his principal by any act done within the scope of his employment.

Where the agent is clothed with full and complete power, unlimited, to do any and all things that the principal could do if personally present, and to perform any and all acts in and about his business and property of all kinds, and to do all things and act in his behalf in all matters the same as he would do if present in his own person, giving and granting unto him, his said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as he might or could do if personally present: *Held;* That in pursuance of an agreement to extend the old charter of the Maine Shore Line Railroad Company, and to secure aid from the County of Washington, the agent of the complainant was authorized to transfer to the defendants, in trust, the control of the outstanding stock of the company, to enable them to protect the interests of the county in accordance with the terms of a certain instrument of trust delivered to the agent; that the general power of attorney contained no special business specifically mentioned, by which it can be properly claimed that the transaction in question was outside of any special matter stated; that in the agreement between the parties for the extension of the old charter, and the benefits to be derived therefrom, there were no such acts as the court would be authorized to set aside as against public policy.

ON APPEAL.

Bill in equity heard upon bill, answer and proof on appeal by plaintiff from decree of the court below dismissing the bill.

The case appears in the opinion.

George M. Hanson and *Edgar Whidden*, for plaintiff.

A. MacNichol and *L. G. Downes*, for defendants.

FOSTER, J. This is an appeal from the decision of the presiding justice dismissing the complainant's bill.

By an act of the legislature approved March 4, 1881, a charter was granted to the Maine Shore Line Railroad Company to build a railroad from Bangor to Calais; this charter expired February, 1883, because work was not begun in accordance

with its terms, but was extended by act approved January 24, 1883, until February 1, 1887, and was again extended by act of January 28, 1887, to January 28, 1891, in which authority was granted to transfer the road between Bangor and Hancock Point to the Maine Central Railroad Company, which was done.

It appears that the controlling interest in the proposed road during the greater portion of this period had been in the complainant or those representing him, and that during all these years the people of Washington county had been anxious to have the road built. In 1890 they concluded that the road would not be constructed so long as the control and management continued in the complainant, and thereupon a number of business men of that county who are interested in its development by means of railroad facilities, met at Augusta at the commencement of the legislative session of 1891, with the purpose of obtaining a new charter free from any control or interests of this complainant, in order that aid might be voted by the county to secure the construction of the road, and also to secure legislation authorizing the county to vote such aid. J. N. Greene, the father of the complainant, acting under a general power of attorney from his son, was present at a meeting of the parties who favored a new charter, addressed the meeting, and then and there suggested that if those representing the interests of the county would accept an extension of the old charter and have the county vote aid to build the road, he would place the control in the hands of any men whom the meeting or county delegation might name, those men to hold a majority of the outstanding stock by transfer from the complainant. It was finally decided to accept the proposition, and all effort to obtain a new charter was abandoned; the old charter was extended and an act was passed and approved March 20, 1891, authorizing the county to aid the road.

In pursuance of this agreement to extend the old charter and to secure aid from the county, the complainant, by J. N. Greene who assumed to act as his duly authorized attorney, transferred to the defendants, in trust, the control of the outstanding stock, —being 2000 shares out of 3616,—to enable them to protect the

interests of the county, as set forth in the following instrument: "Whereas Lewis D. Greene has this day conveyed to Wm. M. Nash, Austin Harris, Lemuel G. Downes, John K. Ames and Benjamin Lincoln, as trustees, two thousand shares, of the stock of the Maine Shore Line Railroad Company. Now, therefore, the conditions of said trust are as follows, viz: Said trustees to have the exclusive right to vote on said stock at any meeting of the stockholders thereof as they may deem best for the interests of said Washington County, State of Maine, said Company. They are not to sell, hypothecate, pledge, transfer or assign any part of said 2000 shares until said railroad shall be completed between the termini named in said company's charter, and when so completed and in running order, said trustees or their successors shall convey all of said 2000 shares to said Lewis D. Greene or his legal representatives. Vacancies in said trustees by death, resignation or otherwise to be filled by the surviving or remaining trustees. Witness our hands this 26th day of January, A. D., 1891, at Augusta, Maine, interchangeably. [Signed] Wm. M. Nash, Austin Harris, Lemuel G. Downes, John K. Ames, Trustees as aforesaid.

"Lewis D. Greene, by J. N. Greene his attorney."

In further pursuance of the agreement for renewing the charter and securing aid from the county, the defendants and the directors of the road, including J. N. Greene, united in issuing an address to the people of the county favoring the voting of aid to the road. The people of the county thereafterwards voted on the proposition submitted to them by virtue of the act of the legislature, the whole number of votes cast being 5398,—4119 in favor, and 1279 against granting aid.

The county having thus voted aid to the road, the annual meeting of the company was held June 3, 1891, and a re-organization of the Board of Directors was made at that meeting to protect the interests of the county, J. N. Greene being present, acting under his power of attorney from the complainant, and fully concurring in all the acts done. He acquiesced in all the transactions of the trustees and directors up to the time when this bill was brought.

Still later, on July 17, 1891, the complainant and one R. B. Greene entered into a contract in writing for the construction of the Maine Shore Line Railroad "from the Bar Harbor Branch of the Maine Central Railroad in the town of Hancock, State of Maine, to Calais, Maine, and Eastport, Maine."

The complainant now seeks to have the 2000 shares of stock re-assigned and delivered back to himself, and the instruments purporting to create a trust set aside, cancelled and given up — on the ground, as it is alleged, that J. N. Greene had no authority as agent of the complainant, to make the transfer to these defendants — that the consideration, if any, was a promise of aid in securing from the legislature an extension of time for the construction of the road, and was therefore void as against public policy.

But we do not think the complainant is entitled to equitable relief upon either ground.

The two instruments introduced, bearing date December 29, 1884, and March 3, 1887, respectively, are general powers of attorney from the complainant to J. N. Greene, both under seal and acknowledged, and are sufficiently broad and comprehensive to embrace the transactions between the attorney and these defendants. They confer full and complete power, unlimited, to do any and all things that the principal could do if personally present, and to perform any and all acts in and about his business and property of all kinds, and to do all things and act in his behalf in all matters the same as he would do if present in his own person; giving and granting unto him, his said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as he might or could do if personally present, etc.

It is difficult to imagine a more general, sweeping and comprehensive power of attorney than was conferred by this complainant. There is no special business named by which it can be properly claimed that the transaction in question was outside of the special matter stated. The authorities relied on by the

complainant, when examined, will be found to apply only where some special business or employment was referred to in the general power of attorney, and not to a case like the present where no particular business is mentioned, either expressly or by implication.

It is a familiar principle of law requiring no citation of authority, that an agent acting under general authority binds his principal by any act done within the scope of his employment. There can be no doubt that the power of attorney relates to the business of the Maine Shore Line Railroad. The complainant's bill in express terms recites the fact that the agent was acting under the power of attorney in going to Augusta, to obtain, if possible, from the legislature the passage of a bill to extend the time for the location and construction of the road. He had full and complete power to do whatever was deemed necessary in reference to accomplishing that object. This agent, as the case shows, for many years had acted as the authorized attorney of the complainant in the business of the Maine Shore Line Railroad, and had transferred other stock for the complainant. If by any means it could be said that the agent exceeded his authority, or that the power of attorney was not sufficiently broad to embrace the transaction in question, there is very strong evidence of ratification of his acts by the complainant,—but we do not consider it necessary to discuss that question.

Nor do we discover anything whereby the transactions between the parties should be set aside as being against public policy.

A railroad is of a public nature. Whatever was done, as it appears from a careful examination of the case, by which the building of this road would be promoted, seems more in favor of public policy than against it. The people of Washington county were anxious to have the road built. For years they had acquiesced in the efforts of J. N. Greene until they thought they saw no prospect under his management, and hence the movement by the people of the county for a new charter in order to get a road built. The transfer of a majority of the stock of the old corporation to trustees was for the protec-

tion of the county, and not for the particular interest or benefit of individuals, or those acting as trustees. It was in pursuance of such protection that the county voted the aid asked for, and with the understanding that its interests would be protected by the trustees. There does not appear to have been any improper influence used, or attempted, to influence legislation in relation to the matter. Everything seems to have been done in the interest of the public rather than against it. A petition for a new charter had been presented by the people of the county for the purpose of insuring the building of the road which the public demands required. The whole transaction, viewed in the light of the circumstances attending it, was only an agreement for the withdrawal of this petition and an extension of the old charter to avoid a contest, and upon terms which were in the interest of all parties concerned. The assignment of the stock and the appointment of trustees have been followed by acts which recognize the contract as complete and valid. The county has voted aid as contemplated by the act of the legislature, and this, moreover, with a full understanding that a board of trustees were to protect the interests of the public, without which, undoubtedly, it would not have been done. The court should be very careful in setting aside contracts and agreements which have been acted upon in good faith by others, and where duties and liabilities have been assumed, lest a greater injustice might thereby be done than would result if no interference were had.

Appeal dismissed. Decree dismissing the bill, with single costs for defendants, affirmed.

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

EMERY, J., did not sit.

In Re Oscar Patten, Insolvent.

Sagadahoc. Opinion December 12, 1892.

Insolvency. Trader. Books of Account. R. S., c. 70, § 46.

Where an insolvent debtor purchased a stock of groceries and carried on a small grocery business for about a year, without keeping during that period any account of the money used for his living expenses, having himself and a wife to support, or any account of the money received for such goods as were sold for cash, estimated to amount daily to from four to ten dollars, he has not kept such sufficient or proper books as will entitle him to a discharge by an insolvent court; although all his other financial affairs were readily ascertainable from his papers and books.

On exceptions.

The decree in this court and to which the debtor took exceptions is as follows: "*First*, that the debtor was a merchant or trader; *second*, that his business having begun and closed since statute 1885, c. 326, took effect, he was not required to keep a cash book; *third*, that neither the debtor, nor his book-keeper, nor any creditor could by his books ascertain the condition of his affairs, and that hence he did not keep proper books of account. Decree of Court of Insolvency reversed, and discharge denied.

Wm. Wirt Virgin, Justice S. J. C. Presiding."

The case is stated in the opinion.

Barrett Potter, for objecting creditor.

The requirement of the statute to keep proper books of account is absolute. *Jones* v. *Bank*, 79 Maine, 191. Intent of non-keeping immaterial. Such omission prevents a discharge, whether the intent was fraudulent or not. *In re Newman*, 2 B. R. 302; *In re Jorey & Sons*, *Ib.* 668.

It is not sufficient that a debtor employed a book-keeper whom he considered competent, and left the whole charge of the books to him. The law does not require traders to keep a book-keeper, but to keep books, and they are responsible to see that this is done. *In re Hammond & Coolidge*, 3 B. R. 273.

The law intends that a merchant's or trader's books and documents should be in such a condition as to show his business situation to his creditors as well as himself. By keeping such books

in a proper manner, the trader cannot but be aware of his standing, his property and effects, and of his liabilities, and whether his business is profitable or otherwise. On the other hand, his books should exhibit to his creditors his position so that when placed before them for investigation they may at once ascertain his standing and property and the result of his business, and whether everything has been fair and honest on his part. *In re Gay*, 2 B. R. 358; S. C. 1 Hask. 108; *In re Newman*, 2 B. R. 302; *In re Solomon*, 2 B. R. 285; *In re Keach*, 1 *Lowell*, 335; Bump's Bankruptcy, 705.

This is a most important provision, because it is that which is intended to provide the assignee representing the creditors with the means of tracing out all the dealings of the debtor, to ascertain what has become of his property, what are the causes of his failure, and whether he has dealt fairly and honestly with his creditors. However harshly the law may sometimes operate with some small traders, whose affairs seem hardly worthy of the trouble of recording, it is a most reasonable and salutary rule. Creditors may thus know the condition of a trader's business, and when one has been kept, a discharge will not be refused. *In re Gay*, 2 B. R. 358; S. C. 1 Hask. 108; *In re Littlefield*, 3 B. R. 57 S. C. 1 Lowell, 331.

Persons who buy on credit, and sell again in such wise as to be merchants or tradesmen, must see to it, in order to be in position when misfortune overtakes them to obtain the benefits of the bankrupt act, that they keep such books in relation to their business as will furnish an intelligible account to their creditors of the state and course of their business transactions, not leaving such account to be made up from memory or from sources other than such books. *In re Garrison*, 7 B. R. 287; S. C. 5 Ben. 430; Bump's Bank. 708. The omission of an entire book, or set of entries necessary to the understanding of the business, prevents a discharge. *In re White*, 2 B. R. 590.

Mr. Justice Grier of the U. S. Supreme Court, *In re Solomon*, 2 B. R. 94, commenting on the provisions of the bankrupt act, says: "It is the policy of this clause of the act, that after its passage, every merchant or tradesman should keep such

books of account, considering the business and condition of the debtor, as would enable any competent person to determine from the books the real condition of the debtor's affairs. Could any competent person, from the bank books, checks, and other papers kept, without any cash accounts of the receipts and expenditures, determine the real condition of the debtor's affairs? It seems to me that the question should be answered in the negative."

In re Gay, *supra*, Judge Fox says further: "The debtor kept a journal and ledger in which most of his sales on credit appear, but they do not exhibit, as I understand, his sales when made for cash or barter, nor does there anywhere appear in his book any entry of cash borrowed, or of sums paid, either for goods, or on other accounts." *In re Tolman*, 83 Maine, 353, PETERS, C. J., uses the following language: "The debtor nowhere enters in any book, in a single instance even, any purchase of milk, or money paid or settlements made therefor. This important test of book-keeping fails. He has an account rendered by his brother for milk, but it is not carried upon any book. No one can ascertain from the insolvent's books the condition of his affairs. The law does not heed excuses for not keeping books, it requires them to be kept. Here there was a failure to comply with the law."

Weston Thompson, for debtor.

Statute should be liberally construed (*Opinion of the Justices*, 70 Maine, 569,) and so applied as to do justice and accomplish a great purpose of the insolvent law. Character and magnitude of the business and the known purposes of the law should be consulted. Uses of book-keeping and the common infirmities of men should have consideration. Debtor not required to keep books of account in any other character than that of a trader. What was due him for goods sold appears by charges and credits on his day-books and their groupings on his ledger; what he owed appears by his invoices, receipts, &c., preserved, and which answered the purposes of books. The last national bankruptcy law required "proper books of account," but this was never expounded by the Federal Supreme Court. It was held (*In re Reed*, 12 N. B.

R. 390) that if the book-keeping was in other respects sufficient and the debtor kept all his invoices, he kept proper books of account, though he kept no invoice book. "There is no positive rule of law requiring entries to be made daily or the books to be kept in any particular mode." *In re George & Proctor*, 1 Lowell, 409; *In re Hammond & Coolidge*, 3 B. R. 273; S. C. 1 Lowell, 381; *In re Schumpert*, 8 N. B. R. 415; *Witherell* v. *Swan*, 32 Maine, 247. A single sheet of paper; a bit of paper about two inches square; a shingle; a stick, notched by a nigger "to prove an account running through two or three years and consisting of a large number of items" have all been admitted as books. In *Hooper* v. *Taylor*, 39 Maine, 224, the court, pp. 228, 229, reviewed some of the cases of this kind and said in conclusion, "But these and other cases of a like character clearly show that it is not important what may be the construction or form of the book or material used, if it be capable of perpetuating a record of events and the charges thereon are fairly and honestly made. . . . Such books, thus kept, are competent evidence . . . as books of original entries."

A book of account, competent as evidence to a jury to prove the facts recorded, is a proper book of account. 2 Campb. 25, 27, 28 *n.* 29; 11 East, 244. That the books show no account of goods sold for cash and no account of family expenses seems to be nothing less than a demand for a cash book. That was struck out by Stat. 1885, c. 326, meaning thereby that a cash account should not be indispensable at all times. The complaint seems to be that more books were not kept; not that those kept contained errors.

PETERS, C. J. The insolvent, now in middle life, for many years followed the sea. On July 11, 1890, he purchased a grocery stock and fixtures, paying therefor in cash one thousand dollars. His grocery business was managed principally by a female clerk, who was also the book-keeper, whom he married in November, 1890. He devoted most of his time to business other than that of merchant or trader, but frequently sold goods in the store for cash, although having nothing to do with keeping the books. The business was conducted in this way for seven

months until February 12, 1891, on which day he sold the whole stock on hand and the fixtures for about eleven hundred and fifty dollars, which sum finally came into the hands of his assignee. On March 10, 1891, he filed his petition in insolvency.

The list of assets included five parcels of real estate, three of which were encumbered by mortgages, and debts due on account amounting to $131.95, the whole assets aggregating, with the amount received upon the sale of the stock of goods, the sum of $2179.44.

The schedule of creditors delivered to the messenger showed liabilities aggregating $4490.46, of which sum about $2500.00 consisted of unsecured claims that were either not contracted by the insolvent as a merchant or trader, or that did not come against his estate in the settlement. The insolvent was largely indebted, not however in the business of a trader, before he purchased the stock of groceries. His estate paid a dividend of twenty-five per cent out of the personal assets.

The debtor's book-keeper kept a daybook, and ledger corresponding with the daybook, containing accounts of all goods sold on credit and all payments made therefor. He also had a bank account showing deposits, from July 17, 1890, to February 7, 1891, of about one thousand dollars, and the checks upon which the money was drawn out from the bank were preserved and produced by him. No other formal books were kept. There was no cash book, and no cash account on any of the books. The books showed no account of any goods sold for cash. Such sales were estimated by the debtor as being nine or ten dollars per day, and by his wife as being from four to six dollars. There was no invoice book, but all receipts for purchases of merchandise were preserved. Merchandise was paid for, sometimes by checks and sometimes by cash at the store. The books show no account of the personal expenses of himself and wife or of any persons dependent upon him, and he and she both attribute his failure to the heavy expenses of the business and their living. They both aver their ignorance of his insolvent condition at the date of his selling the stock of goods.

The debtor's discharge was allowed by the court of insolvency, but on appeal was denied by this court below. We think the latter ruling must be sustained, if we adhere to previous adjudications in similar cases in our own State and elsewhere. See *In re Tolman* 82 Maine 353. How could the condition of the debtor's business as a trader be ascertained from any books or written evidence of his transactions, engaged, as he was, in other business at the same time, keeping no account of money coming in for cash sales or going out for every sort of expenses, receiving money, as he was daily doing with one hand and disbursing it with the other without knowledge by himself or his wife of the amounts so received and expended? It was not strange that neither he nor she was aware of his insolvency. How can we declare, as we would be glad to be able to do, that the debtor's business is exhibited upon his books with sufficient definiteness and certainty under the requirements of the law, to allow us to accede to his petition for a discharge?

Exceptions overruled.

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

GEORGE JORDAN *vs.* JOSEPH J. HOPKINS.

Hancock. Opinion December 12, 1892.

Tax. Assessment. Unsworn Assessor.

An action cannot be sustained, by a town collector, for the collection of taxes which were assessed against the defendant by two assessors legally chosen and sworn and another person chosen and sworn as a selectman only. The participation of the latter contaminates the assessment.

ON REPORT.

The facts appear in the opinion.

F. L. Mason, for plaintiff.

Counsel cited: *Cressey* v. *Parks*, 76 Maine, 534; *Patterson* v. *Creighton*, 42 Maine, 367; *Boothbay* v. *Race*, 68 Maine, 351; *Johnson* v. *Goodridge*, 15 Maine, 29; *Bangor* v. *Lacey*, 21 Maine, 472; *Foxcroft* v. *Nevins*, 4 Maine, 75; *Williamsburg* v. *Lord*, 51 Maine, 599; *Machiasport* v. *Small*, 77 Maine, 113; *Lowe* v. *Weld*, 52 Maine, 588.

Wiswell and King, for defendant.

PETERS, C. J. The report of the evidence in this action, brought in the name of the collector of the town of Otis to recover certain taxes assessed in 1886 against the defendants, establishes the following facts: At the annual town meeting of Otis in March, 1886, Willard D. Fogg, Frank W. Fogg, and Benjamin Jordan were chosen selectmen. Thereupon it was voted that the selectmen be also assessors and overseers of the poor. The clerk's record declares in general terms that all the officers chosen at the meeting were sworn. By oral evidence it is proved that the manner of swearing in the officers was that they stood together before the town clerk who administered the oath as follows: "You, gentlemen, having been chosen in as officers of this town, you solemnly swear that you will perform all the duties required in your special offices to the best of your ability and judgment and according to the law, so help you God."

At some time after this, Benjamin Jordan resigned his offices on account of his removal from town, and, at a town meeting holden on April 27, 1886, John G. Remick was chosen selectman in his place, and he was, on April 30th, sworn as a selectman only. At this meeting no one was by any vote chosen assessor. The assessment made by the assessors, the commitment and record are signed by the two Foggs alone, but the warrant to the collector is signed by them and also by Remick, the newly elected selectman. All the papers exhibited in evidence of the assessment bear the date of May 12, 1886.

It is admitted that Remick, who was not sworn as assessor, could not legally act in that capacity, and it is so settled by the case of *Dresden* v. *Goud*, 75 Maine, 298. But the plaintiff contends that, although Remick was not sworn as an assessor, the original board were legally sworn as assessors, and that two of such board could legally assess the taxes. The plaintiff further argues that the case of *Williamsburg* v. *Lord*, 51 Maine, 599, does not militate against this position, because that was a case of an alleged forfeiture, and that the other case, relied on by the defendants, (*Machiasport* v. *Small*, 77 Maine, 109,) does not

overrule his position, because the claim there was also a claim of forfeiture or a claim of that nature.

Those may be interesting questions, but we need not pass upon them now, inasmuch as we feel constrained to decide that the assessment was vitiated by the illegal participation of the unsworn assessor in making the same. Remick was chosen and pretendedly qualified in April, and the assessment was not finished until about two weeks afterwards. What part he acted as an assessor, more than signing the warrant as such, does not distinctly appear, but his associate Fogg testifies that the original three assessors worked together until the other was chosen, and the strongest presumption arises that the new board acted together after that time. So that the facts of the present case are more conclusive against the validity of the tax than were the facts exhibited in the cases cited.

Plaintiff nonsuit.

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

JOHN T. OLIVER *vs.* JAMES BAILEY, and another.

Sagadahoc. Opinion December 13, 1892.

Waters. Fish. Winnegance Creek. R. S., c. 40, § § 17, 22, 23, 68; Stat. 1885, c. 463.

The construction and maintenance of a dam across a tidal stream, under legislative authority does not exempt the stream from the general statute for the protection of fisheries.

Winnegance Creek in Sagadahoc County is still subject to the general statute.

AGREED STATEMENT.

Trespass for seizing and carrying away a bass net. From the agreed statement it appears that on the 24th day of February, 1892, the defendants then being duly appointed and qualified Fish and Game Wardens, took from the waters of Winnegance Creek, south of a bridge there, a bass net, then and there set by the plaintiff for the purpose of catching bass, and being the plaintiff's property; that the wardens had given notice to the fishermen that a bass net could not be set across the channel,

and that said plaintiff had knowledge of this opinion of the wardens; that the net in all respects conformed to the provisions of the statutes, and especially to the provisions of the special act passed in 1885, regulating the catching of bass in Winnegance Creek; that the waters in the channel of said creek would not flow out to an extent that would leave less than three feet of water in said channel. In addition to the tide, there is a natural flow of water toward the Kennebec river; that said net, when set, was fastened at both ends and was stationary as so fastened; that prior to 1837, Winnegance Creek was an inlet of the Kennebec river; that in that year, under the charter granted in 1835, the dam was erected across said creek and northeast of the public highway, extending from the Bath to to the Phippsburg shore; that saw mills on the dam were erected, gates constructed for the purpose of sawing lumber; and that the dam so erected and the mills so constructed thereon, had for their purpose the utilization of water to be held in the creek above said dam by the operation of said gates.

It was also agreed that since said date, at different times as business might warrant, the several mills upon said dam have been in operation; that the owners of said mills each have above the same and between the dam and the highway, booming privileges, in which to place their logs, and that the same were set off and allotted to the several owners of the mills on said dam, wherein each might place and hold his logs for use; that the flood gates in said dam are eighteen feet wide, would admit scows, lighters, and row boats, and that such had at times passed through said gates, and under said highway; that at a certain time of tide, mastless scows, skiffs and boats can pass under said highway, provided the owners of the booming privileges leave an opening so to do; and that there has been place left by the owners of said booming privileges, for craft of the kind and type designated, to pass up said creek.

It was also agreed that the bridge connecting the city of Bath and the town of Phippsburg has been maintained by both for many years; that said bridge is built legally of cob-work spiling, and across the channel are stringers, affording a space

under said bridge from thirty to forty feet long, that gundalos may pass through, up and down; that some forty years ago a schooner was built and launched in the creek and taken out to the Kennebec river, by removing a portion of the dam sufficient to give passage to said schooner from the creek into the river; that the lighters mentioned, carrying boards and wood of some kind, have occasionally passed through the gates, and under the bridge; and that the mill owners, when the tide had reached its flood, have all the gates so constructed that at the beginning of slack water, they close, and the water is held for the purpose of running the mills constructed on said dam.

Wm. E. Hogan, for plaintiff.

Sections 17 and 23, of c. 40, R. S., apply to a different class of cases entirely, to the catching of a different kind of fish, and in different waters, and the words "said waters" in section twenty-three can only refer to the waters named in section seventeen; and these sections taken together, must of necessity apply, not only to waters in which the fish named would be found, but to waters where navigation by the public might be obstructed and impeded. The words "low water" in § 68, relate to natural low water, and not low water that might come by artificial means, for the owners of the dam would have the power to retain the water in this creek for hours after the waters in the Kennebec river in the course of nature had reached low tide; and the same would apply to the whole part of said section, for in this creek the flow of the tide can be regulated by the owner as well as the ebb. In construing this section, the court will consider that its purpose was that there should be no obstruction of the channel of navigable waters that impeded or interfered with the public right of passage and use; and there is no public right to pass or use this creek except by consent or permission; and as the fish there caught are not the fish contemplated, and the place where caught is not the kind of place found in any of the statutes relied upon. As the special act of 1885 makes no mention of any method of fishing, plaintiff contends that he was lawfully there, lawfully fishing, and in a lawful manner; and the court should not lose sight of the fact that when the mill owners in

the pursuit of their occupation have run the waters off, there is but a small, narrow thread of water in this creek, and that all the waters during the open season where the fishing takes place are frozen over.

J. M. Trott, for defendants.

Navigability of creek not destroyed by act of the legislature. *Charlestown* v. *Middlesex Co. Com.* 3 Met. 202.

EMERY, J. The plaintiff for the purpose of capturing bass, set a stationary fish net across the channel of Winnegance creek in Sagadahoc county, at a place where there was more than two feet depth of water at ordinary low water.

This act of the plaintiff was in violation of the letter of the last clause of § 23, of c. 40, R. S., (the chapter on Fish and Fisheries) which clause provides that no person "shall set any net crosswise of said waters, but only lengthwise," &c. The phrase "said waters" refers to those waters named in the preceding 17th section of the same chapter, which clearly include Winnegance creek.

This act of the plaintiff was also in violation of the letter of § 68, of the same chapter, which section provides, that "No weir, hedge, set-net, or any other contrivance for the capture of fish, which is stationary while in use, shall extend into more than two feet depth of water at ordinary low water." . . .

The plaintiff contends that both the sections cited were intended only for the protection of salt water fish, or fish that migrate between salt and fresh water, and that the waters named in those sections are tidal waters only. Still the fish he intended to capture by his net, were fish of tidal waters, as defined in § 22, of the same chapter, and the tide ebbed and flowed past the place where he set his net for such capture.

It appears however that in 1835, the Legislature authorized the construction of a dam wholly across Winnegance creek below the place where the net was set, and that in 1837 such a dam was built and has since been maintained. Mills have been built and operated on this dam, and the mill owners have

used the space above for booming their logs. There were and are flood-gates in the dam, which permit the flow of the tide, and there has been some unfrequent, intermittent, and limited navigation by means of boats and skiffs through and above the dam though general navigation above the dam has ceased.

The plaintiff contends that these acts under the authority of the Legislature, have separated Winnegance creek above the dam from the general body of the tidal waters of the State, and taken it out of the above cited statutes for the protection of migratory fish. The legislature in its act authorizing the dam did not express any intent to exempt any part of Winnegance creek from the operation of the general statute relating to Fisheries. No words of exemption can be found in the act of 1835. We do not see how any exemption can be implied. Bass still migrate up and down this creek above the dam. Other migratory fish may do the same.

The statutory protection of these fish is as important now as before the erection of the dam.

The plaintiff further contends that the special act, chap. 463, laws of 1885, entitled "An act for the protection of bass in Winnegance creek," impliedly repeals all other prohibitions than those named therein. He must admit there are no words of repeal. The special act simply imposes a few additional restrictions. The inference is that the restrictions imposed by the general statute were found insufficient for the protection of fish in this particular creek, and that the special statute was enacted to supply the deficiency. The restrictions of the general statute are as necessary as ever. We think the special act supplements and strengthens the general statute instead of repealing it.

The question submitted being determined against the plaintiff, there must be, according to the stipulation of counsel,

Judgment for defendants.

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

SUMNER SOULE *vs.* KENNEBEC MAINE ICE COMPANY, and TRUSTEES.

Kennebec. Opinion December 13, 1892.

Trustee. Set-off. Disclosure. R. S., c. 82, § § 58, 130.

A trustee who owes the principal defendant cannot deduct from the funds in his hands an account which another person has assigned to him against the principal defendant, unless after such assignment the principal defendant has agreed to pay the account to him.

It is a matter within the discretion of the presiding judge whether a trustee may be permitted to make an additional disclosure after he has once completed and filed a disclosure, and to the judge's decision of such question exceptions do not lie.

ON EXCEPTIONS.

The case is stated in the opinion.

A. M. Spear, for plaintiff.

L. T. Carleton, for trustees.

PETERS, C. J. The Kennebec Maine Ice Company are the principal defendants in this suit, and D. E. Marston and others, constituting a co-partnership called the Monmouth Ice Company, are the alleged trustees. The trustees admit an indebtedness to the defendants, but claim the right to deduct therefrom, by way of set-off, a debt which D. E. Marston had against the defendants, which debt Marston sold and assigned to them. Marston is a director and stockholder in the Kennebec Maine company and treasurer of the Monmouth company. He says in his disclosure, disclosing for the last named company, that he notified the president of the Kennebec Maine company that he had assigned his claim against them to the Monmouth company. But that is not enough to entitle the trustees to deduct the amount of such assigned debt from the funds in their hands. There must be an agreement of the defendant company to pay the assigned claim to the assignees,—the alleged trustees,—and there is no evidence of any such agreement.

The rights of the parties cannot be different from what they would be if the litigation were a suit by the Kennebec company against the Monmouth company to collect the account due the

former from the latter. The latter could not file in offset a claim which it had purchased against the former, unless the former had before the date of the suit received notice of the assignment, and had agreed to pay it to the assignee. R. S., c. 82, § 58; *Stevens* v. *Lunt*, 19 Maine, 70.

Then the question arises whether this position is changed by the provision of the statute which allows an assignee of an account to sue for the recovery of the same in his own name. R. S., c. 82, § 130. Our opinion is that no such change was effected or intended. The statute referred to is an innovation on the common law of questionable expediency, and should not be extended by implication. Nor are the conditions annexed to the right under such statute fitting to the present case.

After the trustee had made one disclosure he was permitted to disclose again. After that he submitted a motion to be allowed to make still another disclosure, and the motion was denied. There was no suggestion of any newly-discovered facts or of any accidental omissions. There can be no doubt that it was a matter within the discretion of the presiding judge to refuse the rather extraordinary privilege asked for.

Exceptions overruled.

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

SAMUEL M. DAVIS, ADMINISTRATOR, Appellant,

vs.

GEORGE W. GOWER, GUARDIAN.

Somerset. Opinion December 13, 1892.

Probate. Allowance to children. R. S., c. 65, §§ 21, 25.

A judge of probate, after making an allowance to a widow out of her husband's estate for herself and his minor children by a previous wife, cannot afterwards decree an additional allowance to such children for the reason that the widow abandoned them without their receiving the benefit of any of the funds in her hands.

AGREED STATEMENT.

This was an appeal from the decree of a judge of probate for Somerset county. The parties stated their case as follows:

Asa Washburn late of Hartland, Maine, died, leaving a widow, and two minor children by a deceased former wife, the oldest child, Jossie Washburn, being eleven years old, the youngest child, Fred Washburn, being eight years old. The widow presented a petition for an allowance, stating therein that the said Jossie and Fred Washburn were dependent upon her for support. She obtained an allowance of $145.20, in household goods and furniture; and $60.00 in money. At the time of said allowance said children were not represented, no guardian having been appointed up to that time. She abandoned said children and has never furnished them any support.

Afterward a guardian was appointed, who presented a petition asking the judge to decree to said children the sum of $600.00, the same being all the assets then in the hands of the administrator. The prayer in said petition was granted. The estate is insolvent and so represented and declared by said court; and if this allowance is not sustained, will pay only about thirty cents on the dollar, and the children will be left destitute, and if sustained the creditors will receive nothing.

The validity of the allowance to the children is the only question intended to be presented to the law court.

The administrator contended as a matter of law that an allowance having already been made on the petition of the widow, a second allowance on the petition of the guardian of the children is unauthorized and illegal.

D. E. Thompson, for Administrator.

George W. Gower, Guardian, *pro se*.

PETERS, C. J. The facts agreed in this case show that a widow obtained upon her petition an allowance out of her husband's estate for herself and minor children. The judge of probate received no information from any source of the fact that the minors were the children of the husband by a former wife. The widow, after obtaining the allowance, abandoned the children, leaving them without any means of support. Thereupon a guardian was appointed for the minors, they being under fourteen years of age, and he petitioned for and obtained another allowance for such minors.

The question presented is whether the judge had jurisdiction that would authorize him to make the second decree. We think not. He cannot make, excepting as hereafter named, but one decree of allowance. He can divide that allowance, if he pleases, between widow and minor children such as these, but is not compelled to do so. R. S., c. 65, § 25. The discretion is to divide, not to duplicate. The only authority which a judge of probate has to make any second or additional allowance is when there are newly-discovered assets, or when the estate, considered to be insolvent at the time a decree of allowance is made, turns out afterwards to be solvent. R. S., c. 65, § 21. A decree of allowance, after it has been acted upon and executed, cannot be changed for the purpose of reducing the amount allowed. *Pettee* v. *Wilmarth*, 5 Allen, 144. Nor can it be changed in order to increase it. Nor can there be a second decree while the first stands, excepting in such instances as are above indicated.

Decree below reversed.

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

STATE *vs.* EDWARD LIBBY.

Kennebec. Opinion December 14, 1892.

Practice. Criminal Law. Complaint. Trial. R. S., c. 134, § 24.

In an appealed case the court can allow and receive a new and correct copy of the complaint at any time before the case is given to the jury.

Upon the discovery of the error in the copy of the complaint in such case, after the trial is begun, the court has the discretion to suspend the trial, to be resumed upon the correction of the error, or to stop the trial and begin it again after such correction.

ON EXCEPTIONS.

This was an appeal from the Municipal Court of the City of Waterville to the Superior Court, for Kennebec County, on a search and seizure process for the illegal keeping, &c., of intoxicating liquors.

The trial in the Superior Court was commenced the twenty-first day of the term, when the clerk made the announcement

usually made to the respondent before trial. A jury was then sworn, and the clerk commenced the reading of what purported to be a copy of the complaint, but before finishing the reading it was discovered that no offense was charged in the copy as it then stood; the case was then suspended until the twenty-second day of the term, when the County Attorney suggested a diminution of the record and upon his motion, the court ordered that the copy of complaint be amended in accordance with the fact and such amendment was made by inserting the words, "intoxicating liquors were kept and deposited by," before the name of the respondent in said complaint. A jury was then regularly empanneled and sworn, consisting of the same jurymen as first sworn in the case; the complaint as amended was read to them and the respondent put upon trial, the case tried and a verdict of guilty rendered.

To the allowance of the amendment and the empanneling of the jury, after the amendment was allowed, the respondent seasonably objected and to the rulings of the presiding justice allowing the same, he excepted.

The defendant, after verdict and before judgment moved that the judgment be arrested, for the reason that no offense in the complaint in said action is alleged, in that there is no allegation in said complaint that said intoxicating liquors were kept and deposited at any place in this State by any person or by any persons unknown.

This motion was overruled by the court and the defendant excepted.

C. E. Littlefield, Attorney General, and *L. T. Carleton*, County Attorney, for the State.

W. T. Haines, for defendant.

No offense was charged in the complaint as first read and before it was amended. *State* v. *Dodge*, 78 Maine, 439. Defendant should have been discharged by order of court, or at least the amendment should have then been made, and the trial proceeded before the jury, before whom he had been placed for trial; the fact that the second jury happened to be the same

men as the first, cannot affect the principle involved. If this was correct procedure it would have been just as correct if the jury had been of different individuals from the first jury. Section 74 of chapter 82 of R. S., provides for the empanneling of a jury in all cases except capital cases, and says in closing that "After the panel is thus completed the presiding justice shall appoint a foreman for the trial of the case."

This was done in the case at bar. There is no provision in the statute for the empanneling of a jury a second time, or of the selecting of a second jury in the same case.

That the case could have been adjourned from day to day in order to correct the record, if ordered by the Court is not denied, but that the trial can be closed, and commenced again, for such a purpose, before a new jury, is denied. Sickness and disqualification of a juryman, or of the defendant, make a necessity often that can only be met with a postponement of the case, and another trial may properly be begun and gone through with; but no such necessity is shown in the case at bar.

Counsel also cited: 2 Black. Com. 360; Whar. Crim. Law, § § 590, 3168; *The People* v. *Barrett and Ward*, 2 Caines, 304 (2 Am. Dec. 239); *People* v. *Alcott*, 2 Johns. Cases.

EMERY, J. The defendant and appellant made several objections to the proceedings and rulings of the appellate court upon the trial of his appeal.

1. He objected to the amendment of the imperfect copy of the complaint and process making it a true copy. The amendment was clearly allowable. The court was entitled to a correct copy, and could receive it at any time before the case was given to the jury. *Com.* v. *Phillips*, 11 Pick. 29; *Com.* v. *Magoun*, 14 Gray, 398.

2. He also objected to the empanneling of the jury anew after the new and correct copy of the complaint was obtained. Upon the discovery of the error in the copy after the trial was thus begun, it was within the discretion of the court to suspend the trial to be resumed after the correction of the error, or to stop the trial and begin it again after such correction. *Com.* v. *Kelly*, 12 Gray, 123; R. S., c. 134, § 24.

The copy of the complaint upon which the jury was first empanneled did not disclose any offense, nor did the defendant upon the second empanneling interpose any plea of former jeopardy. *Com.* v. *Chesley*, 107 Mass. 223.

3. The defendant moved in arrest of judgment upon the ground that the first copy charged no offense. The judgment, however, will be upon the second and true copy which does charge the offense.

Exceptions overruled. Judgment for the State.

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

JEROME F. MANNING *vs.* CHARLES C. PERKINS.

York. Opinion December 14, 1892.

Attorney. Champerty. Collection of Alabama claims.

An agreement is not champertous which provides that an attorney shall for a certain share of the sum recoverable prosecute the claim of his client for a portion of the award received by the United States from Great Britain on account of depredations committed on American shipping by rebel cruisers, although the agreement was entered into before the Court of Commissioners of Alabama claims was created by Congress, and the agreement stipulates that the attorney's services shall be rendered in prosecution of the claim before any of the courts of the United States and before any officer or commission or convention that might be specially organized to take cognizance of such claims.

ON EXCEPTIONS.

The following is the plaintiff's declaration to which the defendant demurred:

"In a plea of covenant broken, for that the said defendant at said Kennebunkport on the twenty-sixth day of December, A. D., 1876, by his certain writing, by him signed and sealed with his seal, and here in court to be produced, bearing date the same day, in consideration that the said plantiff agreed to take exclusive charge and control of a certain claim which the said defendant then and there held against the Government of the United States for insurance premiums paid for war risks on the ship "Addison" and the charters and freight of said vessel from October 24, 1862, to January 2, 1865, both inclusive as

per schedules hereto, . . . amounting to eight thousand six hundred eighty-three and fifty one-hundreths dollars, more or less, and to prosecute the same before any of the courts of the United States, and upon appeal to the Supreme court of the United States, or before any departments of the Government, or before the Congress of the United States, and before any officer or commission or convention specially authorized to take cognizance of said claim, or through any diplomatic negotiations as may be deemed by him best for the interest of said defendant, covenanted that he would pay the said plaintiff a sum equal to twelve and one half per cent of the amount which might be allowed on said claim.

"And the plaintiff avers that heretofore, to wit, on the twenty-sixth day of December, A. D., 1876, at said Kennebunkport he did take exclusive charge and control of said claim, and that heretofore, to wit, on the first day of January, A. D., 1877, at Washington in the District of Columbia and at divers other times and places he did prosecute said claim before the Congress of the United States and before the Court of Commissioners of Alabama Claims, and before all other officers, commissions and conventions authorized to take cognizance of said claim, as was by him deemed best for the interests of said defendant, whereby said Court of Commissioners at Washington aforesaid heretofore, to wit, on the 15th day of January, A. D., 1884, allowed upon said claim the sum of, to wit, four thousand and ninety-four dollars and twenty-three cents, (of which said sum the defendant has received the sum of one thousand four hundred and forty dollars and seventeen cents,) whereby said plaintiff ought to recover the sum of five hundred and one dollars and forty-two cents being twelve and one half per cent of said sum $4094.23.

And the plaintiff avers that heretofore, to wit, on the fifteenth day of January, A. D., 1884, he duly demanded payment of said sum of said defendant," &c.

The demurrer was overruled and the defendant excepted.

J. F. Manning, pro se.

Fairfield and Moore, for defendant.

Champerty: *Lathrop* v. *Amherst Bank*, 9 Met. 489; *Lancy* v. *Havender*, 146 Mass. 615; *Belding* v. *Smythe*, 138 Mass. 530; *Williams* v. *Fowle*, 132 Mass. 385; *Thurston* v. *Percival*, 1 Pick. 415. In *Manning* v. *Sprague*, 148 Mass. 18, the Court say that by the contract made before the act of Congress, no suit was to be brought. Here a suit is contemplated. No contract for a suit in any of the cases relied on by plaintiff.

It is against public policy that a contract to prosecute a claim before Congress, or before any legislative body, for a share thereof should be sustained. *Coquillard* v. *Bearss*, 21 Ind. 479; *Trist* v. *Child*, 21 Wall. 441; *Weed* v. *Black*, 2 MacArthur, 268.

PETERS, C. J. The agreement set out in the declaration, demurred to by the defendant, is not champertous. It requires no suit in law or equity to be prosecuted as a litigation. There was no party to be sued. The United States may be petitioned, but not sued. There was really no defendant to oppose any claim. There was not even a court before which to prosecute claims. The Alabama Claims Commission was not a common law court in any sense.

The policy of the rule which inhibits champertous contracts does not apply to the present contract. Contracts of this kind do not have any tendency to foment litigation, or to encourage unjust claims against the government. The United States held the amount of the award received from the British government as a trustee for its owners, and not only did not oppose any rightful claim, but invited owners to present their claims, in order to be able to make a proper distribution of such fund. But no judgment against the United States government could be enforced without its assent.

These views are in accordance with decisions in late cases in other courts, where the question has been on principle and authority much elaborated. The case of *Manning* v. *Sprague*, 148 Mass. 18, covers all the ground.

It is contended, however, that the contract in the Massachu-

setts case differs from the present one, because that contract was entered into after the act of Congress was passed constituting the Alabama Claims Court, and required a prosecution of the claim before that tribunal, whilst this contract was consummated before the creation of that tribunal. This criticism is founded on a clause of the contract in this case which provides that the plaintiff shall prosecute the defendant's claim "before any of the courts of the United States, and, upon appeal to the United States Supreme Court, before that court, and before any officer or commission or convention specially organized to take cognizance of said claim," &c., &c. We do not appreciate any difference whether the contract preceded or followed the act of Congress establishing the court or commission. The claim was to be prosecuted before any tribunal, already created or to be created, which might have jurisdiction of such claim. In no interpretation of the contract, could it be said that any suit, strictly involving litigation, was expected. *Bachman* v. *Lawson*, 109 U. S. 659.

Demurrer overruled.

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

PROPRIETORS OF MAINE WHARF, in equity,

vs.

PROPRIETORS OF CUSTOM HOUSE WHARF.

Cumberland. Opinion December 14, 1892.

Waters. Adjoining proprietors. Judgment. Injunction. Damages.

Where a divisional line between adjoining riparian proprietors has been settled in a suit at law so far as the line runs from high to low water mark, the record of that suit is at least a *prima facie* settlement by law of the relative rights of property which the same parties possess beyond low water mark in deep water.

Equity will restrain by injunction one riparian proprietor from maintaining a narrow strip of his wharf in deep water below low water line in front of another proprietor's wharf, when the nuisance is permanent and the injuries caused by it, though small, are frequent and annoying, not easily measurable or adequately compensated for by actions of law.

IN EQUITY.

This was an appeal from a final decree in equity rendered by the court below, in favor of the complainant, where there was a hearing upon the bill and defendant's demurrer.

The case made by the bill and admitted by the demurrer, shows that plaintiff and defendant are adjoining owners of land and flats in Portland, on tide waters, the land of plaintiff being easterly of that of the defendant; that the line between them is established and undisputed, and is known as the Robinson line; that each has a wharf upon its own land extending into the harbor to the harbor commissioners' line in deep water; that complainant, and its predecessors in title, have enjoyed without interruption for more than thirty years unimpeded egress and ingress to and from its land and flats for the whole width of the same, to and from the deep waters of the harbor at the harbor commissioners' line;

That in the year 1889 the defendant, by their president, Peleg Barker, built another wharf from the shore to a point about fifty feet below low water mark, into and towards the deep water of the harbor; that said wharf extended over and upon plaintiff's land about two feet for its whole length, being about fifty feet to low water mark and about fifty feet beyond low water mark;

That John F. Randall, who was then the owner of the land and flats now owned by complainants, brought an action against said Peleg Barker, who in fact built said wharf for said defendant and as its president, and recovered judgment in said action for the encroachment of said defendant's wharf from the shore to low water mark;

That, thereafterwards, said defendant cut off and removed so much of said wharf as was upon said Randall's, now complainants', land from the shore to or near low water mark; but the said defendant has ever since maintained all that part of said wharf below low water mark, which extends easterly over the westerly line of said complainants', extended from low water mark to the harbor commissioners' line; and thereby the plaintiff is impeded and obstructed in the use and enjoyment of their said land, flats and wharf; and complainants pray that said obstruct-

ion below low water mark, which extends easterly over the westerly line of complainants may be removed;

Complainants claimed that the obstruction is not only a public nuisance, but occasions special and peculiar damage to the plaintiff in the use of its property other and different from the public injury.

Strout, Gage and Strout, for plaintiff.

Symonds, Snow and Cook, for defendant.

A court of equity will not undertake to decide whether a nuisance in fact exists, but will require the plaintiff to fully establish his rights at law.

"When the thing already exists, it should be decided in a trial at law to be a nuisance before chancery interferes to abate it." *Porter* v. *Witham*, 17 Maine, 292; *Varney* v. *Pope*, 60 Maine, 192; *Eastman* v. *Amoskeag Manf'g Co.* 47 N. H. 71.

An injunction will not be granted under the general equity powers of the court, to restrain a nuisance, unless the complainant's rights have been settled in a suit at law, or long enjoyed without interruption, or unless there is imminent danger that the threatened injury will result in irreparable damage. *Porter* v. *Witham*, 17 Maine, 292; *Jordan* v. *Woodward*, 38 Maine, 423; *Morse* v. *Machias Water, &c., Co.* 42 Maine, 119; *Manufacturing Co.* v. *Warren*, 77 Maine, 437.

There is no averment in the bill that the rights of the parties below low water mark have ever been determined in a suit at law, or that they have hitherto been directly in issue in any legal process; or that the line between the land and flats of the complainant, and the land and flats of the respondent has ever been fixed below low water mark, either by an action at law; or by long enjoyment without interruption; or that the danger is imminent.

Legal remedy: *Haskell* v. *Thurston*, 80 Maine, 129; *Paper Co.* v. *Manf'g Co.* 74 Maine, 116; R. S., c. 17, § § 12, 13, 16.

PETERS, C. J. The complainants and respondents are coterminous proprietors of upland and adjacent flats in the harbor

of the city of Portland, having wharves on their respective properties. The respondents, in extending the structures on their premises towards the sea, built a wharf over the line between themselves and their neighbors about two feet upon the latter's land. A litigation ensued between the parties over the true location of the divisional line between them which settled the question in favor of the complainants. Thereupon the respondents removed so much of their wharf as was built upon the complainants' land, the removal not however extending seaward below low water line. The result therefore is that the respondents now maintain their wharf upon the true line as far outward from the upland as low water mark, and from that point outward into deep water they still maintain their wharf for a space of two feet in width in front of complainants' land. Of this obstacle in front of the complainants' property they complain, and ask that the respondents be compelled to remove the same. Upon these facts and other facts stated in the bill, we think the prayer of the bill should be granted.

The respondents urge objections to the complainants' claim.

First: That a remedy at law should be first resorted to. This proposition is, that a court of equity will not undertake to restrain or remove an alleged nuisance until a court of law has first established the existence of the nuisance; excepting where an immediate and irreparable injury be threatened, or the complainants are deprived of the use of property long enjoyed by them without question or interruption. The answer to this objection is, that the right of the complainants has been substantially and sufficiently settled by the law. To be sure, the legal controversy was commenced by an action of trespass in which the allegation was that the respondents had encroached upon the land of the complainants (or their predecessors in title) by an erection thereon extending from high to low water mark. But when the court settled the rights of the parties, so far as pertaining to land or flats above low water mark, it settled their relative rights with each other beyond low water mark. The one case settles the other. It is really but one controversy, nothing appearing to indicate the contrary. The presumption

is that an owner of land fronting on the sea has, as such owner, the right of egress and ingress from and to his land over deep water for the whole width of such frontage. The bill asserts such a legal right of the complainants and the demurrer confesses it.

Another objection against the bill is that it discloses facts from which it is clearly perceivable that the complainants have a complete and adequate remedy at law for all supposable injury suffered by them. That is not so. Frequent annoyances may be occasioned by the encroachment which would be remediless at law. The injuries may be small, but would be many, and not easily measurable in damages. And the disfiguration caused by the overlapping structure, if allowed to remain, would be a blemish upon complainants' property. Furthermore, the complainants desire to have their premises clear of all unauthorized occupation or obstruction and are entitled to have them so.

Equity will restrain the continuance of a nuisance by injunction whenever substantial damages might be recovered at law, or when the nuisance is permanent, however small the damages. *Crump* v. *Lambert*, L. R. 3 Eq. 409; *Atty. Genl.* v. *Sheffield Gas Co.* 3 DeG. M. & G. 304. And see cases cited in note in last case. *Demurrer overruled.*

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

CAMDEN AND ROCKLAND WATER COMPANY

vs.

GILMAN B. INGRAHAM.

Knox. Opinion December 14, 1892.

Eminent Domain. Water Company. Parties. New Trial. Practice.

On a petition to assess the damages for land taken for public purposes it is not necessary to join a mortgagee of the land as a party to the proceedings, if the mortgagee files in the case a release of his right seasonably enough to protect the land-takers from liability to pay the damages or any part of them twice.

Where a request is made for an instruction to the jury that the burden lies upon a person claiming damages to prove the amount of damages sustained by him, and the judge merely through inadvertence omits to give the

instruction, a new trial will not be granted unless it is seen that some injury has been suffered by the requesting party by the omission.

ON EXCEPTIONS.

This was an appeal from an award of the County Commissioners of Knox County assessing damages at $500.00 in favor of Gilman B. Ingraham, for the taking of the waters of Oyster River Pond to the amount of 750,000 gallons daily by the complainant corporation. The injury claimed by Ingraham was the diversion of the water from the outlet of the pond which ran through, and as it was claimed by Ingraham, furnished the only supply of living water to a pasture owned by him and a part of and connected with his farm. It was admitted that the farm and pasture were the property of said Ingraham, subject to an outstanding mortgage to the Camden Savings Bank, for the sum of $1400. The presiding justice upon this branch of the case instructed the jury as follows:

"His title is admitted, except that the defendants deny that he has a right to recover in this action because of a mortgage upon the same to the Camden Savings Bank, and they request me to rule to you that he cannot recover in this action. I decline to so rule, because the Camden Savings Bank has filed a paper here which, in my judgment for the present, allows Mr. Ingraham to prosecute this suit and will bind the Camden Savings Bank to abide any judgment or any amount of damages which you may assess. So, then, you will determine the case as though there were no mortgage upon Mr. Ingraham's property."

The outlet of Oyster River Pond, the Oyster River Stream, runs through the pasture of said Ingraham and does not touch any other part of his farm.

The pasture is from one half to three-fourths of a mile from Oyster River Pond with a descending grade nearly all of the way.

The complainant corporation contended that, on account of the watershed below the pond and springs along the line of the outlet of the pond, for the purpose of watering cattle, there was as much water flowing in said outlet during the dry seasons of the year as there was before the taking during equally dry

seasons, and that as an element of irrigation said outlet was of no appreciable value to said pasture or farm. The complainant corporation requested the presiding justice to instruct the jury as follows:

"Complainant Ingraham is not entitled to recover any damages unless he has satisfied you by a preponderance of the evidence that the taking of the water of Oyster River Pond by the Camden and Rockland Water Company has diminished the flow of water through his pasture.

"The burden is upon complainant Ingraham to satisfy you of the amount of water that ran in the Oyster River Brook before the taking by the water company and that the amount flowing there since the taking is perceptibly less than before, so as to injure the complainant's pasture for pasturage purposes, and the amount of such injury, if any.

"If the taking of the water by the Camden and Rockland Water Company has not resulted in the practical diminution of the flow of water through the complainant Ingraham's pasture, then the complainant is only entitled to nominal damages.

"The damages sustained by the complainant Ingraham are the amount that the pasture through which the brook runs, situated as it is, connected with the farm of said Ingraham, is worth less after the taking by the company than it was before, with interest from the time of taking.

"The difference between the fair market value of the pasture situated as it was, connected with and a part of the farm of said Ingraham, before the taking by the water company, and its fair market value situated and connected as aforesaid after the taking, with interest on the same from the date of taking, is the measure of damages which said Ingraham is entitled to recover."

All of which instructions he declined to give except as they were given in the charge.

The presiding justice instructed the jury as follows, on the question of damages:

"Now, gentlemen, this plaintiff is the owner of a farm, consisting of tillage and pasture, a homestead upon which he lives. It had the benefit and advantage of Oyster Brook run-

ning through the pasture. That pasture, according to the evidence, is suited for and is used by him for grazing, as a part of his farm, enabling him to thereby support his cattle in summer by grazing that he sustained in winter by the hay which he cuts upon his tillage land. I say to you that the farm you are to treat as a whole. If the plaintiff has suffered damages by reason of the taking of this water, in the whole of that farm, you are to compensate him; and you are to do no more than that. How much more is this farm worth with this water than it is without it? What is the difference, if you choose to put it that way, in the market value of the farm before this water was taken and after it was taken? Or, as the counsel for the defendant has very fairly put it to his witnesses, what is the difference in the value of the pasture as a part of the farm and in connection with the farm before and after."

The presiding justice also gave other and full instructions upon the question of damages which were not excepted to.

The jury returned a verdict for $425.00 with interest $108.38, in all amounting to $533.38, and the complainant corporation excepted.

C. E. and A. S. Littlefield, for Water Company.

Mortgagee is a necessary party. *Wilson* v. *Railway*, 67 Maine, 360; Jones on Mortgages, § 681, and cases in note a. We are "to pay all damages that shall be sustained by any persons." Cases holding contrary doctrine are those where the fee does not pass to mortgagee. Held to be proper party in flowage case. *Wright* v. *Packer*, 114 Mass. 475.

If after the taking, the value of the pasture was depreciated, for instance the sum of $500, to that extent the Camden Savings Bank would be a party sustaining damage. To such parties the company is made expressly liable by the provisions of its charter. This eliminates the element of technical ownership upon which the other cases turn, for the company in accordance with *Wilson* v. *E. & N. A. Railway* must see, at its peril, that the mortgagee is paid or satisfied. Where the mortgagee only is is entitled to damages by reason of having a technical ownership, *a fortiori* under the terms of this company's charter.

But inasmuch as the company cannot institute proceedings, and as they must be instituted by parties sustaining damage, we see no way by which the company can protect its rights except by insisting that the mortgagor, under such circumstances, join the mortgagee with him in the proceedings for the recovery of damages. In what other way can the company compel the payment of the damages to the mortgagee, if the company has not the right to insist on the mortgagee becoming a party, and thus being bound by the proceedings?

We have the rule of law requiring the company to see that the mortgagee is paid or satisfied, and then the legal proposition that it passes absolutely beyond the power of the company to insure the reaching of this result. It seems that the law cannot be guilty of such an inconsistency.

J. H. and C. O. Montgomery, for Ingraham.

PETERS, C. J. Whilst the case of *Wilson* v. *Eu. & N. A. Railway Co.* 67 Maine, 358, decides that a mortgagee of land taken for public purposes should be made a party to proceedings instituted to ascertain the land-owner's damages for such taking, the necessity for such joinder is mostly, if not wholly, for the protection of the parties who take the land, that they may not be exposed to the risk of paying the damages twice. The mortgagee cannot be regarded as an indispensable party where such protection is not needed; and such is the principle deducible from the opinion in that case. Some courts do not admit the necessity of making mortgagees parties in such proceedings in any circumstances. The mortgagee certainly cannot be required to become a party when he has effectually disclaimed all claim or interest in the damages recoverable.

The presiding judge instructed the jury that no attention need be paid to the fact that the Camden Savings Bank had a mortgage on the land of this complainant because the bank had filed in the case a waiver of all claim to damages. This was correct provided the paper filed was a sufficient waiver, but that fact the other party denies. It seems that the paper first filed as a waiver, upon objection to it as insufficient, was taken off the

files by counsel for the land-owner and another substituted by him in its stead without the assent of opposite counsel or of the court. We think a new trial should not be granted on that account, whether the first paper filed was valid for the purposes for which it was intended or not, inasmuch as the sufficiency of the second paper is not questioned. The absence of the mortgagees as parties could not be of consequence, so long as they cannot in the future make any claim to the damages. The management of the trial would be the same whether the mortgagees were in or out of the litigation, the question in relation to parties and title being incidental merely.

Counsel for the land-takers asked the judge to instruct the jury that the burden lay upon the land-owners to prove that damages were sustained by the taking, and the amount of such damages. The judge did not refuse to give the requested instruction but forgot to make mention of it. It is admitted that the omission was through inadvertence. In such case the judge should have been reminded of the request by counsel. But the omission was harmless in any view. The proposition was so self-evident as to speak for itself. The jury must have seen for themselves that only such damages should be allowed as were proved. The course of the trial and the tenor of the whole charge were to that effect. Nothing to the contrary was suggested or indicated in any way. *Exceptions overruled.*

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

JAMES PERRY, in equity, *vs.* HENRY KNIGHT.

Knox. Opinion December 14, 1892.

Deed. Reformation. Evidence. Pleading.

Where a grantor conveys a certain interest in real estate, and then in the same conveyance by mistake reserves to himself precisely the same interest he first conveys, the deed must be reformed according to the original design of the parties; although the mistake is averred by the complainant and denied by the respondent, the complainant's account of the transaction being more or less corroborated by the circumstances disclosed in the testimony.

IN EQUITY.

Bill in equity heard on bill, answer and demurrer in the court below, where a decree was given sustaining the bill, and comes to this court on appeal by the defendant.

The bill was originally brought by James Perry in his life-time to compel Henry Knight to reform a deed of a certain right of way in Camden, Knox county, given by him to said Perry August 7, 1886. Perry having deceased since filing the bill, his heirs have been made parties by proper amendment.

The case as disclosed by the bill, and which the plaintiffs claimed exhibits an obvious mistake, shows that Henry Knight and James Perry were the owners in common of a right of way forty-one and one half feet long extending back from Mechanic street in Camden, and fourteen feet wide. This right of way was between the Knight building and the building then owned by Perry. The building which Knight had then built, upon his lot adjoining this right of way, was about fifty and one half feet deep extending back from the street nine feet beyond the fourteen-foot right of way. Knight was anxious to acquire a right of way over this nine feet in the rear of the forty-one and one half-foot right of way; Perry was anxious to acquire the whole title to the portion of the right of way nine feet in width, adjoining his property, of the right of way forty-one and one half feet long and fourteen feet wide, which would leave a right of way in common five feet wide and forty-one and one half feet long to be enjoyed between himself and Henry Knight.

To carry out these objects, Perry made a deed to Knight of the right of way in common over a strip of land in the rear of the forty-one and one half foot right of way, nine feet long and five feet wide, and Knight upon his part was to quit-claim his interest in a strip adjoining the land of Perry nine feet wide the whole length of the forty-one and one half-foot right of way; thus leaving a continuous right of way from Mechanic street to the rear of the lot fifty and one half feet long and five feet wide, to be used in common by both Perry and Knight. By a mistake of the scrivener in drawing the deeds, the deed of Knight to Perry contained precisely the same clause that the deed of Perry to Knight contained as to the use and occupation of the right of

way, viz: "said right of way to be kept open and free for passage and repairs for said Henry Knight and James Perry, their heirs and assigns forever," and was thus made in fact, as the plaintiffs alleged, entirely inoperative as a conveyance of any interest in the nine-foot strip to Perry.

The bill after setting out these facts, alleges that the "deed was accepted by Perry with the full belief that it was a full compliance with said agreement, and that its terms were in accordance with the clear, mutual intent and understanding of the parties thereto; that upon a more careful examination of said deed from said Knight is disclosed the facts that, by reason of a mistake of the scrivener (above stated), said Knight retained and still retains his interest in said right of way, and nothing in fact was conveyed by said deed to the plaintiff. Whereupon, he, said Knight, was requested to correct said error, or release and convey to the plaintiff in accordance with said agreement and understanding and intent of the parties thereto, which he refused to do."

The defendant inserted a demurrer in his answer, and alleged a general denial of the agreement. The answer was not required to be under oath.

The depositions of the scrivener who wrote the deed, son of the plaintiff, and the defendant were read in evidence. The former testified that his father did not read the deed until after it had been recorded, it having been left with the witness to send it to the registry, &c.

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

Bill sufficient: *Stevens* v. *Moore*, 73 Maine, 563; Story Eq. Plead. § 252. Amendable: *Gilpatrick* v. *Glidden*, 82 Maine, 201. Burden upon appellant to show decree below is wrong: *Paul* v. *Frye*, 80 Maine, 26. Defendant's testimony contradicts his answer. He admits that Perry was to have nine feet and himself five feet of the right of way. Under the deeds as passed Perry acquires nothing but a restriction of his own rights.

J. H. Montgomery, for defendant.

Bill insufficient: *Merrill* v. *Washburn*, 83 Maine, 189, and

cases cited. Plaintiff's want of care and diligence: *Butman* v. *Hussey*, 30 Maine, 266; *Stover* v. *Poole*, 67 Maine, 217. Negligence in not reading deed: *Lancy* v. *Randlett*, 80 Maine, 175. More than one witness necessary: *Richards* v. *Pierce*, 52 Maine, 560. Testimony of a party in interest is not sufficient: *Parlin* v. *Small*, 68 Maine, 290, and cases cited.

By the plaintiff's showing, Perry would have got a better deed, by defendant's, a better defining of the future occupancy of the right of way. Not a mutual mistake. Counsel cited: *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290; *Fessenden* v. *Ockington*, 74 Maine, 125. Maine cases all show that when decree for relief has been granted, the vital fact was undisputed, and following *Tucker* v. *Madden*, 44 Maine, 206, requiring plenary proof, which leaves no doubt in the mind of the court of a mistake.

PETERS, C. J. An examination of the evidence in this case satisfies us that the decree below should be affirmed.

It is argued on the part of the respondent that it is an instance where witness appears against witness, and therefore it cannot be said that the complainant's proof is clear, convincing and conclusive, as it should be in order to require the reformation of a deed. We, however, regard the testimony of the principal witness for the complainants as corroborated by circumstances much stronger than the oral evidence. But one conclusion can be derived from the different titles and the situation and wants of the parties. Perry, the father of the present complainants who come into the case as his heirs, wanted to add to the width of his premises a strip already belonging to him over which Knight, the respondent, had in common with him a right of passage. On the other hand the respondent needed for his premises a right of passage in another place over Perry's land where he then had no right to pass. So an exchange of interests became desirable and was arranged between the owners. Perry was to convey a new right of passage, and Knight was to surrender the old one; the result of which would be that Knight would have a way in a new location, and Perry would have the old way blocked up. It was

merely the change of location of the respondent's passage way around his premises. While the exchange was beneficial to both parties, it was quite indispensable to the respondent, because it carried him around to certain land in the rear of his store to which before this time he had no access from the street on which his structures and also those of Perry were situated.

It is not difficult to understand how the deed from Perry, in effectuating the contemplated exchange, came to be erroneously made. In the deed from Perry to Knight a passage was granted over the new territory, reserving a right of passage to Perry in common with Knight over the same premises. Now the scrivener in writing the deed from Perry to Knight inserted a release of a right of way which Knight had upon Perry's other land, and then added the same kind of reservation to Knight which in Perry's deed had been made to Perry. Whilst the reservation was right in the one deed it was wrong in the other. The deed from Knight conveys a right and then reserves and takes away precisely the same right that is first conveyed. The intention was for Perry to give one right of way to Knight, in consideration of which Knight was to give up to Perry another right of way; whilst, as the deeds were written, Knight conveyed in effect nothing, but gets two distinct rights of way across his neighbor's premises instead of one. The respondent does not really pretend that the deed, as it stands, executes the intention of the parties, but he opposes such a reformation of the deed as the complainants ask for. His contention is not supported by the facts or law of the case.

Objection is taken to the bill that it is not definite enough. The objection is hardly tenable.

Decree below affirmed with costs.

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

STATE *vs.* FRANK C. THOMPSON.

Cumberland. Opinion December 14, 1892.

Fish. Jurisdiction of State. Judicial Notice. County lines. R. S., c. 40, § 17; c. 131, § 2; Stat. 1891, c. 61, § 17.

The jurisdiction assumed by this State over our shore fisheries by its statutes is not unconstitutional as in contravention of the authority of the United States in the same premises.

The court has judicial knowledge that Casco Bay, computed to extend for a distance of thirty miles along our coast, contains many minor bays, harbors and inlets, within which the taking of porgies and menhaden by seines is inhibited by the statutes provided the entrance to such waters is less than three miles between outside headlands.

Where the facts bearing on the question are undisputed, or if disputed have been settled by the aid of a jury, the court must ultimately determine as a matter of law where the geographical boundaries of a county are located.

Even if the map of Cumberland County, offered by the respondent and rejected, were admissible as tending to show the easterly line of that County, still its rejection became immaterial inasmuch as its effect was overcome by other more controlling evidence. The alleged offense was committed in the waters between Flagg island and Wood island in Casco bay, and by the act of incorporation, dated in 1760, all the islands in that bay are included in that County.

ON EXCEPTIONS.

This was an indictment for violating statute of 1891, c. 61, § 17, with reference to taking porgies. The act was charged as having taken place in Casco Bay, July 18, 1891. The material part of the indictment is as follows:

". . . At that part of Casco Bay, so-called, situated between Flag island, so-called, and Wood island, so-called, within the county of Cumberland and State of Maine, being the master and in control of the steamer Mary P. Bates then and there equipped and supplied with nets, to wit: purse and drag seines of more than one hundred meshes in depth, for the taking of fish, to wit: menhaden and porgies, did then and there unlawfully take and cause to be taken with said nets and seines large quantities of menhaden and porgies, to wit: six hundred barrels of menhaden and porgies, in and from the waters of Casco Bay, to wit: that part and inlet of said Casco Bay lying, extending and being between

the islands aforesaid in the county of Cumberland aforesaid, each and every entrance to said Casco Bay and each and every entrance to that part and inlet of said bay lying, extending and being between the islands aforesaid, being less than three nautical miles in width from land to land, and said part and inlet of said bay between the islands aforesaid, being less than three nautical miles in width from land to land, to wit: from said Flag island to said Wood island; against the peace of said State," &c.

There was a second count alleging that the offense was committed in Sagadahoc county. A *nol pros.* was entered as to this count after verdict against the defendant. The indictment was found and the case tried in the Superior Court for Cumberland county.

At the trial, the counsel for the respondent requested the court to give the jury the following instructions, which the court declined to give except as given in the charge.

1. "That vessels of the United States do not violate chapter 61 of the public laws of 1891, by fishing for menhaden or porgies in the bay known as Casco Bay, extending from Cape Elizabeth to Small Point.

2. "That said Casco Bay is not a small bay within the meaning of chapter 61, public laws of 1891.

3. "That that portion of said Casco Bay, where the offense is alleged to have been committed, is within the county of Sagadahoc, and not within the county of Cumberland.

4. "That the defendant must be tried either in Lincoln county where he was found, or in a neighboring county; and the county of Cumberland is not a neighboring county within the meaning of chapter 95, section 10 of the public laws of 1891."

The defendant took exceptions to the foregoing refusals and to the refusals to admit evidence as appears in the opinion.

The case is stated in the opinion.

Frank W. Robinson, County Attorney, for the State.

Benjamin Thompson, for defendant.

Vessels enrolled under the laws of the United States do not

violate the laws of the State of Maine by fishing in Casco Bay, the entrance from headland to headland of which bay is nearly thirty miles in width, because the jurisdiction of the State, so far as it applies to fisheries, does not extend to it; therefore, the defendant cannot be held to have violated the laws of the State of Maine, by having fished in such bay. *Com.* v. *Manchester*, 152 Mass. 230; *Manchester* v. *Mass.* 139 U. S. 240.

Large bays like Casco Bay, extending from Cape Small Point to Cape Elizabeth, a distance of nearly thirty miles across its entrance, is not a small bay within the meaning of the statute; it was not the intention of the Legislature to restrict fishing in large bays, such as Casco Bay.

The language of the statute is, "in all small bays, inlets, harbors, or rivers, where any entrance to the same or any part thereof, from land to land, is not more than three nautical miles in width."

The object of the statute is very concisely stated in *McLain* v. *Tillson*, 82 Maine, 281, and while this court in that case referred to Casco Bay as being one to which the statute applied, yet it was not necessary to the decision of that case, and if the language of the court there is to be followed, there are no bays upon the shores of this State in which fishing is not prohibited. Under such a construction of the statute, the only place where porgy fishing can be lawfully carried on, will be in the open sea.

The Legislature had two interests to consider in the passage of the statute; one, the preservation of the fishing interest, the other, the protection and preservation of the manufacturing industry growing out of the catching of porgies, and the obtaining of food fish, such as mackerel.

Offense, if any, committed in Sagadahoc county.

The language of the act of 1760, "northwesterly upon said Casco Bay to New Meadows creek or river," means that the line shall be run northwesterly from Small Point upon Casco Bay, until it strikes the deep water and natural channel of the New Meadows river, which the chart shows to be in the vicinity of Mark island; and the variation of the compass in 1760 would have carried it still farther to the southward of that island.

The place which constitutes the mouth of the New Meadows creek, or river, must forever remain unknown, unless this court authoritatively speaks.

It is apparent from the testimony, that the dividing line between Casco Bay and the New Meadows river, is not well defined.

Map admissible in evidence. 1 Greenl. Ev. § § 139, 149 and note. *Id.* § 189, and note.

Defendant not indictable in Cumberland county. Stat. 1891, c. 61; c. 95, § 10; c. 126, § 2.

PETERS, C. J. A verdict was rendered against the respondent for illegally seining menhaden and porgies on our coast. R. S., c. 40, § 17. Public Laws 1891, c. 61. In the trial several rulings were given that are now complained of.

The point was taken that the jurisdiction over the shore fisheries assumed by the State is in contravention of the authority possessed in the premises by the United States. But the Federal Supreme Court does not so hold. *Massachusetts* v. *Manchester*, 139 U. S. 240, 262; *Com.* v. *Manchester*, 152 Mass. 230.

It is objected that our statute does not apply to taking menhaden and porgies in such wide and extended waters as are those of Casco Bay. It is argued that the decision in *McLain* v. *Tillson*, 82 Maine, 281, does not conclusively settle this question. But we regard the opinion in that case as very apposite to the present contention. The allegation is not that the offense was committed in Casco Bay, which is said to be thirty miles or more wide between outside headlands, but that it was committed in that part of Casco Bay which lies between Flag island and Wood island in Cumberland county. The government correctly contends that the locality thus described, although within the general waters of Casco Bay, is also an inlet or inner harbor of itself, the entrance to which is less than three miles wide. There are many bays and inlets within the general bay. Any different interpretation would render the fishery laws of the State ineffective for the purposes intended by the framers of them.

A question arose at the trial whether the waters flowing between Wood island and Flag island are within the limits of Cumberland county. If an offense be committed within one hundred rods of a county line, it may be regarded for purposes of jurisdiction as committed in such county. R. S., c. 131, § 2.

To help in substantiating the contention of the respondent, that the locality referred to is in Sagadahoc and not Cumberland county, Chace's map of Cumberland county, published in 1857, was offered in evidence, and was excluded by the presiding judge. Even if the map were an admissible piece of evidence, its rejection became immaterial in view of the more controlling fact, hereafter stated, upon the force of which the judge correctly ruled, as a matter of law, that the particular locality where the offense was confessedly committed is within Cumberland county.

In 1760, Cumberland county was established by the Provincial Assembly of Massachusetts Bay with the following boundaries:

"*And be it further enacted*, That the westernmost of the two new counties aforesaid shall be, and it is hereby declared to be, bounded, on the west by the easterly line of the county of York above described; on the north by the utmost northern limits of this province; on the southeast by the sea or western ocean and by Casco bay; from the easterly point of which bay, viz., from Smallpoint, the line shall run northwesterly upon said Casco Bay to New Meadows creek or river, and up said creek or river, as far as Stevens' carrying-place at the head of said creek or river; thence across said carrying-place to Merrymeeting Bay and Androscoggin river; from thence it shall run up said Androscoggin river thirty miles; and from thence north two degrees west on a true course to the utmost northern limits of the province; including all the islands in Casco Bay aforesaid, and on the sea coast of the said new county; and all the towns, districts and lands within the said bounds, together with the

islands aforesaid, shall, from and after the first day of November, one thousand seven hundred and sixty, be and remain one entire and distinct county, by the name of Cumberland, of which Falmouth shall be the shire or county town; and the inhabitants of said county of Cumberland shall have, use, exercise and enjoy all such powers, privileges and immunities, as, by law, the inhabitants of any other county within this province have, use, exercise and enjoy." R. S., of Maine, p. 1010.

Although one of the county lines is made to run from Small Point *upon* Casco Bay, all the islands in the bay are made a part of the (then) new county; and we are not aware that, in the creation of any new counties since, or in any alterations of county lines, the two islands called Wood and Flag islands, indisputably situated in Casco Bay, have ever been transferred from Cumberland to any other county. Between these two islands the offense is alleged and proved to have been committed.

The counsel for the defense does not, we apprehend, deny that the judge could, upon his own knowledge and all the evidence produced, make a peremptory ruling that Wood and Flag islands are within the county of Cumberland. Questions of geographical boundaries are ultimately for the court to determine. Otherwise we might have as many different lines established as there were juries passing on the question. One jury is not bound by a precedent set by another jury. If it were a question that could arise but once, a jury might settle it.

There are certain geographical facts of which courts take judicial notice, for the reason that they are universally recognized, or are within the territorial jurisdiction of the court. Wade on Notice, 2d ed. § 1410, and numerous cases cited in the section. See also 89 Amer. Decisions, 663, for cases on same subject. It would not be profitable to explore the multitude of cases touching this principle, because they are so variant from one another, are attended with so many exceptions and qualifications, and are dependent upon facts peculiar to each case. *State* v. *Wagner*, 61 Maine, 178, is a leading case on the question. Sufficient to say, that when a line between counties in this State must be ascertained and declared, the court must

declare it. The responsibility of the question is more fittingly there than upon a jury.

Exceptions overruled.

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

STATE *vs.* GEORGE H. ROBINSON.

Knox. Opinion December 14, 1892.

Indictment. Pleading. Extortion by threats. R. S., c. 118, § 23.

In an indictment under the statute which makes it a criminal offense to verbally threaten to accuse a person of some crime or offense for the purpose of extorting money from such person, it is sufficient to allege in a general way that the threat was to accuse the complainant of the offense of assault and battery, made for the purpose of extorting money from him, the words of the threat being set out in the indictment; although the words do not of themselves import an accusation of such an offense and facts are not specially alleged which would supply the deficiency. It will be enough that the proof accords with the allegation.

It is not enough, however, to merely aver that the respondent threatened to accuse and prosecute the complainant. There must be an averment that the threat was to accuse the complainant of some criminal offense.

ON EXCEPTIONS.

The court having overruled the defendant's demurrer to the indictment, found below in the opinion, he excepted to the ruling of the court. It was stipulated that, if the demurrer should be overruled, the defendant might plead over and the indictment stand for trial.

W. R. Prescott, County Attorney, for the State.

J. F. Libby, for defendant.

PETERS, C. J, The statute applicable to this case, eliminated of its inapplicable portions, would read as follows: "Whoever verbally, maliciously threatens to accuse another of a crime or offense, with intent thereby to extort money from him, shall be punished," &c.

There are two counts in the indictment as follows:

"The Grand Jurors for said State upon their oath present, that George H. Robinson, of Rockland, in said county of Knox,

laborer, on the twentieth day of November, in the year of our Lord one thousand eight hundred and ninety-one, at Rockland aforesaid, in the county of Knox aforesaid, unlawfully and maliciously did verbally threaten one James Harrington to accuse and prosecute him, the said James Harrington, of having committed the crime of assault and battery upon him, the said George H. Robinson, with the intent thereby to extort money from said James Harrington, in words following, to wit: 'If you don't pay me twenty-five dollars before the December court I will put you four years in State prison. I have hired two doctors to go against you and paid them well for it.'

"And the Jurors aforesaid, upon their oath aforesaid, do further present, that the said George H. Robinson, afterwards, to wit, on the twentieth day of November in the year of our Lord one thousand eight hundred and ninety-one, at Rockland aforesaid in the county aforesaid, unlawfully, corruptly and extorsively did verbally demand of said James Harrington the sum of twenty-five dollars and did then and there threaten to accuse and prosecute said James Harrington with the intent thereby to extort money from said James Harrington, in words following, to wit: 'If you don't pay me twenty-five dollars before the December court I shall make complaint against you and will put you four years in the State prison. I have hired two doctors to go against you and pay them well for it.'

"Against the peace of said State and contrary to the form of the statute in such case made and provided."

The first count specifies the offense which the defendant threatened to accuse the complainant of. The second count does not state what offense the threat applied to, leaving the words uttered to speak for themselves on that point. Objection is made, upon general demurrer to the indictment, that the words alleged to have been spoken do not of themselves import that the complainant was to be accused of the offense of assault and battery, and that no facts are alleged proof of which would supply the deficiency.

We think the first count sufficient. It is a matter where considerable generality of allegation is permissible. The same rule

of strictness does not apply as in actions or indictments for libel, a class of prosecutions not very much favored by the law. The gist of the present offense is the malicious threat made to extort money. The defendant is notified of his utterances that are relied on, and also of the nature of the accusation which he has threatened to make. If more particularity of averment than this be required, the purposes of the statute would be defeated in many instances of criminal threats. The intimated accusation is often couched in vague and evasive terms, and may depend for its meaning on a variety of circumstances which cannot be easily alleged. Or the threat may be of a general character, indicating not the accusation of any particular crime or offense, but an accusation of some offense or other. This is the view of the statute and prosecutions under it, taken by the court in Massachusetts where indictments more general than this one have been sustained. *State* v. *Murphy*, 12 Allen, 449; *Com.* v. *Carpenter*, 108 Mass. 15; *Com.* v. *Dorus*, *Idem*, 488; *Com.* v. *Moulton*, *Idem*, 307;

We think the second count should be adjudged bad. It leaves too much for inference and implication. It should be directly averred that the threat was to accuse of some crime or offense, whether the same be particularized or not. The count fails in that respect. It avers that the threat was to accuse and prosecute the complainant, but does not aver that it was a threat to accuse him of any particular offense or of any offense whatever.

Demurrer overruled.

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

GEORGE SIMMONS *vs.* WILLIS A. LANDER.

Franklin. Opinion December 14, 1892.

Insolvency. Action. Continuance. Exceptions. R. S., c. 82, § 54; Stat. 1887, c. 111.

Where a defendant, while in insolvency, might have had an action against him continued until his insolvency proceedings were closed, permitted the action to be defaulted without appearance on his part, and at a later term (the action having been continued for judgment) moved to have the default

removed in order to enable him to plead his discharge then obtained, it is within the discretion of the presiding Judge to grant the motion or not, and exceptions do not lie to his decision of the question.

ON EXCEPTIONS.

The case is stated in the opinion.

J. H. Thompson, for plaintiff.

J. C. Holman and Frank W. Butler, for defendant.

PETERS, C. J. The defendant, while in insolvency in the insolvent court of Somerset county, was sued upon a note of hand in Franklin county, to which action his discharge in insolvency, subsequently obtained, would have been a defense if it could have been pleaded. Making no appearance in the action against him, it was defaulted and continued for judgment. At a later term the defendant, having received his discharge, moved that the default be taken off in order to allow him to plead the discharge in bar of the action. The motion, upon hearing, was denied. It does not appear that the defendant was guilty of any neglect either in the matter of the suit or the insolvency proceedings further than his omission, through an alleged ignorance of its necessity, to answer to the action.

It is contended in behalf of the defendant that he was entitled, as a matter of right, to a defense in the defaulted action by force of the provision of the R. S., c. 82, § 54, as amended by c. 111 of the laws of 1887, which declares that "all actions for debt provable in insolvency, when it appears that the defendant therein has filed his petition in insolvency before or after the commencement of the suit, *shall be continued* until the insolvency proceedings are closed; unless the defendant fails to use due diligence in the proceedings to obtain his discharge."

This a strong and clear statutory declaration, designed to prevent the annoyance of suits in one tribunal while a manifest defense to them is being obtained in another tribunal, and to establish uniformity of practice in such matters in court. But the statute does not execute itself. There must be some one in court to invoke its application. "When it *appears* that the defendant has filed his petition," are the significant words of the section.

In this case the fact did not appear and the action was for that reason defaulted. The presumption may well be that the defendant did not desire to interpose any defense. Owing to his own neglect the defendant became obliged to appeal to the judge for relief from the situation he found himself in. While in most all cases of this kind, a judge would, either with or without the imposition of terms, extend relief to the supplicant, for the interest alike of the insolvent and his creditors generally, still there may be occasional cases where the application for relief should, in the furtherance of justice, be denied. The present case discloses enough to indicate that it was for good reason regarded as an injustice to the plaintiff to allow the defendant to have the benefit of his proposed defense.

At all events, such questions are for the judge to decide according to his judgment and discretion, and, in all ordinary cases at least, his exercise of such discretion is conclusive on all parties concerned. *Reed* v. *Cumberland and Oxford Canal Corporation*, 65 Maine, 132.

Exceptions overruled.

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

TRUMAN H. SIMPSON, and others, *vs.* JOHN D. BLAISDELL.

Hancock. Opinion December 14, 1892.

Deed. Description. Evidence.

Where a grantor conveys a wharf property by clear and definite description, and then adds to the description the following words: "Also one half of an acre of land near the wharf or at the wharf," the deed will be regarded as effective to convey a particular half-acre near the wharf which the parties to the deed, either before or after the date of the same marked out or identified and appropriated as the exact and identical parcel conveyed, or to be conveyed by such deed.

Evidence is admissible, for the purpose of assisting in an identification of the land, to show that the grantor, now deceased, while an owner of the land surrounding the half-acre pointed out to a witness, who was negotiating with him a purchase of an adjoining lot, the location of the half-acre, indicating its corners and other bounds.

ON EXCEPTIONS.

This was a real action in which the jury gave a verdict for the plaintiffs and the defendant excepted.

The case is stated in the opinion.

Deasy and Higgins, for plaintiffs.

Wiswell and King, for defendant.

PETERS, C. J. The demandants claim title to an undivided sixth of a certain half-acre of land which Joseph Blaisdell undertook, by his deed given in 1838, to convey to George Hinman and Samuel P. Donnell, which deed contains the following description:

"Beginning at a pine tree spotted on four sides near the south east corner of the Card lot (so-called); thence running west twelve degrees north fifty-six rods to a birch tree spotted on four sides; thence running north twelve degrees east twenty rods to a hemlock stump spotted on four sides; thence running east twelve degrees south fifty-six rods to a stump spotted on four sides near a large rock; thence south twelve degrees west twenty rods to the point of beginning, and containing seven acres more or less. Also a road from said land to the shore in the place that will best convene the said Hinman and Donnell, together with the wharf built by Wooster and Sanborn in the year 1836, together with all the privileges and appurtenances thereunto belonging. *Also one half of an acre of land near the wharf or at the wharf.*"

The seven acres parcel was purchased for a granite quarry upon it. The road was for the convenience of transporting granite from the quarry to the shore. And the half-acre was undoubtedly intended to be a place for depositing, according to the needs of the quarrying business, granite at the shore. The controversy here is over the parcel of half an acre; the defendant contending that the deed, so far as affecting that parcel, is inoperative and void for the want of sufficient description, and that the insufficiency cannot be supplied by any oral evidence. The question presented here is to be considered precisely as it might have been had it arisen between the original parties to the

deed, inasmuch as the present parties make their claims respectively by inheritance through and under them.

In approaching the task of making effective, if we legally can, the apparently uncertain description in this deed, we must remember that the law desires to sustain the validity of this class of instruments wherever it can. Says Mr. Powell, the writer on this subject, "The law is curious and almost subtilizes to find reasons and means to make assurances and deeds enure according to the just intent of parties, and to avoid wrong and injury which, by abiding by rigid rules, may be brought out of innocent acts." See Wash. Real Prop. 5th ed. vol. 3, *621. Said BARROWS, J., in *Cilley* v. *Childs*, 73 Maine, 130: "Moreover it is well settled law, that a deed shall not be held void for uncertainty but shall be so construed, whenever it is possible, as to give effect to the intention of the parties and not defeat it; and that this may be done whenever the court, placing itself in the situation of the grantor at the time of the transaction, with knowledge of the surrounding circumstances and of the force and import of the words used, can ascertain his meaning and intention from the language of the conveyance thus illustrated."

The questionable description in the deed before us is by no means a blank. It fixes the locality "at or near the wharf." It is not a roving half-acre. The purposes for which it was purchased, in connection with the use of the quarry and road and wharf, may indicate its proximate location, as it would be a half-acre adaptable to the use intended to be made of it. The original parties to the deed, long ago deceased, must have understood just what territory was supposed to be conveyed.

Now, there were two ways in which the parties might have consummated the conveyance of the half-acre according to their intention. They could survey out the parcel from the grantor's surrounding land and then make the deed of it, or could first make the deed and survey out and identify the parcel afterwards.

The demandant's position is that one or the other of these methods of making certain the location of the parcel was adopted. While either mode would be legitimate, the indications are

that after the deed was delivered the grantor assigned a certain half-acre to the grantee which the latter accepted; or that the grantee appropriated to himself a certain half-acre with the acquiescence of the grantor, possession and occupation following afterwards. Suppose that Hinman, after receiving his deed, had selected out a half-acre, and entirely covered it with permanent structures, or had surrounded it with a permanent fence, the structures of fence remaining to this day and the grantee being in possession all the time, could any possible criticism defeat the title of the latter? And would not the result be the same even if there were no evidence of any assignment or appropriation of the half-acre more than the fact of such demonstrative possession and occupation? The supposed cases would be strong illustrations of the principle involved, but the same result may be attainable upon less cogent but still satisfactory evidence, and the principle would be the same. What the entire testimony was on that point we are not informed, as the case is not fully reported; nor do we know whether there has ever before this been any question as to the true location of the half-acre lot.

These principles are illustrated, either partially or fully, by many decided cases which sustain the general proposition, quoted by the demandant's counsel from Washburn on Real Property, as follows: "Thus, to sell ten acres of land without describing any boundaries to the same would be void; but if the parties then go on and stake out that quantity of land and the grantee takes possession of it, it ascertains the grant and gives effect to the deed." The case of *Farrar* v. *Cooper*, 34 Maine, 394, is much like the present case and directly supports the demandant's contention.

The defendant excepts to the admission of the testimony of the demandant's witness, Ambrose Simpson, upon which probably the verdict in favor of the demandant largely depended. His story in substance was, that in 1857 he and his brother were purchasing of the same Joseph Blaisdell land contiguous to the half-acre in question, and that they called upon Blaisdell to show them the location of the half-acre lot; that thereupon

Blaisdell procured a surveyor to measure the lines about it, he (Blaisdell) indicating the lines to the surveyor in presence of the witness; and that the half-acre so shown and measured is identical with the premises demanded in this suit. No stakes were set at the time or found in the ground, but certain natural boundaries were pointed out by Blaisdell. This evidence was properly received as an admission by Blaisdell that the land had been formerly located by himself and his grantees. Counsel for the defense expresses the opinion that it would be hazardous to allow titles to depend for their validity upon such ephemeral evidence. But that must be a question rather for the jury than the court. It was evidence of a clear and unqualified admission of a party against his own interest, accompanied by very significant acts.

The charge of the judge on this point is excepted to, but we do not preceive anything in it legally objectionable. In his interpetation of the law and evidence of the case the judge made the following remarks:

"Now as to the bounderies of this half-acre lot,—for the purposes of this trial I give you the rule intimated by counsel, that, where land is given in this indefinite way,—that is, where its location is generally indicated in the deed, but its precise limits not defined,—then if we find that, at that time, or thereafterwards, the parties themselves defined its limits in any way, that will control. And that fact may be shown by outside evidence to aid us in determining the meaning of the deed. And we here come to a question of fact for you; that is, whether or not at the time of this conveyance or afterwards this half-acre of land was defined,—I do not mean run out by a surveyor, or chained out, or stakes put down, but as between the parties to this conveyance was the half-acre of land ever defined? It may be defined in various ways. It can be defined by the parties going down with the surveyor, and surveying it off, and putting down marks. It can be defined in other ways perhaps. It need not be done necessarily by both parties being upon the ground at the time. If George Hinman went upon the land himself and began to use a half-acre,—a well defined half-acre,—marked it out by

piling paving all over a well defined half-acre, or in any other way; if he began to use it in that way so as to make it clear and distinct that he was appropriating a certain specific half-acre under his deed; and the grantor knew it, and saw it, and acquiesced therein for a number of years,—that would be evidence from which the jury might infer that it had been in that way marked out and appropriated; but it would not be conclusive. The plaintiffs say that under this deed, the evidence should convince you that after the deed was given, either the parties together, or Mr. Hinman, with the consent of Mr. Blaisdell, Sr., by mutual agreement, marked out and defined this half-acre.

"Now, that is for you. If you come to the conclusion that it never was in any way marked out, either by occupation or in any other way, but was left for all time as it was first written, —simply a half-acre lot,—then you cannot say properly that this lot now in demand in the writ is that lot. You will have to say, so far as that is concerned, that the plaintiffs did not have a better title than the defendant. Whether or not the lot described in the writ as the half-acre lot is conveyed by the deed, depends upon whether you find as matter of fact that it was in some way marked out by the parties afterwards, either by both together, or by the grantee, the grantor knowing it and assenting to it impliedly. If you find that there was such a marking out then the plaintiffs have a *prima facie* title to both lots."

Exceptions overruled.

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

CLARINDA S. BUCK *vs.* LYDIA E. WOOD.

Oxford. Opinion December 14, 1892.

Mortgage. Notes. Forgery. Estoppel.

Parties to a note secured by mortgage may substitute a new note for the original one without impairing the validity of the mortgage security, although the terms of the two notes are not the same; either note is merely evidence of the debt to be secured.

Where a person whose name has been forged as the maker of a promissory note makes payments on such note to an innocent holder thereof without

divulging the forgery, for the purpose of screening the forger from detection and punishment, when otherwise the holder would have initiated criminal proceedings against him, such person when sued upon the note by the holder will be estopped from setting up the forgery as a defense thereto. Such acts amount to an implied or indirect ratification.

ON MOTION AND EXCEPTIONS.

This was a real action wherein the plaintiff demanded of the defendant a certain parcel of land in Buckfield village.

From the exceptions it appeared that the plaintiff, on the 18th of May, 1878, gave to one Adna C. Cushman a demand note of one hundred and seventy-five dollars, to secure which she also gave said Cushman a mortgage deed of the premises in question. The plaintiff claimed that the note was surrendered to her, the plaintiff, on the same day that it was given, and therefore the mortgage, which was given to secure said note, became null and void; and the plaintiff introduced in evidence a demand note of $175, running to Adna C. Cushman, and signed by herself, which she claimed was the identical note above mentioned. The defendant also introduced in evidence a note of $175, on one year's time, running to Adna C. Cushman, purporting to be signed by the plaintiff, Mrs. Buck, claiming that that was the original note to secure which the mortgage was given. On the back of this note, produced by the defendant, were four indorsements.

The only question of fact submitted to the jury by the presiding justice was, which of the two above mentioned notes was the note to secure which the mortgage was given.

The jury returned a verdict for the plaintiff.

The counsel for the defendant claimed,—

1. That, if the plaintiff and Adna C. Cushman agreed, after the execution of the mortgage, to substitute the note introduced in evidence by the defendant for the note introduced by the plaintiff, then the plaintiff would be bound by the mortgage in the hands of an innocent purchaser for value, and could not recover in this action.

2. That, if the plaintiff made certain payments on the mortgage and note when in the hands of such innocent purchaser, she would thereby be estopped from showing any irregularity

between herself and said Cushman in regard to said note and mortgage.

The presiding justice declined to so instruct the jury but did instruct them as follows:

"If you find that the note which is held by the defendant, and produced by Mr. Hersey as her attorney, for $175, payable in one year, is the real note which is described in the mortgage, and to secure which that mortgage was executed, it being in the possession of the defendant and produced by her counsel,—then your verdict should be that the defendant did not disseize this plaintiff in manner and form as she has alleged; in other words, your verdict should be for the defendant, Mrs. Wood. If, on the other hand, you believe that is not the note described in the mortgage, and to secure which the mortgage was given, but that the note produced here by the plaintiff herself through her counsel, Mr. McGillicuddy, is the real note that was given, and that it was surrendered and given up to her with the intention thereby to render it invalid,—then the condition in the mortgage was performed, and the plaintiff, Mrs. Buck, is entitled to a verdict that the defendant did disseize in manner and form as the plaintiff has declared against her."

To these instructions and refusals the defendant took exceptions, and filed a general motion for a new trial.

McGillicuddy and Morey, for plaintiff.

O. H. Hersey, for defendant.

PETERS, C. J. The demandant introduced evidence showing that she was entitled to recover the premises demanded, unless a mortgage given by her to Adna C. Cushman on the premises be still in force.

The defendant, claiming her title under such mortgage, dated May 10, 1878, introduced it in evidence together with a note bearing the demandant's name as maker and payable to the order of Cushman, the mortgagee. The mortgage and note had been transferred, either by assignments or absolute conveyances, from Cushman down through different persons until the property was purchased by the defendant; and the mortgage had been fore-

closed. The demandant admitted the mortgage to be genuine but denied the genuineness of the note.

She testified, although her story was contradictory and evidently disingenuous in some respects, that she made the mortgage, and another and different note from this one in defendant's hands, as an accommodation for her friend Cushman to raise money upon for his own use; that immediately after the note and mortgage were delivered to Cushman some difference arose between her and him in consequence of which he gave up the note to her, although he retained the mortgage, and that she has had the note in her possession ever since; and that the note offered in evidence and bearing her name was never signed or authorized by her and is a forgery. The intimation is that Cushman forged the note in order to obtain money with which to buy himself out of a threatened criminal prosecution of some kind.

The demandant produced the note which she declares was the genuine original note accompanying the mortgage, and the evidence quite satisfactorily shows it to be so. The two notes are alike excepting one is on demand and interest and the other is with interest on one year. The conditional clause in the mortgage describes either note, the one as accurately as the other. There was some question whether the two notes bear the same date, as there is an obliteration of the date of the one in the hands of the defendant.

The case finds that the counsel for the defendant took these positions: First, that, if the demandant and Adna C. Cushman agreed, after the execution of the mortgage, to substitute the note introduced in evidence by the defendant for the note introduced by the demandant, then the demandant would be bound by the mortgage in the hands of an innocent purchaser for value, and cannot recover in this action. And secondly, if the demandant made certain payments on the mortgage and note when in the hands of such innocent purchaser, she would thereby be estopped from showing any irregularity between herself and Cushman in regard to such note and mortgage. The presiding judge declined to so instruct the jury, and submitted to the

jury only the question whether the one note or the other was the note covered and described by the mortgage; the jury finding on that issue for the demandant.

A careful perusal of the evidence satisfies us that the defendant's propositions were in the main correct, and that either upon the exceptions or motion, more properly on the motion perhaps, a new trial should be ordered. The evidence bearing upon the point of renewal or substitution, as well as on the idea of ratification, is extremely important.

Here is a property mortgaged in 1878 to secure a note which the demandant says is a forgery, and the premises have been bought and sold for full value by her neighbors, undoubtedly with her knowledge, several times since the mortgage was given.

The mortgage has for all these years stood upon the public records unreleased, and was many years ago foreclosed. These innocent purchasers have been in open possession and occupation of the premises as owners, presumably before her eyes, for more than ten years, without a whisper of claim or any sign of discontent on her part, and no kind of explanation of such silence is even attempted to be given. But more conclusive than this is the fact that she made at four different times payments upon the note which she alleges was forged, to an attorney who held the same for collection, making the payments without any assertion of forgery or wrong and without any complaint whatever. How can such conduct possibly be accounted for, unless upon the theory that she either gave the second note, or authorized it, or adopted it as her own obligation? The attorney says that she came to his office, upon a notice to her that he had the note for collection, and saw him handle the note and mortgage and indorse the payments on the note, and he confidently believes that she took the note on some one of these occasions in her own hands.

She offers no explanation of her conduct in this respect, and is driven reluctantly and haltingly to confess the facts so testified to by the attorney. She says of those payments, "I suppose it was to pay for that note, that mortgage." She also some years ago declared to Mr. Bisbee, who desired to ascertain the fact, that the mortgage was a *bona fide* transaction.

In the letters of Cushman to her, put in evidence for her benefit, there are most significant indications that, even if her story of forgery be true, she had ratified the transaction in order to shield her friend from some threatened criminal punishment. In one letter he entreats her to send the interest due on the note, about ten dollars, to the attorney holding the note. In another letter he asks her to pay the interest on the note, as he anticipates trouble if the owner should discover anything wrong about it. And so she made the requested payments. The disclosure of motive in these letters bears upon the question of ratification. And that may be accomplished in two ways. If a person, whose name is forged to a note, knowing all the circumstances as to the signature and intending to be bound by it, acknowledges the signature and assumes the note as his own, he will be bound upon the note just as if it had been originally signed by him or by his authority. That would be express or direct ratification. But indirect or implied ratification may be consummated upon grounds of estoppel. Now if the demandant made payments on the forged note for the purpose of preventing the exposure of her friend, the forger, when the owner of the note would have caused his arrest and punishment had he not been in this way misled by her, she should be estopped from setting up the defense of forgery when subsequently sued on the note. *Forsyth* v. *Day*, 46 Maine, 176; *Casco Bank* v. *Keene*, 53 Maine, 103; *Wellington* v. *Jackson*, 121 Mass. 157.

On the other point, that the parties to a mortgage may substitute a new note for the original by way of renewal without affecting the validity of the security, the authorities are conclusive. The books abound in such cases. *Hadlock* v. *Bulfinch*, 31 Maine, 246; *Barrows* v. *Turner*, 50 Maine, 127; *Parkhurst* v. *Cummings*, 50 Maine, 127; *Watkins* v. *Hill*, 8 Pickering, 522; *Pomroy* v. *Rice*, 16 Pickering, 22. In Jones on Mortgages, (2nd ed. Vol. 2, § 924) it is said: "No change in the form of indebtedness or in the mode or time of payment will discharge the mortgage. A mortgage secures a debt, and not the note, or bond, or other evidence of it. No change in the form of the evidence, or the mode or time of payment,

nothing short of actual payment of the debt, or an express release, will operate to discharge the mortgage.

"The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note, or by giving a different instrument as evidence of the debt." The text of the author is fortified by an array of cases cited.

We think the jury should be allowed to determine whether there was ratification express or implied, or a renewal of the first note by substituting the second.

Motion sustained.

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

RETIAH D. JONES *vs.* WEBSTER WOOLEN COMPANY.

Androscoggin. Opinion December 14, 1892.

Deed. Description. Reference to Record.

Where land is conveyed by clear and complete description and no ambiguity is apparent on the face of the deed, and the grantor adds at the end of the description that the land conveyed is the same described in an agreement between him and another party, recorded in Androscoggin registry of deeds (Book 137, p. 62), the grantor (or his successor) cannot invoke a reference to the recorded agreement to show that a less amount of land was conveyed than, without the aid of the reference, is apparently covered by the deed.

AGREED STATEMENT.

This was a real action. The opinion states the case.

George C. Wing, for plaintiff.

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

PETERS, C. J. The demandant made a conveyance, to a person under whom the defendant corporation claims title to the demanded premises, which conveyance contains the following description of the premises conveyed:

"A certain lot or parcel of land situated in Lewiston and Webster, in said county of Androscoggin, on the Sabattus stream, and bounded on the north, south, and west by said stream, and on the east by land now or formerly in possession

of James F. Hirst and Stephen Bangs, and being the same agreed to be conveyed by me to said Bleakie, by articles of agreement made and concluded between me and said Bleakie, dated January 1st, A. D., 1878, and recorded in Androscoggin County Registry of Deeds, Book 137, page 62."

The agreement referred to in this description was a lease, or contract of the nature of a lease, between the demandant and a third party relating to the same land as above conveyed. The difference between the descriptions in the two instruments is that the agreement contains the same specific boundaries that the deed does, and at the end of such description these words besides: "So far as the same may be flowed by the dam as at present erected and maintained by the said Bleakie, on the said Sabattus stream, at his mill site in said town of Webster, or by any other dam erected and maintained by the said Bleakie, of the same height as the present dam."

The demandant contends that the reference in the conveyance to the agreement imports into the conveyance the words of description found in such agreement, just as effectually as if the same words had been inserted therein; and that the words added to the description in the agreement lessen the amount of territory that would without the reference pass by the deed.

We are unable to concur in this proposition of the demandant's counsel. No ambiguity is discoverable in the description contained in the deed. The boundaries seem to be complete in themselves. The reference is general rather than particular, and was designed to identify locality rather than to make more certain any limits or bounds in the deed. It would be a hazardous policy to allow a grantor to lessen the amount of land, apparently conveyed by his deed, by a general reference to some other deed or paper. Impositions could be easily practiced under such a rule, as grantees rarely pay much attention to such references or know whether they affect their interests or not. See, for a discussion of these questions, *Hathorn* v. *Hinds*, 69 Maine, 326. *Plaintiff nonsuit.*

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

JAMES T. WHITE, and another,

vs.

ALBION K. P. HARVEY, Appellant.

Androscoggin. Opinion December 14, 1892.

Sales. Delivery. Acceptance. Presumption.

In an action for goods sold and delivered, where the goods were contracted for in writing to be delivered at a place agreed upon by the parties, proof of delivery at such place raises a presumption of acceptance by the purchaser. In such case the seller is not bound to prove any actual acceptance,— the purchaser must disprove it.

ON EXCEPTIONS.

This was an action of assumpsit brought in the Lewiston municipal court which gave judgment for the plaintiff and the defendant appealed. At the trial in the court below a verdict was ordered for the defendant and the plaintiffs excepted.

The case is stated in the opinion.

Savage and Oakes, for plaintiffs.

McGillicuddy and Morey, for defendant.

PETERS, C. J. After the evidence on both sides of this action, for goods sold and delivered, was closed, the judge made a *pro forma* ruling that there was no evidence of either delivery or acceptance, and directed a verdict for the defendant upon that ground. Our investigation satisfies us that there was evidence on that question which should have been submitted to the jury. There are important facts bearing upon that branch of the case which are not disputed. As the agreement between the parties is written, no question arises on any application of the statute of frauds.

The plaintiffs received the defendant's written obligation, dated at Lewiston, February 27, 1891, to purchase of them a physiological manikin of a certain description. The article was to be shipped, freight prepaid, from New York city to Lewiston, and in consideration of its delivery, for the defendant, at the office of the American Express Company in Lewiston, the defendant was to pay for the same a certain sum. A manikin

of the description bargained for arrived at the Express office in Lewiston, and, upon an examination there by the defendant, it was found to have been injured during its transportation. Thereupon it was arranged that that one should be sent back to New York and a new one be forwarded in place of it. The new manikin came along seasonably, arriving sometime in June, 1891. The defendant very well knew the expected article had arrived, but neglected to take personal possession of it until after this action was commenced in October, 1891. During that period, four months' time, not a word of denial or refusal, or of dissatisfaction of any kind, was communicated from the defendant to the plaintiffs. On January 10, 1892, after this action, then pending in the Lewiston Municipal Court, had been tried in that court, the defendant proceeded to the Express office, took the manikin from there to his house, opened the crate in which it was packed, and has kept it in his exclusive control and possession ever since. He says he took it for the purpose of using it as evidence in the trial of this suit on appeal. He never saw it from June to January, and whether his criticisms of it, at the trial in this court in April, 1892, were frivolous and fictitious or not, would have been for the jury to determine.

The question is whether these facts prove or even tend to prove delivery and acceptance. There is very significant evidence of acceptance since the action was brought if not before. It matters not what may have been the inducement that led the defendant to assume and exercise dominion over the property in January, 1892. The law does not allow him to assert himself a trespasser in taking the property. The act is a confession of acceptance. *Burrill* v. *Parsons*, 73 Maine, 286. If he takes the article at all it must be for the purpose for which it is tendered to him. Mr. Benjamin says a constructive acceptance, at least, may be inferred from any act of the buyer to the goods, of wrong if not the owner of the goods, or of right if he is owner. Benj. Sales, 3d Amer. ed. § 144, and cases cited. Here the evidence is of a conclusive character. But acceptance after action brought is not enough to sustain acceptance before the commencement of the action.

But to return to the question of acceptance before suit brought: It is a general principle affecting this subject, that whenever personal property is sold deliverable to a particular person or at a particular place for the buyer, a delivery to such person or at such place is a completed delivery to the vendee. "The cases are numerous," said WHITMAN, C. J., "which show that a delivery, of an article sold, to a person appointed by the vendee to receive it, is a delivery to the vendee." *Wing* v. *Clark*, 24 Maine, 366. The same rule attaches where the delivery is to be at an agreed place. *Means* v. *Williamson*, 37 Maine, 556. The precise rule, as stated in several cases in Massachusetts, is that, "in an action for goods sold and delivered, if the plaintiff prove a delivery *at the place agreed*, and that there remained nothing further for him to do, he need not show an acceptance by the defendant." *Nichols* v. *Morse*, 100 Mass. 523; *Brewer* v. *Housatonic R. R. Co.* 104 Mass. 593; *Rodman* v. *Guilford*, 112 Mass. 405. Discussions in other cases serve to illustrate the rule. *Pacific Iron Works* v. *Long Island R. R. Co.* 62 N. Y. 272; *Spenser* v. *Hale*, 30 Verm. 314; *Strong* v. *Dodds*, 47 Verm. 348; *Hunter* v. *Wright*, 12 Allen, 548; *Page* v. *Morgan*, 15 Q. B. D. 228; *Dyer* v. *Libby*, 61 Maine, 45; Benj. Sales (ed. as above) § § 162, 199, and notes.

The delivery at a place agreed is for the buyer's accommodation. Instead of his taking the goods they are sent to him at his direction. Then the seller's responsibility is ended, and an acceptance is implied. The buyer, in effect, agrees that such delivery shall operate as a complete transfer of the property. The buyer is not, however, precluded from the right of inspection or examination, unless such right has been previously exercised, and of subsequently objecting that the goods are not according to the contract. To that extent the acceptance may be considered as conditional.

But the right of rejection must be for good cause and not upon false or frivolous grounds. And the right must be exercised within a reasonable time, or it is lost and the sale becomes absolute. Silence and delay for an unreasonable time are conclusive evidence of acceptance. The burden of action is upon

the buyer, and he must seasonably notify the seller of his refusal to accept the goods. The seller cannot presume that objection will be alleged. Of course, there can be no refusal or repudiation if the goods are according to the contract. See cases before cited.

The case before us comes within the application of these principles. By the agreement of parties the delivery was to be at the American Express office in Lewiston. The manikin was so delivered, and remained there for months. If there had been an acceptance, either absolute or constructive, the action may be maintained. There is certainly evidence enough of it to require the jury to determine the question. If there has been an acceptance the defendant may still have any defense that goes in reduction of damages. *Moore* v. *Morse*, 83 Maine, 473. There is nothing in *Tufts* v. *Grewer*, 83 Maine, 407, that conflicts with the foregoing. That case went upon other and different principles.

Exceptions sustained.

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

TEWKSBURY DODGE *vs.* BOSTON MARINE INSURANCE COMPANY.

Waldo. Opinion December 19, 1892.

Shipping. Insurance. Warranty. Premium.

There is an implied warranty of the shipowner to an insurer of the vessel, that she was seaworthy at the inception of the voyage. If not seaworthy, the insurance does not attach, and the premium paid therefor may be recovered back, as money paid without consideration.

ON REPORT.

The case appears in the opinion.

J. Williamson and Son, for plaintiff.

C. P. Stetson, for defendant.

HASKELL, J. Assumpsit upon a policy of marine insurance, covering the freight of schooner Lyra, on a voyage from Bangor to Boston.

We have said in *Hutchings* v. *Ford*, 82 Maine, 370: "There was an implied warranty on the part of the owners that the brig was seaworthy at the inception of the voyage, that is, tight, staunch, strong, properly manned and provisioned, and suitably equipped for the voyage. This implied warranty was a condition precedent to any liability of the insurer, although the burden was upon the defendant to establish its breach, since seaworthiness of the brig at the inception of the risk is presumed. The presumption of seaworthiness at the inception of a risk under a marine policy may be rebutted, either by direct evidence of the ship's actual condition, or by proof of facts from which unseaworthiness may fairly be inferred; and when the latter is shown, the insurance is destroyed, for the policy does not attach, and the premium would be without consideration, and may be recovered back. *Taylor* v. *Lowell*, 3 Mass. 347; *Paddock* v. *Franklin Ins. Co.* 11 Pick. 226; *Swift* v. *Union Mutual Marine Ins Co.* 122 Mass. 573. These doctrines are applicable to this case.

The Lyra, loaded with lumber, was towed down river and lay at anchor over night. In the morning, she made sail, and when barely in the bay, sprang a leak without any apparent cause, there being no "stress of weather." Having a fair wind, she made Belfast water-logged and unseaworthy. A survey was called, her cargo discharged and re-shipped, and she was condemned, stripped and torn up as useless. She was fifty years old, had met with disaster two months previous, was weak and substantially worn out.

The evidence rebuts the presumption of seaworthiness, and clearly shows that the vessel must have been unseaworthy at the inception of the voyage. The insurance, therefore, never attached. The premium, however, may be recovered back under the money count.

Judgment for plaintiff for the premium only.

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

WAYLAND HURD *vs.* FRANK A. BICKFORD.

Penobscot. Opinion December 19, 1892.

Sales. Fraudulent Vendee. Rescission. Purchaser's Transfer.

A chattel purchased through fraud and sold by the purchaser of it in payment of his existing debt, may be reclaimed by the original vendor on discovery of the fraud, although the last vendee was ignorant of it.

ON EXCEPTIONS.

This was an action of trover for one horse and sleigh. Demand was proved. Pleadings were the general issue with brief statement of title in defendant. Verdict was for the plaintiff, with special findings of value of horse and sleigh. Defendant was a physician.

The evidence tended to show that the property was owned by the plaintiff, who subsequently sold and delivered it with other livery stock, to one Reuben G. Gross, and that the purchase by said Gross was fraudulent as to plaintiff.

It also tended to show that said Gross was, at the time of said pretended purchase indebted to the defendant for medical services, and after said pretended purchase gave defendant his note on time for such debt. That after such pretended sale, defendant purchased said horse of said Gross and gave in payment therefor said note before it was due.

It also tended to show that defendant at the time of his purchase of said horse was ignorant of any fraud by Gross in his purchase of the said livery stock of said Hurd.

The Court instructed the jury that if they found the purchase by Gross was fraudulent as to Hurd, the defendant would not be an innocent purchaser, and they would find the defendant guilty and assess the damages at the value of the horse and sleigh as they shall find it to be.

The jury found for the plaintiff and the defendant excepted.

George W. Howe, for plaintiff.

Vose and McLellan, for defendant.

Case presents but one question, was there a valuable consideration passing from defendant to Gross. Discharge of a pre-

existing debt is a valuable consideration. Defendant had a right to presume the title was in Gross. *Lee* v. *Kimball*, 45 Maine, 172; *Butters* v. *Haughwout*, 42 Ill. 18; S. C. 89 Am. Dec. 401; *Homes* v. *Smyth*, 16 Maine, 177; *Norton* v. *Waite*, 20 Maine, 175. The doctrine of the New York decisions leads to hardship and works interference with commerce.

HASKELL, J. Trover for a horse and sleigh. One Gross procured them from the plaintiff by means of fraud, being a debtor of the defendant; afterwards, Gross paid his debt with his own promissory note on time. Before the note became due, he sold the horse to the defendant, who was ignorant of the fraud, in payment of the note. No defense is shown as to the sleigh, but exception is taken to the instruction that, if the purchase by Gross was fraudulent, the defendant would not be an innocent purchaser of the horse, and could not hold title to it, although he was ignorant of the fraudulent title of Gross, his vendor.

The horse was used to pay a pre-existing debt of Gross. The payment of that debt by his own note after he purchased the horse did not change the relation of the defendant to him, from prior to subsequent creditor. The same debt existed all the time. The note was but a new evidence of it. The time of payment may have been extended, but no new debt was created, no new credit given; simply further credit for the payment of an old debt.

The doctrine in favor of innocent purchasers is, that they have a right to rely upon the apparent title of their debtors to chattels in their possession, and deal with them as if the property were really their own. So it was held in *Gilbert* v. *Hudson*, 4 Maine, 345, that chattels fraudulently purchased by a debtor, might be held on attachment, by his creditor, to the extent of an indebtedness contracted between them subsequent to the fraudulent purchase, but not for a debt contracted prior to that time. *Gilbert* v. *Hudson*, *supra*; *Buffington* v. *Gerrish*, 15 Mass. 156. This distinction between the rights of prior and subsequent creditors does not seem to have been always recognized.

Jordan v. *Parker*, 56 Maine, 557; *Wiggin* v. *Day*, 9 Gray, 97; *Atwood* v. *Dearborn*, 1 Allen, 483; *Thaxter* v. *Foster*, 153 Mass. 151; *Donaldson* v. *Farwell*, 93 U. S. 631. But property so purchased, and sold for a valuable consideration to a *bona fide* purchaser not conusant of the fraud, can not be reclaimed. *Trott* v. *Warren*, 11 Maine, 227; *Neal* v. *Williams*, 18 Maine, 391; *Sparrow v. Chesley*, 19 Maine, 79; *Tourtellott* v. *Pollard*, 74 Maine, 418.

The discharge of an antecedent debt has always been held in our State a valuable consideration for the transfer of negotiable paper not due, so as to shut out equitable defenses. *Homes* v. *Smith*, 16 Maine, 177; *Norton* v. *White*, 20 Maine, 175; *Railroad* v. *Bank*, 102 U. S. 14. In many jurisdictions, such transfer, in good faith, as security merely, has also been held to so operate; *Goodwin* v. *Massachusetts Loan Co.* 152 Mass. 199; *Swift* v. *Tyson*, 16 Pet. 1; *Railroad* v. *Bank*, 102 U. S. 14. Our decisions are to the contrary; *Smith* v. *Bibber*, 82 Maine, 34. Does the same rule apply to the sale or pledge of chattels? In *Titcomb* v. *Wood*, 38 Maine, 561, the court declares that it does not; but suggests a *quære*, whether it should not, and decides the case upon a doctrine quite as questionable, viz., that the discharge of a thief from liability for things stolen is a present consideration and not equivalent to the payment of an antecedent debt.

The case of *Lee* v. *Kimball*, 45 Maine, 172, cited by the defendant, upon casual reading, might seem an authority in the defendant's favor, and it has been sometimes cited as such; but, on examination, it will be found not to be. A cargo of coal, purchased to arrive, was sold by indorsement of the bill of lading in payment of the consignee's debt. The consignor attempted to exercise his right of stoppage *in transitu*, and the court held he could not, remarking that, as a pre-existing debt is held a valuable consideration in the transfer of negotiable paper, on principle, it would so operate in the sale of the cargo. That may be so; but the consignor did not hold the same relation to the cargo that a vendor does to merchandise, sold by reason of frauds practiced upon him by the vendee. In such

case, the title passes subject to the vendor's right of rescission, that, once exercised, revests the title in him. Such sale is not void, but only voidable. The consignor sold his cargo, without fraud practiced upon him. His sale, once made, irrevocably passed the title to the consignee. The sale was neither void nor voidable, and therefore, he could transfer the cargo to a *bona fide* purchaser by indorsement and delivery of the bill of lading as effectually as by an actual delivery of the cargo. The delivery of the muniment of title was a delivery of the property and worked an executed sale, whereby the right of stoppage became barred. *Leask* v. *Scott*, 2 Q. B. 376; *Clementson* v. *G. T. Railway*, 42 Up. Can. Q. B. 273.

It should be noticed that a merchant, by the exercise of stoppage *in transitu*, never regains title to the property sold, but only the possession, that he may enforce a lien for the unpaid purchase money. The title all the while remains in the vendee. If the vendor converts the property, the vendee can maintain trover for it; and the value in excess of the price agreed to be paid, will be the measure of damages. It is a proper subject of equity jurisdiction, where the vendor's lien can best be enforced. *Phelps* v. *Comber*, 29 Ch. D. 821; *Wentworth* v. *Outhwaite*, 10 M. & W. 436; *Valpy* v. *Oakeley*, 16 Q. B. 941; *Griffiths* v. *Perry*, 1 E. & E. 680; *Schotsmans* v. *Lancashire Railway*, 2 L. R. Ch. 332; *Ludlow* v. *Bowne*, 1 Johns. 15; *Babcock* v. *Bonnell*, 80 N. Y. 244; *Stanton* v. *Eager*, 16 Pick. 467; *Mohr* v. *Railroad*, 106 Mass. 67; *Newhall* v. *Vargas*, 15 Maine, 314.

The right of a vendee, depends upon whether the re-sale was made to a purchaser, ignorant of the fraud, and for a valuable consideration. *Tourtellott* v. *Pollard*, *supra*. And a valuable consideration, in such cases, means something more than the discharge of a debt that revives, when the consideration for its discharge fails. It means the parting with some value that cannot be actually restored by operation of law, leaving the purchaser in a changed condition, so that he may lose something beside his bargain. *Barnard* v. *Campbell*, 58 N. Y. 73; *Stevens* v. *Brennan*, 79 N. Y. 258; *Hyde* v. *Ellery*, 18 Md. 496, 501; *McGraw* v. *Henry*, 83 Mich. 442; *George* v. *Kimball*, 24

Pick. 234-240. The same rule applies to chattels pledged. *Goodwin* v. *Massachusetts Loan Co. supra.*

True, the discharge of an antecedent debt, in one sense, is a valuable consideration; but, if the title of the vendee fails, the discharge of his debt fails also, and he has lost nothing by the transaction. It is said that the vendor might pay his debt, and the vendee purchase the property with the proceeds. That is true, if the vendor have the means to do so, but all vendors are not solvent, if they were, there would be no occasion of reclaiming property fraudulently purchased by them, no occasion to rescind the sale. Other remedies would afford adequate redress. Or, if the property be reclaimed after they had sold it in payment of their existing debts, those debts could be easily collected, and no one would suffer from the transaction; whereas, if, perchance, they are insolvent and can, by fraud, purchase property, and apply it to their old debts, so as to leave their vendors without the power of reclaiming it, they, by defrauding one man, can thereby pay the debts of another, manifestly to the shame of honest dealing and even and exact justice among men. The authorities sustain the ruling at *nisi prius.*

Exceptions overruled.

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

JONATHAN DARLING

vs.

PASSADUMKEAG LOG DRIVING COMPANY.

Corporation. Log Driving. Contracts. Negligence. Special Laws, 1883, c. 229; 1885, c. 383.

A corporation that lets, by contract, to each of several persons, the driving of logs in the same stream, is not liable to them for their torts upon each other.

ON EXCEPTIONS.

This was an action of assumpsit to recover for plaintiff's services in driving logs for the defendant, in Passadumkeag river during the season of 1891, under a contract with the corporation. The corporation is empowered by charter to drive all logs and timber at their owners' expense, during the driving

season, from certain points, viz: Saponac pond and Nicatous lake, down said river to its boom at the mouth of the river, taking the logs when they come into the company's limits where the owners are required to deliver them at their own cost to the company. The jury returned a verdict for the defendant, and the plaintiff took exceptions.

The facts are found in the opinion.

Jasper Hutchings for plaintiff.
Charles A. Bailey, for defendant.

HASKELL, J. The defendant is a corporation, chartered (c. 229, 1883; c. 383, 1885) to drive all logs and timber seasonably in the Passadumkeag river during the driving season, between the dam at the foot of Nicatous lake and Saponac pond, to the boom at the mouth of the river, some twenty miles below the lake. When the logs and timber arrive in the boom, a lien for the cost of driving attaches to it, and is to be paid by the owners of it.

In the spring of 1890, the company let, by contract, to plaintiff the drive below the foot of Grand Falls, known as "the first drive," and the drive above it and below the mouth of Nicatous stream, known as the "second drive;" to one Page, the drive between Nicatous lake and Grand Falls known as the "third drive," but not to include any logs that "may have been taken by the first or second drives." The limits of the third drive include the Passadumkeag above the falls that is also within the limits of the second, manifestly for the purpose of taking those logs that come down the Passadumkeag above Nicatous stream, or into it from the Madagascal after the second drive shall have started. All the contracts required the drives to start when the company shall direct.

The first drive was seasonably driven in. The second drive was ordered to start May 10th. The third drive was started by Page without orders from defendant, and on the same day some of the logs began running out of the Nicatous stream into the Passadumkeag, and into the rear of the plaintiff's second drive, the body of it being over Grand Falls. The second and third drives thus became mixed, and the plaintiff claimed the contract price

for driving both. The cause of the mixture may have been the fault of either plaintiff or Page, or of both of them.

Exception is taken to the ruling that in either case the defendant would not be liable. This was not error. The defendant did not engage by contract to be responsible for the torts or negligence of either plaintiff or Page. On performance of their respective contract labor, the defendant became liable to pay the contract price. Suppose each of two contractors agree to haul lumber for the same owner, over the same highway, on what principle is he liable for their torts upon each other or upon strangers? If they are mere fellow-servants, certainly he is not liable for injuries between them; if not, then he is not responsible for their conduct towards any one. Had the mischief arisen from the defendant's fault in ordering the respective drives, or either of them, to start at an improper time, the case might be different, for then it might have been the necessary result of the defendant's contract duty towards each. Page started without orders, on his own account, and at his own risk. If the plaintiff has any remedy, it is against Page.

Certain Passadumkeag logs came into the company's limits, below the mouth of the Nicatous, after the first and second drives had been driven in. Plaintiff claims the contract price for driving them, because, had Page not prematurely sent the lake water down the Nicatous and caused back water in the Passadumkeag above, these logs would have seasonably come within his limits and have been subject to his contract. But they were not there when he was ordered, under the terms of his contract, to start his drive. When that order was given, and there is no evidence to show that it was improperly given, his rights became fixed. He must move, not wait. Here again is no injury from any improper act of defendant. If plaintiff was unlawfully deprived of any part of his drive, it was the act of Page, not of defendant, that did it. The instruction, relieving the defendant on this score, was manifestly correct. No other exceptions are pressed. *Exceptions overruled.*

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

AMANDA MCKENZIE *vs.* WILLIAM LOMBARD.

Aroostook. Opinion December 26, 1892.

Bastardy. Abatement. Death. R. S., c. 79, § 11; c. 97.

Proceedings in bastardy abate by the death of the respondent during the pendency of such proceeding in court before trial.

ON EXCEPTIONS.

Before the trial of the case in the Superior Court, for Aroostook county, the respondent having died, a motion to dismiss was sustained by the court on the ground that the action did not survive. The complainant took exceptions to the ruling.

Frank L. White and *Ira G. Hersey*, for complainant.

George H. Smith, for respondent.

PETERS, C. J. The question here is whether a bastardy proceeding survives against the personal representatives of a respondent who has died during the pendency of the proceeding in court before a trial has been had. We feel strongly assured that it cannot survive. The proposition finds no favor in the common law, and there is no statutory provision authorizing it. The legislature (R. S., c. 79, § 11) in 1879 passed an act allowing a proceeding of the kind to be prosecuted to final judgment by the executors or administrators of a complainant who has deceased before trial of the prosecution. Beyond this exceptional limit no statute or decision that we are aware of has ever gone. No judgment is sought for or is obtainable against property. The process, though held to be a civil proceeding, is criminal in form, and is an extraordinary means to compel a father to assist in the support of his illegitimate child or suffer imprisonment as a penalty for his neglect to do so. There is no fitness in the proceeding that would adapt itself to the principle of survivorship.

If the pending action survives then the cause of action would survive as well, and the process could be originally instituted against the administrator of a deceased person who in his lifetime had been guilty under the bastardy statute. The incon-

gruities that would beset such a proceeding are obvious enough. It would be a strange sight to see an administrator arrested, required to give a bond, be put on trial, and perhaps imprisoned, for an act of bastardy committed by the party officially represented by him. Besides, it would be an extremely severe and very questionable policy that would allow a living woman to swear the paternity of her illegitimate offspring upon a dead man.

Exceptions overruled.

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

STATE *vs.* DAVID BUTLER, and others.

Kennebec. Opinion December 28, 1892.

Indictment. Trial. Statements of Counsel. Practice.

Three persons were indicted jointly for an assault upon a fourth who was also indicted for a contemporaneous assault upon them, the alleged assaults being but one occurrence. On the trial of the three co-respondents the prosecuting officer persisted in saying to the jury, against the objection of the respondents and without remonstrance from the court, that if these respondents should be convicted he would discontinue the other indictment: *Held*, that the introduction of such extraneous issue would have been cause for a new trial had not the judge in his charge so explained the matter to the jury as to remove all prejudice probably occasioned thereby.

ON EXCEPTIONS.

The case appears in the opinion.

C. E. Littlefield, Attorney General, and *L. T. Carleton*, County Attorney, for the State.

S. S. Brown, for defendants.

PETERS, C. J. The four respondents, together with another person who was not arrested, were indicted for an assault and battery upon John R. Pollard, and Pollard was at the same time indicted for a felonious assault upon one of them. A motion for separate trials of the respondents, made by them, was denied. All the parties, respondents and complainant, testified as witnesses at the trial. The report of the case describes the following episode as taking place during the trial: "In his argument

to the jury in this trial, the county attorney proceeded to say that in his judgment these defendants were all guilty of the offense charged against them in the indictment; and that if the jury so found by their verdict, he should not put Pollard on trial on the indictment against him because he should regard a conviction of these defendants as equivalent to an acquittal of Pollard on the indictment against him, while he should regard an acquittal of these defendants as equivalent to a conviction of Pollard on the indictment against him. When the county attorney was making this statement the counsel for the defendants broke in upon him by way of protest against such a statement by the county attorney, when the presiding judge told said counsel not to interrupt the county attorney, and allowed the county attorney to proceed, whereupon the county attorney repeated the statement."

An exception was taken to the judge allowing the county attorney to make the above statement and to repeat it after objection made by the counsel for the defense.

Courts have of late been more particular than formerly in their efforts to require counsel, especially counsel who have the closing argument, to conduct the trial of causes within the rules. And in several recent instances, new trials have been granted by this court where counsel have in their arguments indulged in immaterial but prejudicial statements of law or fact in spite of the disapproval of the presiding judge.

We think the judge should have yielded to the objection of repondents' counsel, and corrected any false impression which the jury might have obtained from the objectionable statements. All the parties implicated, both respondents and complainant, may have been guilty of the offenses charged against them, or some or all may have been innocent. And still there was danger that the jury, or some of them, might feel inclined to exonerate the complainant of the aggravated offense charged against him by their consenting to a conviction of the respondents for the minor offense charged against them. But inasmuch as the judge in his charge stated the consequences of a verdict either way with great clearness, we apprehend that the prejudicial influence

so strongly deprecated by the counsel for the respondents was prevented in the end. The judge said:

"Now, this being clearly and purely a question of fact, it is of course for you, on your responsibilities as jurors, to determine where lies the truth. It has been put in evidence here by the defendants that Mr. Pollard, this complainant, is under indictment for shooting one of these parties indicted here for this assault. The purpose and the only purpose for which that indictment was allowed to be read to you was to show the circumstances under which Pollard testified before you; because it is proper that the jury should know whether or not there are any influences which might or might not bias him in the giving of his testimony, and therefore I permitted the fact of his being under indictment to go before you. You are not trying Pollard upon that indictment, and you are not by your verdict here to determine his guilt or innocence in the use of his pistol under the circumstances detailed here, and it is not for me to instruct you in this case with regard to the responsibility which he assumed when he undertook to fire his pistol upon that occasion. The question alone which you are to determine here, is, whether or not he himself was assaulted, whether an assault and battery was committed upon him on that occasion."

Exceptions overruled.

WALTON, FOSTER, HASKELL and WHITEHOUSE, JJ., concurred.

JANE P. GOULDING *vs.* CHARLES HORBURY.

Androscoggin. Opinion December 29, 1892.

Gift, causa mortis. Delivery. Witness.

The court adheres to the rule that has dominated its former decisions, requiring that, to constitute a valid gift *causa mortis*, there shall be clear and conclusive evidence, not only of an intention to give, but of an actual gift consummated by as perfect a delivery as the nature of the property given will admit of.

In illustration of such rule, the court holds that a delivery of the key of a small trunk containing money and bonds does not alone amount to a delivery of the contents of the trunk, although the donor designed that such a delivery should be effected thereby.

When a gift *causa mortis* is claimed, the judicial confidence is strengthened by proof that the intention to give existed for a long period before the act of giving, and especially so if such intention is proved by writing under the donor's own hand.

An old and illiterate man, with no other family than an illegitimate daughter thirty-six years old at the date of his death, had by his letters to her and in other ways manifested a strong affection for such daughter, and she was the only occupant in his house with him when he died. He had for some years made her his principal confidant in his business matters, and had frequently intimated in his letters that she would some day receive his property or the bulk of it. His estate consisted mostly of stocks, bonds, and savings bank books, of the value of some fifteen thousand dollars, which he kept in a small portable cupboard in the room where he lived. During his last sickness, while expecting death, he gave her from his pocket two wallets, containing one hundred dollars in money, and the key of the cupboard, saying that he gave her the money and the cupboard and all that was in it. She thereupon unlocked the cupboard in his presence, he seeing what she did, and after some hasty handling and examination of the papers, she locked them in the cupboard again, ever after during his sickness keeping the key in her own pocket. Soon after this on the same day, she placed some valuables of her own in the same cupboard. He had physical strength enough to have got from his bed and taken the articles and passed them to her by his own hand. He died within three days after this act. *Held;* That the jury were authorized on these facts to find a sufficient, actual delivery to consummate the gift.

Where the administrator of a donor wrongfully converts property of the donee to the use of the estate of the donor, upon the belief that the property was not legally given by the donor to the donee, he is personally liable to the donee for such conversion.

Where neither party to an action appears by the record to be an executor or administrator, nor is made (by the order of court) a party as an heir of a deceased party, either party may testify in his own behalf.

ON MOTION AND EXCEPTIONS.

This was an action of trover brought by the plaintiff who claimed that certain bonds and bank books in the possession of the defendant belonged to her as a gift, *causa mortis*. The verdict was for the plaintiff in the sum of $4800, the full amount claimed.

Under the general issue and brief statement of special matters of defense, the defendant claimed that no gift had been made, but that such claim was an after-thought; that the facts offered in evidence to support such gift did not show such delivery as is required by the rule of law as settled by the courts of this State; and that the defendant being an administrator, the plaint-

iff was not a competent witness to anything which happened prior to the death of the alleged donor.

The case is stated in the opinion.

McGillicuddy and Morey, for plaintiff.

Newell and Judkins, for defendant.

Counsel cited: *Drew* v. *Hagerty*, 81 Maine, 231, and cases cited in argument; also *Gano* v. *Fisk*, 43 Ohio St. 462 (54 Am. Rep. 819); *Powell* v. *Hellicar*, 26 Beav. 261; *Seabright* v. *Seabright*, 28 W. Va. 212.

PETERS, C. J. Some of the facts of this case should be stated in order to appreciate the pending questions. Thomas Pemberton, over whose property controversy has arisen, died at Sabattus in this State in May, 1891, then seventy-two years old. He never was married, and he left no will. Jane Pemberton Goulding, his illegitimate daughter, born in England and living there until she became thirty-four years old, in April, 1890, came to this country to live with him. At the time of his death he owned a small house in Sabattus, all of which he rented excepting the basement which was his kitchen and the attic room in which he and his daughter slept in separate beds. He was for a life-time industrious and saving, being evidently a man of miserly habits, and up to the time of his death had amassed an estate amounting to fifteen thousand dollars or more, consisting mostly of stocks, bonds and savings bank books. In a corner of this attic room was a small portable cupboard, so called by the witnesses, brought by him from England when he first came to this country thirty to forty years ago, in which he kept his valuables of a moneyed kind and any other papers he had. His habit was to keep the cupboard locked with the key in his pocket.

He was taken sick on a certain Saturday and died on the Wednesday following, occupying his bed from the first to the last of his sickness. The plaintiff claims that on Sunday during his last sickness, while expecting and awaiting death, he gave her about fourteen thousand dollars worth of stocks, bonds

and bank books which were at that time in this cupboard. The present action is one of trover brought by her for a portion of such property against the defendant who is the administrator of her father's estate. Upon her story as a witness her right of recovery mostly depends.

Her testimony is lengthy, but the most material portion of it is presented here, as follows: "I was just giving him [her father] a cup of tea and he got hold of his pants that were on his bed and he felt in his pockets and took his two old wallets out and the key of the corner cupboard. He said, 'Here, Jane, take these,' he says, and take this key of the corner cupboard. It is thine; and all that is in the corner cupboard is thine, and don't let any one take it from thee for thou art mine and I am thy father.' . . . He said, 'Now, Jane, don't let no one take them off thee, they are thine, and put thy foot down and say that everything of thy father's is thine, and don't let any one take them of thee.' . . . I just went to the cupboard and looked in and took them in my arms and looked them over, and all the bonds were lying on the bottom of the cupboard and I looked at them and put them back again. Then I got the bank books and looked at them and put them back again. There was a bundle of papers all strung up with strings and I did not unfold them and did not examine them, but I put them back again; and I never troubled them afterwards until Mr. Levi Wooley came."

She further testified that after locking the cupboard, she placed the wallets, containing about one hundred dollars in money, and the key in her own pocket where they remained until her father died; that she had never had the key before this in her possession, but had been sent with it by her father to get papers from the cupboard for him; and that she placed some valuables of her own in the cupboard the same Sunday after the donation was made. Of this latter matter she said: "In the afternoon I went to my trunk and I put my two bank books in the cupboard. I thought I would lock them all up together; my father was so sick; there wasn't any safe place only this in the bedroom, in that corner cupboard." On cross-

examination she said her father was not too feeble to have got up and gone to the cupboard himself, and that he had a full view of it and was within a few feet of it as he was situated in his bed.

It cannot be pretended that there was any unnaturalness in his giving her the bulk of his estate. She had for many years been acknowledged by him as his daughter. He visited England several times to see her and her mother, tarrying with them there for months at a time. His letters express great sympathy and affection for his child. And they contain many intimations, if not avowals, that she might expect to receive his property at some time. He imparts to her confidential information, in his indirect way of saying and doing things, as to the amount of his property, an admission which he says he never made to any one else. The free interchanges in their correspondence resulted in her hastening to join her father in this country as soon as she got released from obligation to remain with her mother in England. Before she came here he had placed fifteen hundred dollars at interest in the other country, the income of which she received for the benefit of herself and her mother. And on leaving this country in 1888, for a visit across the water, he left a written order to a savings bank where he had four thousand dollars on deposit, besides accumulated interest due thereon, directing how the funds should be appropriated in case of disaster to him before his return, which paper may as well be incorporated herewith as reference will be made to it again; the paper running thus:

"dec 27, 1888

to Androscoggin
County Savings Bank
Lewiston Maine
to the President and Trustees
and treasurer Mr. frank w. Parker

i Thomas. Pemberton of Sabattus maine i am seting sail for England on the 27 of december 1888, and if i do Not Land Safe Back to Sabattus Please Pay the whole amount of my deposits and interest due me in this County Saving Bank to my order in

Both Books No. 558, and No. 1487 for it All Belong to Thomas Pemberton Not to Annie Wooley. Please to Pay it to my daughter, Jane Pemberton Goulding at No-12 wilson Brook kingston Hyde, Cheshire near manchester England By order of Thomas Pemberton Sabattus me "

In sustaining gifts *causa mortis* where the question of delivery is depending, it is a relief to feel that the donor had, for some time before the act was done, intended to make the gift; and it adds very much to the judicial confidence when that intention is manifested by some writing signed by the donor. Where the intent of the donor is proved under his own hand, the danger or likelihood of perjury is very far less than when the gift is claimed upon parol evidence unsustained by any writing. A court would be disposed to examine the one case less critically than the other. See *Brinckerhoff* v. *Lawrence*, 2 Sand. Ch. 400, 406.

It cannot be denied that Thomas Pemberton not only intended to bestow the most of his estate upon his daughter, but that he died with the belief that he had done so; unless we accept the theory of the defense, ably presented at the argument, that all his declarations apparently to that effect, made after that Sunday, referred to the paper lodged with the Androscoggin County Bank, with his supposed meaning of that paper, and not to the transaction testified to by the plaintiff. Her conduct after her father's death gives a good deal of plausibility at least to the defendant's position in that respect. Still, the testimony of the two neighbors of the deceased who were called in by him on the day before he died, and that of the attending physician, as to his declarations on this matter, corroborated as such testimony is by the same conception expressed in his letters, furnishes evidence of a contrary character not to be easily overcome. At all events, the letters present impregnable proof that the donor during a long period in his life-time contemplated making the daughter the principal, if not the sole, recipient of his estate.

The defense contends that, whether there was any intention to give or not, there was no perfected gift, even if the plaintiff's testimony be fully believed; that any such intention was

not followed by a sufficient actual delivery. On this point the presiding judge gave the jury the following ruling: "If, in contemplation of death at that time as the result of that sickness, Thomas Pemberton decided to make a gift of his property to his daughter, this plaintiff, and for that purpose delivered to her the key to the little cupboard, the cabinet, or closet in the corner of the room where they then were, for the purpose, I say, of enabling her to take possession of the property as her own, and with the intention on his part then and there to part with all dominion and control over the property, to release all right and claim ever after to resume possession of it again unless he recovered, and she used the key for that purpose and then and there accepted the property as her own and took it into her own custody and control, retaining the custody of the key ever after, and placing in the cupboard with this property, property which she had previously held in another place as her own, in her own custody; and if you find that in thus delivering the key to her, he placed it beyond his power to resume possession of this property otherwise than by the extraordinary means of breaking open the lock, and that he then intended it as an actual transfer of possession of all the property in the cupboard, subject only to the condition of his recovery from that sickness, you would be authorized, if you believe all the testimony tending to support these propositions, to find it a sufficient delivery and transfer of possession to constitute a valid gift in contemplation of death.

"You must determine precisely what significance shall be attached to that act of delivering to her the key, with the remarks made in connection with it. The mere delivery of the key as a symbol of the property would not be a sufficient delivery, but only as a means of transferring the possession; when it is actually used for that purpose and the possession is actually transferred, that would constitute a valid and sufficient delivery."

The defense relies on a series of decisions in our own State, the last of which is the case of *Drew* v. *Hagerty*, 81 Maine, 231, where all the preceding authorities are cited, as establish-

ing the general doctrine that to constitute a valid gift *causa mortis* there must be clear and unmistakable proof, not only of an intention to give, but of an actual gift consummated by as perfect a delivery as the nature of the property given will admit of. And particular reliance is placed by the defense upon the practical application made by the court of such doctrine in *Hatch* v. *Atkinson*, 56 Maine, 324, where it was held that the delivery of a key of a small trunk containing money and government bonds, would not be regarded as a delivery of such money and bonds, although such was the purpose and design of the donor. We are aware that the case of *Hatch* v. *Atkinson*, goes further than some of the decided cases in strictly applying the principle, as may be seen in a note to the case of *Thomas* v. *Lewis*, lately decided by the Supreme Court of Virginia, and reported in the Am. Law Reg. Vol. 31, p. 662; but we can see no reason for dissatisfaction with the rule which was deliberately applied by this court to the facts of that case, a rule which has been followed in many reported and unreported cases since. The delivery of a key to a trunk is by no means so expressive and significant an act as a delivery of the articles contained in the trunk. One kind of delivery is more in the words spoken and the other more in the act done. It is easier to falsify as to words than as to an act, and the temptation to do so is greater and the chance of exposure less. Keys are things too easily to be obtained from a dying man to allow the slightest importance to be attached to a mere possession of them as evidence of property. A claim to a trunk is more general, and a claim to the contents usually more particular. Strict rules in this branch of the law are absolutely indispensable. There is not a court in the civilized world that does not look with disfavor and suspicion on death-bed gifts established on parol evidence. The public should be educated as far as may be to the habit of making testamentary dispositions.

By these practical standards, therefore, must the plaintiff's very important claim stand or fall. If we give full faith and credit to that portion of her testimony which has been already herein quoted, the court is of opinion that her claim may be

sustained. The facts of this case are more favorable for establishing a delivery than were those exhibited by the testimony in the case of *Hatch* v. *Atkinson*, *ante*. In that case the testimony was more or less contradictory and suspicious. The claimant was presumably not a relative of the donor. Had the claim succeeded it would have resulted in a complete family despoliation. And the manual delivery was of the trunk and key and not of any articles in the trunk.

Here the gift was a natural one, and had been evidently contemplated for many years before the donor's final sickness. His letters repeatedly intimated if they did not promise some considerable gift. And during his last sickness he declared and emphasized his intention in the presence of some of his neighbors. The only real question must be whether there were acts enough done to constitute actual manual delivery within the letter and spirit of the rule hereinbefore enunciated. The donee received the wallets, a portion of the property given, from her father's hand and transferred them to her pocket. She took from him the key with which she unlocked and afterwards locked the little private cupboard. The donor had strength enough to have done those acts himself. But they were done before his eyes and by his direction. The articles within the cupboard were taken up and handled by the donee. And she knew at least in a general way what the articles were. She placed within the same receptacle on the same day certain savings bank books of her own, which before that time she had kept in a small tin trunk owned by her. She kept the key ever afterwards until the donor died, exercising the same care and dominion over the cupboard and contents as any owner would. To be sure, there might have been a little more formality observed by his taking the papers in his own hands first and then passing them to her. The distinction is, however, a delicate one, and under all the circumstances may be regarded as unessential. Any lacking of the strictest formality is made up by the corroboration before mentioned.

We think the instruction, in the light of the facts we have reviewed, was correct. The judge stated what would be the consequence of such a delivery of the articles, "if accepted by

the donee," meaning, no doubt, by the term acceptance the receiving and keeping the articles in the manner and under the circumstances testified to by the donee.

Any formality omitted in the delivery by him was made up in the acceptance by her in his presence. The substance of the rule, if not its strictest letter, was respected in the transaction.

But it is strongly contended by the defendant's counsel that the plaintiff's testimony is not trustworthy, and that her conduct and conversations subsequently to the death of her father were so inconsistent and conflicting with her present story that the alleged gift cannot be considered, as it must be to be valid, as established by clear, convincing and conclusive evidence. There is no doubt that a serious question of fact is involved in a determination of the case, but space cannot be spared in a judicial opinion to present the evidence or argument on that issue. It is sufficient here to say that the court, with some hesitancy on the part of some of its members, is of the belief that the necessary facts are proved to entitle the plaintiff to retain the verdict which the jury accorded her.

Another question arose at the trial, the defendant contending that the action should, even if the gift is to be regarded as proved, be brought against him in his representative capacity as administrator of the donor instead of against him personally. That position cannot be safely admitted. The consequences would in many cases be very harsh and unjust were that principle to prevail. The defendant must administer upon the donor's property and not upon the donee's. Your executor or administrator is entitled to the possession of your and not my property.

Another question was an incident of the trial, the counsel for the defendant insisting that, as the question of title is one between the donee and the heirs of the donor, both parties claiming under the same person, the donee was not a competent witness in her own behalf to testify to any facts occurring before the death of the donor, and that the litigation is the same in effect as if it were between the plaintiff and the administrator. There is confessedly a good deal of force in this position. But it is now a settled question, and will probably remain so unless

legislative interference changes it, that where neither party is an executor or administrator in the record, nor is made (by the act of court) a party as heir of a deceased party, either party may testify. *Gunnison* v. *Lane*, 45 Maine, 165; *Nash* v. *Reed*, 46 Maine, 168; *Wentworth* v. *Wentworth*, 71 Maine, 72. What the right of the parties might be as witnesses were the action against or in favor of Horbury (present defendant) as an administrator would be another question.

Motion and exceptions overruled.

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

STATE *vs.* CLARENCE M. EATON.

Franklin. Opinion December 29, 1892.

Gambling, Keeping place of resort for. R. S., c. 125, § 1.

Upon an indictment for keeping a place resorted to for the purpose of gambling it is not necessary that the government should satisfy the jury that the respondent kept the place for the sole purpose or even the principal purpose of gambling.

If the parties went there to obtain beer, and as an inducement to and as a means of obtaining it, they resorted to a gambling device, and this was allowed by the respondent, then he would be guilty.

Whether the place was one resorted to for the purpose of gambling was for the jury to determine.

ON EXCEPTIONS.

The case is stated in the opinion.

F. E. Timberlake, County Attorney, for the State.

H. L. Whitcomb, for defendant.

FOSTER, J. Indictment for keeping a place resorted to for the purpose of gambling.

The exceptions are to the instructions of the presiding justice.

It appears that the respondent kept a shop or store as described in the indictment, and that on some occasions in the store shook or played at dice for drinks of beer or cigars which he there kept for sale.

I. In charging the jury, the presiding justice read that section of the statute upon which the indictment was based, and in addition thereto instructed them as follows:

"Now, under the statutes of this State, in addition to the provision already read to you, all places resorted to for the purpose of gambling are declared to be nuisances; and again by another provision of the statutes, under the chapter which is entitled 'Offenses against the public health, safety and policy,' is this provision: 'Every lottery, scheme or device, of whatever name or description, whether at fairs or public gatherings or elsewhere, and whether in the interests of churches, benevolent objects or otherwise, is prohibited and declared a nuisance.' That is what your representatives and mine have said in legislature upon this question.

"That is the public sentiment so far as we are concerned upon this subject. All schemes or devices of chance which are put into operation for any of these purposes, involving the passing of anything of value from one to another as the result of a scheme or device of chance, are declared to be common nuisances."

We see nothing objectionable in the statement of the law as given. The presiding justice had already stated to them the exact language of the particular statute upon which the government based its case. As illustrating and rendering its meaning more clear, additional provisions were read, and we cannot assume that the jury were misled by what the court considered might be of assistance to them in correctly understanding the nature of the offense charged.

II. With considerable stress, the counsel for the respondent contends against that portion of the charge in which the court stated that it was not necessary or indispensable that the government should satisfy the jury that the respondent kept the place for the sole purpose, or even for the principal purpose of gambling — but if parties went there to obtain beer, and as an inducement to it and as a means of obtaining it, they resorted to a gambling device as previously explained, and this was allowed by the respondent, then he would be guilty.

We think this is not susceptible to the objection urged, when

examined in the light of the statute, which prohibits any person from keeping a house, shop or other place resorted to for the purpose of gambling, and from permitting any person to gamble in any way in any house, shop or place under his care and control. The court had expressly stated that the question upon which the jury was to pass was whether the place was resorted to habitually, frequently, for the purpose of gambling, with the knowledge and consent of the respondent or keeper of the place — whether he kept it to be so resorted to for the purpose of gambling — and thereupon the court added that it was not necessary that the government should establish that this was the sole purpose, — that it might be an incidental purpose. And furthermore, the court left it to the jury as a question of fact, whether the respondent kept the shop or store described in the indictment as a place resorted to for the purpose of gambling.

This was as favorable for the respondent as could properly be given. Under a similar statute in Massachusetts, Chief Justice Shaw, in *Com.* v. *Taylor*, 14 Gray, 26, says: "It was properly left to the jury to say whether persons resorted to the defendant's house for the purpose of gaming. In general it is a fair conclusion to hold that persons intend to do that which they habitually do; and if one of the purposes of persons resorting to the defendant's house was gaming, and that necessarily unlawful gaming, and that habitually allowed by the defendant as keeper of the house, it brought him within the statute." See also, *State* v. *Currier*, 23 Maine, 43. While it is true that the offense charged is for keeping a place resorted to for gambling, it is not necessary, nor common, that this is the sole or principal purpose for which the place is kept.

Exceptions overruled. Judgment for the State.

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

HOSEA B. PHILLIPS *vs.* NANCY EMERY.

Hancock. Opinion December 29, 1892.

Chattel Mortgage. Foreclosure. Second Mortgage. Waiver.

The owner of a building gave a personal property mortgage to the plaintiff, and afterwards a second mortgage to another party. Thereafter a creditor of the owner attached the building. The officer gave notice to the plaintiff and requested the amount due under the first mortgage. This was not complied with, and the plaintiff while the attachment was pending foreclosed his mortgage by publication. At the sheriff's sale the defendant became the purchaser. Afterwards the plaintiff purchased and procured an assignment of the second mortgage, and proceeded to foreclose that, which foreclosure became complete before the commencement of this action.

Held, That the waiver of the plaintiff to comply with the statute in giving the officer the amount due under the first mortgage postponed that mortgage, so far as the rights of attaching creditors were concerned, to the second, and the second mortgage became the first on the property:

That the second mortgage still subsisted and was not extinguished by the prior foreclosure; and

All rights the attaching creditor acquired in the property were subject to both mortgages.

See *Phillips* v. *Fields*, 83 Maine, 348.

ON EXCEPTIONS.

This was an action of trover for a building. The court gave judgment for the plaintiff and the defendant excepted.

The case is stated in the opinion.

Wiswell and King, for plaintiff.

Deasy and Higgins, for defendant.

FOSTER, J. Trover for a building situated at Bar Harbor. The real question involved is which party has title — the plaintiff or defendant.

Eliminating dates and figures, the case may be understood from the following statement.

The owner gave a mortgage to the plaintiff, and subsequently a second mortgage to Bragg, Cummings & Co. of Bangor.

Thereafter, a creditor of the owner attached the building — notice being given by the officer to the plaintiff requesting the amount due under his mortgage. The reply was not sufficiently

definite to comply with the terms of the statute (*Phillips* v. *Fields*, 83 Maine, 348). While the attachment was pending, the plaintiff commenced foreclosure proceedings upon his mortgage by publication. The building was sold by the officer under the attachment, and purchased by this defendant. Afterwards, the plaintiff procured an assignment of the second mortgage, and foreclosed the same, which foreclosure became complete before the commencement of this action.

The position of the defendant is, that the foreclosure of the first mortgage by the plaintiff, notwithstanding his waiver to hold the property as security for that first mortgage in consequence of not complying with the statute in furnishing the amount due to the officer, completely divested Bragg, Cummings & Co. of all right and title to the property under their mortgage, and consequently the assignment of the same afterwards to the plaintiff gave him no right or title through that mortgage. Or, briefly put, that the second mortgage "became extinct" by reason of the prior foreclosure.

This principle would undoubtedly be correct, provided the first mortgagee had done nothing to the prejudice of the second mortgagee.

But when the right to hold the property under the first mortgage was waived by the plaintiff's failure to comply with the statute, then, as to the attaching creditor, and those deriving title under him, the first mortgage became postponed to the second — stepped in behind it — and the second mortgage became the first on the property, and no longer rested so far as the attaching creditor is concerned, on any right of foreclosure of the original mortgage. Or, to state it thus: when the plaintiff by his own wrong allowed a subsequent attaching creditor to get a claim superior to his on the property, then, in consequence of that wrong, he lost the power to foreclose that mortgage and thereby abridge the right which the second mortgagees otherwise had.

The defendant has no greater right than that of the attaching creditor, for she claims through him. All the rights such cred-

itor acquired in the property were subject to both mortgages. The creditor would have to redeem these mortgages unless by some default of the mortgagees he was let in before the mortgages. No attempt has ever been made to redeem the second mortgage, and no demand was ever made by the officer making the attachment for the amount due upon that mortgage. The attaching creditor knew of its existence because it was a matter of record long prior to the attachment. When this second mortgage was foreclosed, notice was served upon the defendant as the case shows, and she then had an opportunity to redeem it if she had seen fit.

This mortgage having been properly foreclosed, the title to the property became vested in the assignee of the mortgage — this plaintiff.

Exceptions overruled.

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

FESSENDEN I. DAY, EXECUTOR, in equity,

vs.

FRANK LACASSE, and others.

Androscoggin. Opinion December 29, 1892.

Deed. Escrow. Statute of Frauds. Specific Performance.

A deed to be delivered in *escrow* must be delivered to a stranger, to be by him delivered, upon the happening of some contingency, or upon the performance of some condition, and the deed becomes effectual as a delivered instrument only upon such second delivery.

It cannot be delivered in *escrow* to the agent or attorney of the grantor. Nor to the agent or attorney of the grantor.

Where a deed from the grantor and a mortgage from the grantee are made in pursuance of a verbal contract of sale of real estate, but not delivered, they cannot be used as a memorandum within the statute of frauds upon which to enforce specific performance in equity.

IN EQUITY.

This was a bill for specific performance, heard in the court below on bill, answers and proofs. A decree sustaining the bill was ordered by the court and the defendants appealed.

The case appears in the opinion.

White and Carter, for plaintiff.

Deed, mortgage and note sufficient memorandum under statute of frauds. Browne, Stat. Frauds, § § 346, 348, 382; *Beckwith* v. *Talbot*, 95 U. S. 289; *Williams* v. *Robinson*, 73 Maine, 186; *Lerned* v. *Wannemacher*, 9 Allen, 412; *Fessenden* v. *Mussey*, 11 Cush. p. 127; *Salmon Falls Manf'g Co.* v. *Goddard*, 14 How. 446; *Hurley* v. *Brown*, 98 Mass. 545; *Mead* v. *Parker*, 115 Mass. 415; *Campbell* v. *Thomas*, 42 Wis. 437 (Am. Rep. 427).

Delivery: Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. *Foster* v. *Mansfield*, 3 Met. 414-415; *Regan* v. *Howe*, 121 Mass. 426; 3 Wash. R. P. p. 271; *Shirley* v. *Ayers*, 14 Ohio, 307 (45 Am. Dec. 546), and cases.

Newell and Judkins, for defendants.

FOSTER, J. Bill in equity in which the complainant seeks for the specific performance of an alleged contract for the sale of real estate.

The defendants in their respective answers demur to the bill and invoke the statute of frauds. They raise, therefore, issues both of fact and law.

The defendant Lacasse made a trade with Daniel Holland to purchase of him a lot of land and to pay therefor the sum of $2500,—$200 of which were to be paid in cash, and balance in notes secured by mortgage upon the land. Pursuant to this agreement an attorney was called in by Holland to make the papers. This being done, the papers were read over to Holland who signed and executed the deed and delivered the same to the attorney with instructions to hold the same until Lacasse executed the notes and mortgage and paid over the $200, and then to have the deed and mortgage recorded, and deliver the notes and money to him. Holland at this time was sick and confined to his house. Either the same day or the day follow-

ing the signing of the deed, Lacasse went to the attorney's office where the papers were read over to him, after which he signed the notes and executed the mortgage, but not having the $200 with him requested the attorney to retain the papers until he brought the money which he said he would do that afternoon or the next day. Shortly after that, Holland died before anything further was done.

The defendants admit the execution of the deed, mortgage and notes, and their deposit with the attorney, but claim that the duty of Lacasse to pay the $200 and accept the deed was contingent upon the quality or condition of the land as determined by a test made in accordance with an agreement or understanding with Holland. Upon this the parties are at issue. No possession of the land was ever taken by Lacasse under the contract.

Upon the foregoing facts the complainant maintains that the deed, mortgage and notes were delivered by the parties to the attorney in *escrow*; and that they together constitute a sufficient memorandum of the contract of sale to take the case out of the operation of the statute of frauds.

Unless the fact not only of the execution but also of the delivery of the deed is established, the transaction amounts to nothing more than an unexecuted oral contract to convey land. It is not pretended that there was any delivery of the deed in fact; and certainly there was never any delivery of it in *escrow* within the legal meaning of the term. A deed to be delivered in *escrow* must be delivered to a stranger, to be by him delivered upon the happening of some contingency, or upon the performance of some condition, and the deed becomes effectual as a delivered instrument only upon such second delivery. It can not be delivered in *escrow* to the agent or attorney of the grantor, because the possession of the grantor's agent or attorney is the grantor's possession, and revocable by him. *Wier* v. *Batdorf*, 24 Neb. 83; *Raymond* v. *Smith*, 5 Conn. 559. Nor to the agent or attorney of the grantee, for then it is equivalent to a delivery to the grantee himself. *Hubbard* v. *Greeley*, 84 Maine, 340.

In this case the party with whom the deed was left was the attorney of Holland, the grantor, as the evidence shows. He had made his will, as well as this deed, and was then acting as his legal adviser. Hence there was no delivery. The transaction in respect to the delivery of the deed by the grantor, or the acceptance of the same by the grantee, obviously was not completed. Something yet remained to be done before the deed was delivered and accepted. Were this not so, the deed would have been passed over at once. The instructions of the grantor to his attorney were to retain it till a certain sum of money was paid by the grantee, which was never done. The instrument, therefore, was inoperative to pass any title. *Parker* v. *Parker*, 1 Gray, 409. And notwithstanding Lacasse had executed the mortgage and notes, and left them in the hands of the attorney who held the deed, this was not done with any intention to create vested rights, or as a completed transaction, because further acts remained to be done,—and if at that time there had been no delivery of the deed there was nothing to mortgage.

However effectual, therefore, these papers might have been as constituting a sufficient memorandum of the contract of sale to comply with the statute of frauds, had there been a delivery, yet without such delivery they are ineffectual. Thus, in *Parker* v. *Parker*, *supra*, it was held that papers of conveyance made in pursuance of a verbal contract for the sale of real estate and not delivered, could not be used as a memorandum within the meaning of the statute of frauds; and that if not delivered so as to take effect as documents of conveyance, they were not delivered so as to take effect as a memorandum upon which to enforce specific performance in equity. The same doctrine is laid down in *Wier* v. *Batdorf*, *supra*.

The entry must therefore be,

Appeal sustained.

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

CHARLES E. LITTLEFIELD, ATTORNEY GENERAL,
JOHN H. CALLAHAN, and others, RELATORS,
PETITIONERS FOR MANDAMUS,
vs.
WILLIAM H. NEWELL, and others.

Androscoggin. Decision announced May Law Term, Middle District, 1892. Opinion January 2, 1893.

Mandamus. Parties. Election of City Officers. Joint Convention.

Mandamus extends to all cases of neglect to perform an official duty clearly imposed by law when there is no other adequate remedy.

While the court may not control their official discretion, it may compel the recusant officers to exercise it; and while it cannot direct them in what manner to decide, it may set them in motion and require them to act in obedience to law.

Where a minority of a board has shown a uniform desire to do the act required, it is the better practice to join, as parties defendant in mandamus, all the members of the board which by a vote of the majority has been placed in the position of a recusant body.

The members of a co-ordinate branch of the city government, in this case the Common Council, who are not recusant should not be made parties.

ON EXCEPTIONS.

This was a petition for a mandamus against the Mayor and Aldermen of the city of Lewiston to compel them to meet the Common Council in joint convention for the election of subordinate officers as required by the city ordinances.

The court having ordered a peremptory writ to issue, the defendants excepted.

The case is stated in the opinion.

White and Carter, *Savage and Oakes*, for the petitioners.

George C. Wing, for the respondents.

The entire City Council should have been made defendants. The mandate can be directed to such persons only as are made parties to the writ. Any mandate which could be issued upon the writ in its present form would not conform to the well settled principle of law. No amendment can now be made. To grant such a writ would be an idle and useless ceremony. *Mitchell* v. *Boardman*, 79 Maine, 469. Time for holding the

joint convention, third Monday in March, or as soon thereafter as may be convenient, is left to the reasonable discretion of the boards constituting the City Council.

WHITEHOUSE, J. This is a petition for a writ of mandamus filed by Charles E. Littlefield, Attorney General, on relation of John H. Callahan, John Ryan and Edwin F. Scruton, three members of the common council of the city of Lewiston, against the mayor and seven aldermen composing the board of Mayor and Aldermen of that city.

By the charter and ordinances of that city, it is made the duty of the two branches of the city government, styled respectively, the Board of Mayor and Aldermen and the Common Council, to meet in joint convention annually on the third Monday in March, or as soon thereafter as may be convenient, for the purpose of electing all subordinate officers not chosen by the people. By the uniform practice of twenty-nine years this convention has been held and such officers elected on the third Monday of March, and by the act of 1873 the time for the election of a Water Commissioner was expressly limited to the month of March.

On the third Monday of March, 1892, the common council were ready and willing to perform this duty on their part in accordance with their oaths and the established usage, and three times between that date and the eleventh day of April, formally asked for a joint convention by passing and transmitting to the mayor and aldermen, the customary order for that purpose. But the aldermen, by a vote of four to three on each occasion refused to concur in giving the order a passage; and the four aldermen opposing it declared their purpose to persist in such refusal and thus prevent the election of city officers.

Thereupon on the fifth day of April, the common council passed an order appointing the relators a committee of that body authorized to employ appropriate measures to compel the aldermen to meet in joint convention. On the relation of the committee the Attorney General, on the 14th of April filed a petition in the Supreme Judicial Court, setting forth in detail the

facts constituting the grounds of their claim duly verified by the affidavit of the relators, and asking that a writ of mandamus be issued against the mayor and aldermen, commanding the mayor to call a meeting of the city council and the aldermen to assemble with the common council in joint convention and proceed to the election of city officers. On this petition an order for notice to the defendants was granted by the court, returnable on the third day of May, requiring the defendants to show cause why the prayer of the petitioner should not be granted. To this petition the mayor, and the four aldermen who opposed a joint convention, filed a written answer which admitted all the material facts alleged in the petition and failed to overcome the *prima facie* case made by the sworn statements of the relators. The petition was therefore granted and an alternative writ of mandamus, carefully prepared by the relator's counsel, was issued by the court against the mayor and seven aldermen, composing the board of mayor and aldermen. As the petition upon which the writ issues is not deemed a part of the pleadings, the alternative writ, standing in the place of the declaration in an ordinary action at common law, was properly made sufficient in itself to show precisely what was claimed, and the circumstances under which the claim was made. It fully and clearly recited all the facts deemed requisite to entitle the relators to the relief claimed and commanded the mayor to call a meeting of the city council on the 6th day of May at 7.30 o'clock in the afternoon, and the seven aldermen to assemble with the common council in joint convention and proceed to the election of the officers named in the petition, or show cause for their refusal so to do. The joint convention was not called or held as required by the writ, but on the ninth day of May two returns were made to the writ, one signed by the three aldermen who favored a joint convention and the other by the mayor and the four aldermen who opposed it. In the former, the three aldermen assert their willingness to meet the council in joint convention and their desire to obey the mandate of the court but say they are opposed by a majority of the board, and are therefore powerless to act in the premises. The contesting defendants, in their return to

the writ, as in their answer to the petition, admit all the material facts stated in behalf of the relators, and do not pretend that it has ever been impracticable or inconvenient for them to participate in a joint convention, or assign any reason whatever for their refusal to perform this important public duty on any of the occasions when invited so to do by the common council. To the petitioner's specific allegation that the defendants do not intend to meet the council in joint convention for the election of city officers and that they have so declared, the defendants make the general reply that they have taken the prescribed oath to perform their duties and intend so to do, and thereupon interpose the technical objection that the writ is not issued against the common council as well as the board of mayor and aldermen.

This return is deemed by the court wholly unsatisfactory and insufficient.

It is not in controversy that the petitioners have sought the appropriate remedy. It is a well settled rule that mandamus extends to all cases of neglect to perform an official duty clearly imposed by law when there is no other adequate remedy. If the officers are required to act in a judicial or deliberative capacity, the court cannot, it is true, control their official discretion, but may by its mandate compel them to exercise it. It cannot direct them in what manner to decide, but may set them in motion and require them to act in obedience to law. *Williams, Pet'r*, v. *Co. Com.* 35 Maine, 346; *Carpenter* v. *Co. Com.* 21 Pick. 258; Moses on Mand. 104-147; High, Ex. Leg. Rem. § 323; Dillon's Mun. Corp. 675; *Att'y Gen'l* v. *City Council of Lawrence*, 111 Mass. 90; *Lyon* v. *Rice*, 41 Conn. 248; *Lamb* v. *Lyon*, 44 Penn. 336. In *Att'y Gen'l* v. *Lawrence* the petitioner asked for a mandamus to compel the two branches of the city council to meet in joint convention and elect a street commissioner. After referring to the provisions of the city charter the court said: "The duty to proceed to this election in the manner pointed out is not a matter of discretion, nor dependent upon the judgment of either branch of the government, or of the members of either branch. If it were so

there could be no remedy by mandamus. The court does not attempt to control the judgment and discretion of the individual members when assembled, in the choice then to be made. But it may properly by mandamus require the two branches to meet in convention as a required preliminary step to the election of some one to this office. Otherwise, the anomaly would arise of a minority of those who must constitute the convention being able to defeat an election if they were only a majority of either branch."

In the case at bar, it has been stated that all the subordinate officers not chosen by the people, with the exception of the water commissioner, are required to be chosen "on the third Monday of March or as soon thereafter as may be convenient." But it is not claimed that any such latitude of discretion is here accorded to the city council as would relieve them from the obligation to choose these officers either on the third Monday of March or within a reasonable time thereafter. What is a reasonable time, when the facts are all disclosed to the court, is a question of law. *Att'y Gen'l* v. *Lawrence*, *supra*. And in the absence of any excuse whatever for not performing this duty prior to the 6th of May it is not difficult to determine that a reasonable time had already elapsed.

The objection that the writ is not also issued against the members of the common council must be regarded as entirely without merit. The mandate of the court is required to compel the unwilling, and not the willing body, to compel those who refuse and not those who consent, to act. The common council have never refused but have always consented, and diligently sought the opportunity, to act. They have caused these proceedings to be instituted by their committee duly appointed for that purpose and are already in the position of parties plaintiff. It would be superfluous to make them also parties defendant. It would unjustly subject the innocent to the imputation of wrong-doing.

This is not a case where the writ is issued against a part only of the same board or body of men. The writ is here addressed to all the members of the board of aldermen, including the three

who consented as well as the four who refused to act. No others need be joined as defendants. This is well settled both by reason and authority. It would undoubtedly have been a good return to the alternative writ, if the defendants had truthfully replied that a meeting of the city council was called and a joint convention proposed by them in obedience to the command in the writ, but that they were prevented from holding a joint convention by the refusal of the common council to join them. Nothing of this kind, however, is found in the return. It discloses no purpose on the part of the contesting defendants to perform the duty required of them. The objection is now wholly irrelevant and without force.

Lamb v. *Lyon*, *supra*, is a case precisely in point, and the rule of procedure which there appears to have received the sanction of the court goes one step further than that contended for in the case at bar. The petitioners were members of the common council of Philadelphia and prayed for a mandamus, "requiring members of the select council, being a majority thereof, to assemble in joint meeting with the common council and proceed to the election of certain municipal officers required by the charter." The select council consisted of twenty-five members, and the case not only shows that the common council were not joined as parties defendant, but it appears that the writ of mandamus was issued as prayed for, against the thirteen members only of the select council who had refused to meet in joint convention. The better practice, however, undoubtedly is to join, as parties defendant, all the members of the board which, by a vote of the majority, has been placed in the position of a recusant body, although a minority may have uniformly shown a desire to do the act required. And the great weight of authority will be found to support this rule. *Lyon* v. *Rice*, *supra*; *State* v. *Jones*, 1 Iredell, 129; High, Ex. Rem. *supra*, § § 314-440; Tapping on Mand. 314; Moses on Mand. 199. Such, it has been seen, was the course pursued by the petitioners in this case. On the return made by the defendants, therefore, the ruling of the presiding judge that a peremptory writ of mandamus should issue was clearly and unquestionably cor-

rect. A minority of those who would constitute the joint convention should no longer be permitted to defy the law and obstruct the due administrations of public affairs. A peremptory mandate of this court, compelling the recusant defendants to perform an official duty clearly defined by law and well understood and acknowledged by them, is demanded by a just regard for the free voice of the people and the orderly and decorous conduct of the government as well as the dignity of the law and every consideration of public justice.

Exceptions overruled.

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

STATE *vs.* JOHN H. RICHARDS.

Kennebec. Opinion January 2, 1893.

Jury. Charge. Expression of opinion. Practice. Waiver. R. S., c. 82, § 83.

A charge to the jury does not contravene the statute that prohibits the presiding justice from expressing "an opinion upon issues of fact arising in the case," because of general observations made before commenting on the testimony; *Or*, because it contains affirmations of familiar principles for the application of evidence; *Or*, considerations of an elementary and axiomatic character; *Or*, statements, which, considered in their appropriate connection, do not manifest an expression of opinion.

When counsel regard the charge as containing such expressions of opinion by the presiding justice, he should request the court to rectify the mistake before the jury retires.

His failure to do so will be regarded as a waiver of any objection arising from that source.

ON EXCEPTIONS.

The case is stated in the opinion.

C. E. Littlefield, Attorney General, and *L. T. Carleton*, County Attorney, for the State.

S. S. Brown, for defendant.

WHITEHOUSE, J. The defendant took exceptions to certain portions of the charge to the jury on the ground that the language employed was in contravention of the statute which prohibits the presiding judge from expressing "an opinion upon issues of fact arising in the case." (R. S., c. 82, § 83.)

It was not in controversy that the crime charged in the indictment had been committed by some one and the question submitted to the jury was whether the accused was the criminal agent.

The assault appears to have been committed about two o'clock in the morning, and the proof of the defendant's identity with the perpetrator of the crime consisted mainly of circumstantial evidence. The complainant stated that she recognized the defendant by his voice at the time of the assault, and two witnesses testified that, in the light of the early morning, they followed a man's tracks from the place of the assault across a public street and several dooryards to a stable where the defendant was found asleep soiled with mud. The defendant denies the possibility of tracing footsteps through that part of the town, and claimed that he was on the street intoxicated at an earlier hour, and being assaulted and thrown to the ground by two men, at another point in the street, fled to the stable and fell asleep. Several witnesses for the defendant testified that the complainant stated to them that, before the defendant was found in the stable covered with mud, she did not know who assaulted her.

After instructing the jury that the presumption of defendant's innocence must be overcome by testimony which should convince them of his guilt beyond a reasonable doubt, the presiding judge proceeded to explain the nature and operation of circumstantial evidence, closing as follows: "Now, if you have an impression that circumstantial evidence is necessarily inconclusive and imperfect, I instruct you that its convincing power, like that of any other testimony, depends upon its character. Do the circumstances all concur not only to show the guilt of the prisoner, but are they all inconsistent with any other rational conclusion? A single circumstance may or may not have force in proving guilt. Jurors must avoid being carried away by the impulses of hastily formed conclusions and slight suspicions arising from independent, isolated facts, and weigh every circumstance proven in connection with all the other circumstances; and if they are found all consistent with each other, all

pointing to the guilt of the accused, and all at variance with any rational presumption of innocence, then, and not until then, are you to conclude that he is guilty." These were general observations made before commenting on the testimony in the case, and the last sentence, to which exception is specially taken, was only an affirmation of a familiar principle suggested by reason and experience as the leading rule for the application of this kind of evidence, and recognized by courts and jurists as the great test of all presumptive proof. Circumstantial evidence simply comprises the minor relative facts standing around (*circum-stantia*) the principal fact to be proved. To use the expressive term of the Roman law, these facts are the *indicia* of truth, serving to point out the object sought. They stand as silent witnesses of the main fact, continually pointing to it and aiding to fix its true character and significance. This method of investigating truth by circumstances is often characterized as a "convergence of rays of light to a common focus or centre," but more frequently as the formation of a chain out of a number of separate links. The former simile more aptly illustrates the operation of independent, and the latter of dependent, circumstances. But however figuratively expressed, the idea to be conveyed is, that several distinct circumstances, no one of which is conclusive in its nature and tendency, may be found so naturally associated with the fact in controversy and so logically connected with each other, as to acquire from the combination a weight and efficacy that will be accepted as absolutely convincing.

> "If circumstances lead me I will find
> Where truth is hid,"

says Shakespeare. The conclusion may follow necessarily from the proof of the circumstances, or may be deduced by a process of comparison and special inference. In the latter case the result is affirmatively reached in the first instance by means of the probabilities arising from the established facts examined in the light of the general experience and observation of mankind. But before it is deemed sufficient to warrant conviction in a criminal case, its accuracy and soundness must be negatively tested by inquiring whether it excludes every other hypothesis than that of

guilt. It is not sufficient that the circumstances are all consistent with the defendant's guilt, and raise a strong probability of it; they must also exclude beyond a reasonable doubt the hypothesis of his innocence and be incapable of explanation upon any other reasonable hypothesis than that of his guilt. Burrill on Cir. Ev. 176; Best on Pres. § 188; 1 Stark. Ev. 466-501; 1 Greenl. Ev. § § 11-13; *Com.* v. *Webster*, 5 Cush. 295. The instruction complained of is in harmony with these principles, and not prejudicial to the defendant.

The objection next urged is to the instruction that in weighing testimony the jury "are not of course to take into consideration the mere fact of numbers as being conclusive, . . . but rather the character of the witnesses as they exhibit themselves to you upon the stand, the consistency of their statements, the human probabilities and the natural course of events." These were also, general remarks intended to remind the jury that it was their province to determine the credibility of witnesses and the force of testimony, and that in so doing they were not compelled to prefer physical weight to moral power. It has already been seen that "probability" is the great source of belief and basis of judgment in all investigations of fact. But it is apparent without discussion that the considerations here suggested by the judge were purely of an elementary and axiomatic character, and altogether unobjectionable. *Sweetser* v. *Lowell*, 33 Maine, 449.

Again, it is insisted that the following sentence from the charge is an invasion of the province of the jury, viz: "The complainant has given you her statement of the circumstances as she remembers them, and, of course, in a case like this her statements are of the utmost importance." If this remark had comprised all the comments made by the judge on the statement of the complainant, it might have been understood by the jury as an intimation of opinion on the weight to be given to her testimony. But this is only a single sentence selected from many in the charge respecting the conflict between the testimony of the complainant and the witnesses for the defendant. The "issue of fact" thus raised was elsewhere clearly

explained and fairly submitted to the jury. It could not reasonably be questioned that, if the complainant's statements were literally true, they were of the highest materiality and significance. This was obviously the idea intended to be conveyed to the jury. The instructions had reference to the legitimate tendency of the complainant's testimony as proof in the case, and not to the weight which ought to be given to it in comparison with the opposing evidence. The defendant could not deny of course that if he was actually identified by the complainat the time, the *factum probandum* was established. There was no issue upon that point. The issue was made respecting the complainant's credibility and liability to mistake. Upon this issue the presiding judge manifestly intended to express no opinion; and considered in its appropriate connection with other parts of the charge, the language excepted to would not probably be understood by the jury as an expression of opinion. If the counsel had been apprehensive that it might be, a suggestion to that effect at the time would doubtless have been followed by an explanation from the court which would have removed all ground for misapprehension. *Ruggles* v. *Coffin*, 70 Maine, 468; *Harvey* v. *Dodge*, 73 Maine, 318; *State* v. *Day*, 79 Maine, 120; *Com.* v. *Lawless*, 103 Mass. 426; *McKean* v. *Salem*, 148 Mass. 109; *Com.* v. *Keenan*, *Id.* 472.

Finally the defendant complains that the following sentence: "Here are circumstances which finally led to the finding of the party who stands here accused," states as an established fact what the defendant had uniformly denied. But it is evident from the context that this reference to "circumstances" had a broader scope than that ascribed to it by the defendant and embraced other incidents and conditions besides the alleged tracks leading to the stable. The feasibility of following the tracks to the stable and all questions arising from the discovery of the defendant after the assault were properly left to the determination of the jury; and if, in this sentence the judge inadvertently assumed as proved any fact which had been the subject of controversy, it was here again the duty of counsel to request the court to rectify the mistake before the jury retired.

His failure to do so must be regarded as a waiver of any objection arising from that source. *Grows* v. *Railroad*, 69 Maine, 412; *Murchie* v. *Gates*, 78 Maine, 300; *Elwell* v. *Sullivan*, 80 Maine, 207; *York* v. *Railroad*, 84 Maine, 128.

The other parts of the charge, the exceptions to which have not been urged, clearly fall within the principles and considerations above stated. It is, therefore, the opinion of the court that the charge contains nothing which can fairly be deemed an infringement of the statute prohibition. *State* v. *Rollins*, 77 Maine, pp. 383-4.

Exceptions overruled.

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

FRANK A. CONANT *vs.* SAMUEL C. LESLIE, JR.

Androscoggin. Opinion January 12, 1893.

Slander. Malice. Evidence.

In an action of slander, for the purpose of showing malice, the utterance of the slanderous charge on other occasions, either prior or subsequent to the time laid, is competent as showing that the words charged were spoken maliciously and thus tended to aggravate the wrong and injury for which the plaintiff seeks to recover compensation.

But evidence of a charge of a different nature, or of a different and distinct calumny at a different time from that alleged, is inadmissible to prove malice or for any purpose.

ON MOTION AND EXCEPTIONS.

This was an action on the case to recover damages for alleged slanderous words claimed by the plaintiff to have been spoken of and concerning him by the defendant. The verdict was for the plaintiff in the sum of $254.25, and the defendant presented the case upon exceptions and a motion for a new trial.

McGillicuddy and Morey, for plaintiff.

J. W. Mitchell and *F. L. Noble*, for defendant.

FOSTER, J. This is an action of slander in which it is alleged that the defendant uttered of and concerning the plaintiff the

following false, scandalous and defamatory words: "He stole one thousand dollars from the M. and M. Lodge."

The plaintiff in his evidence in chief offered the testimony of one Arion C. Pierce to a conversation between the witness and defendant at Old Orchard about two months prior to the slander complained of. It was not offered by counsel, or admitted, in support of a substantive charge upon which the plaintiff claimed to recover, but as showing the motive or malice of the defendant, and for such purpose only. But to its admission we think the defendant's objection must be sustained.

The slander relied upon, as appears from the evidence, related to the fact that the plaintiff had applied to the lodge of Odd Fellows, of which he was a member and one of the trustees, for a loan of money and that he had received twenty-five hundred dollars, — the defense claiming that the application made by the plaintiff was for fifteen hundred dollars only.

The testimony of Pierce introduced a conversation concerning an alleged embezzlement of $6,000 by Emery, the financial secretary of the lodge, and in that conversation at Old Orchard, the witness, speaking of the defendant, says: "He said to me that he believed that Mr. Conant was in league with Mr. Emery in regard to taking the money from the lodge. *Question.* Did he refer to Mr. Emery who was guilty of embezzling a large sum of money from the lodge? *Answer.* He did."

The reference is to a transaction entirely separate and distinct from that which formed the basis of the plaintiff's claim for damages, — to a separate and distinct calumny, — and was not a repetition of the words set out as constituting the offense charged, or words even of similar import.

It has now become too firmly settled to be questioned that, for the purpose of showing malice, the utterance of the slanderous charge on other occasions, either prior or subsequent to the time laid, is competent as showing that the words charged were spoken maliciously and thus tended to aggravate the wrong and injury for which the plaintiff seeks to recover compensation. But it is also as firmly established by the weight of modern authority that evidence of a charge of a different nature, or of

a different and distinct calumny at a different time from that alleged, is inadmissible to prove malice or for any purpose. It forms the basis of an independent action, and if allowed in evidence might afford double damages.

This question arose and was considered in Massachusetts in the early case of *Bodwell* v. *Swan*, 3 Pick. 376, and which was followed and sustained by the later case of *Watson* v. *Moore*, 2 Cush. 133. This was an action for slander in charging the female plaintiff with the larceny of two beds from the defendant's attic and selling them to a peddler. The plaintiff offered to prove, as showing malice on the part of the defendant, that he had subsequently made complaint against the plaintiff before a magistrate for stealing a lot of wood and old iron from the defendant, and the court say: "The doctrine of *Tate* v. *Humphrey* (2 Campb. 73 note), as thus stated, was recognized and acted upon in *Bodwell* v. *Swan*, 3 Pick. 376, upon a considerate examination of all the authorities, English and American, which had then been published; and the court decided that a repetition of the words for which the action was brought, or the uttering of words of similar import, might be given in evidence to show that the first uttering was malicious. But the court also declared that they could go no further, and that they could not permit a distinct calumny, uttered by the defendant, to be given in evidence to show his malice in speaking the words for which the action was brought. We adhere to the declaration then made; and as in the case before us, the defendant was sued for charging the female plaintiff with stealing beds, evidence of his having subsequently charged her with stealing other articles at a different time, was not admissible."

These decisions have been subsequently approved by the same court in several cases. *Commonwealth* v. *Damon*, 136 Mass. 441, 448, and cases cited. And the same doctrine has been adhered to in other courts, and by the text writers. *Howard* v. *Sexton*, 4 N. Y. 157; *Randall* v. *Buller*, 7 Barb. 260; *Delegal* v. *Highley*, 8 C. & P. 444; *Root* v. *Lowndes*, 6 Hill, 519; *Mix* v. *Woodward*, 12 Conn. 262; Townshend on Slander, § 392; 13 Am. & Eng. Ency. 428.

The decisions of our own court have never been at variance with this rule of practice whenever the question has arisen. *Smith* v. *Wyman*, 16 Maine, 13; *White* v. *Sayward*, 33 Maine, 322; *True* v. *Plumley*, 36 Maine, 466, 478.

The fact that the defendant on a different occasion, in a conversation charged the plaintiff with criminal malfeasance in his office of trustee, at an entirely different period of time and in league with another person who was guilty of embezzlement of several thousand dollars, is a different and distinct calumny, and not a repetition of the charge set forth that the plaintiff stole a thousand dollars from the lodge on a different occasion.

The evidence having been offered for the express purpose of showing malice, and so received, as appears from the case and the closing paragraph of the judge's charge, was inadmissible.

It is unnecessary to consider the other exceptions, or the motion for a new trial.

Exceptions sustained.

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

ISRAEL J. PREBLE, and another,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Sagadahoc. Opinion January 17, 1893.

Disseizin. Adverse Possession.

One who by mistake occupies for twenty years, or more, land not covered by his deed, with no intention to claim title beyond his actual boundary, wherever that may be, does not thereby acquire title by adverse possession to land beyond the true line.

In case of occupancy by mistake beyond a line capable of being ascertained, the intention to claim title to the extent of the occupancy must appear to be absolute and not conditional; otherwise the possession will not be deemed adverse to the true owner.

It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title that fixes the character of the entry and determines the question of disseizin.

ON REPORT.

This was a real action brought to determine the dividing line between adjoining owners.

The case is stated in the opinion.

A principal issue between the parties was that of adverse occupation, the plaintiff claiming that thereby he had acquired a title to the disputed premises. The testimony bearing upon this issue and coming from the plaintiff's cross-examination, is as follows:—

"Q. Previous to your deed to the railroad of the two rod strip between you and them, was there anything to mark the western boundary of their location? A. Yes, there was a fence on their western boundary. Then they took two rods more and moved the fence. I deeded it to them.

"Q. It was your understanding and also the understanding of the railroad company that the fence was moved back to correspond with the new line? A. Yes, sir.

"Q. Your occupation ever since has been based upon that understanding and supposition, has it not? A. I always supposed that was the line.

"Q. When you made your deed to the railroad company of the two-rod strip, and then occupied afterwards up to this fence, you did not intend thereby to encroach on the land which you had just deeded to the railroad? A. I supposed I was using my own land. I moved the fence in at one time two feet.

"Q. Down to the time when you moved it in yourself, the fence was kept as it was put up shortly after the deed of the two-rod strip? A. They told me they had taken two rods.

"Q. How long after you delivered to the railroad company your deed of the two-rod strip was the fence moved back to correspond to the new line? A. The fence was moved back before I gave the deed; it was within that year. I was away at sea; when I came home they told me they had taken it.

"Q. From that time since you have regarded the fence line as the true line? A. I have.

"Q. And occupied up to it on that account and on that ground? A. Occupied it on account I thought it was my own land."

Spaulding and Buker, for plaintiffs.

Plaintiffs' occupancy continued for more than twenty years, was open, notorious, adverse and exclusive, and such as to give him title and right of possession whether the fence was or is on the true line or not. R. S., c. 105, § 10; *Martin* v. *Me. Cent. Railroad Co.* 83 Maine, 100; *Hitchings* v. *Morrison*, 72 Maine, 331; *Traip* v. *Traip*, 57 Maine, 268; *Abbott* v. *Abbott*, 51 Maine, 575. It is not a case where the plaintiffs' occupancy was not accompanied by a claim of title in fact and without intention to claim title to the extent of his occupation as suggested in the opinion of the court in *Hitchings* v. *Morrison*, *supra*; but on the contrary he did claim title clear to the fence regardless of whether there had been a mistake in the original location of the fence, and which we do not admit there was.

Baker, Baker and Cornish, for defendant.

Counsel cited, besides the cases in the Maine Reports, the following authorities: *Hamilton* v. *West*, 63 Mo. 93; *French* v. *Pearce*, 8 Conn. 439; *Spaulding* v. *Warren*, 25 Vt. 316; *Tamm* v. *Kellogg*, 49 Mo. 93; *Walbrunn* v. *Batten*, 68 Mo. 164; *Doe* v. *Long*, 64 N. C. 433; *St. Louis Univ.* v. *McConn*, 28 Mo. 481; *Grube* v. *Wells*, 34 Iowa, 148; *Skinner* v. *Crawford*, 54 Iowa, 119; *Howard* v. *Reedy*, 29 Ga. 154; *Delano* v. *Bartlett*, 6 Cush. 364; *Central Bridge* v. *Butler*, 2 Gray, 130; *Nichols* v. *Munsel*, 115 Mass. 567.

WHITEHOUSE, J. In this writ of entry the plaintiffs seek to recover a small piece of land, triangular in shape, now covered by a portion of the defendant's freight platform at the Richmond station. The case is presented on report and discloses no material controversy respecting the facts. The rights of the parties must, therefore, be determined by applying the established principles of law to the fair and reasonable inferences drawn from the facts proved or admitted.

The original location of the defendant's railroad in 1848 was made four rods in width at the point in question, its westerly boundary being the easterly line of the premises then owned by the plaintiff's father. But in 1852 the company purchased of

the plaintiffs, who had in the meantime acquired title to the property, an additional strip two rods in width, extending across their lot, and adjoining the original location on the westerly side. At the same time the fence which had been erected on the supposed boundary line in 1848, was moved westerly by the defendant's servants for the purpose of enclosing the two rods then purchased; but the plaintiff, Israel Preble, testifies that in re-building the fence in "1864 or 1866" he moved it two feet further on to his own land. Prior to 1889 the defendants had used only a part of this additional strip, and hence there had been no occasion for an accurate survey of the land. But when at the last named date, it became necessary to enlarge the freight platform, measures were taken to have the boundary line between the parties definitely ascertained and fixed. It was then discovered from the record of the original location that the "central or directing line" of the railroad was not in the centre of the four rods of land taken for the construction of the road, but was twenty-eight feet from the easterly line and thirty-eight feet from the westerly line of the location. It accordingly appeared that the true boundary of the defendant's land on the west was thirty-eight feet and two rods or seventy-one feet from the centre of the main track of the railroad. By this measurement the boundary line was found to be west of the existing fence a distance of two feet and eight-tenths at the southerly end and eight feet and ten inches at the northerly end. Whether the mistake made by the defendant's servants respecting the distance the fence should have been moved in 1848, arose in part from an erroneous assumption that the central line of the track was the center of the location, or otherwise, does not appear, and it is not material to inquire. There is not only no evidence that the main track has been moved at this point since the original location but it is satisfactorily shown that it has not been moved; and the simple process of drawing a line seventy-one feet westerly from the centre of the main track and parallel with it now establishes beyond a doubt the location of the westerly line of the two-rod strip. The triangular piece in controversy is thus conclusively shown to be wholly on the east

side of the true line, and hence a part of the land purchased of the plaintiffs in 1852.

But Israel Preble, the surviving plaintiff, claims that he cannot at this date satisfactorily locate his easterly line by measurement; and says that he has continually occupied the land to the fence as it existed in 1889 upon the understanding and belief that it marked the true line, and he now claims title to the disputed piece by adverse possession. And the question is, can this claim on the part of the plaintiff be sustained on the facts here presented? Clearly not, unless the rule established by an unbroken line of the decisions of this court covering a period of nearly seventy years, is now to be overturned. That rule is that one who by mistake occupies for twenty years, or more, land not covered by his deed with no intention to claim title beyond his actual boundary wherever that may be, does not thereby acquire title by adverse possesion to land beyond the true line. *Brown* v. *Gay*, 3 Maine, 126; *Ross* v. *Gould*, 5 Maine, 204; *Lincoln* v. *Edgecomb*, 31 Maine, 345; *Worcester* v. *Lord*, 56 Maine 266; *Dow* v. *McKenney*, 64 Maine, 138.

We are aware that the soundness of this doctrine has been questioned in other jurisdictions. It has been said that the possession is not the less adverse because the person possessed intentionally though innocently; and the further objection has been made that it introduces a new principle by means of which the stable evidence of visible possession under a claim of right, is complicated with an inquiry into the invisible motives and intentions of the occupant. *Pearce* v. *French*, 8 Conn. 439; Wood on Limitations, § 263, and authorities cited. It is manifest, however, that those holding these views have not critically distinguished the decisions of our court upon the subject, and hence have failed to apprehend their true import and exact limitations.

A frequent recurrence to elementary truths in any science is the greatest safeguard against error, and in the ultimate analysis of the doctrine of adverse possession the distinctive element which supports the rule above stated at once becomes apparent. Indeed it is aptly suggested in the familiar test imposed by

Bracton: "*Quærendum est a judice quo animo hoc fecerit.*" Co. Litt. 153 b; 8 Mod. Rep. 55. The inquiry must be *quo animo* is the possession taken and held.

There is every presumption that the occupancy is in subordination to the true title, and if the possession is claimed to be adverse the act of the wrong-doer must be strictly construed, and the character of the possession clearly shown. *Roberts* v. *Richards*, 84 Maine, 1, and authorities cited. "The intention of the possessor to claim adversely," says MELLEN, C. J., in *Ross* v. *Gould*, *supra*, "is an essential ingredient in disseizin." And in *Worcester* v. *Lord*, *supra*, the court says: "To make a disseizin in fact there must be an intention on the part of the party assuming possession to assert title in himself." Indeed the authorities all agree that this intention of the occupant to claim the ownership of land not embraced in his title, is a necessary element of adverse possession. And in case of occupancy by mistake beyond a line capable of being ascertained, this intention to claim title to the extent of the occupancy must appear to be absolute and not conditional; otherwise the possession will not be deemed adverse to the true owner. It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall eventually be found to be the correct one or not. If for instance one in ignorance of his actual boundaries takes and holds possession by mistake up to a certain fence beyond his limits, upon the claim and in the belief that it is the true line, with the intention to claim title, and thus if necessary, to acquire "title by possession" up to that fence, such possession having the requisite duration and continuity, will ripen into title. *Hitchings* v. *Morrison*, 72 Maine 331, is a pertinent illustration of this principle. See also, *Abbott* v. *Abbott*, 51 Maine, 575; *Ricker* v. *Hibbard*, 73 Maine, 105.

If on the other hand a party through ignorance, inadvertence or mistake, occupies up to a given fence beyond his actual boundary, because he believes it to be the true line, but has no intention to claim title to that extent if it should be ascertained that the fence was on his neighbor's land, an indispensable

element of adverse possession is wanting. In such a case the intent to claim title exists only upon the *condition* that the fence is on the true line. The intention is not absolute, but provisional, and the possession is not adverse. *Dow* v. *McKenney*, 64 Maine, 138, is an excellent illustration of this rule. In that case a fence had been maintained on a wrong divisional line by mistake, and it was found by the court as a matter of fact that "none of the parties had any idea of maintaining any line but the true divisional line and that they occupied according to the fence only because they supposed it was on the true divisional line between them." Upon this finding it was held as a matter of law that such possession was not adverse to the right of the true owner. The unconditional intent to claim title to the extent of the occupancy was wanting. See also, *Worcester* v. *Lord*, 56 Maine, 266.

Thus it is perceived that possession by mistake as above described may or may not work a disseizin. It is not merely the existence of a mistake, but the presence or absence of the requisite intention to claim title that fixes the character of the entry and determines the question of disseizin. The two rules are expressly recognized and carefully distinguished in our recent decisions. The distinction between them is neither subtle, recondite or refined, but simple practical and substantial. It involves sources of evidence and means of proof no more difficult or complex than many other inquiries of a similar character constantly arising in our courts.

The conclusions of fact which are fairly warranted by the evidence leave no room for doubt that the case at bar falls within the principle last stated. It has already been seen that, prior to 1889, both parties were ignorant of the fact that the fence erected by the plaintiff in "1864 or 1866" was not on the true line. The plaintiff, Israel Preble, himself testifies that after he moved the fence he had always regarded it as the true line; that he had occupied the land up to the fence upon the supposition and belief that it was the true line and that he had so occupied it because he thought it was his own land. This testimony, viewed in the light of the circumstances and situation

of the parties, emphatically negatives the idea that during this time the plaintiff had any intention to claim title to land which did not belong to him. We are warranted in believing that it would do injustice to the plaintiff himself, as well as violence to all the probabilities in the case, to assume that immediately after the plaintiff had conveyed the land to the defendant for a satisfactory consideration, he formed the intention of depriving the company of a portion of the same land by disseizin in case the fence should not prove to be on the true line.

The conclusion is irresistible that the plaintiff held possession of the locus by mistake in ignorance of the true line, with an intention to claim title only on condition that the fence was on the true line. His possession was, therefore, not adverse to the true owner, and cannot prevail against the valid record title of the defendant.

Judgment for the defendant.

PETERS, C. J., WALTON, VIRGIN and HASKELL, JJ., concurred. EMERY, J., did not concur.

MELVIN PREBLE *vs.* WALTER L. HUNT.

Penobscot. Opinion January 19, 1893.

Contract. Promissory Note. Failure of consideration.

A promise may be a good consideration for a promise when there is a complete mutuality of engagement, so that each has the right at once to hold the other to a positive agreement.

Entire failure of consideration has the same legal effect as the total want of it.

The defendant gave the plaintiff his promissory note for the following agreement: "Bangor, Jan. 20, 1880. Received of Walter L. Hunt 250 dollars for one original share of the Bluehill Central Mining Property as per written agreement, which entitles the owner to his proportional number of unassessable shares in the corporation when formed; procurable on presentation of this receipt to the Secretary of the company, by the holder or his order. Melvin Preble, Trustee." The note and agreement constitute all the writings in the contract. Plaintiff then held the property in his own right and not as trustee. Defendant was unable to procure a certificate of the shares and refused to pay the note. *Held*, that he had made a personal contract with the plaintiff who undertook thereby to deliver certificates of stock which would have constituted the defendant a shareholder; *also*, that the plaintiff's failure to perform this undertaking was a failure of the consideration of the note.

An instruction, manifestly employed for the purpose of illustration only and not misleading, affords no grounds of exception.

ON MOTIONS AND EXCEPTIONS.

The case is stated in the opinion.

H. J. Preble, for plaintiff.

Jasper Hutchings, for defendant.

WHITEHOUSE, J. This is an action on a promissory note for $250, dated January 28, 1880, signed by the defendant and payable to the order of the plaintiff four months after its date with interest.

It is not in controversy that the following agreement signed by the plaintiff was received by the defendant as the consideration for this note; namely:

"$250. Bangor, Jan. 20, 1880.

"Received of Walter L. Hunt $250 for one original share of the Bluehill Central Mining Property as per written agreement, which entitles the owner to his proportional number of unassessable shares in the corporation when formed; procurable on presentation of this receipt to the Secretary of the Company, by the holder or his order. Melvin Preble, Trustee."

It is an elementary principle of simple contracts that a promise may be a good consideration for a promise when there is complete mutuality of engagement so that each has the right at once to hold the other to a positive agreement. 1 Parsons on Contracts, 479; Chitty on Cont. 50, note a; Wood's Byles on Bills, 121, note. A promise of a thing of value is itself valuable when made on a consideration; so that if two persons simultaneously promise each to the other some valuable thing this constitutes a good contract. Bishop on Cont. § 76. *Babcock* v. *Wilson*, 17 Maine, 372.

It is true the plaintiff signed the above agreement as trustee, but the evidence shows that he was not in fact acting as trustee at that time, for the corporation therein named had not then been organized and he was still owner of the property referred to in his own right. This agreement must, therefore, be deemed the individual contract of the plaintiff involving a personal

responsibility and undertaking on his part to cause something of value to be transferred to the defendant as a consideration for the note in suit. It was, therefore, correctly ruled by the presiding judge that the evidence did not disclose an original and entire absence of consideration for the note. But it is settled law that the entire failure of consideration has the same legal effect as the total want of it. Wood's Byles on Bills, 130 (222); *Jenness* v. *Parker*, 24 Maine, 289; *Small* v. *Clewley*, 62 Maine, 156; *Hodgdon* v. *Golder*, 75 Maine, 293, 295. This principle constitutes the legal groundwork of the defense to this note.

The defendant assumed the burden of overcoming the presumption of valuable consideration arising from the note itself, and sought to nullify the effect of the *prima facie* case thus made by showing that the plaintiff failed to perform his engagement respecting the delivery of the certificate of stock in the corporation according to the terms of the agreement signed by him. This instrument acknowledges the receipt of $250, "for one original share" of the Bluehill Central Mining Property "as per written agreement." This last phrase apparently refers to some other written agreement than the one above recited, but no such written agreement appears in the case and there is no evidence that it ever existed. This contract must, therefore, be interpreted like all others according to the clear meaning and manifest intent disclosed by its own terms, and construed in the light of the facts and circumstances, known to both parties. It states that the "original share" for which the note was given entitles the owner to his proportional number of unassessable shares in the corporation when formed. Everybody knows and hence the court judicially knows that shares in a corporation mean shares of the capital stock of the corporation. It is not in controversy that the corporation was duly organized by the name of the Bluehill Central Copper Mining Co. with a capital stock of $500,000 divided into 100,000 shares of unassessable stock and that the defendant's proportional number would have been 1000 shares; one original share being one hundredth part of the property. And it further declares

that these unassessable shares shall be "procurable on presentation of this receipt to the secretary of the company by the holder or his order."

Upon this branch of the case the presiding judge instructed the jury as follows: "I construe this contract as a conveyance of the interest in the mining property by the plaintiff to the defendant to be evidenced, not by a deed of one hundredth part of the mining property which was real estate, but to be evidenced to him by his proportional number of unassessable shares in the stock of the corporation which was to own the property, and that was the mode by which the plaintiff agrees in this agreement to convey to the defendant his interest in the mining property. . . . The plaintiff by this contract became personally bound to see that the interest in the mining stock named in this contract was conveyed to the defendant, not by deed, but by his proportion of the shares of the corporation unassessable and the shares to be delivered to him by presenting this paper to the secretary of the Company within a reasonable time." This instruction was correct. It is a fair and reasonable interpretation of the language employed in this agreement viewed in the light of the situation and circumstances disclosed by the evidence.

At the time the note was given an extraordinary popular delusion prevailed respecting the mineral wealth of Maine. It was accompanied by a fever of excitement and activity in the markets for mining stocks. "The mining boom became very pronounced in the fall of 1879," says a witness. In the early part of 1880 numerous new mining corporations were organized, the capital stock of which divided into numerous shares was taken by all classes of people with unexampled eagerness. But when these speculative adventures were subjected to the test of practical intelligence and the plain facts of experience and thus found for the most part to be outside the domain of legitimate business enterprise, a lack of confidence was at once apparent and marked depreciation in mining stocks ensued. "Prior to the falling due of this note there was a decline in the interest and market value of the Bluehill Mining Company."

While this financial history of the period, as contended by the plaintiff, may tend to explain the defendant's unwillingness to pay this note, it also illustrates the importance of his right to have the consideration for it in the form in which the plaintiff had personally engaged to deliver it. Referring to his conversation with the plaintiff the defendant says: "I was told that on the presentation of that paper after the Company was formed, which would be in a short time I could get the shares and sell them in the market and realize from them." Indeed it is plain from all the testimony that both parties understood at the time that this contract not only promised the defendant's proportional number of shares of stock but also the certificates of stock which are the usual evidence of ownership; and such is the obvious import of the terms of the written agreement. It is admitted, however, that the defendant has never received this evidence of his interest in the property for which he gave his note. It is not in controversy that the defendant demanded of the secretary of the corporation a certificate of his stock, that the secretary refused to deliver it and that the plaintiff though aware of such demand and refusal took no measures to procure the certificates to be delivered. Whether his demand was made within a reasonable time and in the proper manner was a question which the presiding judge submitted to the jury with full and appropriate instructions and their finding in favor of the defendant was clearly warranted by the evidence.

But in the certificate of the organization of the "Bluehill Central Copper Mining Co." the name of the defendant appears as owner of 1000 shares of the stock. Thereupon it is contended by the plaintiff that this was in legal effect an assignment to the defendant on the records of the corporation of his proportional shares; that it operated as an actual delivery of the shares to the defendant giving him all the rights of a stockholder and that the delivery of the certificate was a question between the defendant and the corporation over which the plaintiff had no control. But it appears that the defendant did not sign the articles of association or have any knowledge that his name was inserted as a stockholder. It does not appear that he

ever signed any paper relating to the organization of the company or was present at any meeting of the associates who organized it or ever subscribed for any stock after it was organized. He never made the contract of membership which gave him the status of a shareholder in the corporation formed. Morawetz on Priv. Corp. § § 45, 46, & 55. He made a personal contract with the plaintiff who undertook to deliver certificates of stock which would have constituted the defendant a shareholder. His failure to perform this undertaking was a failure of consideration for the note.

Finally the plaintiff excepts to the following language in the charge: "It is not sufficient in my judgement that the plaintiff, when the corporation is formed, conveys to it the mining property, and the corporation, by a majority vote of its stockholders, should refuse to issue unassessable shares of stock but voted to issue assessable shares;" and expresses a fear that the jury were misled by this reference to assessable shares. It does not appear that the corporation ever voted to issue assessable shares, but this language of the presiding judge, considered in its relation to the context, was manifestly employed for the purpose of illustration only and was not calculated to mislead the jury. If the plaintiff thought otherwise he should have called the attention of the presiding judge to the matter before the jury retired. *Smart* v. *White*, 73 Maine, 332; *State* v. *Wilkinson*, 76 Maine, 317, 323.

Motion and exceptions overruled.

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

MEMORANDUM.

On the twenty-third day of January, 1893, the Honorable WILLIAM WIRT VIRGIN died at his residence in the city of Portland, having held the office of an Associate Justice of this Court from the twenty-sixth day of December, 1872.

CHARLES E. LITTLEFIELD, ATTORNEY GENERAL,
SETH CHANDLER, RELATOR,

vs.

WILLIAM H. NEWELL.

Androscoggin. Opinion January 24, 1893.

Quo Warranto. False Returns. Evidence.

In *quo warranto*, the defendant is summoned to show by what authority he holds an office. He usually does so by showing his certificate of election or commission, or other document appointing him to office. When these are shown, regular in form, coming from the proper authority, good title to the office is shown, until impeached. This may be done in cases of election, by showing fraudulent ballots, sufficient in number to change the result, or by showing that the certificate of election is false and fraudulent; and, when shown to be false and fraudulent, its effect is absolutely destroyed, and other evidence must be produced showing an election by honest votes, or the office surrendered.

Where the Attorney General offered to show that the returns of a ward were false and fraudulent, and without the vote of that ward the defendant did not apear to have been elected: *Held*; The offer should have been granted.

ON EXCEPTIONS.

This was a *quo warranto* proceeding, brought to try the title of the respondent to the office of Mayor of the City of Lewiston.

The Attorney General in his replication to the respondent's answer alleges among other things the following facts: . . . "That after the breaking of said ballot box as aforesaid, during said election, a large number of illegal ballots were deposited therein by the knowledge, consent, and fraudulent connivance of said ward officers. . . . That for a large portion of said day of election, the check list of said ward five was out of the possession of said ward clerk and was in the possession of one Provost who was entirely without right or authority to have the same, and that while the same was so in his possession and, at other times during said day a large number of persons voted whose names were not checked by the ward clerk in the manner provided by law. . . . That while said ballots were being counted, the ward clerk unlawfully checked names upon the check list of said ward of a large number of persons who had not voted

therein, and thereafter, willfully and with the intent to falsify said election and for the benefit of said Wm. H. Newell and with the knowledge and connivance of the warden of said ward, made out and returned to the city clerk of said city a false and fraudulent certificate of the ballots legally received in said ward five at said election, and therein certified as voting in said ward at said election a great number of persons in excess of the number actually voting therein, to wit: more than a hundred votes."

Savage and Oakes, and Swasey and Briggs, for plaintiff.

The petitioner had two courses open to meet the respondent's *prima facie* case.

First: To contradict the facts therein stated by showing the actual vote to be different from the canvassed return and to differ sufficiently to change the result of the election, by direct proof of the number and kind of ballots thrown.

Second: To destroy the value of the respondent's evidence by showing that the document purporting to prove the case was untrue, valueless and void.

Fraud of election officers, making the returns uncertain, invalidates the returns, and makes the certificate valueless as evidence. This does not conflict with the general rule, stated in *Prince* v. *Skillin*, 71 Maine, 361, that the mere fact that illegal votes were received, will not affect the election or render it void, unless the number is great enough to change the majority. Such fraud does not invalidate the legal votes cast, but by destroying the presumption of correctness of certificate makes it necessary that any person who claims any benefit from the votes shall prove them by other evidence, and where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined, the return of the poll will be rejected. *People* v. *Judson*, 55 N. Y. 525 (14 Am. Rep. 312,); *People* v. *Thatcher*, 7 Lans. 274; *Russell* v. *State*, 11 Kan. 308; *Maun* v. *Cassidy*, 1 Brewst. (Penn.) 11; *Judkins* v. *Hill*, 50 N. H. 140; *Thompson* v. *Ewing*, 1 Brewst. 67; *Weaver* v. *Given*, 1 Brewst. 140; *Littlefield* v. *Green*, Brightly El. Cases, 493; *Knox Co.* v. *Davis*, 63 Ill. 405; *Knowles* v.

Yates, 31 Cal. 82; *Re Wheelock*, 82 Penn, 297; *State* v. *Field*, 14 Wis. 122; *Patten* v. *Coates*, 41 Ark. 111; *McKewes* v. *Whitten*, N. Y. Cont. El. Cases, 430; *McLewd* v. *Halpine*, N. Y. Cont. El. Cases 439; *Knox* v. *Blair*, 2 Cong. Election Cases, 526; *Washburn* v. *Voorhees*, 3 Cong. Election Cases, 54; *Dodge* v. *Brooks*, 3 Cong. Election Cases, 78; *Covode* v. *Foster*, 3 Cong. Election Cases, 603; *Finley* v. *Wells*, 4 Cong. Election Cases, 389; *Finley* v. *Bisbee*, 5 Cong. Election Cases, 74; *Lee* v. *Richardson*, 6 Cong. Election Cases, 520; *Lowe* v. *Wheeler*, 6 Cong. Election Cases, 83; *Lynch* v. *Chalmers*, 6 Cong. Election Cases, 358; *Bisbee* v. *Finley*, 6 Cong. Election Cases, 191; *Smith* v. *Shelley*, 6 Cong. Election Cases, 40; *Mackey* v. *O'Connor*, 6 Cong. Election Cases, 561.

George C. Wing, for respondent.

The rules of law applicable to the case are:

1. The production of returns makes a *prima facie* case.

2. The burden is upon the relator to show sufficient illegal votes to overcome the apparent majority.

3. The fact that there are illegal votes, if they do not change the result, does not aid the relator.

4. The court may go behind the returns; but it will not do so until fraud is shown by the relator sufficient in amount to change the result.

5. Before the defendant can be compelled to produce other evidence showing the number of votes received by him, the returns must be invalidated by the relator.

6. The law does not presume that the illegal votes were thrown for the successful candidate, but this must be affirmatively proved.

There is nothing to indicate that the relator is in a position to successfully meet any of these propositions, and we therefore submit that the ruling of the presiding justice conforms to the law.

The production of certificates of the election officers is sufficient to make a *prima facie* case for the defendant, and the burden of proof to show fraud is upon the relator. In *People*

v. *Thatcher*, 55 N. Y. 525, the court said: "The return is the primary evidence of the result of an election, and I assent to the general principle stated by the court for the defendant, that the return is to stand unless impeached, and is to be set aside or corrected only so far as it is shown to be erroneous." See also *People* v. *Perley*, 80 N. Y. 624, to the same point.

"The presumption of law is that the election was honestly conducted, and the burden of proof to show it otherwise is on the petitioner." *Judkins* v. *Hill*, 50 N. H. 142.

It is no objection to an election that illegal votes were received, unless the illegal votes changed the majority. The mere fact of their existence never avoids an election. *First Parish* v. *Stearns*, 21 Pick. 154; *Prince* v. *Skillin*, 71 Maine, 361 (373); *School District* v. *Gibbs*, 2 Cush. 39; *In ex parte Murphy*, 7 Cow. 153.

We do not controvert the proposition that under certain conditions, the court has the undoubted right to go behind the returns; but it seems that the relator must first show illegal votes sufficient to reduce the apparent majority to a minority. *People* v. *Perley*, 80 N. Y. 624; *People* v. *Cook*, 8 N. Y. 4 Selden, 67; *People* v. *Thatcher*, *supra*; Dillon's Mun. Corp. Vol. 1, § 199; *People* v. *Pease*, 27 N. Y. 47.

HASKELL, J. In *quo warranto*, a defendant may be summoned to show by what authority he holds an office. The burden of showing his title to the office is upon him. He usually sustains it by showing his certificate of election, commission or other document under which he claims the office. When these proofs are shown, regular in form, coming from the proper authority, the title to the office is *prima facie* shown; and, until such evidence is impeached, it stands good. It may be impeached in various ways. It may be shown incorrect, if the office be elective, by proving illegal votes to have been cast. In such case, the proof must go further. It must show a sufficient number of such votes to change the result, else the certificate still shows a valid choice, and the certificate is good until overthrown. It may be impeached by evidence that it is fraud-

ulent; and, *of course*, when shown to be fraudulent and false, its validity is destroyed; its probative force is gone; it proves nothing; leaving the holder of it in the same situation as if he had no certificate of his election and had produced none. The burden, therefore, that was originally upon him to show title to the office, still remaining, must be met; and when it cannot be met by a valid certificate of title, that is *prima facie*, it must be met with other proof that shows a valid election or appointment to the office. The authorities cited at the bar, sustain these views and need not be reviewed.

In the present case, the defendant answered that he was lawfully elected Mayor of Lewiston. He pleads the usual certificate of election to the office and his qualification thereto and entry into the same. The certificates, however, show that without the vote of ward five he was not elected.

The relator, among other things, replied that the certificate of votes cast in ward five was false and fraudulent, and that without the vote of ward five, according to the certificate, the defendant was not elected to said office.

Under these pleadings the relator offered to prove, among other things, that the ward officers of ward five "falsely and fraudulently conducted the election proceedings in said election, so as to return for said respondent a larger number of votes than was actually cast for him;" that they "fraudulently made out and returned to the city clerk a false certificate of the number of ballots legally cast in said election."

The presiding justice, thereupon, inquired of the relator's counsel "if they claimed to be able to prove specific instances of illegal votes cast for the respondent, enough in number to equal or exceed his apparent majority, or if they were prepared to prove the number of legal ballots actually cast in that election." The counsel replied "that they were not, and claimed that, upon proof of the frauds alleged as set forth in the foregoing offers to prove, the burden of proof would then be upon the respondent to prove that he received a majority of the actual legal ballots cast in that election, or the actual state of the ballots." This burden was upon the defendant all the time, and

when a ward return failed him, because it was false and fraudulent, he must rely upon other proof in its place and stead.

The presiding justice ruled that "the burden was on the relator to show a sufficient number of fraudulent or illegal votes to overcome the defendant's majority, as shown in the returns, and that inasmuch as it appeared from the statement of facts made by the relator's counsel that the relator was unable to show that number of fraudulent votes, no useful purpose could be subserved by the introduction of the evidence, and that the petition should therefore be dismissed."

This ruling appears to relate to evidence sufficient to overcome honest returns, and is correct in that particular; but it fails to deal with false returns. The presiding justice doubtless assumed that the relator's counsel did not rely upon showing fraudulent and false returns in ward five, leaving defendant without any proof of the vote in that ward, and, therefore, not shown to have been elected. But, on the other hand, relator's counsel, in his answer to the court, did rely upon showing fraudulent returns in ward five, and claimed, in substance, that, on proof of that fact, he would be entitled to judgment; and so he would have been, unless defendant could otherwise show a legal vote in his favor sufficient to elect him. The presiding justice should have called for proof of the fraudulent returns in ward five, instead of dismissing the petition. This was error.

Exceptions sustained.

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

ALBERT M. PENLEY, and others, *vs.* CITY OF AUBURN.

Androscoggin. Opinion January 27, 1893.

Town. Way. Contract, ultra vires. R. S., c. 17, § § 5, 11-13; c. 18, § 52.

Towns and cities are required by law to keep their roads and streets so that they shall be safe and convenient for travelers. Whatever their legal duty requires of them, in that regard, they are bound by law to do, and cannot bind themselves to do more.

A street in the city of Auburn was incumbered on one side by buildings projecting into it. On the other side, the abuttors deeded a narrow strip of land to the city as a consideration for its covenant to remove these buildings from within the street and keep the same open and wrought its whole

length, including the strip conveyed to it. In a suit upon the covenant, *Held;* that it was *ultra vires*, and void; *also*, that the land having been conveyed without consideration should be returned.

ON EXCEPTIONS.

This was an action of covenant broken. The declaration alleges that the defendant city, on the 11th day of March, 1889, in consideration of the conveyance to it by Frances C. Little and others of a strip of land on the westerly side of Main street in said city, to be used in straightening and widening said Main street, covenanted and agreed with the said Frances C. Little and others, "to cause the land on the opposite side of said Main street, which had before that time been occupied partly by adjacent land owners for private uses, to be taken and used for a street, according to the location of said street at said point as determined by the county commissioners of the county of Androscoggin, by their survey made in September, 1888; the purpose of said covenant and agreement as therein expressed, being to obtain and secure for the public use the full width of said street, to which the city of Auburn was then legally entitled, according to the location of said street, as it then existed; and the said defendant city did, for the same consideration, further covenant and agree that thereafter said street at said point should be maintained at not less than its (then) present width, in addition to the strip conveyed to the said city as aforesaid;" and that all the rights and interest of Frances C. Little and others under said covenants have been assigned by them to the plaintiffs; that the defendant city "has wholly neglected and refused to fulfill its covenants and agreements as aforesaid, yet it has during all the time from the conveyance of said strip of land to it, received, used and occupied and had the benefit of the same."

To this declaration the defendant demurred generally. The demurrer was joined by the plaintiffs and overruled by a *pro forma* ruling of the presiding justice; and the defendant alleged exceptions.

McCann and Verrill, and *N. and J. A. Morrill*, for plaintiffs.

A municipality has the power to pass ordinances for removing obstructions upon its highways. Hence it may agree to remove them in consideration of a deed of land for the purpose of

widening the street. The city in making the contract did not violate its charter or any statute, and is liable on it. *Hitchcock* v. *Galveston*, 96 U. S. 341; S. P. *Bailey* v. *M. E. Church*, 71 Maine, 472. *Ultra vires*, as applied to acts of municipalities: *Thomas* v. *West Jersey R. R. Co.* 101 U. S. 71; *Louisana* v. *Wood*, 102 U. S. 294; *Chapman* v. *Douglas Co.* 107 U. S. 355.

C. B. Mitchell, City Solicitor, for defendant.

If contract is valid and binding it ousts the County Commissioners of their jurisdiction (*Richmond County Gas Light Co.* v. *Middleton*, 59 N. Y. 228), and no one but plaintiffs can absolve the city from its obligation. *Milhau* v. *Sharp*, 27 N. Y. 620. *Ultra vires*, counsel cited: *Bodine* v. *Trenton*, 36 N. J. Eq. 198; *Thorndike* v. *Camden*, 82 Maine, 39; Dillon Mun. Corp. (2d Ed.) § § 61, 387, and cases; *Clark* v. *DesMoines*, 19 Iowa, 199 (S. C. 87 Am Dec. 433).

HASKELL, J. A street in Auburn was incumbered on one side by buildings projecting into it. On the other side, the abuttors deeded a narrow strip of land to the city as a consideration for its covenant to remove these buildings from within the street and keep the same open and wrought its whole length, including the strip of land conveyed to it. In a suit upon the covenant, it is objected that it was *ultra vires* and is void.

The objection is well taken. If public convenience and necessity required the street to be kept open its whole width, it was the duty of the city to keep it so. If not, the city was neither required to do it, nor could it execute a valid covenant to do it. Whatever its legal duty was, it was bound to do, and could bind itself to do no more.

No case has been cited that holds a municipal corporation liable to an individual, on its covenant to perform a municipal duty required of it by law; and it is common learning, that the covenant of a business corporation, even, to do an act beyond its chartered powers is void, as *ultra vires*. *Davis* v. *Railroad*, 131 Mass. 258; *Thomas* v. *Railroad*, 101 U. S. 71; *Green Bay R. R.* v. *Union Steamboat Company*, 107 U. S. 98-100; *Bailey* v. *Methodist Episcopal Church*, 71 Maine, 472.

The law imposes a duty upon municipal corporations to keep

their roads and streets so that they shall be safe and convenient for travellers, under penalty of indictment and fine. R. S., c. 18, § 52. That is their whole duty. The law requires no particular width for the travelled part of the way. That is governed by the necessities of travel in each particular case. *Baldwin* v. *Bangor*, 36 Maine, 518; *Bryant* v. *Biddeford*, 39 Maine, 193; *Farrell* v. *Oldtown*, 69 Maine, 72; *Wellman* v. *Dickey*, 78 Maine, 29.

The traveller may use any part of the way to travel upon, and, if obstructed in the exercise of that right, has a remedy against the person unlawfully placing the obstruction there. *Dickey* v. *Maine Telegraph Co.* 46 Maine, 483; *Parsons* v. *Clark*, 76 Maine, 476.

If the way be incumbered by buildings or fences or othewise, so as to create a common nuisance, it may be indicted and abated; and if an individual suffers any special and peculiar damage to himself from such nuisance, beyond that suffered by the public, or damages, if the nuisance be private, the law gives him a right of action therefor. R. S., c. 17, § § 5-11, 12, 13; *Dickey* v. *Maine Telegraph Co. supra*; *Brown* v. *Watson*, 47 Maine, 161; *Davis* v. *Weymouth*, 80 Maine, 307; *Holmes* v. *Corthell*, 80 Maine, 31; *Jackson* v. *Castle*, 80 Maine, 119; S. C. 82 Maine, 579.

The duty of the municipality is commensurate with the necessities of public travel; when that is served and the way is made safe and convenient therefor, municipal liability ends. If the way is then incumbered to the nuisance of individuals or the public, remedies against others than the municipality must be sought.

In the case at bar, the plaintiffs' assignors had conveyed land to the city as a consideration for its covenant in suit, that is adjudged void as *ultra vires*. The plaintiffs have been guilty of no fraud, and are not in fault. The land was conveyed, therefore, without consideration, and should be returned. *Morville* v. *American Tract Society*, 123 Mass. 129; *Chapman* v. *County of Douglas*, 107 U. S. 348; *Salt Lake City* v. *Hollister*, 118 U. S. 256-263. *Exceptions sustained. Demurrer sustained.*

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

CITY OF AUBURN *vs.* CITY OF LEWISTON.

Androscoggin. Opinion January 27, 1893.

Pauper. Kindred. Supplies furnished. R. S., c. 24, § § 16-19, 35.

In an action for pauper supplies the ability of kindred to contribute for the support of a pauper cannot be set up in defense by the town or city where the pauper has his legal settlement.

Pauper supplies, furnished by a town or city create a cause of action, although actual payment for them has not been made.

ON MOTIONS AND EXCEPTIONS.

This was an action of assumpsit to recover for supplies furnished by the plaintiff to a pauper whose settlement was alleged to be in the defendant city.

The defendant pleaded the general issue with a brief statement alleging, in substance, that the alleged pauper, at the time when the supplies were furnished him, was sick at the house of his parents who were of sufficient ability to support and maintain him, and were bound by law to do so.

The presiding justice ruled that the facts alleged in the brief statement, if proven, would be no defense, and so instructed the jury who returned a verdict for the plaintiff for $433.52. The verdict included the bills incurred for an attending physician and nurse, which had been duly rendered but not paid.

C. B. Mitchell, City Solicitor, for Auburn.

Edgar M. Briggs, City Solicitor, for Lewiston.

HASKELL, J. Action for pauper supplies. The pauper fell grievously sick at his father's house, and the jury found that he was "destitute," under appropriate instructions, to which no exception is taken. The only exception is to the ruling, in substance, that the ability of kindred, liable to contribute for the support of paupers under R. S., c. 24, § § 16, 17, 18, 19, cannot be set up as a defense, by the town where the pauper has his legal settlement, to a suit of the town that furnished the relief.

No authority is cited in support of the point taken in defense. Revised Statutes, c. 24, § 35, requires overseers of the poor to

relieve persons found destitute in their towns, who have no pauper settlement therein, and gives an action against the town, where the pauper's settlement is, to recover the expenses so incurred; and also provides that such expenses "may be recovered of the kindred in the manner before provided in this chapter." Two remedies are given; one against the town liable and the other against the kindred. Either may be pursued. It should be noticed that the last remedy allows only expenses, incurred within six months before filing complaint in court, to be recovered; and then, to the extent only of the kindred's ability, considering their own necessities. Courts do not relieve destitution by creating it. It would be unreasonable, therefore, to send a town, not liable for the support of a pauper, after his kindred, for expenses incurred to relieve his destitution, when the liability for his support belongs to another town. The town may elect to call upon the kindred, but is not obliged to do so. It may require the town, liable to support its own paupers, and leave it to deal with the kindred as it may choose to do. The case of *Salem* v. *Andover*, 3 Mass. 442, seems to be in point, although decided upon statutes differing from ours.

The pauper, an adult, fell terribly sick with some loathsome disease at his parents' home. They became worn out and completely prostrated with continuous care of him, so that he lay destitute, and the overseers took him in charge. He could not be moved. He needed medical attendance, medicines, nursing, and food. All these, the city of Auburn furnished at his own solicitation. No more was furnished than necessary. All the supplies furnished had been paid for by the plaintiff but the bills of the city physician and of Mrs. Ross for care and board, and these had been approved by the overseers and were payable. The liability to pay them was a cause of action, precisely as if they had been paid. *Fayette* v. *Livermore*, 62 Maine, 234; *Westfield* v. *Southwick*, 17 Pick. 68. Their reasonableness was passed upon by the jury, who heard the case patiently and decided it correctly.

Motion and exceptions overruled.

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

GEORGE E. FITCH, and others *vs.* STEPHEN W. WOOD.

Cumberland. Opinion January 27, 1893.

Hoops. Sale. Survey. R. S., c. 41, § § 20, 21.

Barrel hoops are not required by statute to be culled and branded.

See 84 Maine, p. 190.

ON EXCEPTIONS.

Judgment having been rendered in the Superior Court for Cumberland county, in favor of the plaintiffs, the defendant took exceptions.

The case is stated in the opinion.

Frank and Larrabee, and E. L. Poor, for plaintiffs.

John Howard Hill, for defendant.

HASKELL, J. Assumpsit to recover the price of four thousand barrel hoops, sold and delivered to the defendant. Defense, the hoops had not been culled and branded. They were not required to be.

There is no statute fixing the size or quality of barrel hoops, or the size and kind of package in which they shall be sold. R. S., c. 41, § 20, in terms applies to hogshead hoops only. Hoops are not articles that can be surveyed, like lumber, under the ordinary methods. There is no universal or common standard of length, width or quality. Without statute rules for the culling and branding of the various kinds of hoops, none is required. Section 21, therefore, that prohibits the sale of hoops not culled or branded, only applies to such hoops as the statute has given a standard by which the cull shall be governed. The reasoning of the case *Gilman* v. *Perkins*, 32 Maine, 320, is in point. It was to recover the price of a quantity of pine fish-barrel staves. The statute in general terms prohibited the sale of staves before they had been surveyed, &c., but omitted to give any regulations concerning pine staves. It was, therefore, held that no survey of such staves was required.

In *Durgin* v. *Dyer*, 68 Maine, 143, no question was raised or considered relating to the kind of hoops required to be culled

and branded; nor in *Richmond* v. *Foss*, 77 Maine, 590, as to the kind of lumber, in the sense under consideration here.

Exceptions overruled.

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

HATTIE L. HODGE *vs.* HERBERT T. SAWYER.

Cumberland. Opinion January 27, 1893.

Bastardy. Venue. Waiver. Practice. R. S., c. 97, § 3.

Bastardy complaints are civil actions, to be brought in the county where the complainant resides.

A plea to the merits in a civil transitory action waives all matters of abatement.

Motions to dismiss civil actions for defects must be filed within the two first days of the return term.

ON EXCEPTIONS.

This was a complaint in bastardy tried to a jury in the Superior Court, for Cumberland County, where the verdict was for the complainant, and the defendant alleged exceptions.

The first exception is based on overruling the defendant's motion to dismiss the proceedings because the complainant's name was left out of the certificate of the oath of the complaint although it appeared immediately before in the complaint, of which the oath is a part. The next exception was to the refusal of the presiding justice to instruct the jury that upon the testimony given at the trial, the action could not be maintained. The defendant's contention herein was that the complainant was never a resident of the State, and had no right under the statute to prosecute a bastardy complaint.

Clarence Hale, for complainant.

First exception. Statute prescribes no form of oath. Oath, part of the complaint, shows by whom the complaint is signed. *Adams* v. *McGlinchy*, 66 Maine, 474: *Soule* v. *Cilley* (1880), not reported. *Littleton* v. *Parry*, 50 N. H. 31; *Stokes* v. *Sanborn*, 45 N. H. 274. Second exception. *Hill* v. *Wells*, 6 Pick. 104; *Ingram* v. *State*, 24 Neb. 33, 37; *Duffy* v. *State*, 7 Wis. 672; *Baker* v. *State*, 65 Wis. 50; Endl. Stat. § 141.

Frank and Larrabee, for defendant.

Complainant never a resident of this State. *Grant* v. *Barry*, 9 Allen, 459.

It plainly appears that her home was in Stewartstown, N. H.; that she went to North Yarmouth simply to work with the intention of returning; that the length of her stay depended on whether she liked and they liked. Such a stay at a place by a minor only sixteen years of age in no legal sense constitutes a residence. Moreover, before the complaint in this case was made she returned to New Hampshire where her home had always been, and there she was living at the time the complaint was made. There, too, her child was born.

There is no legal evidence from which a jury could lawfully find that the complainant in this case was a resident of this State. If she was not, then upon the evidence in the case the action could not be maintained and the court should so have instructed the jury as requested by the respondent.

The complaint was not sworn to in due form under the oath of the complainant. It should affirmatively appear that it was sworn to by the complainant. Her name is not inserted in the certificate. The inference is that the oath was never administered to the complainant.

HASKELL, J. Bastardy complaint. The child was begotten in Cumberland County in this State, where the defendant was resident and the complainant commorant. Before the child was born, the complainant, a minor, returned to her father's house in New Hampshire and was there delivered. Afterwards, she came to Portland for the purpose, and made this complaint, but has had no residence in this State since the child was born. The complaint alleges her residence to be in Cumberland County.

After motion to dismiss the complaint for causes that will be considered later, the case went to trial on the merits, presumably upon a plea of not guilty, although the record does not state that fact.

At the conclusion of the evidence, the defendant requested the court to rule that "the action could not be maintained."

This is a civil action; *Mahoney* v. *Crowley*, 36 Maine, 486; *Smith* v. *Lint*, 37 Maine, 546; *Knowles* v. *Scribner*, 57 Maine, 495; criminal in form, but not local. *Dennett* v. *Kneeland*, 6 Greenl. 460. It is to be brought in the county where the complainant resides. R. S., c. 97, § 3. The complaint shows jurisdiction of the court.

It is settled law, that a plea to the merits, in a civil transitory action, waives all matters of abatement. *Webb* v. *Goddard*, 46 Maine, 505; *Denuth* v. *Cutler*, 50 Maine, 298; *Brown* v. *Webber*, 6 Cush. 560; *Thornton* v. *Leavitt*, 63 Maine, 384.

In applying this rule, a distinction must be made between cases, over the subject matter of which the court has no jurisdiction, and cases of wrong venue or defective process. A prerequisite to a valid judgment is jurisdiction of the subject matter and of the persons of the parties, so that the "person and case may be rightly understood."

In the case at bar, the complainant came within the jurisdiction of the court and attached the defendant, who voluntarily submitted the cause to the jury on its merits. The court had jurisdiction of the subject matter, and the parties went to trial. It is too late to object to the residence of the plaintiff. And, if it were not, the plaintiff's residence seems sufficient. *Alley* v. *Caspari*, 80 Maine, 234; *Peabody* v. *Hamilton*, 106 Mass. 217.

In local actions, wrong venue may be pleaded in abatement or taken advantage of on trial, but can only be set up as a defense once. *Cassidy* v. *Holbrook*, 81 Maine, 589.

The defendant is a resident of this State. It would be unreasonable to hold that he was not amenable to our laws, because from distress, the complainant sought shelter in her father's house, in another State, the only place for her to go, outside the alms-house.

Exceptions to the overruling of motions to quash in criminal cases do not lie. *State* v. *Maher*, 49 Maine, 569; *State* v. *Hurley*, 54 Maine, 563. In civil actions, they must be filed within the two first days of the return term. The motion in

this case was not filed until the eighth day of the eighth term. For any defect in the complaint, it came too late. No other defect appears upon the record. The declaration, filed before trial, appears, plainly enough, to have been sworn to by her.

Exceptions overruled.

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

STATE *vs.* JOSIE OSGOOD.

Knox. Opinion January 27, 1893.

Indictment. Pleading. Nuisance. R. S., c. 17, § § 1, 2.

An indictment, that charges in the language of the statute, the keeping and maintaining of a certain place, &c., used as a house of ill-fame, to the common nuisance of the people, is sufficient.

ON EXCEPTIONS.

The defendant demurred to an indictment found against her and which charges that she "on the thirteenth day of April, in the year of our Lord one thousand eight hundred and ninety-one, and on divers other days and times between that day and the day of the finding of this indictment, at Rockland aforesaid, in the county of Knox aforesaid, unlawfully did keep and maintain a certain place, to wit: a certain building occupied by the said Josie Osgood as a dwelling, situated on Main street in said Rockland, then and on said divers other days and times there used as a house of ill-fame, then and on said divers other days and times there resorted to for lewdness and gambling, 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."

Upon joinder the court overruled the demurrer, and the defendant excepted.

Washington R. Prescott, County Attorney, for the State.

Mortland and Johnson, for defendant.

The defendant is nowhere charged with keeping and maintaining a nuisance; not even the general charge in the indict-

ment that the defendant kept and maintained a nuisance. It only charges that she "did keep and maintain a certain place, to wit: a certain building occupied . . . as a dwelling," which it says on "divers other days and times there used as a house of ill-fame," and that it was "resorted to for lewdness and gambling" by somebody, but as the courts say in the case of *State* v. *Dodge*, 78 Maine, 439, there is no allegation that it was with the defendant's "consent or knowledge" even.

In *Com.* v. *Stahl*, 7 Allen, 304, the charge was that the defendant "did keep and maintain a certain tenement then and there used for illegal gaming" and the court held that an averment in an indictment, that a person has kept and maintained a tenement used for illegal gaming, does not charge an offense at common law, or one punishable under the general statutes. *Com.* v. *Lambert*, 12 Allen, 178; *State* v. *Hussey*, 60 Maine, 410.

HASKELL, J. Revised Statutes, c. 17, § § 1, 2, among other things, provides that "all places used as houses of ill-fame" are common nuisances; and "whoever keeps and maintains such nuisance" shall be punished.

This indictment charges that the defendant did keep and maintain a certain place, to wit., &c., used as a house of ill-fame, to the common nuisance, &c., in the precise language of the statute, and is sufficient. *State* v. *Stanley*, 84 Maine, 555; *State* v. *Ryan*, 81 Maine, 107. *Exceptions overruled.*

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

WARREN A. HEYWOOD

vs.

MAINE MUTUAL ACCIDENT ASSOCIATION.

Hancock. Opinion January 27, 1893.

Insurance Accident Company. Notice of Injury. Waiver.

An accident policy of insurance, stipulating that failure to notify the company of an injury for the space of ten days after it is received shall bar all claim under the policy, is valid; and when such stipulation has neither been complied with nor waived, the assured cannot recover upon the policy.

ON REPORT.

This was an action of assumpsit upon an accident policy, dated April 20, 1889, and under which the plaintiff sought to recover for injuries received by him April 23, 1890. Plea was the general issue with a brief specification relying for a defense, among other grounds, upon the two following conditions in the certificate or policy:

"Second. In the event of an accidental injury for which claim may be made under this certificate, or in case of death resulting therefrom, immediate notice shall be given in writing, addressed to the secretary of this association at Portland, stating the full name, occupation, and address of the insured, with full particulars of the accident and injury, and failure to give such written notice within ten days of the occurrence of such accident, shall invalidate all claims under this certificate; and unless direct and affirmative proof of the same, and of the death or duration of total disability shall be furnished to the association within one year from the happening of such accident, then all claims shall be waived and forfeited to the association.

"Seventh. All the provisions and conditions aforesaid, and a strict compliance therewith during the continuance of this certificate, are conditions precedent to the issuing of this certificate." . . .

The plaintiff claimed that the following letters and affidavit constituted due and legal notice and proof of his disability according to the terms and conditions of the certificate:—

"C. H. Boothby, Esq., Portland, Maine.

Dear Sir: Will you please send me a blank for indemnity claim, as I am quite seriously injured.

Yours truly, W. A. Heywood.

Bucksport, May 19, 1890." (I.)

"Portland, Me., May 19, 1890.

"W. A. Heywood, Bucksport, Me.

Dear Sir: Notice of your injury just received. Please inform me by return mail what your injury is, what you were doing at time of injury, and just how the accident happened. Also inform me what physician is attending you and how long in his opinion you will be prevented from attending to the duties of

your occupation by reason of your said injury. On receipt of your answer to each of the above enquiries I will mail you a blank on which to prove your claim.

(Dictated.) Very truly, C. H. Boothby, Sec'y."

"C. H. Boothby, Esq.,

Dear Sir: Yours of the 27th at hand. In answer I will say that I am patiently waiting for the blanks which I asked for nearly two weeks since, and when they arrive I will be pleased to answer any of the questions contained in such blanks to the best of my ability. Yours, &c., W. A. Heywood.

Bucksport, May 28, 1890."

"Portland, Me., May 27, 1890.

"W. A. Heywood, Bucksport, Me.

Dear Sir: My letter to you of the 19th instant, remains unanswered. Will you kindly give it your immediate attention. We wish to know when you were injured, how, what the injury was and its extent, to what extent you were disabled, what physician is attending you, and how long in his opinion you will be totally disabled. In my former letter I requested an immediate answer, and do not understand why you have not attended to it.

(Dictated.) Very truly, C. H. Boothby, Sec'y."

"To the Maine Mutual Accident Association, of Portland, Maine.

F. L. Shaw, President.

C. H. Boothby, Secretary.

Affidavit of Claimant.

"I, Warren A. Heywood a resident of Bucksport, County of Hancock and State of Maine. My occupation was merchant (office duty) and reporter. I am insured in the Maine Mutual Accident Association of Portland, Maine, under policy No. 5887, dated April 20th, A. D. 1889, in the principal sum of $5,000, in favor of Ida E. W. Heywood (wife) and $25.00 per week indemnity, on the 23d day of April, A. D. 1890, I was in Bucksport aforesaid, when and where I received bodily injuries by accidental means, to wit: while carrying a ladder from my house to a building on fire some forty rods distant, (which building was owned by my mother) I received a severe strain

which produced aneurism of the femoral artery in my right leg or groin from which bodily injury I have been immediately, wholly and continuously disabled from transacting any and every kind of business pertaining to my occupation as above stated, independently of all other causes which bodily injury has continued from said 23d day of April, 1890, up to the present time, during the space of fifty-two weeks for which I hereby claim indemnity at the rate of $25 per week which when paid shall be in full of all claim which I have or may have on account of the personal injuries aforesaid. This is the only policy I hold for indemnity. Warren A. Heywood."

"State of Maine. Hancock, ss. April 20, A. D. 1891.

Personally appeared the above named Warren A. Heywood and made oath to the above affidavit. Before me,

O. F. Fellows, Justice of the Peace."

The declaration was in the usual form and alleged notice of plaintiff's injuries as follows: "And he further avers that, within ten days, notice was given by him to said defendant after the happening of said accident, in writing, stating his name, occupation and address with full particulars of the accident and injury."

The defendant contended that the required notice was not given within ten days of the occurrence of the accident and the plaintiff contended there had been a waiver of that condition in the certificate, both by the letters and from the further fact that the secretary of the company visited the plaintiff at Bucksport and had a conversation with him. At this conversation Boothby, the secretary, asked the plaintiff how he was injured, what his injury was and upon being told that it was an aneurism, said that he did not know what it was and did not know whether it came under the head of the policy or not; and asked him if he was willing to go before a physician, or to go to Bangor before a physician. In compliance with this request, Heywood did go shortly afterward to Bangor where he was examined by two physicians who were paid by the company.

The view taken by the court upon the defense thus stated renders a report of other defenses offered, immaterial.

O. F. Fellows, for plaintiff.

Wiswell and King, and *A. F. Moulton*, for defendant.

Giving notice, condition precedent. Met. Cont. 213; *Supt. of Schools* v. *Bennett*, 72 Am. Dec. 373; *Pitt* v. *Ins. Co.* 100 Mass. 500; *Ins. Co.* v. *Statham*, 93 U. S. 24: *Shaw* v. *Ins. Co.* 103 Mass. 454; *Riddlesbarger* v. *Ins. Co.* 7 Wall. 386; *Wheeler* v. *Ins. Co.* 82 N. Y. 543; *Thompson* v. *Ins. Co.* 14 Otto, 252; *Gamble* v. *Ins. Co.* 4 Irish R. (C. L.) Exch. 204; *Underwood* v. *Ins. Co.* 57 N. Y. 500.

Plaintiff does not count upon a waiver in his declaration: *Colt* v. *Miller*, 10 Cush. 49; *Hilt* v. *Campbell*, 6 Maine, 109; *Pomroy* v. *Gold*, 2 Met. 500; *Palmer* v. *Sawyer*, 114 Mass. 1; 1 Chit. Pl. * 329.

Waiver: *Diehl* v. *Ins. Co.* 58 Penn. 443 (98 Am. Dec. 302); *Leslie* v. *Ins. Co.* 63 N. Y. 27; *Ins. Co.* v. *Wolf*, 95 U. S. 326; *Ins. Co.* v. *Eggleston*, 96 U. S. 572; *Ripley* v. *Ins. Co.* 30 N. Y. 136 (86 Am. Dec. 362); *Jones* v. *Ins. Co.* 36 N. J. 29 (13 Am. Rep. 405); *Blake* v. *Ins. Co.* 12 Gray, 265; *Ins. Co.* v. *Chicago Ice Co.* 36 Md. 102 (11 Am. Rep. 468); *West* v. *Platt*, 127 Mass. 367; *Hoxie* v. *Ins. Co.* 32 Conn. 21 (85 Am. Dec. 240); *Bennecke* v. *Ins. Co.* 15 Otto, 355; *Beatty* v. *Ins. Co.* 66 Penn. 9 (5 Am. Rep. 318); *Everett* v. *Ins. Co.* 142 Pa. St. 332 (24 Am. State Rep. 499).

HASKELL, J. Assumpsit upon a policy of insurance against accidents. The policy contained a stipulation that failure to notify the company of the injury for ten days after it was received should bar all claim therefor. It was competent for the parties to make the agreement, and they are bound by it. The plaintiff neglected to notify the company of any accident or injury to himself, until twenty-six days had elapsed.

A careful examination of the evidence shows no waiver on part of the company.

The authorities cited at the bar conclusively show that plaintiff cannot recover; according to stipulation of the parties,

Judgment for defendant.

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

GEORGE A. BROWN *vs.* HENRY E. HEARD.

Knox. Opinion January 27, 1893.

Deed. Boundary. Way. Shore.

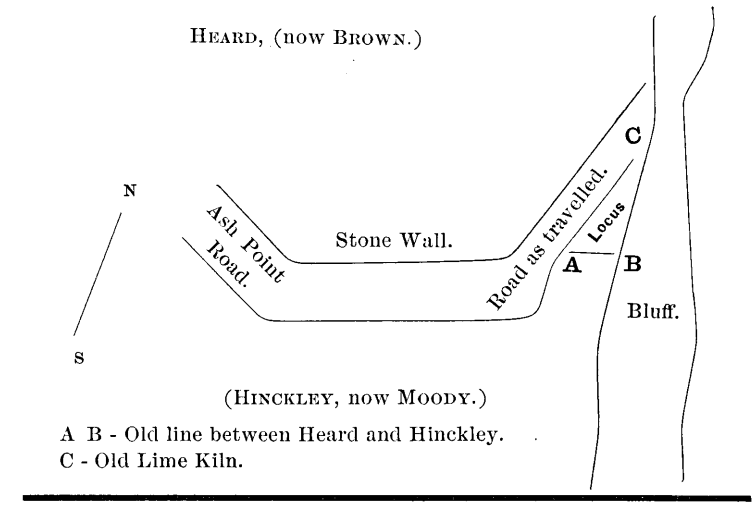
The plaintiff claimed title to a tract of land under a deed bounding him by the sea shore and a road; and claimed the road to be a boundary as if constructed in a right line with its general course until it should reach the shore, whereas, in fact, in building the road it was deflected northerly and a few rods short of the seashore. *Held*, that the road, as actually built, was made a monument in his deed, and constitutes the plaintiff's boundary.

A clause in a deed, at the end of a particular description of the premises by metes and bounds, "meaning and intending to convey the same premises conveyed to me," *is held* to be merely a help to trace the title, and does not enlarge the grant.

A grant to the sea shore, to the bank of a river, or to the line of a highway does not carry title beyond high water or the side of the river or road.

ON REPORT.

This was a real action to recover the Heard or Brown lot, the question in controversy being the title to a small triangular piece, or gore, of land lying southerly and easterly of a road located, in 1874, by the selectmen of South Thomaston, terminating on the beach at Ash Point.



A B - Old line between Heard and Hinckley.
C - Old Lime Kiln.

The locus is situated on the southeasterly corner of the lot marked Brown and northeasterly of the lot marked Hinckley (now

Moody) on the chalk plan; and is thus described in the defendant's brief statement, "bounded southwesterly by land of Moody, southeasterly by low water mark, and on the northwest by the town road leading to the old lime kiln on Ash Point." The defendant seasonably disclaimed as to the land lying north of the town road as actually built.

The stone wall and the line A B, prolonged to the sea shore constituted the original south line of the Heard land which by sundry conveyances came to one Crockett and from him to the plaintiff, Brown, in 1877. March 9, 1874, the selectmen of the town laid out the Ash Point road, a part of which the defendant claimed crosses the Heard premises and cuts off the portion now in dispute.

Further facts as to this road are stated in the opinion.

The deed to Crockett was in 1876 and the defendant, as one of the grantors, claimed that Crockett was bounded by the road, and that no part of the locus passed to Crockett by the deed. This the plaintiff denied and claimed:

1. Although the selectmen of the town laid out a certain road in the vicinity of these premises, and the town duly accepted a certain road, it was not the road that now appears on the premises in controversy;

2. That the road mentioned in the deed to Crockett is not the road across the disputed premises;

3. That, even if a section of said road does cross and cut off the premises in controversy, the parties, who entered into the contract, intended to convey, by their said deeds to Crockett, all the title that they had acquired from their ancestor, Ruth A. Heard, which title included all the premises in controversy.

The clause in the deed to Crockett and from him to the plaintiff, Brown, which became the subject for construction by the court is as follows: "one other lot situate in said South Thomaston, [omitting previous calls in the deed not necessary to an understanding of the question in controversy,] beginning," &c.; . . . "thence S. Easterly to the sea shore; thence by the shore as it runs S. Westerly about forty rods to the town road; thence N. Westerly by said road about sixty rods to stake and stones,"

&c., (omitting other calls to the place of beginning). . . . "Meaning and intending to convey to said George A. Brown the same premises conveyed to me by Robert H. Heard and others, by deed recorded in Knox Registry, Book 44, Page 259, reference being made to said deed and all references therein contained."

The plaintiff also contended further that the last clause in the deed enlarged the prior particular description and conveyed the whole of the original Heard lot. The defendant claimed that the call in the deed, reading "thence by the shore as it runs southwesterly about forty rods to the town road," is answered when the line reaches the place where the town road, as located and built by the town of South Thomaston in 1874, intersects high water mark; and that the plaintiff ignores entirely that portion of the town road running to the "old lime kiln" and claims to go with that call in the deed to the original south westerly line of the Ruth A. Heard, lot.

Mortland and Johnson, for plaintiff.
C. E. and A. S. Littlefield, for defendant.

HASKELL, J. Writ of entry to recover a tract of land lying in the angle formed by intersection of the north line of the Moody lot with the sea shore.

The defendant seasonably disclaimed all the land within the west angle made by the sea shore and road, and pleaded *nul disseizin* as to the residue. The evidence shows that defendant was not in possession of any part of the land demanded and lying north of the town road as actually built, the part disclaimed.

This defeats the plaintiff's action, unless he proves a legal title to more of the land demanded. He claims title under a deed bounding his land by the sea shore and by the road; and claims the road to be a boundary as if constructed on the land of Moody, in a right line with its general course, until it should reach the sea shore; whereas, in building, it was, in fact, deflected northerly from his land, a few rods short of the sea shore, across a point of land, not owned by him, some seven rods wide, to the sea shore.

This road was laid out by the selectmen, before the plaintiff took his title, "fifty-four rods to the sea shore, thence northeasterly on land of Robert H. Heard seven rods to the old lime kiln." The lime kiln stood on the shore. The article in the warrant was "to see if the town will vote to accept a road running from the end of the Ash Point road, near Robert H. Heard's, to the beach, as laid out by the selectmen." The town voted, "to accept the report of the selectmen in regard to the Heard road, so-called." The road was actually laid and built fifty-four rods to a point short of the sea shore, and then northeasterly seven rods to the sea shore. This road as actually built constituted the plaintiff's boundary. It was made a monument in his deed. It was definite and certain, and must control. *Sproul* v. *Foye*, 55 Maine, 164.

It was contended that the clause in plaintiff's deed, at the end of the particular description of the premises by metes and bounds, "meaning and intending to convey to the" plaintiff "the same premises conveyed to me," &c., should enlarge the specific description in it, given by metes and bounds. Assuming that the language referred to a larger estate than is included by the metes and bounds given, which is by no means certain, the contention cannot prevail. It is merely a help to trace the title, but cannot enlarge the grant. *Brunswick Savings Institution* v. *Crossman*, 76 Maine, 577.

The road ends at the sea shore, high water mark. So does the plaintiff's title. He is bounded, "To the sea shore; thence by the sea shore." This boundary goes to high water mark only. *Storer* v. *Freeman*, 6 Mass. 439; *Nickerson* v. *Crawford*, 16 Maine, 245; *Montgomery* v. *Reed*, 69 Maine, 510.

Sometimes, presumptions arise that the owners of land adjoining the sea or an inland river, or a highway, own the flats, or to the thread of the stream or way. But it is never held that a grant to the sea shore, to the bank of a river, or to the line of a highway carries title beyond high water or the side of the river or road. When the language is of doubtful meaning, requiring construction, as in *Snow* v. *Mt. Desert Isl. Real Est. Co.* 84 Maine, 14, where the bound was the sea — low water

mark—thence around a parcel of land to the shore — high water mark — thence to the first bound, the intent to include the shore, that part between high and low water, is manifest and must govern. So in *Erskine* v. *Moulton*, 84 Maine, 243, where the descriptions are confused, and in other cases, too numerous to mention. *Judgment for defendant.*

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

CHARLES T. STACKPOLE, and another, *vs.* ALBERT H. PERKINS.

Kennebec. Opinion January 27, 1893.

New Trial.

In an action for breach of warranty in the sale of a horse, the breach relied on was a quarter-crack. The verdict was for the defendant. An important witness relied on by the defendant was the smith who usually shod the horse prior to the sale and testified that the horse had no quarter-crack. A witness, newly-discovered, testifies that the smith, after the sale, told him that it had a quarter-crack before the sale. It appearing doubtful whether the verdict is sustained by the weight of evidence and other witnesses being produced, since the trial, who testify that they saw the quarter-crack before the sale, *the court consider that a new trial be ordered.*

ON MOTION.

The case appears in the opinion. The verdict was for the defendant.

Baker, Baker and Cornish, for plaintiffs.

Heath and Tuell and *Walton and Walton*, for defendant.

HASKELL, J. This is an action for breach of warranty in the sale of a horse. The verdict was for defendant. A motion for new trial is made because the verdict is against the weight of evidence, and because of evidence newly-discovered since the trial. The unsoundness complained of is quarter-crack. The warranty is admitted. The report of evidence contains more than seven hundred printed pages. Photographs of the foot, taken after the sale, are shown.

A careful consideration of the evidence, used at the trial, makes it extremely doubtful whether the verdict is sustained by the weight of it.

Witnesses are produced who testify that they saw the quarter-crack before the sale. If their testimony be true, the verdict should not stand. We have not seen them, and heard them testify. We think their credibility should be passed upon by a jury.

It is objected that their testimony is cumulative and not newly-discovered. We think it is newly-discovered. In one sense it is cumulative. It tends to prove the one fact in dispute, the existence of the quarter-crack. The evidence of plaintiffs at the trial did. In this respect it is cumulative. But, on the other hand, it tends to prove independent facts,— what each witness saw at different periods of time before the sale,— leading more or less strongly to the inference of unsoundness at the date of sale.

However this may be, there is one piece of evidence that, if true, destroys or at least impairs the testimony of one of the most important witnesses called for the defendant at the trial, not open to this objection.

At the trial, the smith, who had usually shod the horse for its owner during the summer prior to his sale of it in December, testified that the horse had no quarter-crack. Of all men, this witness must have known the fact. His evidence must have had great weight with the jury. A witness is produced who testifies that the smith, after the sale of the horse, told him that it had a quarter-crack before the sale. This witness is newly-discovered, and his evidence is not cumulative in a legal sense. If believed, his testimony must substantially destroy the evidence of a witness at the trial, whose testimony may have been considered of controlling weight. It may be said that, without the testimony of the smith, the defendant should prevail; that the destruction of his testimony does not prove the quarter-crack. True, but the absence of his testimony would be a strong factor in the plaintiff's case.

The price paid for the horse was large, said to exceed $2000. The photographs show quarter-cracks of long standing. Some of the witnesses say the horse had a block foot, slightly drawn at the quarters. On the whole, we think a new trial should be ordered. *Motions sustained.*

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

THE THOMAS MANUFACTURING COMPANY

vs.

JOHN WATSON.

Aroostook. Opinion February 5, 1893.

Action. Special Indebitatus Assumpsit. Damages.

A contract for the delivery of machines by the plaintiff to the defendant and which contemplated sales thereof to others, and fulfilled on the part of the plaintiff, required the defendant to settle in one of three modes on a certain day. This he did not do. The court adheres to the rule that general indebitatus assumpsit for goods sold and delivered will not lie, but that an action of special assumpsit counting on the contract may be maintained; and damages to be assessed at the contract price.

ON EXCEPTIONS.

A verdict was rendered in favor of the plaintiff, under the instructions of the court, for fifty-eight dollars; and he took exceptions.

Madigan and Madigan and *L. C. Stearns*, for plaintiff.

Powers and Powers, and *Wilson and Lumbert*, for defendant.

EMERY, J. There was a written contract between the plaintiffs and defendant which is reported in full. It provided (among other stipulations) for the delivery of twenty-five Royal Self-Dumping Rakes at twenty dollars and fifty cents by the plaintiffs to the defendant between January 1, and June 15, 1889. It also provided for a settlement therefor by the defendant on September 1, 1889, in one of three ways at the option of the defendant (1) by cash, (2) by farmers' notes taken by defendant in exchange for rakes and indorsed by him, (3) by his own note.

The plaintiffs delivered the rakes within the stipulated time, and they were received by the defendant. He did not, however, make any settlement for them in either stipulated mode, nor in any mode, nor is there any provision in the contract releasing him from the stipulation for a settlement on the day named. He thus committed a breach of that stipulation and of the contract.

While the plaintiffs could not maintain for this breach an action of indebitatus assumpsit for goods sold and delivered, they could maintain an action of special assumpsit counting on the written contract and its breach. *Hunneman* v. *Grafton*, 10 Met. 454, 459. The declaration in this action contains such a special count, and under it the plaintiffs are entitled to recover damages, which are to be assessed at the contract price, since the defendant cannot successfully dispute the full value of notes indorsed or signed by himself.

Exceptions sustained.

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

SAMUEL K. WHITING *vs.* CITY OF ELLSWORTH.

Hancock. Opinion February 8, 1893.

Tax. Assessor. Oath. Collector, de facto. R. S., c. 3, § 10.

In a suit to recover a tax paid by the plaintiff, claimed to be illegally assessed because the assessors did not appear to have been sworn, parol evidence is admissible to show that the proper oath was administered and the court has power by R. S., c. 3, § 10, to permit the record of the town clerk to be amended accordingly.

Where the tax was received by the collector who was not sworn but was acting under color of his office; *Held*, that he was collector *de facto*, and had the right, as between the town and tax payer, to receive and receipt for the taxes committed to him as such officer.

ON EXCEPTIONS.

Assumpsit for money had and received. The verdict was for the defendant and the plaintiff took exceptions as appears in the opinion.

Hale and Hamlin, for plaintiff.

Remedy: *Hathaway* v. *Addison*, 48 Maine, 440. The law is well settled that an action for money had and received will lie in favor of a non-resident to recover a tax on personal property assessed against him as a resident and paid under protest, when he is not legally taxable for any personal property in the town receiving the tax; or in favor of a resident,

who pays his tax under protest and to prevent arrest, when such tax is wholly illegal and void. Bolster's Town Officer, page 46, § 10; *Howard* v. *Augusta*, 74 Maine, 79; *Briggs* v. *Lewiston*, 29 Maine, 472; *Look* v. *Industry*, 51 Maine, 375; *Abbott* v. *Bangor*, 56 Maine, 310; *Smith* v. *Readfield*, 27 Maine, 145; *Torrey* v. *Millbury*, 21 Pick. 64; *Wright* v. *Boston*, 9 Cush. 233; *Joyner* v. *Sch. Dist.* 3 Cush. 567; *Oliver* v. *Lynn*, 130 Mass. 143.

Illegal assessment: The record of the city clerk for that year recites that T. E. Hale was sworn as second assessor by A. F. Burnham, justice of the peace. Revised Statutes, c. 3, § 24, provides that when a town officer is sworn by a justice of the peace, such justice shall give to the officer sworn a certificate of the oath administered, which he shall return to the clerk within seven days to be filed. It is not contended that any such certificate of the swearing of Hale was returned or filed. Nothing to show that Hale was ever sworn by a justice of the peace except his (Hale's) testimony to that effect. The very purpose of the statute is to provide the best evidence of the oath, viz: that of the justice who administered it, and not the testimony of the person claiming to have been sworn. Statute mandatory: *Lyon* v. *Alley*, 130 U. S. 177. Counsel also cited: *Williamsburg* v. *Lord*, 51 Maine, 599; *Sanfason* v. *Martin*, 55 Maine, 110; *Orneville* v. *Palmer*, 79 Maine, 472; *Dresden* v. *Goud*, 75 Maine, 298; *Machiasport* v. *Small*, 77 Maine, 109; R. S., c. 3, § 24.

Warrant defective: *Pearson* v. *Canney*, 64 Maine, 188; *Machiasport* v. *Small*, *supra*.

Collector not being sworn, the office was vacant. *Gould* v. *Monroe*, 61 Maine, 544; *Dresden* v. *Goud*, *supra*; *Tucker* v. *Aiken*, 7 N. H. 113; *Parish* v. *Fiske*, 8 Cush. 267. McGown could not have recovered this tax of the plaintiff in an action of debt.

Wiswell and King, for defendant.

An action of this kind will never lie to recover back money on the ground of any irregularity, error, mistake or omission upon the part of the assessors or the collector except in cases

where the irregularity, error, mistake or omission is of such a character as to render the assessment wholly and absolutely void, a mere nullity.

An action of assumpsit for money had and received upon general principles can only be sustained when the defendant had money which in equity and good conscience he ought not to retain against the plaintiff, or when the action is expressly given by statute. *Hayford* v. *Belfast*, 69 Maine, 63; R. S., c. 6, § 142. Right to maintain such action in all Maine cases except *Howard* v. *Augusta*, 74 Maine, 79, based upon non-residence of the tax payer. Not sustainable for errors, irregularities, &c.: *Rogers* v. *Greenbush*, 58 Maine, 390; *Boothbay* v. *Race*, 68 Maine, 351; *Gilman* v. *Waterville*, 59 Maine 491; *Farnsworth Co.* v. *Rand*, 65 Maine, 23; *Bath* v. *Reed*, 78 Maine, 276; *Cressey* v. *Parks*, 76 Maine, 534; *Topsham* v. *Blondell*, 82 Maine, 152; *Oliver* v. *Lynn*, 130 Mass. 143. Collector *de facto*: *Green* v. *Walker*, 63 Maine, 311 (overruling *Payson* v. *Hall*); *Old Town* v. *Blake*, 74 Maine, 280, 286. Defects in warrant: *Lord* v. *Parker*, 83 Maine, 530.

LIBBEY, J. This is assumpsit by the plaintiff to recover of the defendant city, the amount paid by him to James A. McGown, acting collector, as his taxes on personal property in said city for 1890. The plaintiff claimed that he was not an inhabitant of Ellsworth on the first day of April of that year. He was arrested by said McGown for non-payment of his tax, on the 30th day of September, 1890, and thereupon paid his tax under protest, and in this action seeks to recover it back.

It is admitted that said McGown, as collector, paid the tax to the city treasurer on the same day.

The jury found against the plaintiff on the question of his liability to taxation as an inhabitant of said city and that fact is no longer in contention.

The plaintiff claims to recover on two grounds:

1. That the assessors for 1890 were not qualified by taking the oath required by the statute before the performance of their duties. The record of their election and qualification was put in evidence by the plaintiff, and he claimed it was not sufficient

to prove that the oath was duly administered to them. The city clerk was then called by the plaintiff as a witness, and on cross-examination testified that all the assessors were duly sworn in his presence. The defendant then asked leave for the clerk to amend his record of the administration of the oath according to the fact, which was granted by the court, and the amendment was made. It is claimed that this was error. There can be no doubt about the the power of the court to permit such amendment. R. S., c. 3, § 10.

But if there was no sufficient record of the oath, the fact that the assessors were duly sworn may be proved by parol, and it was proved by the city clerk.

2. It is claimed that McGown, acting as collector, was not sworn as required by the statute, and had no legal authority to act as such when he arrested the plaintiff and received from him his tax.

The tax was legally assessed upon the plaintiff. It was due to the city; McGown was duly chosen collector; gave the requisite bond as such, and the taxes were duly committed to him by the assessors. He was acting as collector under color of his election, and was collector *de facto*. As between the city and tax payer he had the right to receive and receipt for the taxes committed to him. *Belfast* v. *Morrill*, 65 Maine, 580; *State* v. *Goss*, 69 Maine, 22; *Woodside* v. *Wagg*, 71 Maine, 207. The defendant has no money which in good conscience belongs to the plaintiff. *Exceptions overruled.*

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

STATE *vs.* INTOXICATING LIQUORS.

SAMUEL FARMER, CLAIMANT.

Franklin. Opinion February 8, 1893.

Evidence. Witness. Intoxicating Liquors. Libel. Issue. R. S., c. 27.

The credibility of a witness, upon whose testimony in part the issue is to be determined, is not regarded as collateral nor as immaterial.

A material fact testing his credibility, may be contradicted by the opposing party, although called out by his cross-examination.

Upon a libel against intoxicating liquors deposited and kept for illegal sale the issue, as made up by the pleadings under the statutes, is whether the claimant owned the liquors and had no intent to sell them in violation of law at the time when the complaint was made.

The search, seizure and confiscation provisions of R. S., c. 27, are aimed at the present condition of the liquors and the present intent of the keeper, and not of the past.

ON EXCEPTIONS.

This was a libel for the condemnation of certain intoxicating liquors seized upon warrant in the hotel and annex of Samuel Farmer, the claimant, in Phillips. The verdict was for the State; and the defendant excepted to the exclusion of testimony and a portion of the charge of the presiding justice, as stated in the opinion.

F. E. Timberlake, County Attorney, for the State.

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

LIBBEY, J. Two points are raised by the defendant's exceptions.

1. The exclusion of Arthur Merrill as a witness. Laura F. Turner was called by the State and testified that she occupied a room next to room ten in the claimant's hotel, in which latter room part of the liquors were found, "and at various times before the seizure had heard Samuel Farmer in room ten, with different persons, talking about liquors and prices." On cross-examination she was asked by claimant if she could name any persons so heard in room ten, and answered she could. She was then asked to give some names. In answer she gave the name of Arthur Merrill of Phillips, as one of the persons she had heard in that room.

In his defense the claimant called said Arthur Merrill and asked him if he was ever in said room ten. This question was objected to by the county attorney on "the ground that the name of Merrill was called out by the claimant himself, from Mrs. Turner, and he could not now contradict her answer." The court sustained the objection and excluded the evidence. We think the question was competent. The question put to the witness

Turner, was proper and relevant. It related to the subject matter of her testimony. It did not call out a collateral and irrelevant fact, and the answer was not conclusive on the claimant. Testimony of Merrill that he was never in room ten might have some tendency to impair the credit of Mrs. Turner.

2. To the instructions of the judge to the jury.

The claimant contended that the State must show that, at the time the complaint and warrant for search were made, he then had the intent that the liquors should be sold in violation of law, — that it was not sufficient for the State to show that at some previous time the liquors had been deposited or kept for such sale, — if before the search the owner had changed his mind, and at the time of the complaint and search, had no intention to sell the liquors. In reference to this contention, the presiding justice instructed the jury as follows:

"Now the issue is as to whether or not these particular liquors described in this libel and seized by the officer, and now in his possession, were kept and deposited at that hotel in Phillips with the intent that the same should be sold in violation of law. The State says that they were; Mr. Farmer, the claimant of them, says that they were not.

"You have heard it said to you by the defendant's counsel that the government must prove that they were intended for sale by the owner of them, at the precise moment when the officer swore out the complaint. He contends, if I understand him, that, whatever may have been the intent before that, — one hour before that, or a day before that, or a week before that, or whenever they were deposited there, — unless the owner, at the moment of the complaint being made for the search and seizure, then had the intent to sell them, — the prosecution fails and the liquors are free from any blame. I cannot assent to that proposition. I do not think it is the law. I do not think that the people of this State are bound to prove that, at the precise moment the liquors were seized, the owner of them then intended, or had the intent, to sell them contrary to law. It may be that the owner at that moment had no intent at all; it may be that he had forgotten all about them, — had forgotten that they were there, perhaps;

at the precise moment he may have been thinking of something else,—may have been thinking of some matter of business. To my mind, gentlemen, when the liquors are once corrupted, once tainted, by being deposited and kept for unlawful sale, they cannot become sweet and pure again, and free from this taint and corruption imposed upon them by the law, by the simple fact that the owner has become frightened and concluded that it is not safe to sell.

"Therefore, I give you the rule in this case that, if these liquors which were libelled and seized according to this process, within six years were deposited in that hotel and kept in that hotel with the intent that the same should be sold in this State in violation of law, they then and there became tainted and corrupted, and then and there became contraband, and forfeited to this State."

Under the rule of law very clearly and tersely stated in the last clause, it was the duty of the jury to find in favor of the State, if satisfied that the claimant five years before the liquors were seized had the intention to sell them in this State in violation of law, although the evidence satisfied them that immediately thereafter he determined to abandon the business and make no more sales and has adhered to that intention, making no sales for the five years before the seizure, and had kept the liquors for his own lawful uses.

We think this instruction to the jury was not sound law. The search, seizure and confiscation provisions of R. S., ch. 27, are aimed at the present condition of the liquors and the present intent of the keeper and not of the past. So held by this court in *State* v. *Howley*, 65 Maine, 100; and affirmed in *State* v. *Dunphy*, 79 Maine, 104.

A complaint under said statute made on the first day of January, 1892, which after describing the place to be searched alleges that the liquors therein kept were intended to be sold in this State in violation of law, on the first day of January, 1887, would be clearly bad.

When the liquors seized are libelled, and claimed by a claimant, the issue made up by the pleadings under the statute, is

whether the claimant owns them and had no intent to sell them in violation of law when the complaint was made.

Exceptions sustained.

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

JAMES H. H. HEWETT, PETITIONER FOR CERTIORARI,

vs.

COUNTY COMMISSIONERS.

Knox. Opinion February 18, 1893.

Railroad Crossings. County Commissioners. Record. Practice. R. S., c. 51, § 21; c. 102, § 14; Stat. 1864, chs. 234-246.

Of the three methods of procedure open to the defense upon petitions for *certiorari*.

County Commissioners, in assessing damages for land taken by the location of a railroad, have no power to establish private crossings other than farm crossings. They cannot otherwise limit or restrict railroads in the free enjoyment of their roadways within their respective locations.

ON REPORT.

This was an action of *certiorari* to bring up the record made up by the Court of County Commissioners, for Knox County, on the petition of the Lime Rock Railroad Company for assessment of damages on land taken by said railroad belonging to the estate of Samuel Pillsbury, late of Rockland, deceased, of whose estate the petitioner is administrator.

The case is stated in the opinion.

Mortland and Johnson, for Petitioner.

C. E. and A. S. Littlefield, for County Commissioners.

HASKELL, J. *Certiorari* to quash the record of the county commissioners of Knox County, in assessing damages to land from the location of the Lime Rock Railroad.

To petitions for the writ of *certiorari*, a copy of the record sought to be quashed should be annexed, and notice thereon ordered to the tribunal whose record is sought to be quashed, and in the discretion of the court, to such persons as may be interested in the result, who may appear and answer and be

subject to costs. R. S., c. 102, § 14. At the hearing, three methods of procedure are open to the defense.

First: If the record is thought to be sufficient, to submit the cause to the court, as upon demurrer, then, if the record fails to show jurisdiction on the part of the court entering the judgment, the writ should issue as a matter of right, and refusal would be error and exceptionable; but, if it simply shows inconsequential errors, that are harmless, or might palpably be corrected by amendment, the writ should be denied. *Hayford* v. *Co. Commissioners*, 78 Maine, 153.

Second: If the record be defective in not reciting facts that appear from the proceedings, or that were actually adjudged and omitted inadvertently from the record, to file, under oath, an answer setting up such facts, and the answer is conclusive evidence of the facts thus recited, but not of the legal conclusions to be drawn from them. *Levant* v. *Co. Commissioners*, 67 Maine, 429; *King* v. *Andrews*, 78 Maine, 239. If the facts so set up show that an amended record would sustain the jurisdiction of the court over the matter before it, leaving, perchance, only defects that do not materially affect the substantial rights of the parties interested, the writ should be denied, otherwise it should issue: Or, if ordered to issue, the court below may send up an amended record according to the facts in the case; *Dresden* v. *Co. Commissioners*, 62 Maine, 365; *Lapan* v. *Co. Commissioners*, 65 Maine, 160; for when the writ issues, the sufficiency of the record returned, in answer to the writ, must be determined from an inspection of it. *Levant* v. *Co. Commissioners*, *supra*.

Third: Matters in estoppel or bar of the writ may be pleaded by way of answer or included in the answer last before considered. Sometimes such matters appear from the record sent up in answer to the writ, and then operate the same as if interposed by answer. *Phillips* v. *Co. Commissioners*, 83 Maine, 541.

In this case, after hearing upon the petition, the court, being in doubt from the answer as to some of the facts set up in defense, the defendants not being at hand to verify a more particular state-

ment of them, and to give progress to the case, ordered the writ to issue, and, as is within the personal knowledge of the justice who draws this opinion, without prejudice to the defendant's right to return, in answer thereto, an amended record. *Chapman* v. *Co. Commissioners*, 79 Maine, 267.

The defendants made no formal return of their record to the writ as regularity in procedure required them to do; but, instead thereof, their original record with the amendment to it was introduced in evidence at the trial, and the cause continued on report. No objection to this irregularity is pressed, and, therefore, the case will be considered as if the record had been returned in due course of procedure.

The first objection to the original record is that the award of damages in favor of the estate of the late Samuel Pillsbury, deceased, does not sufficiently designate to whom they shall be paid. This objection is obviated by the amendment, making them payable to the plaintiff in his official capacity as administrator of the deceased owner of the land.

The remaining objection is that the award of a road as "now used to and from" the kiln as a crossing of a railroad was beyond the power of the commissioners to give, and, therefore, not binding upon the railroad company, which might obstruct or prevent the use of it at any time; so that damages assessed upon the theory that the road was secure for the future use of the kiln, when it was not, did not give compensation, and cannot be assessed to do so in petitioner's appeal now pending, until the permanency of the road be first determined.

This question might, perhaps, be determined on the trial of the appeal on the assessment of damages, but it can just as well be considered and settled here, and thereby fix the rule upon which that trial may proceed.

Railway companies, by locating their roads without excepting and reserving crossings for the use of the land owner, absolutely cut off all such rights, no matter how great the necessity for them may be, and damages are to be assessed upon that theory. *Old Colony Railroad* v. *Miller*, 125 Mass. 1; *Presbrey* v. *Old Colony & Newport Railway Co.* 103 Mass. 1; *Mason* v. *Knox*

& *Lincoln R. R. Co.* 31 Maine, 215; *Bangor & Piscataquis R. R. Co.* v. *McComb*, 60 Maine, 290. When, however, such crossings can be required and established by judicial authority, the convenience thus afforded must be considered in awarding the pecuniary damages. R. S., c. 51, § 21.

In this case, the county commissioners did consider and award that the raiload company should "keep open the road now used to and from the" kiln of petitioner's intestate. Had they power to do it? The present statute, copied from the revision of 1871, confers the power to establish "cattle guards, cattle passes and farm crossings," purely ways of an agricultural nature, and to serve the uses of a farm. The original legislation was in 1864, chapters 234-246. Chapter 246 seems to have conferred more enlarged powers upon the commissioners. Its provisions are of a most general character, and somewhat vague and indefinite. The revisors, in 1871, must have considered that they included in their revision all the essential powers conferred by these statutes. A second revision made no change; nor has any change of the plain reading of the statute of 1871 been attempted by the legislature in these last twenty years. It would be a stretch of judicial construction to read into the present statute a meaning so much wider than its plain language fairly imports. That limits the powers of the commissioners, in this behalf, to crossings needed for agricultural purposes only. It is not broad enough to confer powers that may require railroads to maintain private crossings for any landowner, regardless of the use and necessity. These companies, when passing through cities and towns, can best determine from the necessity of their business, when they locate their roads, where and what crossings for private and commercial uses it is expedient for them to establish and maintain, or when they had better pay large damages, perhaps, to be rid of all private interference.

Private ways across railroads may be secured by reservation, grant, agreement or adverse use. *Gay* v. *B. & A. Railroad Co.* 141 Mass. 407; *Wright* v. *B. & A. Railroad Co.* 142 Mass. 296; *Deerfield* v. *Connecticut River Railroad*, 144 Mass. 325; *Turner* v. *Fitchburg Railroad Co.* 145 Mass. 433; *Fitch-*

burg Railroad Co. v. *Frost*, 147 Mass. 118. It would seem, therefore, that damages assessed by county commissioners, upon the consideration of the existence of ways determined by them and mentioned in their records, and paid by the railway companies, would work an estoppel on such companies from disputing the existence of such ways, or from seeking to quash the record giving them, and become equivalent to a contract for their existence. Perhaps these rights might be extinguished by a new location, followed by a new assessment of damages.

It is settled law, that a record may be affirmed in whole or in part, in proceedings of this nature. *Minot* v. *Co. Commissioners*, 28 Maine, 121; *Commonwealth* v. *Blue-Hill Turnpike Corporation*, 5 Mass. 420; *Commonwealth* v. *West Boston Bridge*, 13 Pick. 195. Inasmuch as we know that an appeal is pending in this court for a re-assessment of the damages in this case, we conclude not to quash the whole assessment, but only that part of the record restricting the railroad in the free use of its easement and providing for the road to and from the kiln. The remainder had best be affirmed, but without costs.

Judgment accordingly.

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

MARSHALL H. HOLMES

vs.

FREDERICK A. WALDRON, EXECUTOR.

Kennebec. Opinion February 22, 1893.

Husband and Wife. Action. Mutual Wills.

An action of assumpsit by a husband against the wife's executor to recover for expenditures on the wife's property, before her death, will not be sustained in the absence of an express or implied promise.

There is no implied promise to pay such expenditures although made upon the expectation of benefits provided for the plaintiff under mutual wills between him and his wife.

ON EXCEPTIONS.

This was an action of money had and received brought under R. S., c. 66, § 14, upon an appeal by the plaintiff from the decision of commissioners, on a claim made by the plaintiff,

against his deceased wife's estate. At the conclusion of the plaintiff's testimony the court ordered a nonsuit and the plaintiff excepted to it.

The case is stated in the opinion.

S. S. Brown, for plaintiff.

Walton and Walton and *F. A. Waldron*, for defendant.

HASKELL, J. Assumpsit by a husband against the executor of his deceased wife, to recover sums of money expended upon his wife's homestead, during their joint occupancy of the same.

There is no proof of an express promise, on the part of the wife, to pay the plaintiff's claim. Nor do the circumstances of the case raise an implied promise, on her part, to do so. It appears that the plaintiff, a physician, married the testatrix and moved into her home. He immediately repaired and refitted the same, to make it the more comfortable and convenient for their joint use. The inference is that, whatever he did was out of consideration for their joint comfort, and as a voluntary improvement of her property, without any expectation of payment therefor from her.

Soon after their marriage, they executed wills in favor of each other. These, not proving satisfactory, were afterwards destroyed and others executed in their places. The testatrix, however, at a later date, without the knowledge of her husband, executed a new will, that has been proved and allowed in the probate court. By the terms of it, the plaintiff takes a life estate in the homestead, and the use for life of substantially all the household furniture, with right to sell the furniture if necessary for his support after the expenditure of his own property.

It is urged that the outlay, sought to be recovered here, was made upon the expectation of benefits provided for the plaintiff under the mutual wills between them. If it were so, the law would raise no implied promise to pay such expenditure. The most it could do would be to give damages, measured by the difference between benefits expected by the plaintiff under the mutual will, and those actually received under the real will, the expenditure working a consideration for the liability, thus cast

upon the testator. This method of compensation, the plaintiff repudiates. His reasons for doing so are not stated. Perhaps the provision made for him under the last will is quite as valuable as that expected under the former will, although not quite so much to his taste. He has elected to make his claim for actual expenditures. This he cannot maintain, and the nonsuit must be confirmed. *Exceptions overruled.*

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

GEORGE HAZEN *vs.* SARAH P. WRIGHT.

Cumberland. Opinion. February 22, 1893.

Pleading. Real Action. Non tenure. Nul disseizin. R. S., c. 104, § 10.

Pleas of *non tenure* and disclaimer not pleaded within the two first days of the return term are null, and operate as no defense.

Since an undivided part of land may be recovered by writ of entry, a plea of *nul disseizin* as to an undivided part is a good plea.

ON EXCEPTIONS.

This was a writ of entry to which the defendant filed at the January term, 1892, in the court below and after one continuance, without enlargement of time therefor, a plea of *non tenure* to one undivided half part and of *nul disseizin* to the remainder of the demanded premises. Thereupon the plaintiff moved to dismiss that part of the plea purporting to be a plea of *non tenure* or disclaimer; and the motion being overruled, a demurrer to the plea was filed and joined, which demurrer was overruled and the plea adjudged good.

The pleadings are as follows:

"And the said Sarah P. Wright comes, and defends her right when, etc., and as to one undivided moiety of the said piece or parcel of land with the buildings thereon declared on in plaintiff's writ, says, she cannot render the same to the said plaintiff because she says, that she is not nor was at the time of the suing forth the writ aforesaid of the said plaintiff or at any time since tenant thereof as of freehold; and is not and has not been in possession thereof, and wholly disclaims the same, and this she is ready to verify. Wherefore, as to that moiety of the said

piece or parcel of land with the buildings thereon, she prays judgment of said writ and that the same may be quashed, etc.

"And as to all the residue of the said piece or parcel of land with the buildings thereon, the said defendant says, that she did not disseize the said plaintiff of the same residue of the said piece or parcel of land with the buildings thereon, in manner and form as the said plaintiff hath thereof in his writ and count aforesaid above supposed, and of this she puts herself upon the country," etc.

(Motion.) "And now comes the plaintiff, George Hazen, and moves this honorable court that so much of said defendant's plea as purports to be a disclaimer, or plea in abatement, be disallowed and stricken out, the same not being legally in the case, or properly before this court, not having been seasonably or properly filed in accordance with the laws of this State and the rules of this honorable court."

The motion having been overruled by the presiding justice, the plaintiff reserving exceptions to the overruling the motion, demurred to defendant's plea and the defendant filed a joinder. The demurrer was overruled and the plea adjudged good. Plaintiff excepted to both rulings.

Symonds, Snow and Cook, for plaintiff.

The plaintiff claims that his motion was improperly disallowed because the plea, so far as it purported to be in abatement, was not properly filed; that the overruling of the motion in general terms by the court was an allowance of the plea as and for the purposes pleaded, and that, being so allowed, the plaintiff was bound, unless he demurred to reply thereto and to tender and abide an issue which was not legally in the case. If the motion was wrongfully disallowed, it follows that the demurrer to the plea should be sustained.

It became material for the plaintiff to demur, for the refusal of the defendant to alter his pleadings imposed upon the plaintiff the necessity of tendering an issue, to sustain which he was required to adduce more evidence than he would have been required to adduce in support of his case, had the pleadings been properly framed. 1 Chit. Pl. 694.

The plea was also bad as above stated for lack of proper verification and for non-conformity to the statute.

Counsel cited: R. S., c. 104, § 6, Rule VI; *Ayer* v. *Phillips*, 69 Maine, 50; *Cunningham* v. *Webb*, *Ib.* 92; *Chaplin* v. *Barker*, 53 Maine, 275; *Fogg* v. *Fogg*, 31 Maine, 302; *Bellamy* v. *Oliver*, 65 Maine, 108; *Morse* v. *Sleeper*, 58 Maine, 335; *Putnam*, &c., *School* v. *Fisher*, 38 Maine, 327.

J. C. and F. H. Cobb, for defendant.

HASKELL, J. Writ of entry to recover land. At the second term the defendant pleaded *non tenure* with disclaimer as to one undivided half thereof and *nul disseizin* as to the other half.

Before the statute prohibiting the plea of general *non tenure* and disclaimer in bar, and requiring that defense to be made in abatement, which must be interposed within the two first days of the return term, such pleas presented traversable facts, that, if proved, might defeat the action. But, since that statute, such defense cannot be interposed at all after the lapse of the time for pleas in abatement. So that any plea of that character, not seasonably filed, sets up no legal defense whatever, and may be held bad on demurrer, *Hathorn* v. *Corson*, 77 Maine, 582, disregarded, *Ayer* v. *Phillips*, 69 Maine, 50, *Hatch* v. *Brier*, 71 Maine, 542, treated as null, *Putnam Free School* v. *Fisher*, 38 Maine, 324, or stricken out, and judgment entered for want of plea.

In this case, that result follows as to the undivided half disclaimed. For that half, the plaintiff may have judgment with costs, as an undivided part of the premises demanded may now be recovered. R. S., c. 104, § 10. But, as to the other half, the defendant pleads *nul disseizin*. Upon proof of title, the plaintiff might recover that half also. The plaintiff's title to one half only is denied. The defendant's plea is a limited general issue, neatly pleaded, to put in issue only the facts in controversy. It is simple, plain, truthful, and convenient. It does not attempt to answer the whole declaration, as in *Augusta* v. *Moulton*, 75 Maine, 556. The plaintiff might have joined the issue tendered, and tried his right to the undivided half of the

land claimed by defendant. This he did not choose to do, but confessed, by demurrer, the truth of defendant's plea, and asks judgment for the whole land, at the same time admitting that he owns but half of it.

It is analagous to a case where two distinct parcels of land are demanded, and the defendant pleads *nul disseizin* as to one parcel and remains silent as to the other. Can there be any doubt that such plea would be good so far as it went? Or, where two notes are sued, and defendant pleads non assumpsit as to one, and declares nothing as to the other, would not judgment go on one note, as matter of course, on default, and the validity of the other be put to the jury?

The justice below might have stricken out so much of defendant's plea as was disclaimer. That part of it is no plea, no defense, whether in or out, whether true or false. It is mere explanatory surplusage. Refusal to strike it out was so far a matter of discretion as not to be exceptionable, for it did the defendant no harm.

The demurrer is general. If the plea sufficiently states any defense to a specific count or cause of action, not pretending to cover the whole declaration, it is good. If it has any vitality, surplusage does no harm. "A demurrer complains of too little, not too much." *Bean* v. *Ayers*, 67 Maine, 488. The plaintiff was bound to traverse only material facts. He need not notice immaterial ones. The issue of *nul disseizin* as to half the demanded land was tendered him, and he refused it. The plea is a good defense to that half. None is interposed as to the other half. *Exceptions overruled.*

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

MINOTT TOLMAN, EXECUTOR, in equity,

vs.

JOHN M. TOLMAN, and others.

Knox. Opinion February 22, 1893.

Will. Legacy. Ademption. Practice.

It is a general rule, that where the estate in, or title to, the thing specifically bequeathed is essentially changed, the legacy will be adeemed.

Upon a bill of interpleader to obtain a construction of a will, reported to the law court, it appeared that some of the parties defendant were minors, and that no guardian *ad litem* appeared. The court orders the report to be discharged, that complete jurisdiction over the parties may be obtained below.

ON REPORT.

Bill in equity, heard on bill, answer and agreed statement, so far as the latter is admissible, to obtain the instruction of the court upon the will of John Tolman, of Camden, Knox county, and under the following facts:

August 10, 1881, the testator, having conveyed his homestead farm to his son, Minott, received in payment therefor, twelve promissory notes of said Minott for one hundred dollars each, secured by mortgage of the same property.

On the 29th of the same month the testator made the will now before the court, in the second clause of which it is provided, "if at my decease any portion of said notes shall remain unpaid, or any portion of the proceeds thereof shall remain unexpended, I give and bequeath such unpaid and unexpended monies to my executor hereinafter named, in trust, to be by him paid to my son John M. Tolman," &c.

September 9, 1890, Minott conveyed back said farm to the testator, and the testator surrendered said notes to Minott and discharged the mortgage.

On the same day the testator conveyed the same property to Henry H. Tolman, his grandson and son of said Minott, and received in payment six notes of said Henry H. for one hundred dollars, each, also secured by mortgage of the farm.

The testator died March 28, 1891, possessed of the last named notes, all unpaid. The question presented for decision is, do said notes of Henry H. Tolman for six hundred dollars go to the executor in trust under the second clause of the will, or are they to be distributed as intestate property. It was agreed that the following agreed statement of the parties, so far as the same would be legally admissible in evidence, might be considered by the court in giving construction to the will.

The testator left four children, all of whom are named in the will. The real estate named in the first clause of the bill and in the several clauses of the will consisted of the testator's homestead farm.

Some years previous to the date of the will the testator conveyed said farm to his son, John M. Tolman, as a gift, but afterwards and before the will was made, John M. became involved in debt and the testator paid his debts and took back a deed of the farm.

About the time of the conveyance of the farm by him to his said son, Minott Tolman, August 10, 1881, as stated in the first clause of the bill, the testator, having previously made provision for his support during his life-time by his daughter, Lisania E. divided about $3000 among his three children, Minott, Lisania E. and Danson C., which was intended by him as their distributive share of his estate, which included all his estate, except the twelve notes of said Minott Tolman for one hundred dollars each, named in the first clause of the bill and which, with the provisions in the will afterwards executed, were intended as the distributive share of John M. Tolman.

Minott Tolman had no possession of the farm while he held the title under his deed, dated August 10, 1881, but during that period the farm was occupied by said Henry H. Tolman under an arrangement made with him by his grandfather, the testator, to whom he accounted and said Henry H. Tolman has ever since continued in possession.

Before the re-conveyance of said estate by Minott Tolman to the testator, said John M. Tolman had procured a divorce from his wife, and had been granted a United States pension and was, at the time of said re-conveyance and at the testator's death, an inmate of the Soldiers' Home at Togus.

Said John M. Tolman had three children living, to wit: Isabel G. Tolman of Warren, aged twenty-one years, Lulie Anna Tolman of Rockport, aged fourteen years and Delora Ella Tolman, aged twelve years, of Rockport.

Said John M. Tolman at the date of said will was and ever since has been physically incapacitated from maintaining himself and children and is mentally somewhat deficient; and the testator had never during his lifetime made him any advancement out of his estate, except as hereinbefore stated.

The assets of the testator's estate were as follows:

Six notes of H. H. Tolman, including interest,	$622.50
C. B. Ingraham note, including interest,	147.25
Deposit in Rockland Savings Bank,	112.50
	$882.25

The testator left no debts and the only charges to be paid out of his estate are expenses of administration and the cost of the erection of suitable gravestones.

W. H. Fogler, for executor.

Counsel cited: 2 Redf. Wills, 2nd Ed. 152 and cases, 153; 2 Williams Exors. 1320, 1325; *Harv. Unit. Soc.* v. *Tufts*, 151 Mass. 76; *Beck* v. *McGinnis*, 9 Barb. 35; Roper Leg. 337; *Mitchell* v. *Danforth*, 12 Cush. 330, 331; 3 Pom. Eq. § 1131, notes.

C. E. and A. S. Littlefield, for J. M. Tolman and others.

Where the proceeds of the property devised can be traced and identified, such proceeds pass under the general provisions in the will. *Stuart* v. *Walker*, 72 Maine, 154. Transfer of farm to Henry not a sale or new arrangement to affect the relation of the old indebtedness. *Barnett* v. *Barnett*, 43 N. J. Eq. 297.

HASKELL, J. Two of the defendants are minors. No guardian *ad litem* appears; a decree cannot bind them. The report, therefore, should be discharged, that complete jurisdiction over the parties may be obtained below.

As the single question presented has been fully argued, we conclude it best to advise as to the proper determination of it in the court below.

The bequest was of certain notes secured by mortgage of land. The testator surrendered those notes, in his life-time, and took a re-conveyance of the property for which they had been given. He afterwards sold the same property to another and took notes for it that were unpaid when he died.

We think the legacy had been adeemed and that the notes now held by the executor constitute a part of the estate to be

distributed among the heirs. The legacy was specific and the subject of it had been disposed of by the testator in his life-time. *Harv. Unitarian Society* v. *Tufts*, 151 Mass. 76.

Report discharged.

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

UNITED COPPER MINING and SMELTING COMPANY

vs.

LUTHER FRANKS.

SAME, in equity, *vs.* SAME.

Hancock. Opinion February 23, 1893.

Tax. Sale. Notice. Trespass. Possession. R. S., c. 6, §§ 188, 205. Stat. 1826, c. 337, § 8.

To effect a valid sale of land of non-residents for taxes assessed thereon, there must be a punctilious compliance with the statute provisions preparatory to, as well as those governing, the sale. *Held;* that a tax title is void for irregularity where the lists, required by R. S., c 6, § 188, to be published three weeks successively within three months after the collector's return, were not so published. In this case the return was made February 25, 1890; the three weeks publication should have been completed on or before May 25, 1890; but it was first published May 22, and the last on June 5, 1890; and the court orders the deposit made by plaintiff pursuant to R. S., c. 6, § 205, to be returned to him.

A deed without a seal conveys no title.

Of the possession insufficient to maintain trespass against one not a mere stranger but claiming title.

Dunn v. *Snell*, 74 Maine, 28, followed.

ON REPORT.

These cases are stated in the opinion.

Hale and Hamlin, for plaintiff.

Wiswell and King, for defendant.

VIRGIN, J. An action of trespass *quare clausum* and a bill in equity under which the defendant was enjoined from committing any further acts of alleged trespass upon the premises during the pendency of law.

The principal question is one of title. The plaintiff, organized in February, 1888, negotiated for the purchase of the plants of the three mining corporations known as the Bluehill, Stewart,

and the Douglass, situated in the town of Bluehill. Having obtained deeds of the several properties, the plaintiff, in March or April, 1888, commenced active operations thereon, principally working the Douglass, but using the machinery and implements of the others at will. The work was prosecuted by a gang of twenty to thirty men, until April or May, when it was suspended and has never been resumed.

In January, 1892, the defendant under the directions of one McLaughlin, entered the premises with men and teams and began to remove the engines, boilers and other valuable machinery and fixtures, with the intention of transporting them to Massachusetts. After much of the property had been severed and removed, viz: on February 11, 1892, the defendant was arrested on this writ of trespass, but he gave the bond required to procure his release and immediately thereupon resumed the severance and removal of the property as before. As the defendant, after three successive writs had been served upon him still persisted in divesting the buildings of their contents, the plaintiff, on February 20, 1892, caused him to be enjoined.

The title of McLaughlin,—under whom the defendant acted,—rests solely upon a sale of the property as owned by non-residents, for taxes assessed thereon in Bluehill for the municipal year 1889.

To effect a valid sale of land of non-residents for taxes assessed thereon, there must be a punctilious compliance with the several statutory provisions preparatory to, as well as those governing the sale. *Brown* v. *Veazie*, 25 Maine, 362; *Matthews* v. *Light*, 32 Maine, 305. Passing by several omissions which would seem to render the sale, at least, questionable, we come to one which we think renders the sale fatally defective. By R. S., c. 6, § 188, certain lists are required to be returned by the collector to the treasurer, "the lists so returned the treasurer shall cause to be published in some newspaper, if any, published in the county where such real estate lies, three weeks successively; if no such paper is published in such county, said lists shall be published in like manner in the state paper; and in either case such publication shall be within three months after the date of the collector's return."

What does the phrase, "such publication," mean? Obviously the act of publishing "three weeks successively." It is an undivided, unbroken, whole thing,— viz: a notice of three weeks' duration. It is no notice unless it is continued during the time mentioned and completed within the period specified,— "three months after the date of the collector's return." The whole notice and not a part of it is what must be seasonably given before the treasurer can sell the land of a non-resident for taxes.

This construction is substantially settled in *Bussey* v. *Leavitt*, 12 Maine, 378. Statute of 1826, c. 337, § 8, then under consideration, provided that "the notice of sale required to be published in the public newspapers three weeks successively, shall be so published three weeks prior to the time of sale." The court said: "We understand the provision to mean that, the notice, by advertising three weeks successively, shall be completed three months prior to the sale." The only difference is that, in the case at bar, the notice is required to be published three weeks successively *after* a certain date, and the act of 1826 three weeks successively *prior*.

So in New Hampshire, where the statute required the sale to be advertised by "publication for three successive weeks, at least six weeks before sale," the court held that, "the last publication shall be at least six weeks before the sale." *Mowry* v. *Blandin*, 64 N. H. 3.

Application. The collector's return was made on February 25, 1890. The three weeks' publication should have been completed "within three months" after that date,— on or before May 25, 1890; but it was first published on May 22, and last on June 5, 1890. McLaughlin, therefore, at the time of the alleged trespass, had no legal title to any of the property of the three mining corporations named.

The plaintiff's title to the Stewart property is not sound. One link in its chain of title is derived from one Laughton who recovered a judgment against that corporation, at the January term, 1887, in Penobscot county. On the execution issued on such judgment, the sheriff sold the debtor's property at auction, to the creditor who was the highest bidder, and undertook to con-

vey it by deed of April 9, 1887. But the deed conveyed no title for it was not a sealed instrument. *McLaughlin* v. *Randall*, 66 Maine, 226.

Did the plaintiff have such a possession of the Stewart property as would entitle it to maintain trespass against the defendant, who was not a mere stranger and wrongdoer, but claimed title to the property under a tax deed for which he had paid seven hundred dollars cash?

As seen, the plaintiff had purchased in (as it supposed,) all the outstanding record title, and claims, and had worked the property for one year, when its operations ceased. One Dunn had been its manager and superintendent, at least, during the operation. He retained the keys thereafter; but the locks were taken off, some of the windows broken, the buildings became out of repair, the roofs leaky so that the storms had reached and rusted some of the valuable machinery, some of the less valuable of which with sundry tools and implements had been carried away. In fine, the whole property inside and outside seems to have had the appearance of gross neglect and final abandonment to the tax gatherer, who had sold it at auction a year or two before.

Dunn did not seem to consider himself as the plaintiff's agent in charge of its property during any portion of the seven weeks while the defendant was severing the engines, boilers and other heavy machinery, and taking down sides of buildings necessary for their removal. For while he was a witness to these proceedings he made no complaint or protest. To be sure, the plaintiff's directors, on April 21, 1892, formally voted that he was its local agent and had been such ever since the company's ownership though no formal recorded vote to that effect, was in existence, but "recognized, approved and adopted Dunn's acts as those of the corporation, and his possession that of the corporation." The difficulty is he had performed no acts indicating that he was in possession for the purpose of caring for the property; but he seemed to look upon what was going on as the acts of one whose principal had purchased the property, at a tax sale, for seven hundred dollars, and that it was a matter which did

not concern the plaintiff. We are of opinion, therefore, that so far as the Stewart property is concerned, the action at law cannot be maintained.

On recurring to the declaration, it is found that the only trespass sued for is that committed upon the Douglass and Stewart properties which were adjoining. The action is trespass *quare clausum*, and the gist is the breaking and entering. *Sawyer* v. *Goodwin*, 34 Maine, 419. The defendant is responsible for such breaking and for all other injuries done to the property real or personal, known as the Douglass, after such breaking.

The bill covers all three of the properties and must be sustained as to the Douglass and Bluehill, the plaintiff's title to which is not questioned. The injunction to be made permanent as to both of them, with costs.

If the Bluehill property was injured, no damages can be recovered therefor in this action, for none are claimed in the declaration.

The plaintiff is, therefore, entitled to judgment as above indicated, damages to be assessed at *nisi prius* as stipulated in the report.

The deposit made by the plaintiff pursuant to R. S., c. 6, § 205, should be returned to him. *Dunn* v. *Snell*, 74 Maine, 28. *Judgment for plaintiff.*

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

GEORGE L. WESCOTT *vs.* CHURCHILL L. STEVENS.

Hancock. Opinion February 25, 1893.

Promissory Note. Indorsement.

One, who indorses a note at the request of and for the accommodation of the maker, may elect in what capacity to become bound, and, if the payee has already indorsed the note, and he signs as second indorser, in the absence of any agreement with the payee to the contrary, may look to him for the payment of the note.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit on a promissory note, which was admitted to be a renewal by several intermediate renewals of a note dated November 7, 1888, viz:

"$300. Bar Harbor, Nov. 7, 1888.

Three months after date I promise to pay to the order of C. L. Stevens three hundred dollars at any bank or banking house in Maine. G. A. Barron."

[Indorsed,] C. L. Stevens.
G. L. Wescott."

It appeared that the maker, Barron, owed Stevens and gave him this note, and that Wescott, the plaintiff, owed neither Barron nor Stevens but became an accommodation party to the note; that the note with Wescott's name on it under Stevens' was discounted by Stevens at a bank; that at its maturity this note was renewed by the same parties signing in the same respective places, and successively renewed; that the bank finally refused any further renewal and called upon the plaintiff, Wescott, as last indorser, to pay the amount due with protest fees; that the plaintiff paid the amount to the bank, took up the note and brought this suit against Stevens as prior indorser. The defendant admitted that this is *prima facie* the relation of the parties, but contended that by the circumstances of the signing the plaintiff became, as between the original parties, a surety for the maker and consequently a joint promisor with him. And the defendant introduced evidence tending to show that the plaintiff indorsed the note at the request and for the accommodation and benefit of Barron; whereupon the plaintiff introduced evidence to the contrary, tending to show that he indorsed solely at the request of Stevens and after the note had been delivered to and indorsed by Stevens, and not even in Barron's presence. The defendant introduced evidence to show that at the time the original note was given, Barron, the maker, was indebted to him for labor performed on certain buildings erected by Barron, and endeavored to effect a settlement in part by giving this note, with the understanding that defendant should try to get the note discounted at bank and, if this could not be done, that it should be returned to Barron and he would procure

an indorser in order to make the note acceptable to defendant. The note was not taken by Stevens at this time as a final settlement but simply for the purpose of ascertaining if it could be discounted.

The note was refused at the banks and Stevens thereupon returned with it to Barron, who then, in pursuance of his agreement, requested and obtained the indorsement of Wescott. The defendant contended that this indorsement was solely for the benefit and at the request of Barron, and that it was before the final and complete delivery of the note to the defendant and its acceptance by him.

Stevens was entitled to a lien for his work for which Barron was anxious to effect a settlement. There was evidence showing that Wescott had indorsed many notes for Barron and had extensive business relations with him, but he had never indorsed a note for Stevens, nor had there ever been any business relations between them.

The plaintiff contended that the sole point was not at whose request and for whose benefit he indorsed the note, but at what time he indorsed, whether before or after delivery to the payee or indorsement by the payee, and he requested the presiding justice to rule as matter of law that the liability of the plaintiff would be either that of second indorser or original promisor; that to be an original promisor he must have indorsed the note before delivery to the payee (or afterwards in pursuance of a prior agreement to do so,) and before indorsement by the payee; that it is immaterial at whose request the plaintiff indorsed the note if he indorsed after delivery or after a prior indorsement by the payee; that if the plaintiff indorsed after the prior indorsement of the payee, the plaintiff will be treated as a second indorser and parol evidence that he indorsed for the accommodation of the maker would be inadmissible.

The presiding justice declined to make such ruling but instructed the jury in his charge, in substance, as follows: "He [the plaintiff] accommodates some party by signing it. Now the defense contends that the accommodation was for Barron's benefit, and the plaintiff contends that it was, as the note

reads, for the defendant's benefit. . . . Now, the point is within rather a narrow compass, and it is for you to say whether the defendant satisfies you, by at least a greater weight of evidence on that side than on the other, that his signing was for the benefit of Barron and not, as the note would indicate, for the benefit of Mr. Stevens."

To these instructions the plaintiff excepted, and also filed a motion for a new trial, the verdict being for the defendant.

Wiswell, King and Peters, for plaintiff.

Hale and Hamlin, for defendant.

Assuming every contention of the plaintiff to be true, so far as disclosed in the bill of exceptions, the signature of Wescott was made at Barron's request, before delivery, and before indorsement of the payee. The facts all taken together, in law show this to be true. The jury must have so found in order to have rendered their verdict.

The charge of the presiding justice embodied, in substance, all the instructions asked by the plaintiff. It is a clear exposition of the law applicable to this case as developed by the evidence, and omitted nothing necessary for the proper understanding of the issue by the jury. It placed the issue squarely before them and their verdict was in accordance with the law and evidence; *Pearson* v. *Stoddard*, 9 Gray, 199; *Coolidge* v. *Wiggin*, 62 Maine, 568; *Hagerthy* v. *Phillips*, 83 Maine, 336; *Weston* v. *Chamberlain*, 7 Cush. 404; *Phillips* v. *Preston*, 5 How. 278; *McComb* v. *Thompson*, 72 Am. Dec. 706.

HASKELL, J. Assumpsit by the last indorser of a promissory note, who had paid it at maturity, against a prior indorser. The defense was that plaintiff indorsed the note at the request of and for the accommodation of the maker, and was, therefore, *qua* the defendant, a joint promisor. The defendant was the payee and had indorsed the note before the plaintiff indorsed it.

It is immaterial to inquire for whose accommodation the plaintiff made his contract, but material to know the terms of his contract. If the maker presented the note, already indorsed by the payee, to the plaintiff, with a request to become a party

to the note, he had the choice in what capacity to become bound. He might have elected to sign as maker, but did not. In effect, he handed the maker the cash and took the note. That was the result of his contract; and it is very plain that he intended, by his indorsement, to look to the note, as it was when he indorsed it, for his security, otherwise he would have signed in a different capacity. By signing as he did, he accommodated the maker all the same, gave currency to the note, and looked to the note for his security. He became bound as indorser. That was the contract made. Sometimes the order of indorsements may be shown to be different from what they appear to be. Such proof shows what the writing was when made, therefore what the written contract was.

Coolidge v. *Wiggin*, 62 Maine, 568, is precisely in point. The defendant, as payee, and plaintiff successively indorsed the maker's note for his accommodation, and, in the absence of an agreement between them to be sureties merely, they were held bound to each other as successive indorsers. There, the indorsements were both at the request of the maker. Here, if plaintiff's indorsement was at the request of the maker, without any agreement with defendant, whose name was already on the note, *a fortiori* the defendant should be held to a completed contract, on which plaintiff paid his money. *Stevens* v. *Parsons*, 80 *Maine*, 351; *Colburn* v. *Averill*, 30 Maine 310; *Dubois* v. *Mason*, 127 Mass. 37; *Bigelow* v. *Colton*, 13 Gray, 309; *Howe* v. *Merrill*, 5 *Cush.* 80; *Smith* v. *Morrill*, 54 Maine, 48; *Williams* v. *Smith* 48 Maine, 135.

Moreover, the weight of evidence is clearly against the contention of the defendant, that plaintiff indorsed at the request of and solely for the accommodation of the maker. That is his account of the transaction; but the maker and plaintiff squarely deny this. They both say that the indorsement was not procured at the maker's request, and the plaintiff says that it was made at the defendant's request. Their account is corroborated by the circumstances. *Motion and exceptions sustained.*

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

INHABITANTS OF PARIS *vs.* NORWAY WATER COMPANY.

Oxford. Opinion February 25, 1893.

Tax. Water Company. Pipes. R. S., c. 1, § 4, rule X; c. 6, §§ 3, 9; 43 Eliz. c. 2; 38 Geo. III.

The water pipes, hydrants, and conduits of a water company, laid through the streets of a city or town, are taxable as real estate to the company in possession of them, under our statute, in the city or town where they are laid.

AGREED STATEMENT.

This was an action of debt brought in the name of the inhabitants of Paris for the collection of a tax assessed by the assessors of said town against the Norway Water Company, as non-residents, on its property in the town of Paris, viz: on its aqueducts, pipes, conduits, hydrants and franchises within said town, as real estate. The assessors of said town were duly elected and qualified at the annual meeting in March, 1890, duly called. The assessors gave notice in writing as required by R. S., c. 6, § 92, and said corporation did not make or present any list to said assessors. In the apportionment of taxes for state, county and town purposes for the year 1890, said assessors assessed against said corporation the sum of seventy-three dollars and fifty cents, and thereafterwards on the 8th day of July, 1890, committed the said tax with the other taxes assessed for that year to the collector, who was duly elected and qualified, under a warrant in due form of law. Said collector duly and properly returned the tax so assessed against said corporation, within the time required, to the treasurer of said town, who was duly elected and qualified. The acts and duties of said treasurer in receiving and recording said tax were in due form. Demand for the payment of said tax was seasonably made before commencement of this suit. The suit was properly authorized by the selectmen. The defendant is a legally organized corporation, having its place of business at Norway, in the county of Oxford, and owning therein a pumping station, reservoir, and certain pipes and hydrants, with rights as defined by its charter to take water from Pennesseewassee Lake in

Norway. Its pipes and hydrants extend into Paris and through the village of South Paris, for the use of which water the said corporation are paid. Said corporation own no property in said town of Paris, except its aqueducts, conduits, pipes and hydrants as described in the assessment of said tax; and their pipes and hydrants in Paris are supplied from the pumping station and reservoir in Norway.

Upon the foregoing statement of facts and evidence introduced, the court were to render such judgment as the rights of the parties require; and if for plaintiff the amount due shall be assessed at *nisi prius* (as a petition for abatement before the county commissioners is now pending).

J. S. Wright, for plaintiffs.

Bearce and Stearns, for defendant.

HASKELL, J. Debt for a tax laid upon defendant's aqueducts, conduits, pipes and hydrants, as real estate, within the town of Paris. These appliances are used to distribute water among the citizens of Paris, supplied by a pumping station and reservoir in Norway, where the defendant corporation has its place of business. By charter (acts of 1885, c. 369; 1887, c. 46), defendant is authorized to supply the inhabitants of Paris and Norway with water, and to lay pipes necessary for the purpose through the streets of both towns. The charter does not locate the corporation in either town.

Taxes on real estate are to be assessed "in the town where the estate lies, to the owner or person in possession thereof;" R. S., c. 6, § 9; and real estate for the purposes of taxation, includes "all lands . . . and all buildings erected on or affixed to the same;" R. S., c. 6, § 3; and the word "lands" includes "all tenements and hereditaments connected therewith and all rights thereto and interests therein." R. S., c. 1, § 4, rule x.

Under these provisions, a boom across the Kennebec river, fastened to permanent piers in the river and to the shores by chains, was held to be real estate for the purposes of taxation, *Hall* v. *Benton*, 69 Maine, 346. So was that part within the State of a toll-bridge across a river that marks the boundary line.

Kittery v. *Portsmouth Bridge*, 78 Maine, 93. Water pipes were assessed *in solido* with personal property in *Rockland* v. *Water Co.* 82 Maine, 188, and, in a suit for the tax, it was contended that they were real estate and improperly included in an assessment with chattels; but the court, without deciding the question held it immaterial, as the controversy was one of overvaluation merely.

It will be seen from these authorities that the court gives very wide scope to the definition of real estate, for the purposes of taxation; and it is best that it should be so. Subjects of public revenue should contribute to the public burdens so that they may lie as equally as possible among all the people. And, in these days, when capital accumulates in commercial centres, many times representing contrivances, local and permanent in character, that contribute an income, it is just that such source of profit pay its tax where its location may be.

Aqueducts above or under ground are but conditions suited for carrying water, undefiled, through or over the soil. They are fixtures, permanent in character and part of the land that sustains them. Size, capacity, and the material used in their construction do not change their nature. They are a constituent part of the freehold, and so long as they remain the property of the owner of the fee, their character as real estate will not be questioned. It is only when they are constructed and occupied by persons or companies having no title in the soil, that their classification as property becomes doubtful, that is, the interest of such persons or companies in them, becomes of doubtful classification, rather than their generic character, regardless of ownership. The owner of a fee may, by sale of some structure upon it and by granting license for it to remain, as between himself and the vendee, make it a chattel, while as a whole, in a generic sense, it would be classified as real estate.

The proper classification, under the rules of the common law, of this species of property, is not a new question. It has been many times considered in England during the last century. And water-mains and underground conduits have there been considered as fixed to, included in, and a part of the soil. They

have been considered real estate, and have uniformly been held locally taxable as such to the "occupiers of lands," under the statute of 43 Eliz., or as our statute puts it, "to the person in possession thereof." *King* v. *Bath*, 14 East, 610; *King* v. *Rochdale Water Works*, 1 M. & S. 634; *King* v. *Gas Light & Coke Co.* 5 B. & C. 466.

Under the statute of 38 Geo. III, laying taxes upon the owners of "lands and hereditaments," the pipes of a water company in a street were held to be not taxable as land to the owners of them. Lord Campbell says: "The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another; and whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us for this purpose to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditaments; nor do we think that the pipes, when laid, can be so considered within the meaning of the land tax acts. . . . The company are not the owners of the land where the pipes lie; nor are they the tenants of the land. . . . The moment the company take up their pipes which had been laid under the streets of any particular parish, all pretense for saying that they have or held land in the parish would be gone; but, after the pipes are removed, all the land in the parish would remain, and it would be had and be held as before. . . . But 'land,' like the word 'inhabitant,' which likewise occurs in the 43 Eliz. c. 2, has various meanings; and it may, in that statute, passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement, although, in other acts of parliament, it means a legal interest in the soil. This is the meaning which we think it bears in the land tax acts." *Chelsea Water Works* v. *Bowley*, 17 Q. B. 358.

The city of Providence laid a tax on the pipes of the Gas Company in the streets, as real estate, under a statute authorizing such a tax against those "who hold or occupy the same," and it was held a valid tax like those laid under the statute of Elizabeth. *Providence Gas Co.* v. *Thurber*, 2 R. I. 15.

So a pipe line, laid through the soil of New Jersey, under grants from the owners of the fee, is not only real estate when considered as a part of the fee, but is held, for the purposes of taxation, to be real estate of the company owning it, under a statute defining real estate as including all lands and all buildings or erections thereon or affixed thereto. *Pipe Line* v. *Berry*, 52 N. J. L. (23 Vroom,) 308.

Gas mains and pipes are sometimes distinguished from the class of property now under consideration, as apparatus for the delivery of the manufactured article, and are considered machines or chattels. *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75; *Memphis Gas Light Co.* v. *State*, 6 Cold. 310. Water pipes, &c., are not machinery. *Dudley* v. *Jamaica Pond Aqueduct Corporation*, 100 Mass. 183.

The public has an easement in land, over which streets and roads are laid, co-extensive with the necessities of public use. No title in the soil is acquired thereby, and when the ways are discontinued the easement is extinguished. Private corporations, like gas companies, water companies and street railway companies, by legislative authority, are sometimes allowed the use of the public easement to serve the necessary demands of society, and without any additional compensation to the owner of the soil. Such companies, therefore, by the public license accorded them, take no title in the land. They are simply allowed to use it for the public convenience as a counterbalancing consideration for their expenditures, giving opportunities to gather tolls from its use. In using the street or road, they place their pipes or rails in or upon the ground there permanently to remain. They occupy land with appliances that become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies, they are not land within the common law rule. But when considered as if owned by the same person who has title to the soil, they may properly enough be so considered. Suppose the street with these appliances in it be discontinued and they be abandoned without removal and pass

to the owner of the soil, who should then lease them in gross or singly to tenants or persons desiring to operate them. Would they not be real estate when considered with the property as a whole? Would they not pass by a deed of the land? Why then may they not properly enough be assessed as real estate, and to the person in possession of them? Their value as chattels would be nominal. Water pipes buried in the ground as chattels would be of little or no value. It is the use that gives them value, and that use is strictly of a fixture, a permanent appliance. As bearing upon this view, see *Flax Pond Water Co.* v. *Lynn*, 147 Mass. 31; *City of Fall River* v. *Bristol*, 125 Mass. 567; The *People* v. *Cassidy*, 46 N. Y. 46.

In the last case cited, in considering the validity of a tax upon a street railway as land under a statute very similar to ours, Folger, J., said: "The statute means, for its purpose, to make two general divisions of property; one, all lands, another, all personal estates; and then, to be more definite, it declares, that by land, is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not in the view of the statute land unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion, that the statute means that such an interest in real estate, as will protect the erection, or affixing thereon, and the possession of buildings and fixtures, which will bring those buildings and fixtures, within the term "land," and hold them to assessment, as the lands, of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures. The defendants are right, then, in considering the track of the relators as land, and liable to assessment as such."

In our opinion water-mains, pipes, &c., may be considered real estate and taxable where they are located, to the person or company owning them. The idea that they may be considered appurtenances to the place of supply and taxable there is untenable. There is no principle upon which it can rest. *King* v. *Bath* and *King* v. *Brighton*, 5 B. & C. 466. See *Boston*

Manuf'g Co. v. *Newton*, 22 Pick. 22. The Iowa doctrine that water works are real estate and taxable as an entirety at the place of supply is not supported by authority. *Askaloosa Water Co.* v. *Board of Equalization*, (Iowa,) 51 N. W. R. 18.

Defendant defaulted.

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

ERNEST L. COLE *vs.* JOHN E. CLARK and Building and Lot.

Hancock. Opinion February 27, 1893.

Lien. Contract. Voluntary Service. R. S., c. 91, § § 30, 32.

A mechanic's lien is dissolved by a failure to file with the town clerk a statement of the amount due him within thirty days after he ceases labor.

The mechanic's lien though arising by virtue of express statute is dependent on the existence of contract and the obligation of debt. There can be no lien in favor of a party who voluntarily performs a service without express or implied promise of payment.

Where the plaintiff loaned his tools for a few minutes, and rendered the trifling service of receiving from the foreman's hand a board which might otherwise have been allowed to fall without danger of injury; *Held*, that they were only spontaneous acts of friendly accommodation performed under circumstances which distinctly repel any implication of a promise to make payment. They were not labor which creates the obligation of debt and which draws after it the security of a lien.

AGREED STATEMENT.

Deasy and Higgins, for plaintiff.

J. A. Peters, Jr., for owners.

WHITEHOUSE, J. The defendant, Clark, built the "King Cottage" under a contract with the owners. The plaintiff worked in his employment in erecting it, and brings this suit to enforce a lien on the building to secure the payment of a balance of one hundred and twenty-three dollars and twenty-seven cents for labor performed between February 15 and August 4, and "one half hour's labor" alleged to have been performed on or about August 24, 1891. The statute provides that the lien shall be dissolved unless the claimant files in the office of the town clerk a true statement of the amount due within thirty days after he ceases to labor. The plaintiff claims that he complied with this requirement and preserved his lien by filing such statement on

the 12th day of September, 1891. The owners, who appear in defense, claim that he "ceased to labor" on their cottage on the fourth day of August. They therefore contend that his statement was not seasonably filed in the clerk's office, and that his lien was accordingly dissolved. This is the only question presented for the determination of the court. It is not in controversy that the plaintiff "ceased to labor" on the King Cottage August 4, unless the incident of August 24, hereafter described can reasonably be deemed labor on that day, within the meaning of the statute.

The plaintiff was discharged from the work on the cottage and removed his chest of tools August 4, and a few days after, prior to August 24, a bill of his time on the cottage was rendered to Clark by the foreman with the plaintiff's knowledge. The plaintiff was never engaged in or about the cottage at work again, but remained in Clark's employment in the workshop three-fourths of a mile distant and performed such work as was there assigned him. On the 24th of August, the foreman, Mr. Lawrence, had occasion to place some moulding between two piers at the cottage, a piece of extra work not called for by the contract. The "labor" alleged to have been performed at that time is thereupon described as follows in the agreed statement:

"Not having the necessary material on the ground Lawrence went to Clark's shop to prepare it. At the time he arrived there Cole was around the stable doing nothing, it being the noon hour. Cole's tool chest was in the shop over the stable. When Lawrence went up to the shop over the stable at about one o'clock Cole followed of his own accord. In the shop Lawrence asked Cole for the loan of his tools with which to prepare a moulding. Cole complied with that request and took his "hollows" and "rounds" from his chest near which was the bench. Some lumber being stored on the rafters overhead in the shop, Lawrence swung himself onto the rafters and lumber thereon and selected a board, and instead of dropping it he passed the board down between the rafters, and Cole, who was underneath, took the end nearest him and laid the board on two wooden

horses or benches near by. Lawrence lowered himself down and began work on the board and made of it a moulding which was used as aforesaid. Cole did nothing further except to receive back his tools when Lawrence was through. When Lawrence began his work on the board, Cole began filing a saw for himself. He worked the rest of the half day for Mr. Clark on another job. Nothing was said by either Cole or Lawrence about any charge being made for the above by Cole. Cole himself keeps a book in which he enters his labor by date, person, time or otherwise. But in doing several small jobs on the same day or half day it has been his practice to make one charge to Mr. Clark without designating the place where the work was done; and in this case for the afternoon in question he charged Mr. Clark with a half day's work; but made no special charge for the work above mentioned."

The mechanic's lien though arising by virtue of express statute, is obviously dependent upon the existence of contract and the obligation of debt. The contract is the principal thing and the lien the incident, following the legal liability to pay. Whenever this obligation fails to arise, the security ceases to exist. *Farnham* v. *Davis*, 79 Maine, 282; *Wescott* v. *Bunker*, 83 Maine, 499; Phillips Mech. Liens, 112; Overton's Law of Liens, § 564; 2 Jones on Liens, 1235. "There can be no lien," says Judge Thurman in *Chateau* v. *Thompson*, 2 Ohio, N. S. (L. Warden) 114, "unless there is a debt and it would be idle to presume an intention to guard against liens that could never exist for want of a debt to support them." Hence there can be no lien in favor of a party who voluntarily performs a service without express or implied promise of payment. It is a familiar principle that when services are rendered with the knowledge and consent of another under circumstances consistent with contract relations between the parties, a promise to pay is ordinarily implied by law on the part of him who knowingly receives the benefit of them, and is enforced on grounds of justice in order to compel the performance of a legal and moral duty. But all true contracts grow out of the intention of the parties to the transaction in question; and if in a particular case it satis-

factorily appears from the situation, conduct and mutual relations of the parties, that the service was proffered as an act of friendly accommodation or otherwise rendered without expectation of payment at the time, no promise to pay will afterwards be implied, though a new exigency may arise from the changed relations of the parties. Bishop Cont. § § 219, 220; Metc. Cont. 4; *Brown* v. *Tuttle*, 80 Maine, 162; *Godfrey* v. *Haynes*, 74 Maine, 96; *Potter* v. *Carpenter*, 76 N. Y. 151; *Woods* v. *Ayers*, 39 Mich. 345. The law will not thus permit what was intended at the time as an act of kindness or courtesy to be subsequently converted into the foundation of a pecuniary demand.

In the case at bar the plaintiff's loan of his unused tools for a few minutes, was manifestly but an act of friendly accommodation granted to a fellow workman without expectation of reward. In like manner the trifling service performed by the plaintiff in receiving from the foreman's hand a board which might otherwise have been allowed to fall to the floor without danger of injury, was unmistakably one of those natural and spontaneous acts of courtesy which daily mark the friendly intercourse of men, and enter into the amenities of all social life. It was unquestionably a voluntary and gratuitous act of kindness and civility performed without thought of compensation on the part of either, and under circumstances which distinctly repel any implication of a promise to make payment. Undoubtedly it was not "labor" which creates the obligation of debt and draws after it the security of a lien under our statute. It clearly was not understood to be "labor" when it was performed, and it clearly cannot become "labor" now simply because it would thus remedy the plaintiff's unfortunate neglect to comply with the statute by filing his statement in the clerk's office within thirty days from August 4.

It is, therefore, considered by the court that the plaintiff has no lien on the King Cottage; but it is not controverted that against the defendant Clark there should be entered,

Judgment for plaintiff for $123.16 and interest from date of writ.

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

CHARLES R. MILLIKEN, and others, APPELLANTS,

vs.

EDWIN MOREY, and others.

Androscoggin. Opinion March 2, 1893.

Insolvency. Appeal. Jurisdiction. Decree. Proofs of Debt. R. S., c. 70, § § 12, 25.

Appeals from the Insolvency Court must be entered at the next term of the Supreme Judicial Court in the County, and consent of parties does not confer jurisdiction, if entered at any other term.

On objections, in writing, to a claim filed in the insolvency court, the statute requires the court "to admit the claim to be proved," or "disallow the same, in whole or in part," from which decision an appeal is given. Where the insolvency court did neither, but simply dismissed the objecting creditors' petition "*pro forma*," *Held;* That there is no decree below from which an appeal could be taken, or that bars new proceedings.

ON EXCEPTIONS.

This was a petition brought under R. S., c. 70, § 25, in the Insolvent Court, for Androscoggin County, by creditors of the Dennison Paper Manufacturing Company, insolvent, and to obtain a decree expunging the claim of $134,815.07 proved by Morey & Company, against the insolvent's estate. The petition alleged that said Morey & Company had accepted an unlawful preference.

The procedure in the case is stated in the opinion. The view taken by the court renders it unnecessary to report the issues raised upon the petition and answer by the parties, in the insolvent court, where a *pro forma* decree only was entered dismissing the petition.

John A. Morrill and *Seth M. Carter*, for Appellants.

Symonds and Cook, *A. A. Strout*, *Charles F. Libby*, and *A. R. Savage*, for Appellees.

HASKELL, J. The appellants petitioned the court of insolvency in Androscoggin county to expunge the appellee's proof of debt against the insolvent's estate. To the petition, appellees filed their answer, and proofs were taken, whereupon the judge

of insolvency, on the 29th of April, 1892, decreed *pro forma*, that the petition be dismissed. Two days afterward, April 30th, an appeal was taken by the petitioners "to the Supreme Judicial Court now holden at Auburn within and for said county of Androscoggin, to which term said appeal is to be taken in accordance with the stipulation of parties of record in this court." Notice thereof was ordered by the judge of insolvency and duly served on the same day. Three days afterward, May 3, the appeal was entered in this court at the April term thereof, that began on the 18th of April, then in session. Two days later, May 5th, the appellees moved to dismiss the appeal for want of jurisdiction, inasmuch as the appeal was prematurely entered, it being by law only authorized to be entered at the next term of court, to wit: September term, 1892. The court refused to dismiss the appeal and ordered the cause to a hearing against appellees' protest, and, thereupon, exceptions were taken and allowed, and appellees filed their answer, not waiving their motion to dismiss. A hearing was had and the cause reported to this court, a proceeding unauthorized by law. The exceptions, however, were seasonably certified to the chief justice, who held them for further argument before himself and associates at the July law term.

The Supreme Judicial Court takes jurisdiction of appeals from the decrees of judges of insolvency, by force of R. S., c. 70, § 12, that requires all appeals in insolvency to "be taken to the supreme judical court next to be held within and for the county where the proceedings are pending," giving exceptions in matters of law, that must be certified to the chief justice.

It is plain that the appeal was prematurely entered and should have been dismissed. *Clark* v. *Railroad*, 81 Maine, 477. But it is urged that appellees agreed in writing that the appeal might be entered at the April term. Be it so; they saw fit to repudiate their agreement, and seasonably, the next day after their appeal was entered, moved to dismiss it. The jurisdiction of the supreme judicial court, in such matters, is purely appellate and only exists by force of statute. Consent of parties never gives a court jurisdiction. *State* v. *Bonney*, 34 Maine, 223; *Powers* v. *Mitchell*, 75 Maine, 372.

As said by the supreme court of Massachusetts: "The consent of parties to the entry of this appeal at a term of court which was not the time fixed by law for such entry could not give the court jurisdiction of the appeal and it is accordingly dismissed." *Eddy's case*, 6 Cush. 28; *Palmer* v. *Dayton*, 4 Cush. 270; *Clark* v. *Railroad*, 81 Maine, 477. Want of jurisdiction may be taken advantage of at any time before judgment. *Custy* v. *Lowell*, 117 Mass. 78.

A valid appeal vacates a valid decree or judgment; and until affirmed in the appellate court there is neither. *Knox* v. *Lermond*, 3 Maine, 377; *Winslow* v. *Commissioners*, 31 Maine, 444; *Atkins* v. *Wyman*, 45 Maine, 399; *Tarbox* v. *Fisher*, 50 Maine, 236; *Hunter* v. *Cole*, 49 Maine, 556. Not so with insolvency appeals, by reason of the peculiar provisions of R. S., c. 70, § 12. Nor with void appeals from valid judgments, for they give the court no jurisdiction of the cause. *Cleveland* v. *Quilty*, 128 Mass. 578; and cases cited. Nor with valid appeals from void judgments. *White* v. *Riggs*, 27 Maine, 114; *Veazie Bank* v. *Young*, 53 Maine, 555.

It may be said that the appellees should not be allowed to repudiate their agreement and thereby deprive the appellants of their appeal, and leave them bound by a decree that cannot now be appealed from, and especially as that decree was *pro forma* only, leaving a determination of the cause without any judicial consideration. Certainly not.

The decree does not purport to be a decision upon the merits of the question. It can be no bar to a new petition. Moreover, the statute requires the insolvent court, on objections in writing to the allowance of a claim that has been filed, "to admit the claim to be proved," or "disallow the same in whole or in part." R. S., c. 70, § 25. This decree did neither. It simply dismissed the petition, without passing any judgment upon the claim, and without intending to do so. An appeal is given, not from a dismissal of a petition of this sort, but "from the decision of the judge, allowing or disallowing, in whole or in part, any debt, claim or demand against the debtor or his estate." The filing of a claim, under oath, is *prima facie* only. When

objections are filed, the validity of the claim is to be inquired into and its status determined by a decision upon the claim. Until this is done, the validity of the claim has not been determined, and it is open to objections by any party interested.

Exceptions sustained. Appeal dismissed.

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

PROPRIETORS OF MACHIAS BOOM

vs.

CORNELIUS SULLIVAN, and others.

Washington. Opinion March 3, 1893.

Corporation. Constitutional Law. Sorting and Rafting Logs. Spec. Laws, Massachusetts, Feb'y 13, 1808, c. 55; Spec. Laws, Maine, 1891, c. 174.

A charter was granted to the proprietors of Machias Boom by the Commonwealth of Massachusetts, by act passed February 13, 1808, for the purpose of laying and maintaining a boom across the West Branch of Machias River; and therein specified fees and tolls were allowed for "rafting and securing" logs and timber. The legislature, however, reserved the right at all times to revise and alter said fees and tolls.

By special act of the legislature of this State passed in 1891, c. 174, the fees and tolls were changed, and a rule established by which to fix the price for "sorting and rafting" logs and timber so rafted and secured at said boom and also for "boomage" of logs and timber.

Held: That the powers reserved to the state had not been transcended, and there had been no impairment of the obligation of contract within the meaning of the contract clause of the constitution.

Legislation oftentimes may be such as to injuriously affect the interests of those with whom the contract exists, and yet impair no obligation of contract.

No additional duty independent of that contemplated by the charter is imposed upon the corporation by the insertion of the word "sorting" in the amendatory act.

The duty of sorting and rafting according to ownership is imposed by the charter under the term "rafted."

AGREED STATEMENT.

The case is stated in the opinion.

Charles Sargent, for plaintiff.

Heath and Tuell, for defendant.

FOSTER, J. By the provisions of c. 55 of special laws of the Commonwealth of Massachusetts, passed February 13, 1808,

certain persons therein named and their successors were constituted a corporation by the name of the proprietors of Machias Boom, for the purpose of laying and maintaining a boom across the west branch of Machias river.

The third section of that act provides: "That the said corporation shall be entitled to receive of the respective owner or owners of masts, logs and timber, which shall be rafted and secured at said boom by any person or persons, the following respective fees or toll: for each mast six (6) cents, for each pine mill log of thirty feet in length or upwards four (4) cents, for each pine mill log under thirty feet in length three (3) cents, and for each spruce or hemlock mill log, or stick of timber, two (2) cents. Provided, however, that the fees or toll shall at all times hereafter be subject to the revision or alteration of the Legislature."

A subsequent act of the Legislature of this State (c. 174, special laws of 1891), entitled, "An act to regulate the tolls of the Machias Boom," is as follows:

"Section 1. The fees or tolls of the proprietors of the Machias Boom are hereby revised and altered so that said corporation shall be entitled to receive of the respective owners of logs and timber which shall be rafted and secured at said boom by any person or persons the following respective fees or tolls: for sorting and rafting logs and lumber, so secured at said boom, a price per stick not to exceed such prices as the owners of such logs and lumber shall in writing agree to perform such sorting and rafting for, at their own expense, such agreement by them signed to be filed with said corporation before each rafting season shall open, to be for the season then next ensuing and if accepted, to bind such owners to be responsible for the acts, default or negligence of all persons employed thereunder, and also provide therein that if at any time the corporation is dissatisfied with the count of the logs, then it shall be authorized to employ a man to take account of them, and his count shall be final, his wages to be paid one half by the corporation and one half by the log owners, such wages to be in addition to the prices aforesaid; for the boomage of each pine, spruce or hem-

lock mill log or stick five-eighths of a cent; for the boomage of each cedar stick, one quarter of a cent; provided, however, that all the fees or toll of said corporation shall at all times hereafter be subject to the revision or alteration of the legislature."

While this action is brought by the plaintiff corporation ostensibly to recover the amount claimed in the account annexed, it is in reality to test the validity of this last mentioned act.

The contention on the part of the plaintiff is, that the grant of the franchise to this corporation, when accepted, became a contract executed which cannot be summarily annulled, or its powers, rights or privileges otherwise impaired without the consent of the corporation; and that this subsequent legislation is an impairment of the obligation of that contract, and brings it within the contract clause of the constitution of the United States and of this State.

It has long been the settled doctrine that a state in the exercise of her sovereignty may contract like an individual and be bound accordingly, and that acts of incorporation, granted upon a valuable consideration, partake of the nature of contracts within the meaning of that clause of the constitution which prohibits the enactment of any law impairing the obligation of contracts. *Rockland Water Co.* v. *Camden and Rockland Water Co.* 80 Maine, 544.

The question, therefore, to be determined in this class of cases where legislative interference is claimed, is whether the act in question does in fact impair the obligation of contract. Oftentimes legislation may be such as to injuriously affect the interests of those with whom the contract exists, and yet impair no obligation of contract.

To determine whether the legislature has transcended its powers in this particular case, we must examine not only the act of which complaint is made, but also the language of the original charter granted to this plaintiff corporation.

The authority upon which this legislation is based comes from the charter itself. It can come from no other legitimate source. This authority was expressly reserved to the State and became a part of the contract between the State and the plaintiff cor-

poration, and is thus expressed: "Provided, however, that the fees or toll shall at all times hereafter be subject to the revision or alteration of the legislature." This reserved or delegated power, vested in the legislature, permits it to exercise the right of revising or changing the price or compensation to be received by the plaintiff for the acts required to be performed under its charter. Has the legislature done more than that? We think not.

The plaintiff, however, contends that by the act an additional duty is cast upon it independent from that of rafting and securing, by introducing the work of "sorting"—a term not found in the original charter. But the plaintiff admits that, by its charter, it was its duty to secure all logs coming into its boom, and subsequently to raft out the same. And the agreed facts show that, in the transaction of the business at the boom, it is necessary for logs to be pushed out and rafted according to their ownership. The amendatory act, evidently proceeding upon the idea that the duty of rafting was imposed upon the corporation by its charter, first establishes a rule by which to fix the price for rafting, and next establishes in effect an independent price for boomage, or securing the logs. Over this duty of securing or boomage, there seems to be no controversy. For the performance of that, the act authorizes a specific price according to the kind of lumber boomed or secured.

Admitting, according to the plaintiff's contention, that the word "rafted" in section three of the charter, imposes upon the corporation the duty of rafting the lumber that comes into the plaintiff's boom, we are not inclined to hold that by the use of the word "sorting,"—or the term "sorting and rafting,"—in the amendatory act, any new or additional duty has been imposed upon the corporation. There is no material difference in legal construction between the use of the word "rafted" as contained in the charter, and the phrase "sorting and rafting" as used in the amendatory act. The act of sorting is a necessary part of the work of rafting. The very nature of the business, which is a proper element to be taken into consideration in giving construction to the language of the charter, indicates

that logs of different owners arrive in the boom, and in rafting have to be separated or sorted out. The case shows that in rafting logs they must be "pushed out and rafted according to their ownership." To this extent at least they must be sorted,— the logs of the different owners being sorted according to ownership. If the logs are simply sorted by ownership and rafted without sorting by kinds, then there is no ground for any complaint that a new duty is cast upon the plaintiff. "Sorting and rafting," mentioned in the act of 1891, may well be construed in harmony with the language of the original charter, and imposing no greater duties than are therein implied. The duty of the corporation is performed when the logs have been secured or boomed, sorted and rafted by ownership.

While thus construing the meaning of the language used both in the charter and the amendatory act, we are not inclined to that broader construction claimed by the learned counsel for the defendants,— that by the word "rafted" the logs should not only be sorted according to ownership but also according to kinds. However convenient this might be for the owners, there is nothing in the case or in the signification of the word that requires such a construction to be given. Additional expense would be incurred were the logs to be sorted by kinds instead of ownership.

The act in question, while adding no new duties, takes away no rights, and destroys no privileges guaranteed by the State. It simply furnishes a rule by which the compensation is to be adjusted. It establishes certain necessary precedent conditions, which, if complied with, fix the maximum price for rafting.

In the case at bar these conditions have been substantially complied with. The offers were declined by the plaintiff, and this action is brought to recover upon the old rate as specified in the charter of 1808. The provisions of the amendatory act regulating tolls must apply. And in accordance with the stipulation in the report of the case, judgment must be rendered for the plaintiff for the sum of $101.50, together with interest thereon from the date of the writ. *Judgment accordingly.*

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

SAMUEL P. SMITH *vs.* CALIFORNIA INSURANCE COMPANY.

York. Opinion March 13, 1893.

Verdict. New Trial. Insurance.

Where the evidence, viewed in the light of the circumstances surrounding the whole transaction so strongly preponderates against the party in whose favor a verdict has been rendered as to amount to a moral certainty that the jury erred, in the conclusion reached by them, a new trial will be granted.

ON MOTION AND EXCEPTIONS.

The case is stated in the opinion.

The view expressed by the court upon the motion renders a report of the exceptions unnecessary.

E. M. Rand, for plaintiff,

E. Stone and *R. P. Tapley*, for defendant.

FOSTER, J. The plaintiff recovered a verdict of $1648.80 upon a Massachusetts standard policy of insurance issued to him on the sixth day of November, 1888, for $1500 upon property in a detached frame dwelling-house situated in the outskirts of the village of Woburn in the commonwealth of Massachusetts.

The case comes before the court upon motion by the defendant to set aside the verdict and upon exceptions.

The defense interposed by the pleadings and relied on at the trial, was an absolate denial of the company's liability to pay any amount, on the ground that the plaintiff had been a party to causing the fire, and had been guilty of fraud, and therefore was not entitled to recover at all. Whatever, therefore, may have been the legal effect of this position as bearing upon that provision in the policy relating to arbitration in reference to the amount to be recovered, in case of loss, and failure of the parties to agree upon the same (*Robinson* v. *Ins. Co.* 17 Maine, 131; *Wainer* v. *Ins. Co.* 153 Mass. 335), it is unnecessary now to determine, inasmuch as we are satisfied that the motion should be sustained and the verdict set aside. The contract was made in Massachusetts with the plaintiff, a citizen of that State at the time.

The evidence from beginning to end discloses a most flagrant conspiracy to defraud the defendant company. The plaintiff, while perhaps not so active a participant in the details of this conspiracy as his brother, who is now serving sentence in the Massachusetts penitentiary for this crime, (*Com.* v. *Smith et als.* 151 Mass. 491,) or the other party who has fled his country to escape the law, appears to have been acting in conjunction with them in this fraud.

The evidence, viewed in the light of the circumstances surrounding the whole transaction, so strongly preponderates against the plaintiff upon points vital to the result as to amount to a moral certainty that the jury erred in the conclusion reached by them.

It is practically impossible within the reasonable limits of an opinion to give any analysis or even extended summary of evidence introduced, nor would it subserve any practical purpose beyond a decision in this particular case.

Motion sustained. New trial granted.

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

MARKET AND FULTON NATIONAL BANK

vs.

FRANCIS T. SARGENT.

Waldo. Opinion March 16, 1893.

Promissory Note. Accommodation Indorser. Agency. Verdict.

If one affixes his signature to a printed blank for a promissory note and intrusts it to another for the purpose of having the blanks filled up and thus becoming a party to a negotiable instrument, he thereby confers the right and such instrument carries on its face an implied authority to fill up the blanks and complete the contract at pleasure, so far as is consistent with its printed words.

As to all purchasers for value without notice, the person to whom a blank note is thus intrusted must be deemed the agent of the signer; and an oral agreement between such principal and agent, limiting the amount for which the note shall be perfected, cannot affect the rights of an indorsee who takes the note before maturity for value, in ignorance of such agreement, with a different amount written in it.

Proof of fraud in the inception of the note undoubtedly casts upon the indorsee the burden of showing that he took it for value before maturity without notice of the fraud. But proof that he paid full value for the note before maturity raises a presumption that he purchased it in good faith without notice of the fraud.

The court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict could not be sustained.

ON EXCEPTIONS.

The case appears in the opinion.

R. F. Dunton, for plaintiff.

W. H. Fogler, for defendant.

WHITEHOUSE, J. This was an action on a promissory note for seven hundred and eighty-five dollars, brought by the plaintiff bank as indorsee of Earl B. Chace & Company against the defendant as maker of the note.

The defendant seasonably filed his affidavit that the paper declared on had been materially altered since it was executed.

The facts were not controverted. The defendant had signed a prior note for the accommodation of Chace & Company which was outstanding and overdue at the time of the signing of the note in question. At Chace's request he agreed to sign three other accommodation notes to take up the overdue note, each to be for one third of the amount. But when the parties met for the purpose of executing this agreement, the amount of the overdue note was not definitely known to either of them, but was understood to be between six hundred dollars and six hundred and fifty dollars. Thereupon, at Chace's suggestion the defendant signed three printed blank notes and delivered them to Chace who agreed to fill them out with the requisite amount specified in each, when ascertained, and use them for the purpose of taking up the overdue note. The note in suit is one of the three notes thus signed. But instead of making it for one third of the overdue note according to his agreement, Chace fraudulently wrote in "Seven hundred and eighty-five dollars" and indorsed the note to the plaintiff bank before maturity in the ordinary course of business, receiving therefor the full amount of the note less fifteen dollars and ninety-six cents discount

thereon. It is not claimed, however, that Chace made any alteration in the printed terms of the blank thus delivered to him. He simply inserted in the blank spaces such words and figures as were necessary to constitute the instrument a complete promissory note. There is also positive testimony from the plaintiff's discount clerk that, at the time the note was discounted, the bank had no knowledge of any equities existing between the defendant and Chace, but took the note in the usual course of business. Upon this evidence the presiding justice directed the jury to return a verdict for the plaintiff for the amount of the note in suit.

This instruction was correct. The court may properly instruct the jury to return a verdict for either party when it is apparent that a contrary verdict could not be sustained. *Heath* v. *Jaquith*, 68 Maine, 433; *Jewell* v. *Gagne*, 82 Maine, 431; *Moore* v. *McKenney*, 83 Maine, 80.

It is well settled and familiar law that, if one affixes his signature to a printed blank for a promissory note and intrusts it to the custody of another for the purpose of having the blanks filled up and thus becoming a party to a negotiable instrument, he thereby confers the right, and such instrument carries on its face an implied authority, to fill up the blanks and complete the contract at pleasure, as to names, terms and amount, so far as consistent with its printed words. As to all purchasers for value without notice, the person to whom a blank note is thus intrusted must be deemed the agent of the signer, and the act of perfecting the instrument is deemed the act of the principal. An oral agreement between such principal and agent limiting the amount for which the note shall be perfected, cannot affect the rights of an indorsee who takes the note before maturity for value, in ignorance of such agreement, with a different amount written in it. *Bank of Pittsburgh* v. *Neal*, 22 Howard, 97; *Angle* v. *Ins. Co.* 92 U. S. 330; *Bank* v. *Stowell*, 123 Mass. 196; *Kellogg* v. *Curtis*, 65 Maine, 59; *Abbott* v. *Rose*, 62 Maine, 194; *Breckenridge* v. *Lewis*, 84 Maine, 349; Bigelow's Bills and Notes, 571.

But the defendant contends that it is not satisfactorily shown by affirmative evidence that the bank was an innocent purchaser.

Proof of fraud in the inception of the note undoubtedly casts upon the indorsee the burden of showing that he took the note for value, before maturity without notice of the fraud. *Farrell* v. *Lovett*, 68 Maine, 326; *Kellogg* v. *Curtis*, 69 Maine, 213. But proof that he paid full value for the note before maturity raises a presumption that he purchased it in good faith without notice of the fraud; and until overcome by rebutting evidence this presumption stands in lieu of direct proof. *Kellogg* v. *Curtis*, *supra*.

The plaintiff's testimony that the note was discounted in the usual course of business before maturity, for its face value less the discount stated, is not controverted. A *prima facie* case is thus made out for the plaintiff, without the aid of the affirmative statement of the discount clerk that the bank did not know of any equities between the defendant and Chace. There is no opposing evidence to overcome the presumption arising from the purchase of the note before maturity for full value, and no evidence in the case upon which a verdict for the defendant could be allowed to stand.

Exceptions overruled.

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

DANIEL F. PALMER *vs.* SAMUEL BELL.

Cumberland. Opinion March 22, 1893.

Sale. Deceit. False Representations by Vendor.

In order to sustain an action on the case for deceit in the sale of real or personal property, the deceit or fraud relied upon must relate distinctly and directly to the contract, and affect its very essence and substance, and it must be material to the contract.

If it is extrinsic and collateral to the contract, or relates to it only in a trivial and unimportant way, it affords no ground of action.

Thus, where the plaintiff purchased a farm of the defendant, and a right of way was expressly reserved in the deed, the plaintiff knowing of this right of way being upon the farm and having his attention called to it and the defendant during the negotiations of purchase stated to the plaintiff that there was no trouble whatever in regard to this right of way over the premises about to be purchased; *Held*, That such statement did not constitute a legal cause of action notwithstanding the same may have been false, and known to be false by the defendant.

Such statement related to matters entirely outside the deed, extrinsic and collateral to it, not affecting the title or quality of the land, or the essence or substance of the contract of conveyance, but rather to the conduct of the parties in the use of the right of way clearly defined in the deed.

ON MOTION AND EXCEPTIONS.

The case is stated in the opinion.

S. C. Strout and *J. A. Waterman*, for plaintiff.

J. W. Symonds and *L. B. Dennett*, for defendant.

FOSTER, J. This is an action on the case to recover damages for alleged deceit in the sale of a farm by the defendant to the plaintiff. The case comes before us upon exceptions and motion for a new trial.

When the defendant purchased this farm which he afterwards sold to the plaintiff, a right of way was reserved in the deed from what may now be termed the Clifford house and land to the main road leading from Portland to Gray. In the deed, which the defendant received from his grantor, the way is specifically set out and the rights of the parties fully defined. The defendant conveyed to the plaintiff, and in his deed, by express reference to the deed he had taken, precisely the same reservation as to this right of way was made.

The writ contains two counts, both based upon substantially the same alleged misrepresentation, that, being about to purchase the farm, the defendant, during the negotiations, stated to the plaintiff that there was not and never had been any trouble whatever between himself and Clifford in regard to this road.

At the trial it was claimed on the part of the defense that if these representations were made by the defendant at the time with reference to the sale of the farm, and if it was proved that they were not true, still they did not constitute a legal cause of action.

But the judge in charging the jury, among other things, instructed them in effect that the statement made to the plaintiff by the defendant during the negotiations for the sale and purchase of the farm,— that there was no trouble in regard to the right of way which Charles E. Clifford had over the premises about to be purchased,— would, if proved to have been made, and

to have been false and known to be false by the defendant, be such a material misrepresentation as would sustain the plaintiff's action.

The only inquiry which we consider essential in deciding this case upon the exceptions raised, is whether, assuming the misrepresentations to have been proved as stated, they constitute a legal cause of action against the defendant. We think they do not.

It is well settled that to be actionable the fraud or deceit relied upon must relate distinctly and directly to the contract, must affect its very essence and substance, and it must be material to the contract; for if it relates to another matter, or to this only in a trivial and unimportant way, or is wholly extrinsic and collateral, it affords no ground of action. 2 Par. Con. *769. To entitle a party to sustain an action for deceit on account of fraudulent misrepresentations, it must appear that the statements were made in relation to some fact or facts material to the subject matter of the transaction. As was said by this court in *Long* v. *Woodman*, 58 Maine, 49: "It is not every misrepresentation, relating to the subject matter of the contract, which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation." Hence, it is the well recognized doctrine of the courts in this State and Massachusetts, if not in many others, repeatedly recognized and acted upon in relation both to real and personal property, that the statements of the vendor as to its value, or the price which he has given or been offered for it, are so commonly made by those having property to sell in order to enhance its value, that any purchaser who confides in them is considered as too careless of his own interests to be entitled to relief, even if the statements are false and intended to deceive. *Medbury* v. *Watson*, 6 Met. 246, 259, 260; *Manning* v. *Albee*, 11 Allen, 520, 522; *Hemmer* v. *Cooper*, 8 Allen, 334; *Brown* v. *Castles*, 11 Cush. 348, 350; *Long* v. *Woodman*, 58 Maine, 49, 52; *Martin* v. *Jordan*, 60 Maine, 531, 533; *State* v. *Paul*, 69

Maine, 215; *Richardson* v. *Noble*, 77 Maine, 390, 392; *Bourn* v. *Davis*, 76 Maine, 223, 225. With regard to such statements the maxim of *caveat emptor* applies, and they are to be received with great allowance and distrust. It is folly for the purchaser to rely upon such statements, in disregard to his own judgment and means of information. They do not fall within that class of representations upon which actions have been held to lie when made in relation to past or existent facts, material to the contract, and pertaining to the quantity, quality or condition of the property, as in *Martin* v. *Jordan*, 60 Maine, 531, where a fraudulent affirmation was made by the defendant to the plaintiff as to the quantity of hay cut the previous year; or *Rhoda* v. *Annis*, 75 Maine, 17, in relation to the quantity of hay cut in previous years; or *Ladd* v. *Putnam*, 79 Maine, 568, where the misrepresentations related to the boundary lines, the quantity of land and the amount of annual products; or *Atwood* v. *Chapman*, 68 Maine, 38, where misrepresentations were made in regard to the title to the land sold, a fact known to the seller, concealed from the purchaser who had not equal means with the seller of ascertaining the fact, and not ascertainable by the use of ordinary diligence; and many other cases of like nature.

Even in cases where the misrepresentations are in reference to material facts affecting the value of the property, and not merely expressions of opinion or judgment, the law holds that the person to whom such representations are made has no right to rely upon them, if the facts are within his observation, or if he has equal means of knowing the truth, or by the use of reasonable diligence might have ascertained it, and is not induced to forego further inquiry which he otherwise would have made. *Gordon* v. *Parmelee*, 2 Allen, 212, 214; *Savage* v. *Stevens*, 126 Mass. 207, 208; *Rhoda* v. *Annis*, 75 Maine, 17, 27; *Brown* v. *Leach*, 107 Mass. 364; *Parker* v. *Moulton*, 114 Mass. 99; *Veasey* v. *Doton*, 3 Allen, 380; *Bradbury* v. *Haines*, 60 N. H. 123, 125; *Bowles* v. *Round*, 5 Vesey, 509. "The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic

length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." 2 Kent, Com. *485.

In the case before us, the alleged misrepresentation was not one upon which the purchaser had a right to rely. It did not relate to any fact material to the quantity, quality, or intrinsic value of the farm, or to the validity of its title. It related to matters not embraced within the contract of conveyance, but, on the contrary, to the conduct of Clifford in his use of the right of way which was clearly defined by deed. The plaintiff had full knowledge of the provisions of the deed. The negotiations for the purchase of the farm were made when upon the farm, with the way then existing pointed out to the plaintiff. He looked the farm over, as he says, and saw this road, and was told how it came to be there. He was told by the defendant that if he purchased the farm the same reservations would be made as to this right of way which had been made to the defendant when he bought. There was no misunderstanding between the parties in reference to the precise character of this right of way, or its location upon the face of the earth. The misrepresentation relied upon by the plaintiff in support of this action has reference to matters entirely outside the deed, extrinsic and collateral to it, not affecting the title or quality of the land, or the essence and substance of the contract itself, but relating exclusively to the manner of living under the defendant's deed while he and Clifford were occupants of adjoining farms.

The statement that the defendant said there was no trouble about a right of way, and which is relied on as the gist of this action, was too vague and uncertain in its meaning to warrant the plaintiff to rely upon it; its weight when legally considered, can be no more than though the defendant had stated that Clifford was an amiable man and a good neighbor, and would make no trouble in the use of the way. The statement can be considered no more than mere seller's statement, and furnishes no ground for an action for damages, any more than statements in regard to value, price paid, or offers received. They are, strictly speaking, *gratis dicta*, mere affirmations of the vendor on which

the vendee cannot safely rely; and will not excuse his own want of viligance and care in omitting to ascertain whether they are true or false, or what credit should be given to the assertions. As the case shows, no suit was pending in relation to this way; and any misrepresentations as to what may or may not happen in the future are merely promissory in their nature, and afford no legal cause of action. *Long* v. *Woodman*, *supra*. No reason is shown why the plaintiff might not have readily ascertained from Clifford the truth or falsity of the statement of which he complains.

With the view of the case which we have taken in reference to the alleged misrepresentation, it becomes unnecessary to consider the remaining exceptions, or the motion for new trial.

Exceptions sustained.

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

HIRAM M. NORTON *vs.* JOHN E. CLARK, and Building and Lot.

Hancock. Opinion March 28, 1893.

Lien. Consent of owner. Evidence. R. S., c. 91.

The consent of the owner of a building, that labor and materials may be furnished for its construction, may be inferred from the existence of a contract for such construction between the owner and a building contractor.

Stipulations in such a contract, that no liens should exist or be claimed for any labor or materials furnished by the contractor or others by him employed, will not bar a laborer and material man's lien who has not assented to it, although he introduces the contract in evidence to prove the owner's consent.

ON MOTION AND EXCEPTIONS.

This was an action to enforce a lien under R. S., c. 91, § 30. The suit was brought by the party furnishing labor and materials against the builder or contractor, who is in insolvency, and the building and land on which it stands.

The presiding justice in his charge to the jury, among other things, instructed them as follows, viz :

"I instruct you that when the owner of the land and buildings erected contracts with the builder, as in the present case, to construct a house upon the owner's land, and the builder employs workmen and contracts for materials entering into the

construction of the house, the consent of the owner of such building may properly be implied from the contract under which the house was built." Referring to the stipulation as to liens in the written contract between the builder and the owners he said:—"I instruct you that other parties having no knowledge of the terms of that contract would not be bound by its terms or stipulations although John E. Clark [the contractor] might be bound by this in relation to enforcement of his lien."

. . . . . .

"I instruct you, from the evidence in this case bearing upon that question, that if Hiram M. Norton [the plaintiff] is otherwise entitled to a lien upon the building, he is not a sub-contractor in such a way as to prevent him from maintaining a lien for the labor or materials furnished by him entering into the construction of this cottage and appurtenances."

The jury returned a verdict for the plaintiff, and the defendant excepted to the foregoing instructions. He also filed a motion for a new trial.

Deasy and Higgins, for plaintiff.

Consent of owner properly implied. *Parker* v. *Bell*, 7 Gray, 431. Rule in Pennsylvania not followed in other States. *Benedict* v. *Hood*, 19 Am. St. Rep. 698, and cases in note, including *Mulrey* v. *Barrow*, 11 Allen, 152.

The statute of that State has no provisions like those contained in § 31 of our lien law. In this State the owner can protect himself against liens by giving timely notices. In Pennsylvania he must protect himself by contract if at all.

Bedford E. Tracy, for owner.

The contract is the basis of plaintiff's right to furnish work or materials. He cannot thrust it aside and neglect its terms. In *Benedict* v. *Hood*, 134 Pa. St. 289, and reaffirmed in *Wilkinson* v. *Brice* (1892), 1 Adv. Rep. Penn. p. 481, it is held that the sub-contractor is bound by the agreements in the builder's contract. *Vide*, *Schroeder*, *Galland*, 134 Pa. St. 277, and cases cited in opinion of court. *Shaver* v. *Murdock*, 36 Cal. 298; *Henley* v. *Wadsworth*, 38 Cal. 356.

EMERY, J. Under our Statute of Liens, R. S., ch. 91, the claimant of a lien for labor or material performed or furnished in erecting a building, must establish as a proposition of fact that he performed or furnished the labor or material, either by virtue of a contract with the owner of the building, or by the consent of such owner. In these cases before us, the plaintiff sought to establish the alternative fact, viz: that the labor and materials were performed and furnished by the consent of the owner.

He performed and furnished the labor and material at the request of one Clark, the defendant. At the trial, as tending to establish the fact of the owner's consent thereto, he offered in evidence a written contract between the owner and Clark providing for the erection of the building by Clark for a gross price, Clark to procure all the necessary labor and material. To this evidence the owner objected, but it was admitted and he excepted.

The fact that such a contract was made, clearly tends to prove that the owner consented to the furnishing of labor and materials by others at Clark's procuration. He could not reasonably have expected Clark to personally perform all the labor, and have on hand all the materials. He must have anticipated that Clark would procure much of the labor and materials from others. Hence his consent thereto may be reasonably inferred from his making such a contract.

The written contract when admitted and read in evidence, disclosed a stipulation by Clark, that no liens should exist or be claimed for any labor or materials furnished by Clark or by others employed by him. The owner claimed that this stipulation barred the plaintiff's lien,— though he had no previous knowledge of it,— he having acted under Clark and having put in the contract as part of his evidence. The court ruled otherwise and the owner excepted.

The argument is that, having put the contract in evidence, the plaintiff is bound by its terms. Not so. The plaintiff did not put it in as his contract, but only as a written admission by the owner tending to prove consent by him. The plaintiff, having

no knowledge of the stipulation, cannot be deprived by it of any rights he had acquired by contract or by statute, even though he prove it as a circumstance to establish such rights. Neither does the fact that the plaintiff was in Clark's employ make him subject to any stipulations Clark might choose to make with others. This particular stipulation, like all other stipulations, binds only those who made it or assented to it. The plaintiff did neither. *Motion and exceptions overruled.*

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

CHARLES E. WITHAM, APPELLANT, from Decree of JUDGE OF PROBATE.

Franklin. Opinion March 30, 1893.

Probate. Appeal. Guardian. Bond. R. S., c. 63, § 24; c. 64, § § 23, 24; c. 67, § 2.

A ward may appeal from a decree granting or refusing guardianship over him. It is not necessary to the validity of such appeal that a bond be filed with the reasons of appeal, in the probate office, as required by R. S., c. 63, § 24, in other cases.

ON EXCEPTIONS.

The case is stated in the opinion.

E. O. Greenleaf, for appellant.

B. Emery Pratt, for adverse party.

FOSTER, J. The appellant, a minor above the age of fourteen years, nominated a guardian in accordance with the provisions of R. S., c. 67 § 2. Upon hearing before the judge of probate, the nomination was not approved, and thereupon he nominated and appointed Isaac D. Newman as guardian. From this decree an appeal was seasonably taken to the Supreme Court of Probate under R. S., c. 64, § § 23, 24, the reasons of appeal being duly filed. On the second day of the term of the appellate court, Isaac D. Newman by his attorney appeared and filed a motion to dismiss the appeal for the reason that no bond had been filed with the reasons of appeal. The court overruled the motion, and the adverse party excepted.

The only question to be settled, as the case is presented to us, is whether the appeal was properly taken, no bond having been filed.

We think it was.

It has been settled that a ward may appeal from a decree granting or refusing the guardianship over him. *Lawless* v. *Reagan*, 128 Mass. 592, 594.

Our statute in relation to the requirement of bonds by appellants in probate proceedings is based upon and substantially the same as the Massachusetts act of March 12, 1784, the 4th section of which provided that bonds should be given and filed in the probate office by the appellant from any decree, order, &c., of the judge of probate, for the prosecution thereof, and for the payment of costs, &c. The provisions of that act were general, and no exception was made in favor of infants or insane persons. Yet the court of that State, in the earliest case reported in which that act was invoked and objection raised, as in this case, that no bond had been filed, held, that on an appeal from a decree of the judge of probate in relation to the guardianship of a person *non compos*, on application to have the guardianship revoked, the applicant need not give bonds to prosecute the appeal. *McDonald* v. *Morton*, 1 Mass. 543. The reasons why no bonds are necessary in such cases are fully stated by the court in that case.

An exception was incorporated into the statute in this State (R. S., 1841, c. 105, § 26) which expressly provided that "in case of any controversy between a supposed insane person or other person under guardianship, with his guardian, the supreme court may, at their discretion, sustain an appeal on the part of the ward, although no bond may have been executed, or filed, as aforesaid."

And our present statute (R. S., c. 63, § 24) is substantially like the foregoing, though more condensed, and in which is this exception: "but in case of controversy between a person under guardianship and his guardian, the Supreme Court may sustain an appeal on the part of the ward without such bond."

This statute is in the furtherance of justice and is to receive

a liberal construction. There can be no doubt that it was the intention of the legislature to relieve appellants, who were incapable of contracting, from the necessity of filing bonds in cases of appeals where the guardian was a party. If the reasons are correct why no bond should be required in the case of an insane person appealing under a statute general in its provisions in regard to the requirement of bonds, as was the case of *McDonald* v. *Morton*, *supra*, *a fortiori* the same reasons would apply in the case of an infant under a statute which excepts that class and expressly provides that they need not furnish bonds.

The reasons given by the court in the case to which we have referred are pertinent to the case before us, notwithstanding the appointment was made by the probate judge and an appeal taken therefrom. It falls within the spirit of the statute exception.

Exceptions overruled.

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

ANDREW J. LIBBY *vs.* JAMES A. DICKEY, and another.

Kennebec. Opinion March 31, 1893.

Sale. Deceit. Deed. More or less.

Upon the trial of the issue of fraudulent representations as to the quantity of land that induced a purchase, an instruction to the jury, "a deficiency of a few acres, perhaps a dozen, or even fifty, in such a large parcel as eight hundred acres, more or less, might be allowed by those words" (more or less) is erroneous; but not as the construction of a deed, purporting to convey "eight hundred acres, more or less."

ON EXCEPTIONS.

This was an action on a promissory note of $2500.00, given by the defendants to the plaintiff for timber and wood land bought by them September 28, 1888. The deed described the premises by metes and bounds and concluded with the words "containing eight hundred acres more or less."

The case was tried to a jury in the Superior Court, for Kennebec county, and a verdict was returned for the plaintiff in the sum of $2000. From the defendants' exceptions it appeared that the defendants testified that the plaintiff represented to

them, at the time of the purchase, that the parcel of timber and wood land contained eight hundred acres. The land was somewhat irregular in shape, and was not measured out by the parties till this suit was commenced. A surveyor then surveyed it, when it was found to contain only four hundred acres and a fraction of an acre. It also appeared that, before the purchase, the defendants had opportunity to examine the land and did examine it by going over it in person, and by sending an agent over it to ascertain the amount of timber upon it, and that the principal value of the land was for the timber upon it; that the land was bounded on two sides by the public highway. The plaintiff testified that, at the time of the purchase, he gave no assurance to the defendants that the parcel contained eight hundred acres, or any other number of acres, but that he told the defendants where the land was and that they could go and see it, and that it was stated to him by them afterwards that they had done so before the trade was consummated for the land.

It became an important question at the trial, whether the plaintiff did or did not represent that the land contained eight hundred acres, the defendants contending that such a representation was made by the plaintiff, which they relied upon; and the plaintiff contending otherwise, which was one of the issues presented to the jury.

It also appeared that the defendants operated upon the land two winters, cutting a large part of the wood and timber on the same before they raised any question as to the number of acres.

At the trial, the plaintiff claimed that the phrase "more or less" in the deed, was evidence that the land was not bought by the defendants with any understanding that it contained eight hundred acres, and that said phrase relieved him from all responsibility for the fact that the land did not contain eight hundred acres in any event.

The presiding judge instructed the jury as follows:

"Now, it is claimed by the plaintiff's counsel that there was no representation as to the size of the parcel in the deed, because the words 'more or less' are used to qualify the quantity, eight hundred acres, more or less. The plaintiff contends that the use

of these words should be held to mean that he did not intend to be bound at all by the amount of the land, but such a construction, gentlemen, is too broad. The words as used in the deed mean that the grantor, having no precise knowledge as to the quantity, guarantees that there are somewheres near or about eight hundred acres. Unless there is a sufficient description otherwise to make the amount certain, or reasonably certain, the words are equivalent to 'about' or 'approximating' eight hundred acres. They are words used simply to exclude a construction that the precise quantity of land named should be conclusive upon the parties. It gives the seller reasonable margin for uncertainty and moderate latitude in the performance of his contract. A deficiency of a few acres, perhaps a dozen, or even fifty acres in such a large parcel as eight hundred acres, more or less, might be allowed by these words; but would it in half of the quantity, four hundred acres? Surely it would not, and such a deficiency, if it was shown, might sustain an inference of fraud, but it is not conclusive of fraud."

The entire charge was made a part of the case.

To the foregoing instructions of the court to the jury as to the effect of said phrase in the deed, and particularly that the aforesaid phrase might excuse the plaintiff for the loss of fifty acres, the defendants excepted.

W. T. Haines, for plaintiff.

The charge sustains the defendants' contention as to the construction of the words "more or less" and he is not aggrieved. *Soule* v. *Winslow*, 66 Maine, 447 and cases.

Deceit: *Carlton* v. *Rockport Ice Co.* 78 Maine, 49, and cases; *Medbury* v. *Watson*, 6 Met. 259; *Thompson* v. *Mansfield*, 43 Maine, 490; *Houghton* v. *Nash*, 64 Maine, 477.

S. S. Brown, for defendants.

Defendants did not base their claim to a reduction in price simply on the ground that the deed called the land eight hundred acres, but upon the fact that, at the time of the purchase, the plaintiff assured them that it contained eight hundred acres. They proved this fact by testimony *dehors* the deed.

The chief point of objection to the charge of the presiding

judge is what he said to the jury as to the allowance, or deduction, which he told them they might make from the eight hundred acres in consequence of the phrase "more or less." His instruction on that point was, in substance, that they might assign a loss of fifty acres or justify without reduction in price the value of fifty acres on account of that phrase. So that, although they found that the contract was for eight hundred acres, they might render their verdict on a basis of seven hundred and fifty acres as the amount of land bargained for. Under this instruction, the jury gave their verdict for a sum larger by the price of fifty acres than it would have been if the court had held them up to the contract actually made. The real question raised by this bill of exceptions, as a matter of law, is this: Was the judge correct in telling the jury that the phrase "more or less" inserted in the deed, as a matter of law, was in effect a deduction of fifty acres from the number of acres bargained for? For that was in substance what he told the jury they might deduct from the number of acres to start with.

Counsel cited: 1 Story Eq. Jur. § 141; *Hill* v. *Buckley*, 17 Ves. 395: *Putnam* v. *Hill*, 2 Russell, 520; *Belknap* v. *Sealy*, 14 N. Y. (4 Kernan) 143; *Couse* v. *Boyles*, 38 Am. Dec. 514.

VIRGIN, J. In September, 1888, the plaintiff, in consideration of $5500, conveyed to the defendants a tract of land, described by metes and bounds and as "containing eight hundred acres, more or less."

All the consideration has been paid except this note now in suit, of $2500 and interest, payable in two years from its date.

The defendants, at the court below, contended that they were induced to purchase by relying on the plaintiff's fraudulent representations that the premises contained eight hundred acres, when, in fact, a subsequent survey showed there was only the fraction of an acre more than one half of the quantity represented.

The jury returned a verdict for $2000 only, making an allowance to the defendants of $913 for the deficiency. They must, therefore, have found the plaintiff guilty of either misrepresent-

ing the quantity of land knowing it to be false, or asserting the false quantity without knowing whether it was true or false. *Harding* v. *Randall*, 15 Maine, 332; *Hammatt* v. *Emerson*, 27 Maine, 308.

The plaintiff makes no formal complaint against the verdict. The defendants, however, complain that the jury did not make a sufficient allowance for the fifty per cent deficiency of land; that as they had received only one half of the land bargained for, the plaintiff should receive only one half of the consideration. But as the defendants had already paid more than one half, they ought not pay any more. And the defendants undertake to trace their cause of grievance to an instruction in relation to the number of acres which the words "more or less" might properly be allowed to cover.

After stating quite fully the meaning of that phrase as the same is laid down in cases of acknowledged authority, the judge then added what the defendants claim was erroneous and to their disadvantage, viz: "A deficiency of a few acres, perhaps a dozen, or even fifty in such a large parcel as eight hundred acres more or less, might be allowed by these words."

Considered as a construction of the deed, the instruction as an illustration is sustained by a very large number of authorities. The subject matter has often arisen and created much discussion in the books. Chancellor Kent, upon authorities cited, declares the general rule to be "when it appears by definite boundaries, or by words of qualification, as 'more or less,' or words of like import, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity — if there be no intermixture of fraud in the case." 4 Kent, Com. *467. Judge Story entertained a like view. *Stebbins* v. *Eddy*, 4 Mason, 414. See also 1 Sug. Vend. (Perk. ed.) § III, 489, and notes; *Pierce* v. *Faunce*, 37 Maine, 63; *Hall* v. *Mayhew*, 15 Md. 551; *Smith* v. *Evans*, 6 Binn. 102.

When the difference between the actual and the stated quantity thus qualified, is so great as to naturally raise the presumption of fraud or gross mistake, the purchaser has his remedy. Same cases.

What precise difference should be regarded as evidence of fraud has not been determined that we are aware of. It has been held, however, that when it is so great as to warrant the conclusion that the parties would not have contracted had the truth been known, then the party injured is entitled to relief in equity, on the ground of gross mistake. *Weart* v. *Rose*, 16 N. J. Eq. 290, 297-8, and cases there cited. Chanceller Kent says: "A very great difference — as thirty per cent for instance — would entitle the party to relief." 4 Kent, Com. *467, note *b*. A very large number of cases on both sides of the line are collected in 15 Am. & Eng. Ency. 718 *et seq*. Fifty acres off from "eight hundred acres, more or less," is but a fraction over six per cent. We think, therefore, that the instruction if confined to the construction of the deed can afford no legal cause of complaint to the defendants.

But the case as presented to the jury was not based upon a construction of the deed; but upon fraudulent representations proved by oral testimony, which was undoubtedly admissible. *B. P. & B. L. Soc.* v. *Smith*, 54 Md. 187, 202. The jury found that the plaintiff unqualifiedly assured the defendants that the premises comprised eight hundred acres, and that relying upon that assurance they purchased. If the same unqualified statement had been made in the deed, the defendants would undoubtedly have been entitled to a remedy for the material difference; for quantity would then be regarded as a material consideration entering into the essence of the contract. *Marbury* v. *Stonestreet*, 1 Md. 147. Why should fraud place him in any better condition?

The charge, which is made a part of the exceptions, shows that the instruction complained of was not intended to be confined to a construction of the deed, but was expressly made applicable to the case as presented. The judge said: "However, if you should allow a reasonable margin, would seven hundred and fifty acres be an unreasonable amount, if you should conclude there was misrepresentation, as a basis upon which to calculate, four hundred acres having been proved to be the amount that was actually conveyed? If seven hundred and

fifty would be a reasonable basis, why then you should deduct the four hundred acres from the seven hundred and fifty and compute the damages upon that." We think the instruction when applied to the fraudulent representation was erroneous.

Exceptions sustained.

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

WILLIAM D. ATKINSON, in error,

vs.

PEOPLES' NATIONAL BANK OF WATERVILLE.

Kennebec. Opinion March 31, 1893.

Error. Judgment. Record. R. S., c. 79, § 11; c. 102, § § 7, 8.

Where the plaintiff in a writ of error submits the case to the law court upon anything less than a full transcript of the extended, unabbreviated record, the writ of error will be dismissed.

ON REPORT.

This was a writ of error to reverse a judgment recovered in the Superior Court, for Kennebec County, against the plaintiff in error by the defendant in error at the December term, 1882. The defendant pleaded *in nullo est erratum*, which was joined by the plaintiff.

The errors alleged are: *first*, the writ in said suit in which judgment was rendered was not signed by the clerk of the Superior Court; and the proceedings are void, having no legal foundation whatever; *second*, the court rendering said judgment had no jurisdiction to render the same, the process upon which it was rendered being void for want of a legal writ, said writ not having been signed by the clerk of the court which rendered said judgment.

The original writ bears date January 5, 1882, and purported to be signed by W. M. Stratton, who, defendants admitted was not clerk at that time, and whose term of office had expired more than a year previously.

The following docket entries in the original action were offered in evidence subject to the plaintiff's objections.

"*People's Natl. Bank* v. *Wm. D. Atkinson.*
Foster, L. Greenleaf—Pittsfield.
Feb. T., 1882.
Apr. " " —1—Dfd, [the dfd. has lines drawn through it.]
6—Plea filed by consent—cont.
June " " 23—Dfd. c. f. j.—
Sept. " " 8—c. f. j.—
Dec. " " 1—Judgt. on motion, Dec 5th.
Dec. T. 1882. Judgt. for ptfs. Damages, $2646 62
Costs, 22 51
Exon. iss'd, Dec. 8, 1882."

D. D. Stewart for plaintiff.

Counsel cited: *Riggs* v. *Johnson County*, 6 Wall. 187; *Suydam* v. *Williamson*, 20 How. 437; Story's Pl. 366; *Hemmenway* v. *Hicks*, 4 Pick. 497; *Ins. Co.* v. *Hallock*, 6 Wall. 556, and cases; *Coler* v. *Cleburne*, 131 U. S. 162; *R. R.* v. *Weeks*, 52 Maine, 458; *Davis, ex parte*, 41 Maine, 58; *Leach* v. *Marsh*, 47 Maine, 552, and cases; *Valentine* v. *Morton*, 30 Maine, 194; *Fall River* v. *Riley*, 140 Mass. 488; *Jewell* v. *Brown*, 33 Maine, 250; *Winchester* v. *Shaw*, 69 Maine, 536; *Carlisle* v. *Weston*, 21 Pick. 535; *Booth* v. *Com.* 7 Met. 287.

Heath and Tuell, for defendants.

Counsel cited: *Austin* v. *Ins. Co.* 108 Mass. 338, and cases; *Pillsbury* v. *Brown*, 82 Maine, 450, and cases; *Dennison* v. *Portland Co.* 60 Maine, 519; *Parrott* v. *R. R.* 47 Conn. 575; *Huntley* v. *Henry*, 37 Vt. 165, and cases.

EMERY, J. At common law the usual writ of error (*coram vobis*) issued out of the writ office in chancery to the cour whose record in the particular case was to be examined, and commanded that court to send the record and process in the case with all things touching them, (and also to return the writ itself,) into some other court, usually the king's bench, for

examination and judgment. Thus the writ partook of a dual nature. It operated as a writ of *certiorari* to the inferior court to send up its record and proceedings in the case, and it also operated as a commission to the superior court to inquire into and determine the legality of such record and proceedings.

After the return of the writ with the record and proceedings of the inferior court, into the superior court, the latter court issued its own writ of *scire facias* to the defendant in error. Upon the return of this writ of *scire facias*, the pleadings were made. The plaintiff assigned errors, and the defendant pleaded *in nullo est erratum*, or some other appropriate plea.

If the return made upon the original writ of error did not include the entire, completed record and proceedings in the case, the superior court upon the suggestion of either party would issue a special writ in the nature of a writ of *certiorari* to the inferior court to send up the omitted portions. The superior court would also issue this special writ of its own motion in order to supply omissions and obtain enough to show a valid record. The pleadings did not properly begin until the entire, completed record had been obtained.

Under our system of procedure in Maine, the original writ of error and all the special writs of *certiorari* and also the special assignments of errors are dispensed with. The proceedings are begun by the writ of *scire facias* from the Supreme Judicial Court, in which writ are specified the errors relied upon. Instead of the writ of *certiorari* to the court to send up its record and proceedings, the parties procure transcripts of the record and proceedings, and introduce them as evidence before the court which is to examine them. R. S., c. 102, § § 7 and 8. The court, however, has unquestionably the same right as at common law to insist upon a full transcript of the complete record and all the proceedings being produced, before hearing argument and rendering judgment. It may refuse to proceed until one party or the other produces such transcript.

In this case, the transcript is very fragmentary. The plaintiff offered only a transcript of an "abbreviated record," such as is named in § 11 of chap. 79, R. S., together with a copy of the

original process and the officer's return thereon. The defendant offered only a copy of the docket entries and a copy of the pleas. We have repeatedly held that the court will not pronounce a judgment erroneous where only the abbreviated record permitted in § 11, ch. 79, R. S., is produced. *Tyler* v. *Erskine*, 78 Maine, 91; *Lewiston Steam Mill Co.* v. *Merrill*, 78 Maine, 107. That abbreviation may suffice as evidence of a judgment where it is only sought to prove its existence. Where, however, it is sought to re-examine the proceedings and reverse the judgment for error, there must be a full unabridged record made up so that all the proceedings may be seen. Such a record, according to Blackstone, comprises "the original writ, and summons, all the pleadings, the declaration, view or oyer prayed, the imparlances, plea, replication, rejoinder, continuances and whatever other proceedings have been had; all entered verbatim on the roll; also the issue or demurrer and joinder therein." 3 Bl. 317.

Either party can require the clerk of the court to extend the record without abbreviation, and give him a transcript of such complete record.

If such a record were made and presented by transcript in this case, it may appear that the matters specified as errors in the original process and the return thereon, were completely waived and cured by the defendant's appearance and pleading directly in bar to the declaration without interposing any plea in abatement or motion to dismiss. We think, therefore, we should not pronounce judgment upon the record until the complete unabbreviated record is brought before us.

The plaintiff in error has, however, submitted his case upon the transcript and copies produced by him. These as above explained, do not necessarily show any error; hence his writ of error should be dismissed.

Writ dismissed. Plaintiff nonsuit.

All concur.

ARTHUR D. ROGERS

vs.

DEXTER AND PISCATAQUIS RAILROAD COMPANY.

Piscataquis. Opinion April 1, 1893.

Railroad. Sub-Contractor. Lien. R. S., c, 51, § 141.

The statute provision (R. S., c. 51; § 141,) which imposes a liability on railroad corporations to pay for the work of laborers employed in constructing their roads, does not apply to the labor of a sub-contractor personally expended with that of a crew employed by him upon a section of a railroad which he has contracted to build.

ON REPORT.

H. Hudson and *J. S. Williams*, for plaintiff.

Statute general and applies to all laborers. *Hart* v. *R. R.* 121 Mass. 510; *Lyon* v. *R. R.* 127 Mass. 101; *Parker* v. *R. R.* 115 Mass. 580; 1 *Redf. R. R.* *586, and notes; *Kent* v. *R. R.* 12 N. Y. 628; *Aiken* v. *Wasson*, 24 N. Y. 482; *Balch* v. *R. R.* 46 N. Y. 521.

J. B. Peaks, for defendant.

PETERS, C. J. The defendant railroad company contracted with Brown Brothers & Company for the entire construction of its railroad. Brown Brothers & Company contracted with one Tucker for a certain amount of the grubbing and filling in such construction. Tucker contracted with the plaintiff for a certain amount of the grubbing (embraced in his contract with Brown Brothers & Company) at a fixed price per square yard. The plaintiff employed other men and labored personally with them, in doing the grubbing he had contracted to have done. Tucker did not pay the plaintiff as provided in the contract, and the plaintiff has now brought this action against the railroad company to recover, not the contract price, but only the amount of his personal labor in such grubbing. He bases his claim to recover on R. S., c. 51, §, 141, which reads as follows:

"Every railroad company, in making contracts for the building of its road, shall require sufficient security from the con-

tractors for the payment of all labor thereafter performed in constructing the road by persons in their employment; and such company is liable to the laborers employed, for labor actually performed on the road, if they, within twenty days after the completion of such labor, in writing, notify its treasurer that they have not been paid by the contractors. But such liability terminates unless the laborer commences an action against the company, within six months after giving such notice."

This statute was evidently intended, not for the benefit of contractors, but for the benefit of laborers. The railroad company is made liable to laborers only. The question, therefore, is whether one who contracts to do a certain specific portion of the work of construction of a railroad, and personally labors in the performance of his contract, along with others hired by him for the same purpose, is a "laborer employed," within the meaning of the statute.

Etymologically the word "laborer" may include any person who performs physical or mental labor under any circumstances; but its popular meaning is much more limited. The farmer toiling on his own farm, the blacksmith working in his own shop, the tailor making clothes for his own customers, is not called a laborer. One who performs physical labor, however severe, in his own service or business, is not a laborer in the common business sense. A contractor, who takes the chance of profit or loss, is not a laborer in that sense.

In the language of the business world, a laborer is one who labors with his physical powers in the service and under the direction of another for fixed wages. This is the common meaning of the word, and hence its meaning in the statute.

The plaintiff in this case performed his labor in his own business. He was responsible only for the performance of his contract.

The means for such performance were of his own choice. He need not personally have performed physical labor at all. He could have employed all, as well as a part, of the necessary labor. What physical labor he did perform, was not for

wages, but to reduce the expenses and increase the hoped for profits of his contract. He clearly was not a laborer within the common and statute meaning of the term.

Authorities are not wanting to sustain this interpretation of the statute. The word "laborer" in similar statutes has received a similar interpretation in other jurisdictions. *Aiken* v. *Wasson*, 24 N. Y. 482; *Balch* v. *R. R. Co.* 46 N. Y. 521; *Vane* v. *Newcombe*, 132 U. S. 220; *Weymouth* v. *Sanborn*, 43 N. H. 171. Also in the China Treaty, *In Re Ho King*, 14 Fed. Rep. 724.

It is urged that the statute should be liberally construed, being remedial and intended to prevent hardships. This may be so as to the class to which it clearly relates. It should not be stretched, however, to include a class not within the common meaning of its language. *Lord* v. *Woodard*, 42 Maine, 497.

Judgment for defendant.

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

ALICE LYON *vs.* THOMAS L. OGDEN, and others.

Hancock. Opinion April 3, 1893.

Foreign Will. Witnesses. Real Property. R. S., c. 64, § § 12-15; c. 65, § 36; Stat. 1874, c. 169.

Real property, situate in this State, passes by a will made with two witnesses in a foreign state, where but two subscribing witnesses are required; or, if first proved and allowed in another state according to the laws thereof, is legally allowed and recorded in this State.

Section 36, R. S., c. 65, is repugnant to § § 12-15, c. 64, R. S.; and the latter provisions, being the embodiment of more recent enactments, must control.

ON REPORT.

This was a real action brought to recover certain land in Eden, Hancock county, and which the plaintiff claimed as one of the children and heirs-at-law of Samuel E. Lyon, late of New York city, deceased, or as her distributive part of the land as if her father had died intestate.

Said Lyon left a will executed in accordance with the laws of New York and which was duly proved and allowed in the

proper court of that State, where he lived and died; and which was also proved and allowed in this State, by copy, as provided in R. S., c. 64, § 13.

The defendants are trustees and executors, having duly qualified as required by law, and claimed title as such to the demanded premises.

There were but two subscribing witnesses to the will.

The plaintiff denied the validity of this will to pass title to real estate in the State of Maine, on the ground that it is not executed in conformity with the laws of this State relating to wills; and claimed that the real estate of Samuel E. Lyon within the State of Maine should be distributed amongst his heirs-at-law in accordance with the statutes of descent and distribution of this State, precisely as it would have been distributed had he died intestate.

The statutes which came up for construction by the court are as follows:

Revised Statutes, chapter 64, § § 12, 13, 14, 15:—

"Sec. 12. Any will executed in another state or country, according to the laws thereof, may be presented for probate in this State, in the county where the testator resided at the time of his death, and may be proved and allowed, and the estate of the testator settled, as in case of wills executed in this State.

"Sec. 13. A will proved and allowed in another state or country, according to the laws thereof, may be allowed and recorded in this State in the manner and for the purposes hereinafter mentioned. A copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any person interested, to the judge of probate in any county in which there is estate, real or personal, on which the will can operate; whereupon the judge shall assign a time and place for hearing, and cause public notice thereof to be given, the first publication to be thirty days at least before the time so assigned. After such hearing, if the judge considers that the instrument should be allowed in this State as the will of the deceased, he shall order the copy to be filed and recorded.

"Sec. 14. Such will shall then have the same force as if it had

been originally proved and allowed in the same court in the usual manner; but nothing herein shall give any operation and effect to the will of an alien different from what it would have had, if originally proved and allowed in this State.

"Sec. 15. After allowing and recording any will as aforesaid, the judge of probate may grant letters testamentary, or of administration with the will annexed thereon, and proceed in the settlement of the estate found in this State, in the manner provided by its laws with respect to the estates of persons who were inhabitants of any other state or country; and the letters thus granted shall extend to all the estate of the deceased within this State, and exclude the jurisdiction of the probate court in every other county. Such administration may be granted in any county in which lands of the testator, subject to the operation of his will, remain undisposed of for more than twenty years from his decease."

Revised Statutes, chapter 65, § 36:—

"When administration is taken in this State on the estate of any person, who, at the time of his death, was not an inhabitant thereof, his estate found here, after payment of his debts, shall be disposed of according to his last will, duly executed according to the laws of this State, if he left any; but if not, his real estate shall descend according to the laws of this State; and his personal estate shall be distributed according to the laws of the state or country of which he was an inhabitant; and the judge of probate, as he thinks best, may distribute the residue of said personal estate as aforesaid, or transmit it to the foreign executor or administrator, if any, to be distributed according to the law of the place where the deceased had his domicile."

Deasy and Higgins, for plaintiff.

Probate Courts must show jurisdiction or their proceedings are void. *Overseers of Fairfield* v. *Gullifer*, 49 Maine, 360; *Smith* v. *Rice*, 11 Mass. 506; *Wales* v. *Willard*, 2 Mass. 120; R. S., c. 65, § 36.

In the absence of statutory provisions on the subject, the probate of a will does not affect the question of the application of the will to

real estate, unless the will was executed and recorded according to the requirements of the law of the State where the real estate is situated. Freeman on Judgments, § 608; Wharton's Conflict of Laws, § 645; Story's Conflict of Laws, § 474; *Bowen* v. *Johnson*, 5 R. I. (S. C. 73 Am. Dec. 56, note); R. S., c. 65, § 36, not repealed by c. 64, § § 12-15. *Pratt* v. *R. R.* 42 Maine, 587; *Haynes* v. *Jenks*, 2 Pick. 176; *Crofton* v. *Illsley*, 4 Maine, 134; 1 Jar. Wills, pp. 6, 7, Am. Ed. Probate of Lyon's will in Maine was a qualified probate. *Holman* v. *Perry*, 4 Met. 492.

Hale and Hamlin, for defendants.

The tendency of modern legislation is to remove the harsh restrictions imposed by our earlier laws upon non-residents who attempted to dispose of their real estate here by will. Rule of interpretation: *Winslow* v. *Kimball*, 25 Maine, 493.

The result intended by the act of 1874, is a just result and wipes out a narrow and inhospitable discrimination against non-residents. It harmonizes our statutes with the broad principles of international law. They now permit a resident of this State who may be in a foreign country, where he cannot get the advice of those aquainted with the Maine law, to make his will in accordance with the law of the country where he is; and they recognize the law of domicile with reference to a non-resident to the full extent, by allowing him to dispose of all his property, real or personal, in accordance with the law of domicile, so far as formalities are concerned, it first being shown by the action of the court of domicile that his will complies with that law. 1 Woerner Am. Law of Adm. § 226, *et seq.*

Reading R. S., c. 65, § 36, as modified by the act of 1874, it means "duly executed according to the laws of this state," or "duly executed, proved and allowed according to the law of domicile and then duly proved and allowed here," precisely as the words in the same section "distributed according to the law of the place of domicile" would necessarily be construed so broadly as to compel distribution according to a will valid under the law of the domicile, even although not in the form according to our statutes. A thing within the intention, is as much within

the statute, as if it were within the letter, and a thing within the letter is not within the statute, if contrary to the intention of it. *Holmes* v. *Paris*, 75 Maine, 559, and cases there cited; *Allen* v. *Young*, 76 Maine, 80. A subsequent statute generally will control the provisions of former statutes which are repugnant to it, according to its strict letter. *Pease* v. *Whitney*, 5 Mass. 382; *Pratt* v. *R. R. Co.* 42 Maine, 579.

Adjudication of Maine Probate Court conclusive. *Dublin* v. *Chadbourn*, 16 Mass. 433; *Parker* v. *Parker*, 11 Cush. 519; *Patten* v. *Tallman*, 27 Maine, 17; *Waters* v. *Stickney*, 12 Allen, 1; 1 Woerner Am. Law Adm. § 227; *Schultz* v. *Schultz*, 10 Gratt. 358; S. C. 60 Am. Dec. 335, and cases.

WALTON, J. The question is whether real property situated in this State can be effectually disposed of by a will having but two subscribing witnesses. The answer depends upon where the will is made. If made in this State, it will not. Our law requires at least three subscribing witnesses. But if made in another state or country, where but two subscribing witnesses are required, or, if first proved and allowed in another state or country according to the laws thereof, and then legally allowed and recorded in this State, as it may be, it will.

This conclusion is seemingly in conflict with section 36, chapter 65, of the Revised Statutes of 1883. But the words in this section, "duly executed according to the laws of this state," were, in the opinion of the court, rendered inoperative by the act of 1874, chapter 169, and should have been omitted in the revision of 1883. Their retention was probably the result of an oversight. They are repugnant to sections 12, 13, 14, and 15, chapter 64, of the Revised Statutes of 1883, and the latter provisions being the embodiment of more recent enactments, must control.

This conclusion entitles the defendants to judgment.

Judgment for defendants.

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

STEPHEN B. ATWOOD

vs.

THE MOOSE HEAD PAPER AND PULP COMPANY.

Somerset. Opinion April 4, 1893.

Flowage. Mortgage. Levy

A mortgagor of real estate, while he remains in possession of the premises, and before a foreclosure of the mortgage, has such an interest in the premises mortgaged as will enable him to maintain a complaint for flowage under the Mill Act, provided there is no objection to his so doing other than the existence of the mortgage.

The same rule applies to land sold for taxes or levied upon to satisfy an execution so long as the owner's right to redeem continues.

ON REPORT.

This was a complaint for flowage.

The complaint is dated August 12th, 1891. Plaintiff received his title by deed from Southard Walker, November, 1876, and mortgaged the premises back on the same day to Walker, to secure the purchase money, $800. This mortgage remains unpaid.

The premises were sold on execution, at sheriff's sale, three times, viz: they were twice sold on June 15, 1891, and sold again on December 19, 1891.

On March 24, 1892, the plaintiff paid the grantees under the sheriff's deeds of June 15, 1891, the amount for which the premises sold; and on March 25, 1892, he paid the amount of the sale of December 19, 1891.

The defendant commenced the construction of its dam in June, 1889, and completed it in February, 1890; there was no interruption of the water or flowage of the plaintiff's premises in the year 1889. The defendant, by means of the dam built in the year 1889, flowed the premises of the plaintiff during the seasons of 1890 and 1891.

The plaintiff has had possession of his farm from the time of his purchase to the present time. No claim for flowage has been made by the grantees in said deeds.

J. J. Parlin and *Walton and Walton*, for plaintiff.

Counsel cited: *Dickenson* v. *Fitchburg*, 13 Gray, 546, 558; *Charles* v. *Manf'g Co.* 17 Pick. 70; *Paine* v. *Woods*, 108 Mass. 160; *Vaugh* v. *Wetherell*, 116 Mass. 138; *Moor* v. *Shaw*, 47 Maine, 88; *Turner* v. *Whitehouse*, 68 Maine, 221; *Walker* v. *Woolen Co.* 10 Met. 203; *Calais* v. *Dyer*, 7 Maine, 157; *Bean* v. *Hinman*, 33 Maine, 480.

Webb, Johnson and Webb, for defendant.

After alienation damages belong to the grantee. It is a personal claim for money. Grantees were owners. *Seymour* v. *Carter*, 2 Met. 520; *Craig* v. *Lewis*, 110 Mass. 377; *Snow* v. *Moses*, 53 Maine, 546; *Sargent* v. *Machias*, 65 Maine, 591; *Chick* v. *Rollins*, 44 Maine, 114.

WALTON, J. The question is whether a mortgagor, while he remains in possession, has such an estate in the mortgaged premises as will enable him to maintain a complaint for flowage under our mill act.

We think he has. The prevailing doctrine at this day is that, as against all persons except the mortgagee and those claiming under him, the mortgagor is regarded as the owner of the land so long as he remains in possession of it. In equity, the mortgagor is deemed the owner, and the mortgage is considered as nothing more than security for the debt. The mortgagor has a right to lease or sell the land, and to deal with it in every particular as owner, so long as he is permitted to remain in possession, subject only to the rights of the mortgagee. "The courts of law have also, by gradual and almost insensible progress adopted these equitable views," and, "except as against the mortgagee, the mortgagor, while in possession and before foreclosure, is regarded as the real owner; and a freeholder, with the civil and political rights belonging to that character." Such were the views expressed by Chancellor Kent, and sanctioned by Chief Justice WHITMAN, in *Wilkins* v. *French*, 20 Maine, 111.

Such being the law, we can not doubt that a mortgagor, while

he remains in possession, and before foreclosure of the mortgage, has such an estate in the mortgaged premises as will enable him to maintain a complaint for flowage under the mill act, provided there is no objection to his so doing except the existence of the mortgage.

And we think the same rule applies when one's land has been sold for taxes or levied upon to satisfy an execution. So long as the owner's right of redemption continues, and he is permitted to remain in possession of the premises so sold or levied upon, we think he has an estate sufficient to authorize him to maintain a complaint for flowage. The relations of the parties are precisely the same as those of mortgagor and mortgagee, and we fail to perceive any reason why the same rule should not apply. And we think it is better that it should be so; for such a sale or such a levy can give no right to the mill owner to flow the land without paying the damage; and if he pays it to the purchaser or to the levying creditor, the latter must account for it in case the owner redeems; and the latter might not be satisfied with the amount so paid; and then there would be a dispute, and perhaps litigation, to settle the amount. And the relations of the parties are such, that while the right of redemption remains in the owner, and he is permitted to retain the possession, we think it is better that the right to recover damage for flowage should also remain in him.

It happens that in this case the mill owner is the holder of a tax title; and that when this suit was commenced, the plaintiff's right of redemption had not expired. He was still in possession of the land sold, and the defendant Pulp Company was continuing to flow it. Before this case can reach a committee, either the land will have been redeemed or the right of redemption will have expired. If redeemed, the sale will have no effect upon the proceedings. The damages will be appraised precisely as if no such sale had ever taken place. If not redeemed, then the damages to be assessed must stop at the date of the sale. From that time forward, the sale must be treated as if it had been absolute, and the title of the Pulp Company complete. The sales from which the land has already

been redeemed are to be regarded as nullities, and are to have no influence upon the proceedings whatever.

Case remanded for further proceedings in the court below.

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

MEMORANDUM.

On the tenth day of April, 1893, the Honorable ANDREW PETERS WISWELL was appointed a Justice of this Court, in place of Mr. Justice William Wirt Virgin, now deceased, and he took his seat on the bench on the twenty-fourth day of the same month, at a session of the court held at Ellsworth in the County of Hancock.

EDWIN H. BOWERS, in equity,

vs.

GEORGE H. M. BARRETT, and others.

Knox. Opinion April 15, 1893.

Way. Sidewalk. Abutters. Adverse Use. Towns. R. S., c. 18, § 17.

The building of a sidewalk within the limits of a road legally located does not necessarily infringe the rights of an abutting proprietor.

Structural changes made at different points in a way, after a new location, are evidence of an intention to subject the entire extent to public use as the exigencies of travel may require.

Nor need the new servitude be imposed at once on every abutting proprietor.

The control which a town has over its streets, under the paramount authority of the legislature, is not lost or impaired by an omission to pass a general ordinance respecting sidewalks.

Towns may determine the location of sidewalks and prescribe the details of their construction; they may intrust to the discretion of the road commissioner the less important features, or impose upon him the entire responsibility of such matters.

Pillsbury v. *Brown*, 82 Maine, 450, affirmed.

ON REPORT.

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

The case appears in the opinion.

W. H. Fogler and *J. E. Moore*, for plaintiff.

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

WHITEHOUSE, J. The plaintiff brings this bill in equity to restrain the defendants, Barrett and others, as selectmen, and the defendant, Carey, as road commissioner of Rockport, from constructing a sidewalk in front of his premises on the westerly side of Commercial street leading through Rockport village to Camden. He alleges that the proposed location of the sidewalk is across his lawn, outside of the limits of the street, and that the action contemplated by the defendants is without any lawful authority, and if permitted would cause irreparable injury to his premises.

The defendants deny that the projected sidewalk is to be laid over any portion of the plaintiff's premises, alleging that it is within the located and recorded limits of the street; and claim that their proposed action is fully justified by a vote of the town expressly authorizing the construction of the sidewalk at the point in question.

The case is reported on bill and answer with copies of the records and an agreed statement from which the following facts appear.

In 1840, the county commissioners by legislative authority located a highway across Goose river, and the following year the town of Camden "accepted" the "Goose river road" leading from the bridge located by the county commissioners past the premises now owned by the plaintiff through the present village of Rockport to Rockland. But there is no record in existence by which the bounds and admeasurements of this way could be located and defined. It satisfactorily appears, however, that it was soon after wrought and opened to the public, and with the changes hereafter noticed, in later years, under the name of Commercial street became the principal thoroughfare on the southerly side of Goose river in Rockport village, and very largely used for public travel by both teams and foot passengers.

In 1861, a petition was presented to the county commissioners of Knox County representing that "in the highway leading from Camden village over Rockport lower bridge to the old road near Hoboken school house in Camden, thence to Charles Ingraham's in Rockland, there should be alterations, building, locating and establishing of said highway." After due notice the commissioners "adjudged and determined that common convenience and necessity do require the alterations, widenings, locating and establishing of said road as prayed for; and in pursuance of the foregoing adjudication they proceeded to perform the duties required and to *lay out* the following described road." The report then gives a detailed statement of the courses and distances, and a definite description of the limits and boundaries of the road thus "laid out." It extends a distance of ninety-two rods on the northerly side of the bridge and two hundred and seventy-eight rods on the southerly side. It is four rods in width opposite the plaintiff's premises and the westerly line of the way is within four feet of the northerly end and within three feet of the southerly end of the plaintiff's house. In either direction the new location terminated at a previously located county road or highway.

The defendants claim that by force of their proceedings a strip of land twenty-seven feet wide at the southerly end and thirty-two feet wide at the northerly end of the plaintiff's premises, was legally subjected to the public easement, and the street widened to that extent on the westerly side.

It is not in controversy that the location of the sidewalk which the defendants propose to construct is within the limits of the highway thus "widened" and "laid out" in 1861. But the plaintiff contends that these proceedings of the county commissioners were ineffectual and void for several reasons; 1st, because the petition was too indefinite and vague to confer jurisdiction; 2nd, because a petition for an alteration of an old road gives no authority to lay out a new one; 3rd, because the old road must be deemed a town road, and the duty of altering a town road devolves solely upon the selectmen of towns; and 4th, because these proceedings of the county commssioners were

not closed and recorded until the second term after their report was filed.

How far these objections are open to the plaintiff in this proceeding it is not necessary to consider, for in the view here taken of the case a correct decision of it does not depend upon a solution of all or any of the difficulties thus suggested respecting the jurisdiction of the commissioners or the regularity of their proceedings. No objection appears to have been interposed to the validity of these proceedings at the time; no appeal was taken and no proceedings for *certiorari* instituted. On the northerly side of the river, the owners of abutting lots accepted the damages awarded, amounting in the aggregate to $220. A building standing upon one of these lots within the limits of the new location, was removed, the lots upon the easterly side of the road cut down, and the fences moved back on to the lots, to conform to the line of the new location. South of the plaintiff's lot, on the same side of the street, the new location cuts off more or less from fifteen lots.

About the year 1871, on the westerly side of the road leading southerly from the river, a sidewalk was built over a ledge by the abutters, who were authorized by the town to appropriate so much of their highway tax as was necessary for that purpose, and this walk has since been maintained and kept in repair by the town. The southern terminus of this sidewalk is about five rods from the plaintiff's lot, and with this, the projected sidewalk over the plaintiff's lot is designed to be connected. All of the abutters along this sidewalk over the ledge have maintained bank walls, upon which terraces have been made running back from the street. In 1884, the town made an excavation in the ledge within the limits of the new location, and thus widened the street for the purposes of public travel to the extent of ten or fifteen feet.

Thus after a clear and definite description of the bounds and admeasurements of this way had been recorded in 1861, all adversely interested acquiesced in the location then made for thirty-one years, and the way was used for public travel with-

out interruption and maintained and kept in repair by the town the same as before that location, except that actual modifications were made as above stated by removing obstructions and widening the traveled way as the needs of public travel seemed to require.

It is undoubtedly accepted as a general rule that when a public or private easement is sought to be established by adverse use alone, its limitations will be determined by what is actually used and enjoyed. But in *Sprague* v. *Waite*, 17 Pick. 309, Chief Justice Shaw said: "If it is intended to say in regard to ancient highways, that the right of the public is limited to that portion of the highway usually called the traveled path, . . . it is a misapplication of the rule. Where a tract three or four rods wide, such as is usually laid out as a highway, has been used as such, although twenty or thirty feet only have been used as a traveled path, still this is such a use of the whole as constitutes evidence of the right of the public to use it as a highway, by widening the traveled path, or otherwise, as the increased travel and the exigencies of the public may require."

The principle involved in this decision was further developed and the correct rule formulated in the recent case of *Pillsbury* v. *Brown*, 82 Maine, 450. It was there held that when a way is commenced under an actual and recorded location clearly defining its width, though the proceedings may not have been in all particulars strictly conformable to law, "the use is presumed to be co-extensive with the location, precisely as possession under an invalid deed is presumed to be co-extensive with the land purporting to have been conveyed by it." In the opinion, Judge WALTON says: "The true rule of law is this, that after the lapse of twenty years, accompanied by an adverse use, a location *de facto*, becomes a location *de jure*."

It is contended by the plaintiff, however, that *Pillsbury* v. *Brown* is clearly distinguishable from the case at bar, because in that case the use of the way originally commenced and afterward continued by virtue of the location there in question, while in this case a way had existed and been used for nearly twenty years before the proceedings of the commission-

ers in 1861. It is accordingly claimed that the travel upon the way thereafter was but a continuation of the prior use and in no way founded upon the recorded location of 1861; and that the only easement the public acquired in the plaintiff's land had its origin in the "acceptance" of a way by the town in 1841.

But in the light of the facts already stated, it is not perceived that this distinction is a material one in this case. The important structural changes made at different points in the way after the new location, were unmistakable evidence of an intention to subject the entire extent of it to public use as the exigencies of travel might require. It was not necessary that a new form of servitude should at once be imposed on every abutting lot throughout the length of the new location. Using any part of the four rods of the road was in effect using the whole of it. As stated by PETERS, C. J., in *Heald* v. *Moore*, 79 Maine, 274, "the widened road became a new road. . . . The moment the traveler passed over the usual traveled track afterwards, the new road, all of the road, became dedicated to the public use."

For thirty-one years there had been no occasion to widen the traveled way in front of the plaintiff's house. But in the progressive development of public enterprises and improvements, increased facilities for travel and new modes of using the highways and streets have been demanded. In the summer of 1892 an electric railway was duly located on this street past the plaintiff's premises, the westerly line of it being practically identical with the westerly line of the street as then actually wrought and used. Prior to this time, the plaintiff's lot being higher than the street, a bank wall had been maintained in front of it on the line of the street as then used, but in constructing the railway this wall was removed with the plaintiff's consent, and the embankment newly graded and sodded. At the front of the house the lot is from nine to eleven feet above the grade of the street as now wrought, and slopes down to the bank, the top of which is about five feet above the present grade.

The building of the street railway also made it necessary to remove the only sidewalk then existing upon this street except the one over the ledge above described. Thereupon a town

meeting was held in the town of Rockport, July 6, 1892, "to see if the town will vote to locate the sidewalk on Commercial street in said Rockport, from Hoboken school house to the iron bridge, on the westerly side of said street, and instruct the road commissioner to build said walk at once from said school house to E. H. Bower's house," and it was voted that "the sidewalk should be located and built upon the right hand side of Commercial street from the iron bridge to Hoboken school house, and instruct the road commissioner to build it at once."

It is not in dispute that the location of the sidewalk described in this vote extends across the lot occupied by the plaintiff on the westerly side of the street, and that it is proposed to construct it wholly within the limits of the street as "widened" and "laid out" in 1861. But the plaintiff still contends that this vote is not sufficient authority for the construction of the sidewalk, because it does not prescribe how much of the street shall be used for that purpose, and because the town has not by any ordinance or by-law set off any portion of the street as a sidewalk.

The location of the proposed sidewalk is within the limits of the highway, and when constructed it will still be a part of the highway. In *Hunt* v. *Rich*, 38 Maine, 195, the power of a highway surveyor to change the course of travel within the located limits of a highway, by virtue of his official authority alone, was distinctly recognized; and in *Cyr* v. *Dufour*, 68 Maine, 492, where there had been an alteration of an existing way, the action of the highway surveyor in preparing the newly located portion for public travel was sustained by the court, although the work was done without the authority of a vote of the town or special directions from the selectmen. The provisions of R. S., c. 3, § 59, par. VI, that "towns may make by-laws or ordinances for setting off portions of their streets for sidewalks," &c., and of § 17, c. 18, R. S., of similar purport, were designed to confer a power or capacity to do the acts mentioned. They are not mandatory or restrictive. The control which a town has over its streets under the paramount authority of the legislature is not lost or impaired by an omis-

sion to pass a general ordinance respecting sidewalks. That control involves duties and responsibilities which under our statutes are largely delegated to highway surveyors and road commissioners. These officers, however, are amenable to the instructions of the town. By a vote passed at a legal meeting the inhabitants may determine the exact location of a sidewalk and prescribe all the details of its construction; they may intrust the less important features to the discretion of the road commissioner; or may impose upon him the entire responsibility.

In the case at bar, the vote of the town locates the sidewalk on the westerly side of the street, and instructs the commissioner to build it at once. It was competent for the town to intrust to the commissioner the execution of the details. The vote is sufficient to authorize the construction of the sidewalk as contemplated.

The proposed action of the road commissioner, in building a sidewalk within the limits of the highway with the co-operation of the selectmen and in obedience to a legal vote of the town, does not necessarily involve any infringement of the plaintiff's rights.

Injunction dissolved. Bill dismissed with costs.

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

EDMUND R. BLINN

vs.

THE DRESDEN MUTUAL FIRE INSURANCE COMPANY.

Lincoln. Opinion April 21, 1893.

Insurance. Loss. Policy. Damages.

A contract of insurance, like any other, is to be construed in accordance with the intention of the parties, and this is to be ascertained from an examination of the whole instrument.

The face of the policy, while insuring the property destroyed to the amount of seven hundred dollars against loss or damage by fire, expressly limited such insurance to an amount "not exceeding in any case or under any circumstances, the sum aforesaid, nor more than two-thirds of the actual destructible value of the buildings at the time the loss may happen."

The same provision was contained in one of the conditions annexed to the policy, as also in one of the by-laws of the company, both of which were referred to and became a part of the contract between the parties.

Held; That the plaintiff was not entitled to recover more than two-thirds of the actual value of the building destroyed, notwithstanding another condition annexed to the policy provided that "in settling a loss, the damage is to be paid in full, not exceeding (in any case or under any circumstances,) the whole amount insured, and is to be estimated according to the fair value of the property at the time of the fire."

The term "damage" as therein used may, when considered in connection with the whole contract, properly be construed as referring not to the amount of loss which the plaintiff has sustained, but rather to the recompense or compensation, to which the plaintiff is entitled from the company.

ON EXCEPTIONS.

The case is stated in the opinion.

There was a verdict for the plaintiff in the sum of $426.03. He contended that he was entitled to recover the full amount of the policy, the property having that value, viz: $800.00, and after the verdict excepted to the instructions of the court.

George B. Sawyer, for plaintiff.

W. H. Fogler and *J. F. Libby*, for defendant.

FOSTER, J. The defendant company insured the plaintiff's house and ell against fire in the sum of seven hundred dollars. A total loss occurred, and this suit was brought, the plaintiff claiming to be entitled to the full amount named. The court instructed the jury that the plaintiff could recover, if at all, only two-thirds of the fair value of the house and ell above the cellar, not exceeding the amount insured, with interest. To this instruction the plaintiff excepted.

The only question presented is, whether by the terms of the policy, the plaintiff is entitled to recover only two-thirds the value of the property destroyed.

The by-laws of the company and conditions annexed to the policy are referred to therein and become a part of the contract. A contract of insurance, like any other, is to be construed in accordance with the intention of the parties, and this is to be ascertained from an examination of the whole instrument.

By article eight of the by-laws it is provided that "in no case shall the insurance exceed two-thirds the real value of the prop-

erty insured." The same provision is found in the second condition annexed to the policy, and is in these words: "and no property insured for more than two-thirds of its value." Upon the face of the policy itself the company, while insuring the property destroyed to the amount of seven hundred dollars against loss or damage by fire, expressly limits such insurance to an amount "not exceeding in any case or under any circumstances, the sum aforesaid, nor more than two-thirds of the actual destructible value of the buildings at the time the loss may happen." There is also a further provision that the loss or damage is "to be estimated according to the fair valuation of the property at the time of the fire."

Notwithstanding these express stipulations contained in the body of the policy, the by-laws, and the condition before referred to, the plaintiff contends that he is entitled to recover the full amount insured, and bases his claim principally upon the language of the ninth condition annexed to the policy which provides that — "in settling a loss, the damage is to be paid in full, not exceeding (in any case or under any circumstances) the whole amount insured, and is to be estimated according to the fair value of the property at the time of the fire."

While at first glance it might appear with some degree of plausibility that this language would entitle the plaintiff to the full amount of his claim, yet upon an examination of the contract as a whole, and giving a fair and reasonable construction to the whole instrument, and to each clause such a construction as will give effect to every other part of the instrument if possible, we are not inclined to believe that the language of this last condition is in conflict with the other portions of the policy to which we have referred. The body of the policy expressly states that the company shall not be liable for more than two-thirds of the actual destructible value of the buildings at the time the loss may happen. The condition and by-law already mentioned declare that no property shall be insured for more than two-thirds of its value. This language is so plain that but one interpretation can be given to it, — that in no event is the company liable for more than two-thirds the fair cash value of

the property at the time of loss. It is therefore not a "valued policy." Wood, Fire Ins. § 42.

True, the language of the condition relied upon by the plaintiff is that in "settling a loss, the damage is to be paid in full." But the word "damage" as there used, considering the intention of the parties as disclosed from an examination of the whole instrument, may properly be construed as referring not to the amount of loss which the plaintiff has sustained, but rather, in its legal acceptation, to the recompense or compensation to which the plaintiff is entitled from the company,— not the amount of loss but the amount recoverable by reason of the loss. The damage "is to be estimated according to the fair value at the time of the fire," the obvious meaning of which is, that the fair cash value of the property is to be ascertained, and the damage — the amount for which the company is liable — is to be estimated therefrom. Nor can this exceed two-thirds the value of the property at the time the loss occurs, and in no event "exceeding the whole amount insured," however great may have been the value of the property destroyed, or the actual loss to the party insured.

Such a construction harmonizes all the different parts of the contract, effectuates the intentions of the parties, and is supported by reason as well as authority.

"The design is to prevent frauds and negligence, by making it an object with the owner to guard his property from exposure to fire and to preserve it from destruction when the calamity comes, and by this increased security to induce honest persons, who are men of property to become members of such companies, and who will be able and willing to contribute in event of loss." *Holmes* v. *Charlestown Mut. F. Ins. Co.* 10 Met. 211.

In *Ashland Mut. F. Ins. Co.* v. *Housinger*, 10 Ohio St. 10, the insurers were to pay "all loss or damage," not exceeding the sum insured, the loss or damage to be estimated according to the true and actual value of the property at the time of loss, and to be paid at the rate of two-thirds of its actual cash value. The court held that the two clauses construed together meant that the insurers should pay two-thirds of the actual value of the

property at the time of the fire, not however exceeding the sum insured.

So where a policy insuring the plaintiff's barn against fire contained the following clause: "This company shall in no event be liable beyond the sum insured, nor beyond three-fourths of the actual cash value of the property insured at the time of the loss or damage." The court held that the amount recoverable was three-fourths of the actual cash value at the time of the fire, to be determined by the jury on the evidence. "It is an express contract," say the court, "between the parties limiting the liability of the company to three-quarters of such actual value." *Brown* v. *Quincy Mut. F. Ins. Co.* 105 Mass. 396. To the same effect may be cited, *Huckins* v. *People's Mut. F. Ins. Co.* 31 N. H. 238; *Post* v. *Hampshire Mut. F. Ins. Co.* 12 Met. 555.

Exceptions overruled.

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

CHARLES G. GOVE, in equity, *vs.* CITY OF BIDDEFORD.

York. Opinion April 24, 1893.

Specific Performance. Pleading. Towns. Sewers. Contracts.

If municipal authorities make contracts in relation to sewers, or other similar structures, which are binding on the municipal corporations, and the latter neglect or refuse to perform them, redress must be sought, as a general rule, in actions at law.

A bill praying for specific performance, in which the aid of a court of equity may be properly sought in such case, must contain a full and clear statement of the circumstances which create the exception and render the assistance of the court necessary.

ON REPORT.

Bill in equity, heard on bill, answer and demurrer. The bill praying for specific performance was filed January 6, 1891, against the city of Biddeford, the mayor, aldermen and common councilmen. Its material allegations are that "on the 24th day of February, A. D., 1888, said city of Biddeford by its written agreement under seal for a good and sufficient consideration, to it moved, agreed with your complainant to maintain the drain or sewer herein

described, and to extend said drain or sewer within a reasonable time from said date; . . . Your complainant further alleges that said city of Biddeford has neglected and refused from said 24th day of February, A. D., 1888, to the date of this bill of complaint, to extend said sewer or drain over and across said land as aforesaid. And your complainant alleges upon information and belief that a reasonable time to build and extend said sewer or drain has long since elapsed.

"Your complainant further alleges that by reason of the non-performance of said agreement by said city of Biddeford, his property is greatly damaged, and he is prevented from using his land in said Biddeford over which said city agreed as aforesaid to extend said sewer or drain, for building-lots as he otherwise would do."

The bill then alleges that the defendants, personally named, are the mayor, aldermen and common councilmen, and charges them with the same neglect and refusal which are charged against the defendant city, &c.

Hamilton and Haley, for plaintiff.

Statute, R. S., c. 77, § 6, par. XI, is not limited in effect by reason of its being accompanied by a re-enactment of the various restricted provisions of former statutes. *Woodbury* v. *Gardner*, 77 Maine, 68. Jurisdiction in equity: Aldrich Eq. Pl. and Pr. pp. 22, 23, 24; *Jones* v. *Newhall*, 115 Mass. 248-9. Sewer cannot be extended except by a vote of the city council. That body must act in order to furnish the means and authority to execute the contract. Relief sought would not be of same measure and kind in law. Legal remedy would be inadequate.

Charles T. Read, City Solicitor, for defendants.

The contract was *ultra vires*, the city having no authority to enter into same.

The general statutes providing for the laying out and construction of public drains and sewers is the only rule to be followed.

If the contract is not *ultra vires*, then the only remedy is by an action at law and not in equity. See R. S., c. 16, § 2. If the contract was one which would be binding upon the city, any

liability upon the part of the city, and remedy for same, would be governed by § 9, c. 16, R. S.

Provision being made by general statute law for the laying out and construction of public drains and sewers by municipal officers, a town has no such authority incidental to its corporate powers or in the exercise of its corporate duties. *Bulger* v. *Eden*, 82 Maine, 552. A town is not liable for any acts of its officers when they act beyond the scope of their authority, even if under color of right. *Small* v. *Danville*, 51 Maine, 359; *Barbour* v. *Ellsworth*, 67 Maine, 294.

The pleadings show that no liability, created by R. S., c. 16 § 9, exists, therefore respondent would not be liable as set forth in the bill.

WALTON, J. This is a suit in equity. Annexed to the plaintiff's bill is a paper signed by the plaintiff, and four other persons, the latter professing to act as a committee of the city of Biddeford, in which, among other things, it is agreed that the city shall extend a sewer through the plaintiff's land; and the plaintiff avers that a reasonable time has elapsed, and that the city has neglected and refused to extend the drain through his land, as it agreed to do; and he prays that the court will decree a specific performance of the agreement.

The city denies that the persons who undertook to act as its committee had authority so to do, and denies that their action is binding upon the city; and it says further that the plaintiff has a plain, adequate, and complete remedy by an action at law, and that he has in fact commenced such an action, and that it is now pending in court; and the city demurs to the bill.

We think the demurrer must be sustained. It has been denied that a municipal corporation can bind itself by such a contract. In a recent case in Wisconsin, the city of Hartford had agreed to erect a city hall on a lot of land which the plaintiffs had conveyed to the city for that purpose, and the plaintiffs asked for a decree to compel a specific performance of the agreement; but the court refused to grant it on the ground that the judgment and discretionary authority of the city council could not be

bound by such an agreement; that if such an agreement had been made, still, if upon further consideration, it was deemed best to build upon another lot, the city had a right so to do; and that it would be highly improper for a court of equity to interfere with the *quasi* judicial or legislative power of municipal corporations in matters which concern the welfare and convenience of all their citizens; that in such matters, municipal corporations must be left at all times free to exercise their powers untrammelled by the private interests of individuals. *Kendall* v. *Frey*, 74 Wis. 26 (17 Am. St. Rep. 118).

In a case in Tennessee, it was held that a court of equity had no power to compel a city to build a sewer; that the building of a public sewer by a municipal corporation is the exercise of a legislative discretion which the courts cannot rightfully coerce or control. *Horton* v. *City Council*, 4 Lea, 39, S. C. 40 Am. Rep. 1. And to the same effect is *Mills* v. *City of Brooklyn*, 32 N. Y. 495.

If municipal officers, or duly authorized committees, make contracts in relation to sewers, or other similar structures, which are binding upon their towns or cities, and the latter refuse or neglect to perform them, we think redress must, as a general rule, be sought in actions at law; and, if an exceptional case arises, in which the aid of a court of equity may properly be sought (and we do not mean to say that such a case is impossible), the bill praying for a specific performance, must contain a full and clear statement of the circumstances which create the exception and render the assistance of the court necessary, or the relief prayed for will not be granted. In fact, this court has recently held that in all cases in which decrees compelling the specific performance of contracts are asked for, the bills must contain allegations sufficient to show that actions at law will not be plain, adequate, and complete means of redress.

The bill now before us contains no such allegations. It avers that by reason of the non-performance of the agreement of the city to extend the sewer, the plaintiff's property is greatly damaged, and that he is prevented from using his land for

building lots, as he otherwise would do. But these are only such general allegations as could be made in every case. They show no specific circumstances, such as would be necessary to justify a decree for specific performance. *Porter* v. *Land Co.* 84 Maine, 195. And see *Atwood* v. *Cobb*, 16 Pick. 227; 26 Am. Dec. 661; and note.

Bill dismissed with costs.

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

CHARLES A. EVERETT *vs.* SAMUEL D. CARLETON, and others.
FRANK GILMAN *vs.* SAME.

Piscataquis. Opinion April 25, 1893.

Real Action. General Issue. Attachment. Lien. R. S., c. 81, § 59.

Where the only plea in a real action is the general issue, the question is, which party shows the better title in himself.

Where a party claims title by virtue of an attachment and levy, and the writ contains only the general money count, with no specification of the "nature and amount" of the claim to be proved under it, such attachment is void, and no lien is created thereon.

In this case, the plaintiffs' predecessors in title had obtained title by deed prior to the levy made under such attachment.

The title, therefore, by deed in the plaintiffs' predecessors, and transmitted to the plaintiffs, is a better title than that of the defendants derived under the levy made subsequent to the plaintiffs' title by deed.

ON REPORT.

The case appears in the opinion.

C. A. Everett and *Davis and Bailey*, for plaintiffs.

A. M. Robinson and *Wilson and Woodard*, for defendants.

FOSTER, J. Real actions, the defendants being the same in both. Each plaintiff claims title to one undivided half part in common of certain wild land in the town of Medford in the county of Piscataquis, estimated at about one thousand acres.

The defendants plead the general issue. The real question, then, is, which party shows the better title in himself.

In order to understand correctly the position of the parties, it becomes necessary to state the claims of title by which the plaintiffs respectively assert their rights of recovery against the defendants.

Samuel H. Blake of Bangor, who owned the lands embraced in these suits, conveyed the same to Caleb Wentworth, by warranty deed dated July 9, 1853, recorded January 6, 1854. Wentworth being in failing circumstances, and attempting to shield his property from creditors, executed a warranty deed of the property to Amasa Stetson, dated January 4, 1854, and recorded January 6, 1854. Amasa Stetson died in 1859, leaving a will, by which, after sundry pecuniary legacies to relatives, he bequeathed and devised the balance of his estate, both real and personal, to his wife, Abigail J. Stetson, and appointed her and Robert Fernald executors of his last will and testament. These executors by quit claim deed dated October 14, 1886, recorded November 3, 1886, released all the title or interest which Amasa Stetson had in the lands at the time of his decease, to C. A. Everett, the plaintiff in the first suit.

The deed from Wentworth to Stetson as appears from the evidence, was never delivered. It was made and sent to the register of deeds to be recorded, by the grantor without the knowledge of the grantee; the grantee, when informed of the transaction repudiated it, and "said he would have nothing to do with it." Nor did he afterwards receive it from the registry, or in any manner ratify the transaction.

But in the view we have taken of the case this does not become material. The plaintiff, not only in the first suit but also in the second, claims title not through Amasa Stetson or his legal representatives alone, but through a different source.

Samuel H. Blake having conveyed to Caleb Wentworth, as we have before stated, by deed dated July 9, 1853, recorded January 6, 1854, John D. Prescott, a creditor of Wentworth, brought suit against him and attached his real estate, the attachment being made January 5, 1854,—one day before the record of Wentworth's deed to Stetson; judgment was recovered June 14, 1855, and an extent made upon these lands July 12, 1855, the whole being set off to satisfy the judgment and costs of levy. August 12, 1856, the judgment creditor, John D. Prescott, conveyed the premises by warranty deed to Henry A. and James H. Burkett, the deed being recorded November

12, 1856. The Burketts, by warranty deed dated October 19, 1857, recorded October 24, 1857, conveyed the premises in question in both suits to Robert Thompson. Thompson died, and his heirs thereafter, on the 24th day of December, 1878, joined in a quit claim deed to Enoch P. Thompson, another heir, of all their "right, title and interest in and to any and all real estate and lands in Medford, county of Piscataquis," which they inherited from Robert Thompson. This deed was recorded July 2, 1880, and on the same day Enoch P. Thompson conveyed to C. A. Everett (plaintiff in the first suit) all his interest in the real estate which he acquired by inheritance from his father, Robert Thompson, and by deed from the other heirs. January 11, 1887, Everett, by warranty deed recorded the same day, conveyed to Frank Gilman, the plaintiff in the second suit, one half part in common and undivided of the lands embraced in these two suits.

Such is the plaintiff's claim of title in these suits.

Whatever claim the defendants have, by way of record title, is derived through and under the Prescott levy, and conveyance to the Burketts, and may be thus stated: James H. Burkett was owing Phillip Brown, and Brown attached the real estate of James H. Burkett, on the 8th day of November, 1856, (understood to be one half in common and undivided of the lands in question) recovered judgment October 26, 1857, and on the 19th day of November, 1857, extended his execution upon Burkett's undivided half of the real estate. Afterwards, on the 29th day of November, 1858, Phillip Brown, the judgment creditor, conveyed to these defendants by warranty deed, recorded December 2, 1858, the land set off on execution against James H. Burkett.

This attachment of Brown against Burkett was eleven months prior to the deed from the Burketts to Robert Thompson, and had it been valid, and followed by due proceedings, and the levy been valid, the plaintiffs might have met with difficulty in maintaining their actions, as to any title by way of the Stetson deed.

But the attachment upon the writ of Phillip Brown against

James H. Burkett was not valid. The writ, upon which the attachment was made, at the time of service contained a general money count only, without any specification of "the nature and amount" of the claim to be proved under it. An attachment of real estate on such a writ is void, and creates no lien thereon. R. S., c. 81, § 59; *Osgood* v. *Holyoke*, 48 Maine, 410; *Neally* v. *Judkins*, 48 Maine, 566; *Hanson* v. *Dow*, 51 Maine, 165; *Drew* v. *Alfred Bank*, 55 Maine, 450; *Briggs* v. *Hodgdon*, 78 Maine, 514. The levy was not made until after the deed from the Burketts to Thompson had been executed and recorded. Consequently, at the time the levy was made, the judgment debtor had no real estate upon which there was any lien by way of attachment, and that which was levied on had been conveyed away to others through whom the plaintiffs derive their title.

The deed from the two Burketts to Thompson of October 19, 1857, conveyed all that was set off to Prescott by his levy against Wentworth. That embraced all the land in controversy in both these suits. That passed, by the subseqent conveyances, to Everett who conveyed one half part in common and undivided to Gilman.

The plaintiffs, therefore, have the better title in themselves as against these defendants, and the entry must be in each suit,

Judgment for demandants.

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

FRANCES E. HURLEY, PETITIONER FOR MANDAMUS,

vs.

REUEL ROBINSON AND EDWIN SPRAGUE.

SAME, Appellant from decree of Judge of Probate.

Knox. Opinion April 27, 1893.

Record. Decree. Mandamus. Adoption. R. S., c. 63, § 30; c. 67, § 34; c. 82, § 123.

An application for the alteration of a record, which if granted would be futile will be denied.

The record of the Probate Court showed that the judge made two decrees substantially alike, granting leave to adopt a child; one, in the form of a letter of adoption addressed to the adopting parents, and the other attached to the petition in the form of a memorandum. Upon the application of a third party, another child of the adopters, asking to have the record altered

so that it would show the decree was made out of court at a place other than where the court sits, the judge of probate refused to order the record to be changed and the applicant appealed and later applied to this court below for a writ of mandamus, alleging, in the petition for the writ, that but one decree was signed by the judge of probate, and asking to have only one of the decrees amended. *Held*, to be a fatal defect in the application; for, if the prayer of the application should be granted, and the alteration asked for should be made, it would affect only one of the decrees; and the other, remaining intact, would be sufficient to sustain the legality of the adoption.

ON REPORT.

The first of these cases was a petition for *mandamus* and the other a probate appeal. Both arose from the same facts and were heard together.

The material facts will be found in the opinion. The petition for *mandamus* was filed against the Judge and Register of Probate for Knox county, and William H. Clark Pillsbury, who had been adopted March 19, 1889, prior to their decease, by his grandparents, Samuel and Sarah M. Pillsbury, late of Rockland, deceased, and also the other heirs of said Samuel and Sarah M. Pillsbury.

A principal contention of the petitioner was that the decree of adoption, otherwise regular, was granted out of court at Camden when and where there was no term of the court, instead of at Rockland, which was the place provided by law for its regular sessions; and that the record, originally showing the decree was made at Rockland, had been changed to show it was made at Camden, and again subsequently changed to the original place; and that the record, as the same now exists, is wholly unauthorized and void, and should be amended and corrected in accordance with the facts, &c.

The probate appeal was a petition to the probate judge, upon the same state of facts, who after the notice and hearing dismissed the petition. The adopted son introduced in evidence a second decree of adoption which will be found in the opinion of the court.

N. and H. B. Cleaves, and *Stephen C. Perry*, *William H. Fogler* and *J. F. Libby*, for petitioner.

Probate court has power to correct its own records. R. S., c. 63, § § 1, 14; *Bowers* v. *Hammond*, 139 Mass. 365; *Waters* v. *Stickney*, 12 Allen, 1; *Pierce* v. *Prescott*, 128 Mass. 140; Freem. Judg. § 73, and cases; *Newell* v. *West*, 149 Mass. 520, 531, and cases; *Balch* v. *Shaw*, 7 Cush. 282. Writ should be granted. R. S., c. 77, § § 3, 5; *Williams* v. *Co. Com.* 35 Maine, 346; *Dennett, Pet'r*, 32 Maine, 508; *Carpenter* v. *Co. Com.* 21 Pick. 258; *R. R. Com.* v. *R. R.* 63 Maine, 269, 279; *Baker* v. *Johnson*, 41 Maine, 15; 3 Black. Com. 110; *Smith* v. *Titcomb*, 31 Maine, 272; *Kendall* v. *U. S.* 12 Pet. 524; *Ex parte Hoyt*, 3 Pet. 279; *People* v. *Judges*, &c., 20 Wend. 658; *Ken. Toll-Bridge, Petr's*, 11 Maine, 263; Am. & Eng. Enc. L. Vol. 14, pp. 121, 127; *State* v. *Van Ells*, 69 Wis. 19; *State* v. *Engel*, 22 Am. St. Rep. 655, 656, 658, note; *Smith* v. *Moore*, 38 Conn. 105; *Anderson* v. *Pennie*, 32 Cal. 265; *Taylor* v. *Gillette*, 52 Conn. 216; *Hendee* v. *Cleveland*, 54 Vt. 143; *Rand* v. *Townsend*, 26 Vt. 670; *Woodstock* v. *Gallup*, 28 Vt. 537; *Hall* v. *Crossman*, 27 Vt. 297; *Moore* v. *Chester*, 45 Vt. 503; High Ex. Rem. § 230; *Lewis* v. *Ross*, 37 Maine, 230; *White* v. *Blake*, 74 Maine, 489; *Rockland Water Co.* v. *Pillsbury*, 60 Maine, 425. Parol evidence admissible. *Willard* v. *Whitney*, 49 Maine, 239; *State* v. *Hall*, 49 Maine, 412; *Spaulding* v. *Record*, 65 Maine, 220. Ministerial duty. *Manning* v. *Fifth Parish*, 6 Pick. 16; *Taylor* v. *Gillette*, 52 Conn. 216; *State* v. *Edwards*, 17 Atl. Report, p. 974 (N. J. 1889). Probate Court. *White* v. *Riggs*, 27 Maine, 114. No vested rights under a void decree. *Pettee* v. *Wilmarth*, 5 Allen, 144. If no remedy by mandamus it must be by appeal. R. S., c. 63, § § 22, 28; *Wiggin* v. *Scott*, 6 Met. 197; *Deering* v. *Adams*, 34 Maine, 41; *Veazie Bank* v. *Young*, 53 Maine, 558; *White* v. *Riggs*, 27 Maine, 114.

Mortland and Johnson, for defendants.

The record as set out in the petition shows a legal adoption. Parol evidence not admissible to contradict the record. 1 Greenl. Ev. 275; *Holden* v. *Barrows*, 39 Maine, 135; *Willard* v. *Whitney*, 49 Maine, 235; *Sayles* v. *Briggs*, 4 Met.; *Kendall* v. *Powers*, *Ib.* 553. Allegations in petition insuffi-

cient. Woerner, Vol. 1, p. 334. Mandamus does not supersede legal remedies, but supplies the want of them. High Ex. Rem. § 10. Relator not interested in the matter of adoption. R. S., c. 67, § 36; *Gray* v. *Gardner*, 81 Maine, 558; *Deering* v. *Adams*, 34 Maine, 41; *Levant* v. *Co. Com.* 67 Maine, 434; *Bath Bridge Co.* v. *Magoun*, 8 Maine, 292. Cannot have two remedies. High, Ex. Rem. § § 10, 16, 177, 188, 190. Shall come into court with clean hands. *Ib.* § 26. Must show an equity for intervention. *Belcher* v. *Treat*, 61 Maine, 577. Relator has no status in the probate appeal, cases *supra*. Records and vested rights: *Jackson* v. *Esten*, 83 Maine, 165; *Boynton* v. *Grant*, 52 Maine, 220. Counsel also cited: 1 Woerner, p. 331, and cases; *Bradbury* v. *Jefferds*, 15 Maine, 212; *Johnson* v. *Johnson*, 26 Ohio St. 357; *Alexander* v. *Nelson*, 42 Ala. 462; *Bryant* v. *Horn*, *Ib.* 496; *Wolf* v. *Banks*, 41 Ark. 104, 107; *State* v. *Probate Court*, 33 Minn. 94; *Browder* v. *Faulkner*, 82 Ala. 257; 1 Woerner, p. 331, Note 8, and cases; *Ib.* p. 328, and cases; Freem. Judg. § 69, and cases; *Makepeace* v. *Lukens*, 27 Ind. 435-7; *Wynne* v. *Thomas*, Willes R. 563; *Ray* v. *Lister*, And. 351; Bac. Abr. Tit. Amend. F. 98; *Abners* v. *Whitney*, 1 Sto. 310, 312; *Russell* v. *U. S.* 15 Ct. Cl. 168, 171; *Colby* v. *Moody*, 19 Maine, 111, 113; *White* v. *Blake*, 74 Maine, 489, 493; *Hall* v. *Williams*, 10 Maine, 290-1; *Limerick*, *Pet'r*, 18 Maine, 186-7; *Balch* v. *Shaw*, 7 Cush. 282; 1 Greenl. Ev. 275-280; *Com.* v. *Slocum*, 14 Gray, 395; *Harlow* v. *Harlow*, 65 Maine, 449; *Parcher* v. *Bussell*, 11 Cush. 107; *Potter* v. *Webb*, 2 Maine, 257; *Bean* v. *Ayers*, 70 Maine, 432; *Marsh* v. *McKenzie*, 99 Mass. 64; *Pettee* v. *Wilmarth*, 5 Allen, 144; *Hall* v. *Marsh*, 11 Allen, 563.

WALTON, J. The object of the proceedings now before us is to obtain an alteration of the records of the probate court for the county of Knox relating to the adoption of a child. The judge of probate refused to order the record to be changed, and the petitioner appealed. A little later she applied to this court for a writ of mandamus to compel the judge and register of pro-

bate to make the change. The object of the proposed alteration is to show that the proceedings of the probate court were irregular and the adoption of the child illegal. Both processes are combined in one report and will be considered together.

The record shows that the judge of probate made two decrees granting leave to the applicants to adopt the child. One is in the form of a letter of adoption, and is adressed to the adopting parents. The other is attached to the petition, and is in the form of a memorandum. But they are substantially alike, and grant the leave prayed for.

The petitioner ignores the existence of one of these decrees. She asserts in her petition for a mandamus that but one decree was signed by the judge of probate; and she asks to have only one of the decrees amended. We regard this as a fatal weakness in her proceedings. For, as we shall show presently, if the prayer of her petition should be granted, and the alteration asked for should be made, it would affect only one of the decrees, and the other, which would remain intact, would be amply sufficient to sustain the legality of the adoption. The alteration would therefore be entirely futile.

The only objection to the legality of the proceedings for the adoption of the child is that one of the decrees above mentioned was signed by the judge at Camden, on the first day of April, instead of at Rockland on the third Tuesday of March. The decree signed at Camden has been altered, and now reads as the petitioner desires to have it. And the prayer of her petition is that the judge and register of probate may be compelled to alter the record so as to make it correspond to the altered form of the decree. The petitioner claims, that if this change is made, the adoption will be shown to have been illegal, and the adopted child's right of inheritence defeated.

We do not think such would be the result. If the record of the decree signed at Camden should be altered, and the court should then hold that its validity was thereby destroyed, the remaining portion of the record would show that an application for leave to adopt the child had been made at a regular term of the probate court, and that it had been then and there acted upon,

and that a decree, under the hand of the judge and the seal of the court, had then and there been made, and that this decree had been duly recorded. With the decree signed at Camden eliminated, the record would stand as follows:

"To the honorable judge of probate for the county of Knox:

"Respectfully represents Samuel Pillsbury, of Rockland, in said county, and Sarah M. Pillsbury, his wife, that they are desirous of adopting William H. Clark, a child of Edward H. Clark, of Rockland, in the county of Knox, and Helen L. Clark, his wife, which said child was born in Rockland, on the tenth day of June, A. D., 1869; that your petitioners feel that they are of sufficient ability to bring up and educate said child properly.

"Wherefore they pray for leave to adopt said child pursuant to the statute in such case made and provided, and that his name may be changed to that of William H. Clark Pillsbury.

"Dated this nineteenth day of March, A. D., 1889.

Samuel Pillsbury.
Sarah M. Pillsbury.

"The undersigned, being the father of said child (the mother being dead), hereby consents to the adoption as above prayed for. Edward H. Clark.

"I, the child above named, being of the age of fourteen years, hereby consent to the adoption, as above prayed for.

William H. Clark."

"State of Maine. Knox ss. Probate Court.

"To Samuel Pillsbury of Rockland, in said county, and Sarah M. Pillsbury, wife of said Samuel Pillsbury.

"Whereas, you have petitioned this court for leave to adopt William H. Clark, a child born on the tenth day of June, A. D., 1869, and for a change of his name, and the written consent required by law has been given thereto; now therefore:

"Trusting in your ability to bring up said child, and to furnish him with suitable nurture and education, and being satisfied of the identity and relations of the persons, and the fitness and propriety of such adoption, I, Reuel Robinson, Esq., judge of said court, by virtue of the power and authority vested in

me, have decreed that from this day said child shall to all legal intents and purposes be your child, and that its name shall be changed to William H. Clark Pillsbury, which he shall hereafter bear, and which shall be his legal name.

"You, therefore, assume the relations of parents to said child, and will hereafter cherish, support, educate and otherwise provide for him as though you were his natural parents.

"In witness whereof, I have hereunto set my hand and caused the seal of said court to be affixed, at Rockland, this nineteenth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

(L. S.) Reuel Robinson, Judge of Probate Court."

Such would be the record of the probate court if the decree which was signed at Camden should be expunged from it. It would still show a legal application of the adopting parents for leave to adopt the child; it would show the consent of the child and the consent of its only living parent; and it would show a solemn adjudication by the court that the child should thereafter be to all intents and purposes the child of the adopters; and it would show that this decree was made and signed and sealed at Rockland at a regular term of the probate court. In fact nothing would be wanting to show that the statutes of the State relating to the adoption of children had been fully complied with. The decree which was afterwards signed at Camden seems to have been wholly unnecessary. The proceedings for the adoption of the child appear to have been complete without it. And if the court should hold that the decree which was signed at Camden, *nunc pro tunc*, after the court had adjourned and the judge had gone to his home, was on that account inoperative and void, such a conclusion could not possibly impair the validity of the prior decree which appears to have been made at the proper time and place. We infer that the learned counsel for the petitioner did not know of the existence of this prior decree when these proceedings were commenced, as otherwise they would have advised their client that, if the decree signed at Camden should be held to be null and void, the decree which purports to have been signed at Rockland at

a regular term of the probate court would not be thereby invalidated.

Having come to the conclusion that the decree which was signed at Camden was wholly unnecessary, and that, if it should be expunged from the record, the validity of the proceedings for the adoption of the child would not be thereby affected, it is unnecessary to determine whether such a decree may be signed *nunc pro tunc* by a probate judge. We do not doubt that many decrees are so signed. And if the probate court has full jurisdiction of the subject matter of the decree, and a hearing has been had at the proper time and place, and an adjudication has then and there been made, we do not think the adjudication will be rendered null and void, because the judge for his own convenience, or the convenience of the register of probate, whose duty it is to prepare the decree, omits to sign it till after the court has adjourned, and then signs it, *nunc pro tunc*, at another time and place. We apprehend that such a doctrine, if enforced, would upset thousands of titles derived through the proceedings of probate courts, and render their records mere traps to catch the unwary. But upon this point we do not wish to be understood as expressing a decisive opinion, because we do not regard the question as necessarily before us. We regard the record of the probate court as complete without the decree which was signed *nunc pro tunc*, and that the latter was therefore of no importance. And it is the opinion of the court that for this reason the entries must be,

Decree of the judge of probate dismissing the petition asking for an amendment of the probate records confirmed, with costs to the respondent, William H. Clark Pillsbury. (R. S., c. 63, section 30.)

Petition to this court for a writ of mandamus dismissed, with costs to the respondent, William H. Clark Pillsbury. (R. S., c. 82, section 123.)

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

GEORGE L. SNOW, in equity, *vs.* ANDREW PRESSEY.

Knox. Opinion May 1, 1893.

Mortgage. Debt imperfectly described. Evidence. Insurance.

Where the language of a written contract is susceptible of more than one meaning, it is allowable to take into consideration the situation of the parties and the circumstances under which it was made, in order to ascertain its true meaning. The instrument may be read in the light of surrounding circumstances.

Thus, a mortgage securing "all other legal claims due said A and B," was held to include the individual debts due A, as well as the joint debts due A and B.

A mortgagor is not liable for insurance premiums paid by a mortgagee where the insurance is not procured, or the premiums paid, at the request or benefit of the mortgagor.

ON REPORT.

This was a bill in equity to redeem a mortgage.

(Abstract of bill). "I. That on the third day of March, 1874, the complainant was seized in fee of seven undivided eighth parts of a certain parcel of real estate therein described, situate in Rockland.

"II. That on said third day of March, the complainant executed and delivered a mortgage of said real estate to one G. W. Candee and the defendant to secure payment of the sum of $4000 in four equal payments of $1000 each, in four, eight, twelve and sixteen months from the date thereof with seven per cent interest, according to the tenor of four promissory notes of the same date given by the complainant to said Candee and the defendant.

"III. That on the first day of May, 1884, one Julius A. Candee, executor of said G. W. Candee, then deceased, conveyed and assigned to the defendant all the interest which said G. W. Candee had at his decease, and which said executor then had in and to said mortgage and notes.

"IV. That on the 16th day of August, 1878, the complainant conveyed to the defendant all his right, title and interest in and to said premises, by his quit-claim deed and of that date appearing on its face to be absolute, and that the defendant then and

as part of the same transaction executed and delivered to the complainant a separate instrument of defeasance of the tenor following, to wit: 'Know all men by these presents, that I, Andrew Pressey of Brooklyn, Kings county, New York, in consideration of a conveyance of certain real estate this day made to me by George L. Snow of Rockland, in the county of Knox and State of Maine, to wit, a quit-claim of all of said Snow's interest in and to the premises described in a mortgage deed from said Snow to said Pressey and another, recorded in Knox registry of deeds in book 36, page 252, I do hereby covenant and agree with the said Snow and his heirs or legal representatives that on the receipt of the amount of the said mortgage claim of G. W. Candee of New York city and said Andrew Pressey, or an amount equal thereto, together with the interest thereon, with the amount of all other legal claims due said Candee and Pressey, I will re-convey the premises aforesaid to the said George L. Snow, his heirs or legal representatives, by a good and sufficient deed, including the interest of said G. W. Candee therein.

"'In witness whereof I have hereunto set my hand and seal this 16th day of August, A. D., 1878.

Andrew Pressey. [L. S.]'

"V. That the defendant in the year 1878 entered into said premises and took possession, by complainant's consent, of an undivided portion thereof, to wit: one lime-kiln, a portion of the lime sheds and other buildings and structures, and wharves, and has remained in possession thereof ever since; and has received rents from other portions thereof.

"VI. That on the 11th day of November, 1887, the complainant demanded, in writing, of the defendant a true account of the amount due on each of said mortgages, and of the rents and profits, money expended in repairs and improvements, if any, and also the strip and waste committed upon the premises.

"VII. That the complainant has frequently requested the defendant to render such an account, and to pay over the amount received by the defendant above the amount due him, and to surrender said premises, all of which the defendant has refused to do.

(Prayer.) "That an account may be taken; that the defendant pay over such sum, if any, that he has received above the amount due him; that compensation be decreed for strip and waste; that the complainant may be allowed to redeem; that the defendant surrender said premises to the complainant, and release the same to him, on payment of the complainant of such amount, if any, as may be found to be due the defendant, and for other and further relief.

(Abstract of answer.) "I. Defendant admits the first and second allegations of the bill.

"II. Defendant claims that the mortgage to Candee and himself has been forever foreclosed.

"III. The defendant admits the third allegation of the bill.

"IV. Defendant denies that the quit-claim deed and instrument described in the fourth clause of the bill constituted a mortgage, and alleges that the quit-claim deed of August 16, 1878, was an absolute conveyance of the premises.

"V. Defendant admits that he has been in possession of the premises and has received the rents and profits thereof since August 16, 1878.

"VI. Defendant denies that he is under any obligation to account to the complainant."

The bill was sustained (82 Maine, 552,) and the following decree entered.

(Decree.) "At the December term, 1888, after hearing, it was decreed as follows, viz: 'That the bill be sustained, and that the defendant account for all rents and profits received by him from the premises described, or by any other person or persons by his order or for his use, or which he without his default might have received, and the case be sent to a master in chancery with directions to hear the parties, determine the amount with which the defendant is to be charged for such rents and profits, and all matters of account between the parties in relation to the mortgage debt, and make report thereof, with the amount, if anything, due on the mortgages.'"

At the same term A. R. Savage, Esq., was appointed master in accordance with the decree.

To the master's report both the complainant and the defendant excepted.

The following are extracts from the master's report bearing upon the points raised by the exceptions:

"I find that on the third day of March, 1874, the complainant mortgaged the property described in the bill to Gilead W. Candee and the respondent, who were then co-partners in business under the firm name of Candee & Pressey, to secure the payment of four thousand dollars.

"And it was agreed at the hearing, and I find, that there was due said Candee and Pressey on said mortgaged indebtedness, June 10, 1875, $3,782.60.

"I further find that said firm of Candee & Pressey was dissolved in 1875 or 1876.

"I find that April 13, 1875, the complainant was indebted to the estate of Israel Snow in the sum of $16,804.43; that at said complainant's request, and on his account, respondent individually purchased said indebtedness and paid therefor $6,721.77, it being forty per cent; that respondent paid this amount of his own funds, but took an assignment of said indebtedness to Julius Candee and himself, he and the said Julius being then co-partners in the firm of Candee & Pressey.

"And I find that on account thereof the complainant became and was indebted to the respondent in said sum of $6,721.77 on said April 13, 1875.

"I find that subsequently, during the years 1875 and 1876, complainant shipped quantities of lime to the respondent's firm; and that out of the proceeds of said shipments, the respondent retained:—1875, April 30, $1000; 1875, May 26, $1000; 1875, August 19, $1000; 1876, August 4, $300; and rendered an account therefor to the complainant.

"At the hearing, the complainant claimed that no legal appropriation had ever been made by the parties of the said $3,300, and that it should be applied in the reduction of the mortgage indebtedness.

"But the respondent claimed, and I find, that said amounts so retained were legally appropriated at the time towards the

payment of the $6,721.77 advanced by respondent for complainant, April, 13, 1875.

"I find that August 16, 1878, complainant quit-claimed his interest in the premises in question to the respondent, and as a part of the same transaction the respondent gave back an agreement under seal [ante p. 409,] in which he covenanted and agreed with the complainant that on receipt of the mortgage indebtedness hereinbefore described, or an amount equal thereto, together with the interest thereon, with the amount of all other legal claims due said Candee and Pressey, he would reconvey the premises to the complainant. The complainant thereupon, on said August 16th, took possession of the premises, and has remained in exclusive possession thereof up to the time of the hearing.

"I find that August 17, 1878, Julius Candee assigned to the respondent all his interest in the Israel Snow indebtedness. The respondent claimed that he was in possession under a deed absolute in form, and under such circumstances that he might well believe and did believe himself to be, in fact, owner of the estate, subject only to an agreement to sell; and I so find.

August 19, 1878, Gilead W. Candee and respondent were sued by the executors of one I. C. Abbott, on account of transactions of complainant as the agent of Candee and Pressey. The respondent claims that complainant was not their agent in fact, but that the said transactions related to the complainant's own business; and I so find.

"September 25, 1878, respondent paid of his own funds $1100 to settle said suit, and I find that this was done at complainant's request and made him debtor to the respondent individually for said sum of $1100.

"I find that on May 1, 1884, the executor of Gilead W. Candee assigned to respondent the original mortgage, dated March 3, 1874." . . .

"Respondent claimed that under the agreement of August 16, 1878, he was entitled to charge the complainant the $6,721.77 paid by him for complainant on account of the Israel Snow indebtedness, and interest thereon. Respondent also claimed that under said agreement he was entitled to charge the $1100

paid after the making of the agreement, it being, to wit, September 25, 1878, on account of the suit of the executors of Abbott. That is, respondent claimed that under the agreement he was entitled to charge any sums due G. W. Candee and himself jointly, or any sums due either individually, whether due at the time of the making of the agreement, or afterwards before redemption.

"And complainant further claimed that the agreement was intended to secure G. W. Candee and respondent against any liability they might be under on account of a threatened suit of the estate of I. C. Abbott, to settle which respondent afterwards paid the $1100, as before stated.

"The firm of G. W. Candee and Pressy had been dissolved more than two years prior to August 16, 1878, and I find that the complainant was not indebted to them jointly on that date for any amount except the original mortgage indebtedness.

"Complainant claimed that the language in the agreement of August 16, 1878, was intended by the parties thereto to cover any amounts which Candee and Pressey might thereafterwards pay on account of the Abbott claim.

"Complainant claimed that said agreement should be construed to secure amounts legally due Gilead W. Candee and Pressey jointly, and not amounts due to either of them severally.

"If it be permissible to so affect the construction to be placed upon said agreement, I find and report for consideration of the court, that upon the evidence, and taking into account the situation of the parties and the surrounding circumstances, the parties to the agreement intended that it should secure the payments of the amounts which had been advanced by respondent on complainant's account by the Israel Snow indebtedness, and also to secure moneys to be paid thereafter by respondent on account of the Abbott claim as a condition precedent to a re-conveyance.

"Respondent claimed and testified that after the premises were conveyed by quit-claim deed August 16, 1878, he paid complainant $500 as consideration therefor, which he seeks now to charge against the estate. The complainant denies that $500, or any sum of money was paid.

"I find that said $500 was not in fact paid as a consideration for the purchase, and disallow the claim.

"The respondent in his account rendered charged himself with rents of land and lime-kiln, etc., as therein stated, and at the hearing it was agreed that he should be charged for additional lime-kiln rents as follows: 1880, $108.30; 1881, $95.67; 1882, $12.30; 1883, $90.44; 1884, $215.88; 1886, 24.92; 1887, $130.44; and for certain small amounts of lime burned, the dates for which are not given, $12.00.

"Complainant also claimed that respondent should charge himself $550, cash paid by Haviland and Pressey to the respondent in 1885, out of moneys due complainant, or his wife, for lime, and appearing on certain 'settlements,' so called, to wit: $200, August 19, 1884; $100, September 17, 1884; $50, September 26, 1884; $200, August 26, 1885.

"Inasmuch as I have otherwise charged the respondent with all rents received, or which he ought to have received, I disallow the claims.

"Respondent claims and I find, that he paid the several sums for insurance on the premises. . . .

"And I find that the first three items, . . . were paid by him for insurance while a mortgagee out of possession; that the remaining items were paid by him for insurance upon the property after he took possession.

"Respondent claimed to be allowed for these several sums paid for insurance, but I find that he did not procure the insurance or pay the premiums at the request of the complainant, nor for his benefit, and I disallow the claim.

"And having made these findings, I report them for the consideration of the court in the alternative as follows:

"If, under the agreement of August 16, 1878, respondent is not entitled to charge complainant in this proceeding for the amount advanced on his account to purchase the Israel Snow indebtedness, nor the amount advanced on complainant's account to settle the Abbott suit, as hereinbefore described, the account should be stated as follows: Amount found due defendant November 19, 1890, $117.04. Or, if under said agreement

respondent is entitled to charge for the advances made on account of the complainant to purchase the Israel Snow indebtedness, and not the advances made on account of the complainant to settle the Abbott suit, then I state the account as follows: Amount found due defendant November 19, 1890, $8,643.43. Or, if under said agreement the respondent is entitled to charge for the money advanced on account of the complainant to purchase the Israel Snow indebtedness, and the money advanced on account of complainant to settle the Abbott suit, then I state the account as follows: Amount found due defendant November 19, 1890, $10,894.39.

(Complainant's exception.) "1. For that the said master hath in and by his said report certified that he finds and reports for the consideration of the court, 'That upon the evidence, seasonably objected to by the complainant, and taking into account the situtation of the parties and the surrounding circumstances, the parties to the agreement [August 16, 1878,] intended that it should secure the payments of the amounts which had been advanced by respondent on complainant's account by the Israel Snow indebtedness, and also to secure moneys to be paid thereafter by respondent on account of the Abbott claim as a condition precedent to a re-conveyance.' Whereas the case is wholly without evidence upon the points to which such findings of the said master relate and there is no evidence in the case whatever to sustain the said findings of fact, and the same being made without evidence, are, therefore, wholly unwarranted and the said master ought not to have made said findings of fact. . .

"5. For that the said master hath in and by his third alternative finding in his said report certified that 'If under said agreement the respondent is entitled to charge for the money advanced on account of the complainant to purchase the Israel Snow indebtedness, and for the money advanced on account of complainant to settle the Abbott suit,' then he states the account between the parties as fully set forth in said report in such a manner as to show the amount due from complainant to respondent on November 19, 1890, to have been $10,894.39. Whereas the said master ought to have certified that he found that according

to the legal construction of said agreement the respondent was not entitled to charge either for the money advanced on account of the complainant to purchase the Israel Snow indebtedness or for the money advanced on account of the complainant to settle the Abbott suit, and further that the said respondent was not entitled in equity, upon the facts found and reported by the master, to charge the complainant in this proceeding for the amounts advanced on either of the two accounts last named or for any part of the same." . . .

J. W. Symonds and *J. O. Robinson*, for plaintiff.

W. H. Fogler, for defendant.

WALTON, J. This is a bill in equity, the prayer of which is that the plaintiff may be allowed to redeem certain real estate held by the defendant by virtue of a deed absolute in form, but which, by reason of an instrument of defeasance executed at the same time, was, in contemplation of law, no more than a mortgage.

The court has already decided that the plaintiff is entitled to redeem, and the case has been sent to a master to ascertain the amount due. (See *Snow* v. *Pressey*, 82 Maine, 552.) And the case is now before the law court on exceptions to the master's report.

The principal contention is in relation to the interpretation of a single phrase in the instrument of defeasance. By that instrument the defendant (Pressey) agreed to reconvey to Snow the premises which the latter had that day conveyed to him, upon the receipt of the amount due on a mortgage which had before been given by Snow to him and G. W. Candee, "*with the amount of all other legal claims due said Candee and Pressey.*"

The contention is in relation to the meaning of the phrase "*all other legal claims due said Candee and Pressey.*" The plaintiff contends that it can mean only joint claims. The defendant contends that it was intended to include, and should be construed to include, debts due to him individually as well as debts due to him and Candee jointly.

The master (a good lawyer) has found (if it be permissible for him to so find) that it was the intention of the parties to secure the debts due from Snow to Pressey individually as well as the debts due to him and Candee jointly.

We think it was permissible for him to so find.

It often happens that the language of a written contract is susceptible of more than one meaning. And, in such cases, it is always allowable to take into consideration the situation of the parties and the circumstances under which the writing was made, in order to ascertain its true meaning. Or, as the idea is often expressed, the instrument may be read in the light of the surrounding circumstances. *Veazie* v. *Forsaith*, 76 Maine, 172; *Hartwell* v. *Insurance Company*, 84 Maine, 524.

And this rule has been appled with great liberality to mortgages in which the debts or other claims intended to be secured have been imperfectly, obscurely, or erroneously described.

In *Boody* v. *Davis*, 20 N. H. 140 (51 Am. Dec. 210), it was contended that the note produced did not correspond with the one described in the mortgage. The note described in the mortgage was said to be signed by four persons, naming them. The note produced was signed by five persons. It was claimed that this constituted a fatal variance. But, upon proof that the note produced was the one intended to be secured by the mortgage, the court held that the variance was immaterial.

In *Johns* v. *Church*, 12 Pick. 560 (23 Am. Dec. 651), the note was described in the mortgage as being for $236, but the note produced was for $256. Upon proof that the note produced was the one intended, the variance was held immaterial.

In *Hall* v. *Tufts*, 18 Pick. 460, the note secured by the mortgage was described as payable to Ebenezer Hall, 3rd. The note produced was payable to Ebenezer Hall, and was erroneously dated. "We can not doubt," said the court, "but that parol evidence may be admitted to prove that the note now produced was the one to which the mortgage referred."

In *Robertson* v. *Stark*, 15 N. H. 109, the mortgage described the contract secured thereby as signed by Jeremiah Eastman,

Junior, while it was in fact signed by a firm of which he was a member, and it was held a sufficient description.

But this is a rule intended only for the interpretation of contracts. It is not intended to enable the parties to make new contracts. It does not permit the parties to testify to their understanding of the meaning of the words used; and it is not applicable to contracts the meaning of which is clear, nor to words which will admit of but one meaning. It is applicable only to contracts in which the language used is fairly susceptible of more than one interpretation; and is then employed to enable the court to determine which of two or more possible meanings was the one really intended by the parties. And, when properly applied, it is a useful rule. It is, in fact, a necessary rule; for, without it, the decisions of the court in many cases would be but little better than guess-work. By its use, what was before obscure often becomes plain.

In the present case, we think the words, "with the amount of all other legal claims due said Candee and Pressey," as used in the instrument of defeasance, are fairly susceptible of more than one interpretation. They may mean claims due to them jointly, or they may mean claims due to them severally, or they may mean claims due to them jointly and severally. The master has found that they were intended to include claims due to Pressey individually as well as claims due to him and Candee jointly. We think it was competent for him to so find; and we are so well satisfied that the finding is correct, that, were it otherwise, we should be inclined to set it aside.

We have examined the master's report with care, and our conclusion is that none of the exceptions to it can be sustained. He has reported in the alternative three sums as due from the plaintiff to the defendant, and submitted to the court to determine which of the sums the plaintiff shall be required to pay in order to redeem the property covered by the mortgage. We are satisfied that it must be the larger sum, namely, $10,894.39. This was the amount due November 19, 1890. If the plaintiff redeems, interest on that sum must be added from that date.

Decree accordingly.

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

SAMUEL PILLSBURY *vs.* CITY OF ROCKLAND.

Knox. Opinion May 2, 1893.

Way. Use. Boundary. Damages. R. S., c. 18, § 95.

Upon the question of damages for taking land in locating and establishing the side-lines of a street, it appeared that the street had existed upwards of forty years and the plaintiff's store had been erected over thirty years fronting on the street. The street was not widened and the line established was close to the front of the building, which was allowed to remain the same as before. There was a wall three feet in front of and parallel with the building, with cross-walls extending under flag-stones to the foundations of the building. The flag-stones, making a sidewalk over the cross-walls, extended four feet into the street. There was no obstruction to the use of the street.

Held; That the plaintiff had a right to erect the walls and use them with the subterraneous spaces between so long as he keeps them safely and securely covered.

Also, that no new burden was placed on his land in thus locating and establishing the side line of the street; or any old burden enlarged; and that he is not entitled to damage.

AGREED STATEMENT.

This was an appeal by complainant from an award of damages in a proceeding, by the city of Rockland, to locate and establish the bounds of Main street in said city, and which bounds had never been legally established.

The case was submitted upon the following agreed statement of facts:

"Appeal from the award and proceedings of the city of Rockland, establishing the bounds in Main street in said Rockland, in 1890.

"Prior to said proceedings in 1890, there is no record of the laying out or establishing of said street; nor were there any records or monuments by which the bounds of said street could be made certain.

"Said street had been used by the public as a street for more than forty years prior to 1890.

"At the time when said proceedings were had, Samuel Pillsbury was the owner of a lot of land on the westerly side of said Main street, on which he had erected a brick building or block three stories in height, which had remained in the said loca-

tion for more than thirty years, and now occupies the same position.

"When said Pillsbury built said block he excavated for a basement, and constructed the front basement wall along what he then deemed to be the western line of said street, though more into or towards the street, as then used, than the adjoining (Farnsworth) building. . . .

"The lower story of said block is divided into separate stores or rooms by brick walls, so also is the basement.

"The face of the lower story of said building, fronting on Main street, consists of an iron frame resting on granite pillars or posts for support. Said iron front and pillars or supports are back from the front basement wall about three feet, and cross-section walls of brick are built from said granite pillars to said basement wall.

"The iron front of said building is and always has been about fourteen inches and one half back from the front of the adjoining building of Farnsworth. . . .

"Said building is erected above the street so that there are two steps, each from six to eight inches in height, from the walk to the entrance to the stores on the first floor.

"Immediately after the erection of said building said Pillsbury caused the space between said stone pillars and said basement wall, and also said basement wall and a space, more than four feet outside of the same, to be covered with cut granite flag-stones, fitted so as to surround the openings, . . . and leaving said openings for air, light and steps to the basements aforesaid.

"Said Pillsbury also built and has ever since maintained doors and windows between said granite pillars in said basement opposite said openings. At the same time said Pillsbury fitted plank coverings or shutters to said openings, which have ever since covered said openings, except as they have been removed by the tenants and occupants of said basements, as occasion might require, for purposes connected with their occupancy.

"The basements aforesaid have never been occupied separately from the stores in the lower story of the building.

"The space covered by said flag-stones and shutters has always been used by the public as a sidewalk, except when such use has been interrupted by the removal of said shutters as before stated, though said Pillsbury has always maintained and repaired at his own expense, when needed, all of the walk in front of said building, until the laying out of the street aforesaid; and the granite flag-stones aforesaid are now taken and used by said city for a sidewalk in the same position as formerly.

"The westerly line of said street, as established by said proceedings, runs close to the iron posts of said building. . . .

"The case is submitted to the law court upon the foregoing statement, upon which the court is to determine whether the complainant is entitled to damages. If entitled, what was, before and at the time of said proceedings, the western line of the street, under the provisions of § 95, of ch. 18, R. S.? — the damages to be assessed at *nisi prius*. If not so entitled the complaint is to be dismissed."

The plaintiff claimed that the basement wall is to be deemed the true bound of the street under R. S., c. 18, § 95, which provides that: "When buildings or fences have existed more than twenty years upon any way, street or lane or land appropriated to public use, the bounds of which cannot be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof."

Mortland and Johnson, for plaintiff.

All inside of the basement wall, whether excavation or elevation, by building openings and steps leading to and from the walk into the basements to afford access to light and air and to facilitate traffic, became and is a part of the building. It is a portion of the building within R. S., c. 18, § 95. As the court said of this statute in *Farnsworth* v. *Rockland*, 83 Maine, 508, "It means that portion of the building which rests upon the ground and does, in fact, bound and limit the way." We say the basement structure "limits" the way. It was such, with the openings, their use, &c., as to notify the public that they were for private use, and not within the limits of the public way. City not liable for injuries occurring inside the openings or

between the four-foot walk and the granite pillars. *Stockwell* v. *Fitchburg*, 110 Mass. 305. It would be unjust to permit the city, without compensation, to take the granite walk, the openings, curbs, &c., and fill up the openings, as they may do.

W. H. Fogler, City Solicitor, for defendant.

That the excavation outside the building was kept covered by the plaintiff, and the openings were closed by planks instead of being surrounded by railings, indicate that the excavation and its use was regarded by him as subservient to the public use.

Counsel also cited, besides the authorities by defendant in *Farnsworth* v. *Rockland*, 83 Maine, 508; 2 Dill. Mun. Corp. 3d Ed. § § 699, 700, 734, 1027; *Underwood* v. *Carney*, 1 Cush. 285; *O'Linda* v. *Lothrop*, 21 Pick. 292; *McCarthy* v. *Syracuse*, 46 N. Y. 194; *Fisher* v. *Thirkill*, 21 Mich. 1; *Witham* v. *Portland*, 72 Maine, 539.

WALTON, J. The question is whether the proceedings of the city of Rockland in locating and establishing the side lines of Main street in front of Pillsbury Block were such as to entitle the owner to damage.

We think not. The proceedings were in 1890. The street had then existed for over forty years and the block had been erected for over thirty years. Presumptively the front of the block was the line of the street. And it is still the line of the street. At that point the street was not widened. It was allowed to remain precisely as it had remained for over thirty years. True, there was a wall about three feet in front of the block, with cross-walls extending from it to the foundations of the building. But these walls were wholly beneath the surface of the sidewalk, and were covered with granite flag-stones, and the sidewalk extended from the front of the building over these subterraneous walls and into the street four feet. As these subterraneous walls in no way obstructed the use of the street, the owner of the building had a right to put them there, and he will have the right to continue them there. And he will have the right to keep the spaces between the walls open and unob-

structed so long as he keeps them safely and securely covered. Such areas are very common, and they are not unlawful and the city authorities will have no right to fill them up.

We are unable to discover that any new burden was placed upon the complainant's land by the action of the city authorities in 1890; or that any old burden was enlarged; or that any possible inconvenience to him was thereby created; and our conclusion is that he is not entitled to damage.

Appeal dismissed.

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

MERCY A. H. DANFORTH *vs.* CITY OF BANGOR.

Penobscot. Opinion May 8, 1893.

Deed. Way. Dedication. Damages. Deposition.

When the owner of land divides it into lots, designated by numbers, upon certain streets or ways, represented upon a plan of the lots of the land, made at the time, and conveys to third parties lots by number, bounded by such streets so represented upon the plan, referring to the plan in the description of the lots as a part of such description, the land so designated as streets or ways becomes dedicated to the use of the purchasers and the public; and such dedication is irrevocable and binding upon the proprietor of the land and his grantees, until it is proved by the subsequent acts of the owners that such dedication is extinguished.

The rule in this State is that where a plan is referred to as a part of the description of a lot of land, it becomes binding upon the parties as to the boundaries of the land, and what there is upon the plan affecting the location of the premises conveyed; and is admissible against the grantee and any person taking the title under him, without proof of its record.

The plaintiff, a grantee under a title as above stated, claimed damages for land taken by the defendant for the extension of certain streets delineated upon said plan. At the points involved the streets had not been opened to the public when the grantee received his deed. *Held;* That the plaintiff is not entitled to damages for the land so taken.

Notice to take a deposition *in perpetuam*, under R. S., c. 107, § 22, is not sufficient, if served on the husband, when the wife being the owner of the subject or premises to which the testimony relates is not named in the statement or duly notified, although the husband appeared at the time of taking the deposition and put interrogatories to the deponent.

ON REPORT.

The facts appear in the opinion.

A. W. Paine, for plaintiff.

Deposition of Coombs not admissible. *Simpson* v. *Dix*, 131 Mass. 179, 185; *Simpson* v. *Carleton*, 1 Allen, 109, and cases. Plan annexed is at best only a copy of a copy enlarged. Plan must be recorded. *Murdock* v. *Chapman*, 9 Gray, 156; *Farnsworth* v. *Taylor*, *Ib.* 162; *Rogers* v. *Parker*, *Ib.* 445, and cases cited; *Taylor* v. *Millard*, 118 N. Y. 244, 251. Dedication must be of such character as would bind purchasers by some kind of notice, a record or on face of the earth. Here no writing recorded affecting the *locus*. *R. R.* v. *Briggs*, 132 Mass. 24. There must be an acceptance of the dedication by the public (*State* v. *Wilson*, 42 Maine, 9,) within a reasonable time. Abandonment: *Corning* v. *Gould*, 16 Wend. 531; *Derby* v. *Alling*, 40 Conn. 410; 3 Kent Com. 3d Ed. pp. 444-5, and cases; Wash. Ease. 3d Ed. 661, *et seq.* Adverse use and the sewer deed, taken by city, of right to cross the *locus*, negative city's present claim.

H. L. Mitchell, City Solicitor, for defendant.

Plaintiff's deed, a quit claim only, is made subject to the public rights of passage-way over Somerset and Date streets and Jefferson Lane, as laid down on the plan. Hence her grantor affirms the dedication to the city and cannot deny that sufficient notice of it was given. *Cincinnati* v. *White*, 6 Peters, 431. Counsel also cited: 2 Dillon Mun. Corp. § 640, and cases; *Morgan* v. *R. R.* 96 U. S. 743.

LIBBEY, J. An appeal from the action of the city council of Bangor in awarding damage to the plaintiff for land which she claims was owned by her, taken for the extension of Date and Somerset streets, on the first day of October, 1889. They appraised the damage to the plaintiff for the land taken at the nominal sum of one dollar, on the ground, as the city claims, that the land taken had been dedicated to the public use by Philip Coombs, who was the owner, in 1835. And the contention between the parties is, whether there was such dedication to the public use as authorized the city to open the streets as it did in 1889, without the payment of the actual damage for the land taken. It is admitted by the counsel for the plaintiff that,

if there was such dedication by the owner in 1835 which would bind him and his grantees, the plaintiff's claim for damages is not maintainable.

On the 26th of March, 1835, Philip Coombs and three others who had acquired some interest in the premises, conveyed a portion of the lands which they owned in the immediate vicinity, to the city of Bangor, by the following description: "In consideration of one dollar to us paid, and also in consideration and upon condition that the parcel or tract of land herein intended to be conveyed to the corporation of the city of Bangor shall be inclosed as a Common and be kept by said city unintersected by roads, for the proper use of the public forever, have granted, bargained, sold, released and conveyed," . . . "unto the said corporation of the city of Bangor, and their successors, the piece of land in the several portions held by us respectively, called the City Common, according to a plan of the premises, drawn by Charles G. Bryant, marked 'A,' to be recorded, and which is embraced within the following boundaries, viz: Cumberland street on the north, Somerset street on the south, Date street on the east, and Lime street on the west."

The validity of this conveyance for the use named was before this court in *Bangor* v. *Henry Warren*, reported in Maine Reports, Vol. 34, page 324, in which the court held that the conveyance was valid and had been duly accepted by the city. Henry Warren in that litigation claimed to have acquired the title to the whole of the Common and the premises surrounding it, by virtue of a levy against Philip Coombs; and upon that claim a contention between the parties arose and was determined. It is claimed that the plan by Bryant referred to in the deed not only embraces the land conveyed to the city but a large portion of lands surrounding the Common in different directions, and that upon that plan, streets and lanes for public use were marked and the lands divided into lots bounded upon one side by the streets, and designated by numbers.

The first question discussed arises upon the admissibility of the deposition of William Coombs, taken *in perpetuam*. With that deposition what is alleged to be a copy of the Bryant plan

is produced. It is claimed by the counsel for the plaintiff that the deposition is not admissible, because no notice was given to Mrs. Danforth of the time and place of taking it and the purpose for which it was to be taken. The notice was served upon Enoch C. Danforth, plaintiff's husband, and he appeared before the magistrate when the deposition was taken and participated in taking it. It is claimed on the part of the city that in equity the land was the property of the husband and that he was the party in interest. It appears in the evidence and is not controverted that he bought the land and paid a part of the consideration and had the title conveyed to his wife. But, we think that is not sufficient to show that the wife was not interested in the taking of the deposition under the statute. The presumption is, in the absence of proof to the contrary, that the husband gave to the wife the land at the time it was purchased; and she certainly has the legal right to claim damages from the city for taking it. We are of opinion that the deposition is not admissible against her, because she was not notified.

That excludes from this case the evidence offered by the city to prove the plan and its contents. But, we think there is enough in the case to prove the contents of the plan independent of this deposition. Henry Warren took the title of Coombs by levy July 4, 1842. The attachment on the original writ was made October 12, 1837. Asa Warren, the plaintiff's grantor, took his title from Henry Warren, December 11, 1849. The plaintiff took her title from Asa Warren, December 7, 1885. Asa Warren was called by her counsel as a witness. He is a brother of Henry Warren, now deceased; and on cross-examination, with reference to the original plan he testified as follows: "The original plan was suppressed. My brother had what was represented to be the plan. My brother could not get the original C. G. Bryant plan. He says the reason it was suppressed is because it was false, and he took the ground that it was suppressed — but he got somebody to make a copy of it, and I have that copy now. The copy will not vary much from the plan we have here; [the one testified to by Coombs in his deposition.] All the time I owned the land and when I deeded

the lots I recognized Jefferson Lane as dedicated, and I intended that every lot owner should have a chance to go around them if he wished. I knew there was this claim, and I gave a release deed of whatever there was."

It is admitted "that after the deed of the City Common was made to the city, the several lots around the Common were conveyed by the proprietors to the different purchasers by description of number according to the plan of the City Common by C. G. Bryant, not, however, including the *locus*, and that as these lots have afterwards been sold, the same description has been uniformly adopted down to the present time."

The plaintiff's lot as shown by the plan was bounded on one side by Date street and on another by Somerset street. The description in her deed from Asa Warren is as follows:

"Beginning at the east side of Date street at the dividing line of lots Nos. 1 and 2, Jefferson Row, as laid down on a plan of the City Common, made by C. G. Bryant, thence running easterly on said dividing line one hundred feet through to the east line of Jefferson Lane; thence southerly on the east line of said lane straight to Wingate's land; thence westerly on said Wingate land and Bowler's land to Francis Casey's south-east corner; thence northerly on said Casey's land to Somerset street; thence easterly on said Somerset street to the easterly line of Date street; thence northerly on the easterly line of Date street, to place of beginning, together with all my right, title and interest in Date and Somerset street adjoining said premises."

We think the testimony of Asa Warren sufficiently proves the existence of the Bryant plan, and that the copy produced at the trial is in substance a copy of that plan; and the existence of that plan is not only recognized by the conveyances of the surrounding lots to others, but also by the plaintiff's deed. Referring to the plan it appears that Date street, referred to as one of the boundaries of the City Common, is extended north to the northern limit of the land of the proprietors and south to the southern limit; and that Somerset street is extended east and west to the east and west lines of the proprietors' lands; and that the lands along said streets are divided into lots desig-

nated by numbers and bounded on one side by the street, bringing the case so far as dedication is involved, directly within the authority of *Stetson* v. *City of Bangor*, 60 Maine, 313; *Bartlett* v. *Bangor*, 67 Maine, 460; and *Stetson* v. *Bangor*, 73 Maine, 357.

It is contended, however, by the counsel for the plaintiff that she is not bound by what appears upon the Bryant plan, because it was not recorded; and authorities are cited from some of the states, holding that a plan referred to in a deed does not become a part of the deed by which subsequent purchasers are bound unless it is spread upon the record. No case is found in this State holding such to be the rule, and the practice has been uniformly, we think, the other way. Where the plan is referred to in a deed our doctrine is, that as to the boundaries of the land and what there is upon the plan affecting the location of the premises conveyed, it is sufficient to prove the plan and its contents; and especially, should this rule be applied to the plaintiff's deed, because the plan is referred to in a description of her land, and the existence of the streets and Jefferson Lane upon it are made boundaries of her land. She is chargeable with full notice of the contents of the plan. So, we think it clear that the land upon the plan embraced in Date street and Somerset street is dedicated to the use of the purchasers of the lots upon the plan and the public, although not opened for public use as streets by the city at the time; and is subject to be taken by the city and opened as streets and ways at any time without the payment to those claiming the land as embraced in the deeds, more than nominal damages, if any at all. *Stetson* v. *Bangor*; *Bartlett* v. *Bangor*; and *Stetson* v. *Bangor*, *supra*.

If the plaintiff has entered upon the land embraced in those streets upon the Bryant plan in erecting her buildings, it was her own folly or mistake, and she cannot require the city to pay her the expense that she may have to incur for their removal. The doctrine is too well established in this State that a dedication of the land in a case like this is irrevocable and binding upon the owners of the land at the time and their subsequent grantees, unless it is proved that by the subsequent acts of the parties interested the effect of the dedication is extinguished.

There is nothing in the proof in this case which authorizes the court to find that the rights acquired by the dedication have been in any way impaired by adverse use of the land embraced in the streets by the plaintiff or her grantor.

Appeal dismissed.

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

PHILIP H. STUBBS *vs.* WILLIAM L. PRATT.

Franklin. Announced July Law Term, Western District, 1892. Opinion May 20, 1893.

Trespass. Estoppel. Division Line. Rule 18.

Equitable estoppel now freely applied to actions of law, as in suits in equity, to suppress fraud and oppression, must be applied with great care and caution; and when a party is to be deprived of his property, or his right to maintain his action, by an estoppel, the equity ought to be strong and the proof clear.

A party is not estopped to prove a legal title to his land by any misrepresentation of its locality made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot.

In an action of trespass *quare clausum* it appeared that the plaintiff owning adjoining lots 13 and 14, sold lot 13 to the defendant who afterwards cut over the line upon lot 14. The defendant pleaded in justification of the cutting that, while negotiating for lot 13, the plaintiff pointed out to him clumps of trees on lot 14 as being on lot 13, but the plaintiff denied this. *Held*; that the plaintiff was not estopped to maintain his action.

ON MOTION AND EXCEPTIONS.

This was an action of trespass *quare clausum*, in which the jury returned a verdict for the defendant.

Besides a general motion for a new trial, the plaintiff filed a bill of exceptions which the presiding justice signed, adding a memorandum as follows:

"The foregoing bill of exceptions states the rulings correctly and is allowed, if lawfully allowable under Rule XVIII, under the following statement: At the close of the charge the presiding justice asked the jury to remain in their seats, and then inquired of both counsel, if they desired any modification of the

charge or desired to reserve any points for the law court. Counsel upon both sides answered in the negative, whereupon the justice committed the case to the jury upon the charge already given."

W. Fred P. Fogg, for plaintiff.

H. L. Whitcomb, for defendant.

As no lines were found, if the plaintiff pointed out these "clumps" or clusters of timber as being on the land he proposed to sell to the defendant, knowing the defendant was buying it for a lumbering operation, and the defendant purchased it under such representations, the plaintiff would be estopped from maintaining this action. *Holloran* v. *Whitcomb*, 43 Vt. 306.

WALTON, J. This is an action of trespass for cutting timber on the plaintiff's land. At the trial in the court below the defendant obtained a verdict, and the case is brought into this court on motion of the plaintiff for a new trial.

We think the motion must be sustained. No one can read the evidence and for a moment doubt that the defendant cut timber in considerable quantities on the plaintiff's land. The defendant denies the fact but feebly, while his counsel in his brief furnished to this court, does not deny it at all. He rests his client's case on an allegation that during a negotiation between the defendant and the plaintiff for the sale of a lot of land, the latter pointed out to the former certain clumps of timber as being on the lot, and that after the purchase, the defendant cut this and other timber in the vicinity, believing it was on the lot which he had bought of the plaintiff. The defendant's counsel claims that such a representation, if made by the plaintiff, estops him from the maintenance of this suit.

We do not so understand the law. Such a representation, if fraudulently made, might have that effect; but, if innocently made, it would have no such effect. A party is not estopped to prove a legal title to his land by any misrepresentation of its locality made by mistake, without fraud or intentional decep-

tion, although another party may be induced thereby to purchase an adjoining lot. "It would be most unjust that a party should forfeit his estate by a mere mistake." Per Wilde, J., in *Brewer* v. *Boston & Worcester Railroad Co.* 5 Met. 478.

In a recent case in West Virginia, the court held that where the owners of adjoining lots actually surveyed and marked a line between their lots, but, by mistake, included a considerable portion of one of the lots within the supposed limits of the other, neither was bound by the line so run; nor could it be construed as a license from the one party to the other to cut timber between the true line and the mistaken boundary. *Hatfield* v. *Workman*, 35 W. Va. 538, S. C. 14 S. E. Rep. 153; *Buker* v. *Bowden*, 83 Maine, 67.

In *Evans* v. *Miller*, 58 Miss. 120 (38 Am. Rep. 313), A pointed out to B, an adjoining owner, what he supposed to be the boundary line between their lands, and forbade his cutting trees beyond that line. B cut trees within that line. It was subsequently discovered that A was mistaken in that line, and that the trees cut were on A's land; and the court held that A might recover their value. Appended to this case is a very full note on the subject of estoppel in this class of cases, by Mr. Irving Browne.

In *Copeland* v. *Copeland*, 28 Maine, 525, it was said by Chief Justice WHITMAN, that, to defeat one's title to real estate by an equitable estoppel, or estoppel *in pais*, the act or declaration of the party must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; that he must, at least, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured if the representation is not true. And *Titus* v. *Morse*, 40 Maine, 348, is to the same effect.

We do not wish to be understood as holding that in no case can a divsion line between the adjoining owners of land be established by an oral agreement. There are numerous decisions in other states to the effect that when the boundary line between adjacent lands is in dispute, or uncertain, the owners

may establish a division line between them by oral agreement, and that when such an agreement has been acted upon by the erection of fences or buildings, or in any other way, the parties will be estopped to deny that such conventional line is the true line. We are not aware that it has ever been so held in this State or Massachusetts, unless the possession to the line so agreed upon has continued for not less than twenty years. But the doctrine of equitable estoppel has been very much extended within the last half century, and is now as freely applied in actions at law as in suits in equity; and it is a doctrine so well calculated to suppress fraud and oppression, that we do not wish to be understood as limiting its application in the slightest degree in proper cases. But it is a doctrine that must be applied with great care and caution, or it will encourage and promote fraud instead of preventing and defeating it. And it seems to us that in all cases when a party is to be deprived of his property, or his right to maintain an action, by an estoppel, the equity ought to be strong and the proof clear.

In the case now before us, it appears that the defendant bought of the plaintiff a hundred acre lot of land numbered 13. It has been run out to him by a surveyor appointed by the court; and it is of full size and a fraction over. The proof is that he has cut largely upon the adjoining lot numbered 14. He justifies the cutting upon the ground that while negotiating for lot 13, the plaintiff pointed out to him clumps of trees on lot 14. This the plaintiff denies. Here we have an issue of fact, with the burden of the proof upon the defendant. He swears one way and the plaintiff swears the other way. It is oath against oath, and no corroboration of either party. Can an estoppel be allowed to rest on proof so unsatisfactory? We think not. We think to so hold would encourage fraud and perjury, and place one's title to real estate upon a very slippery foundation. And besides, as we have already seen, the fact itself, if proved, would not be sufficient on which to base an estoppel, without proof of the further fact that the plaintiff knew, at the time he pointed out the clumps of trees, that they were

not on lot 13; and, of this additional fact, there is not so much as a scintilla of evidence. As said by Mr. Justice Wilde, in one of the cases cited, "it would be most unjust that a party should forfeit his estate by a mere mistake."

The plaintiff's exceptions were improperly filed, and may be regarded as dismissed without further consideration.

Motion sustained, and a new trial granted.

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

MARY E. NUGENT, in equity, *vs.* FRANCES B. SMITH.

Sagadahoc. Announced at July Law Term, 1892, Western District. Opinion May 20, 1893.

Equity. Specific Performance. Stat. of Frauds. R. S., c. 77, § 6, cl. 3.

This court has power to compel specific performance of written contracts.

A memorandum in writing of the following form is sufficient within the statute of frauds: "Bath, April 10, 1890. Mary E. Nugent bought of Frances B. Smith, house and land on Winter street, number 21, owned and occupied by said Frances B. Smith, for one thousand dollars. Paid one hundred dollars on account. Frances B. Smith."

ON REPORT.

This was an appeal in equity, heard on bill, answer and a report of the evidence before the jury on issues of fact submitted to them.

The case is stated in the opinion.

W. E. Hogan, for plaintiff.

J. M. Trott, for defendant.

WALTON, J. This is a suit in equity. The plaintiff bargained with the defendant for a house and lot in Bath, and took from her a memorandum in writing of the following tenor:

"Bath, April 10, 1890.

"Mary E. Nugent bought of Frances B. Smith, house and land on Winter street, number 21, owned and occupied by said Frances B. Smith, for one thousand dollars. Paid one hundred dollars on account. Frances B. Smith."

The defendant afterwards refused to give the plaintiff a deed of the premises, and the prayer of the bill is that she may be compelled to do so.

Issues of fact were submitted to a jury, and the jury found specially that the defendant signed the memorandum referred to, that it had not been altered, and that it was obtained without fraud; and, generally, that the defendant did enter into an agreement for the sale of the property described in the plaintiff's bill in manner and form as therein charged.

We have examined the case with care and can discover no valid reason for withholding the decree prayed for. We think the memorandum signed by the defendant is sufficient in form and in substance to obviate any objections arising under the statute of frauds. This is conceded by the learned counsel for the defendant. And the jury have found that it was obtained without fraud. The evidence fails to disclose any reason for the defendant's refusal to complete the contract except that she found it inconvenient to find another tenement in which to live. This can not be regarded as a sufficient excuse.

Among the equity powers expressly conferred upon the court is the power to compel the specific performance of written contracts. R. S., c. 77, § 6, clause 3. True, this is a discretionary power; and, generally, it will not be exercised when the party seeking to have it exercised has a full and adequate remedy by an action at law. But an action at law has never been regarded as an adequate remedy for the breach of an agreement to convey real estate; and when such an agreement is founded on an adequate consideration, and is obtained without fraud or oppression, the duty of the court to compel its specific performance is universally acknowledged. *Foss* v. *Haynes*, 31 Maine, 81. 1 Story's Equity, § 751.

We think the plaintiff is entitled to the decree prayed for.

Bill sustained. Decree as prayed for, with costs.

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

SARAH E. PARKER *vs.* EDMUND E. PRESCOTT.

Waldo. Announced at July Law Term, 1892, Western District.
Opinion May 20, 1893.

New Trial. Verdict. Jury. Notice. R. S., c. 73, § 8.

When a verdict is so clearly wrong as to require the intervention of the court, it will be set aside.

This was a writ of entry in which both parties claimed title from one Willard H. Chadwick. The plaintiff claimed title by virtue of an attachment made November 3, 1884, in a suit brought by her against said Chadwick, and a sale on the execution which issued on the judgment recovered in the suit. It was undisputed that Chadwick conveyed the premises, situated in Palermo, Waldo county, by deed of warranty, to Edwin O. Chadwick, May 17, 1875; and that said Edwin conveyed the same to the defendant, Prescott, April 27, 1878; also that neither of these deeds was recorded at the time of the attachment, nor at the time of the sale. These deeds were not recorded until 1890.

The issue of fact submitted to the jury was whether the plaintiff, at the time of making her attachment, had actual notice of the deed from Willard H. Chadwick to Edwin O. Chadwick.

Under the instructions of the presiding justice, to which no exceptions were taken, the jury returned a verdict for the defendant.

The testimony showed that the plaintiff, having an unsatisfied judgment against Willard H. Chadwick, ascertained by the registry of deeds for Waldo county that the record title of the demanded premises was in him, and caused the same to be attached and sold on execution as his property. The plaintiff who resides in Worcester, Massachusetts, was a stranger to the premises, and had recovered a judgment against said Chadwick in Worcester county, Massachusetts, for board furnished him in 1872, 1876, and 1877.

The defense relied upon the testimony of Chadwick and his wife to prove that the plaintiff had actual notice of the unrecorded deed of Willard H. Chadwick to Edwin O. Chadwick in 1875.

The testimony related to conversations in 1875 with the plaintiff at Worcester. The plaintiff denied the conversations.

The testimony also showed that Willard H. Chadwick was married January 1, 1871. After their marriage, he and his wife boarded with Mrs. Parker, the plaintiff, until they left Worcester and came to Palermo in the latter part of 1871 or the first of 1872. After his arrival in Palermo, Chadwick bought a farm, the demanded premises, in Palermo, of his father. In May, 1875, he sold the farm to his brother, Edwin O. Chadwick. In the fall of 1875, Mrs. Chadwick commenced to board again with the plaintiff, and in January, 1876, Chadwick went there to board. They continued to board with the plaintiff until January 10, 1878. Mrs. Chadwick testified that after she went to Mrs. Parker's to board in the fall of 1875, and while she was boarding there, she informed Mrs. Parker that the place was sold to Edwin O. Chadwick, and that she was glad the farm was gone, and that they, (the plaintiff and her mother) were glad for her sake. This witness testifies that the matter of the sale of the place was talked over between her and the plaintiff several times and that she had heard her husband tell the plaintiff that he had disposed of his farm to his brother.

Willard H. Chadwick testifies that he informed the plaintiff that he had disposed of his place and was glad of it; that on one occasion he told him that he got no money for the place, but had got notes.

J. Williamson, for plaintiff.

Alleged conversations too remote; general, not confined to the subject; relating to property at a distance. Pom. Eq. § 602, and note; 2 Sug. Vend. 1041; *Lambert* v. *Newman*, 56 Ala. 623; *Porter* v. *Sevey*, 43 Maine, 529. Information by strangers. *Woods* v. *Farmere*, 7 Watts, 382; *Ripple* v. *Ripple*, 1 Rawle, 391; *Kerns* v. *Swope*, 2 Watts, 7. Notice should be actual in the transaction, by the party at interest. *East Grimstead case*, Duke Ch. Us. 638, 640; *Peebles* v. *Reading*, 8 S. & R. 484; *Boggs* v. *Varner*, 6 W. & S. 469. Implied or constructive notice does not apply to attaching creditors. *Parker* v. *Osgood*, 3 Allen, 487; *Richardson* v. *Smith*, 11 Allen, 134.

W. H. Fogler, for defendant.

Counsel cited: *Knapp* v. *Bailey*, 79 Maine, 195; *Houghton* v. *Davenport*, 74 Maine, 594 approving *Hackett v. Callender*, 32 Vt. 97.

WALTON, J. This is a writ of entry. The plaintiff claims title through an attachment and levy; and the only question is whether the plaintiff, at the time of the attachment, had actual notice of the existence of an unrecorded deed.

The evidence of such notice is very unsatisfactory. But the jury, nevertheless, found in favor of the defendant, which shows that, in their judgment, the plaintiff had such notice.

Is the verdict so clearly wrong as to require us to set it aside? The presiding justice before whom the case was tried (VIRGIN) thinks it is. We have read the evidence very carefully, and we are of the same opinion.

Motion sustained.

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

ROBERT HENDERSON, and another, *vs.* MAGGIE CASHMAN.

Androscoggin. Announced at July Law Term, 1892, Western District. Opinion May 20, 1893.

Trustee Process. Partnership. Notice. R. S., c. 86, § 32.

It is only the individual share of a partner, after all the affairs of the firm have been fully settled, that can be taken on a trustee process and applied to the payment of his individual debt.

When one of the members of a firm is sued for his individual debt, and a debtor of the firm is trusteed, notice of the fact must be given to the other members of the firm, or a judgment charging the trustee will not be binding upon them.

ON EXCEPTIONS.

This action was commenced in the Lewiston Municipal Court December 10, 1890, and was for the sum of $116.15, claimed to be due from the defendant; being the balance due upon a contract for building a house for defendant.

December 6, 1890, prior to commencement of the above action,

a suit was begun in the court below against Robert Henderson, one of the above plaintiffs, in favor of John Sweeney, and the said Maggie Cashman was therein summoned as trustee of the said Robert Henderson.

The action, *Sweeney* v. *Henderson*, was entered at the January term, 1891, of the Supreme Judicial Court for Androscoggin county, at which time the said Cashman made disclosure in due form, showing the amount of $100 due from her to Robert Henderson and Adoniram Hasey, above named, co-partners.

The case was continued till the April term of said court, when the defendant was defaulted, and on hearing on the trustee disclosure, the trustee, Cashman, was charged by consent as trustee of the said Henderson, for the sum of $50, less her costs, no evidence beyond the disclosure, appearing as to the rights of the partners, Henderson and Hasey, in the fund disclosed; and Hasey not being made a party to said proceedings, either voluntarily or by being summoned therein.

Judgment duly issued thereupon against the principal defendant, Robert Henderson, and against said Cashman as trustee, for said $50, which sum she has since paid upon execution duly issued thereon within thirty days from the date of judgment.

The present case came up for trial in the Lewiston Municipal Court at the June term, 1891, and upon hearing, the judge presiding found as follows: . . . .

"That the judgment of the Supreme Judicial Court charging trustee and the payment of $50 upon execution thereon was a bar to the recovery in this action of the amount so paid on the trustee execution."

"The court thereupon found for the plaintiffs in the sum of $50, (the extras claimed above the hundred dollars being disallowed,) and the $50 paid as aforesaid, on the trustee execution being deducted."

To the above finding as to the effect of the judgment in the trustee suit, being a finding of law, and as to the payment of the $50 upon execution thereon as a bar to the recovery of said $50 in this action, the plaintiffs excepted.

Savage and Oakes, for plaintiffs.

McGillicuddy and Morey, for defendant. The judgment charging defendant as trustee of Henderson in the first suit and her payment is a bar and protects her in this suit. *Ladd* v. *Jacobs*, 64 Maine, 347; *Webster* v. *Lowell*, 2 Allen, 123; *Foster* v. *Jones*, 15 Mass. 185; *Doyle* v. *Boutwell*, 1 Allen, 286; *Morrison* v. *New Bedford Inst. for Savings*, 7 Gray 269; *Wheeler* v. *Aldrich*, 13 Gray, 51; *Merriam* v. *Rundlett*, 13 Pick. 511; R. S., c. 86, § 76; Drake on Attachments, § §, 617, 692, 695, 697, 700, 706, 710, 711-15, and 713.

WALTON, J. This is an action by two co-partners against a woman for whom they contracted to build a house.

It appears that before the commencement of the action she had been summoned as the trustee of one of them, and consented to be charged for half the amount then due to both of them. This was done without notice to the other co-partner; and the question is whether such a judgment is binding upon him. Clearly not.

It is settled law in this State that, when one of the members of a firm is sued for his individual debt, and a debtor of the firm is trusteed, notice of the fact must be given to the other members of the firm, or a judgment charging the trustee will not be binding upon them. Whether or not the trustee shall be charged, and, if so, for how much, are questions in which they are interested, and, in the decision of which, they have a right to be heard; and if they do not voluntarily appear and become parties to the suit, notice of its pendency must be given to them, or a judgment charging the trustee will not be binding upon them. All the assets of the firm, including its credits, may be needed for the payment of the firm's debts; and, if so, no portion of them can be applied to the payment of the debt of one of its members. It is only his individual share, after all the affairs of the firm have been fully settled, that can be taken on a trustee process and applied to the payment of his individual debt. He, indeed, may be very willing to have the assets of the firm thus applied; but his copartners may be very unwilling;

and they must have an opportunity to be heard before the question can be conclusively settled against them.

The ruling excepted to was clearly wrong. *Parker* v. *Wright*, 66 Maine, 392; *Burnell* v. *Weld*, 59 Maine, 429; *Look* v. *Brackett*, 74 Maine, 347; *Hawes* v. *Waltham*, 18 Pick. 451; R. S., c. 86, § 32.

Exceptions sustained.

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

GEORGE WOODWARD *vs.* JOHN W. PERRY.

Cumberland. Announced at July Law Term, 1892, Western District. Opinion May 20, 1893.

Limitations. Administrators. Alabama Claim. R. S., c. 87, § § 12, 13.

An action against an administrator brought after the two years limitation in R. S., c. 87, § § 12 and 13, is barred.

The defendant collected, in his capacity as administrator, a judgment of the court of commissioners of Alabama claims for war premiums alleged to have been paid by the plaintiff through the defendant's intestate. *Held*, that the defendant was liable to the plaintiff in his representative capacity only; that the statute of limitations, in favor of administrators, will not be avoided by omitting to describe the defendant as administrator in a suit by the plaintiff; and that the time for commencing a suit would not be enlarged by a distribution of the funds by the administrator, after notice of the plaintiff's claim.

ON REPORT.

This was an action for money had and received. The writ is dated September 11, 1888. Plea was the general issue with brief statement that the action was barred by the provisions of R. S., c. 87, § 12; and c. 81, § 82.

It was admitted that the defendant, as administrator of Joseph C. Givin's estate, obtained judgment in the court of commissioners of Alabama claims, April 23, 1885, for war premiums on a claim of the second class; which premiums had been paid for insurance on seven sixty-fourths of the ship Marcia Greenleaf, which was the share that said Givin was claimed to have owned; and that on September 9, 1886, defendant received the net avails of said judgment, amounting in the whole to $457.00, in a check payable to him as such administrator.

It was also admitted that the defendant gave due notice of his appointment, as such administrator, on the first Tuesday of April, 1882, and had duly proved the fact in the probate court; and that before this action was commenced and before he received the avails of his judgment obtained in the court of commissioners of Alabama claims, the defendant filed an inventory and settled one account only in the probate court without charging himself in either the inventory or account with the claim on which said judgment was obtained, or any part thereof.

The facts relating to plaintiff's ownership in the vessel and payment of the war premiums for insurance are omitted as immaterial, the view taken by the court rendering a report of them unnecessary.

Weston Thompson, for plaintiff.

No bar by limitation. Perry sued in his private capacity, and not as administrator, for plaintiff's money received by defendant within six years. Plaintiff had no cause of action until defendant had received the money. There was no legal claim against the government. *Manning* v. *Sprague*, 148 Mass. 18. Perry distributed the money before plaintiff's right to sue him as administrator under R. S., c. 87, § 13, had expired. By that distribution without any probate order, Perry parted with all defenses which he might otherwise have had as administrator, and, if not so before, he came personally liable for the money misappropriated. *Thurston* v. *Doane*, 47 Maine, 79, says the fund collected by defendant from the government could not be regarded as "new assets" to extend the time for suing the administrator, because (as plaintiff had known), defendant had charged himself with the claim in the probate court as administrator.

If *Manning* v. *Sprague*, is to stand, this is a very questionable doctrine, especially when it is to be applied to deprive a man of what is confessedly his own. If the administrator does not obtain judgment within the time first allowed for suing him, there may be serious legal difficulty in the way of the decedent's co-owner, in obtaining his part of the sum recovered. By this theory, while the right of suing the administrator subsists as to

the limitation, it may not exist on the merits; the claim may be barred before it is born. During the time allowed for suing him the administrator has neither the fund nor the legal right nor ability to obtain it. *Newell* v. *West*, 149 Mass. 520. That plaintiff himself should have applied to the commissioner's court, it may be replied:

1. The administrator may be in possession of all the evidence.

2. Parties should not be put to the expense of needless proceedings.

3. Government does not undertake to settle questions between rival claimants, and should not be vexed by them. The federal tribunal leaves the state court to control the division of the fund; and if the administrator's petition should be filed first, would be likely to dismiss another by one who could find his remedy afterwards in the state court.

Counsel also cited: *Call* v. *Houdlette*, 70 Maine, 308; S. C. 73 Maine, 293; *Sewall* v. *Patch*, 132 Mass. 326; *Gould* v. *Emerson*, 99 Mass. 154.

George D. Parks, for defendant.

WALTON, J. This is an action to recover from the defendant a portion of the money paid to him on a judgment which he recovered as administrator on the estate of Joseph Givin, in the court of commissioners of Alabama claims. The money was received more than two years before the commencement of the suit; and the only question we find it necessary to consider is whether the action was seasonably commenced. We think it was not.

If the defendant was ever liable to the plaintiff for any portion of the money so received, it was in his representative and not in his private capacity; and the action not having been commenced within the two years limitation mentioned in section 12, chapter 87, of the Revised Statutes, nor within the two years limitation mentioned in section 13 of the same chapter, we think the right to maintain it must be regarded as barred by the lapse of time.

We do not think this result can be avoided by the fact, if it

be a fact, that the defendant distributed the fund among the heirs of the estate after notice of the plaintiff's claim; nor by the fact that the defendant is not described as an administrator in the plaintiff's writ. In distributing the fund, after notice of the plaintiff's claim, the defendant would do so at his peril. The plaintiff's claim, if seasonably sued, would not be thereby affected. But we can perceive no reason, nor do we know of any authority, for holding that the time for the commencement of the suit would be thereby enlarged.

Nor do we think the plaintiff could avoid the statute of limitations in favor of administrators by omitting to describe the defendant as an administrator in his writ. Such an omission might, perhaps, by creating a variance between the cause of action, as stated in the writ, and the cause of action established by the proof, be regarded as furnishing an independent ground of defense, unless cured by an amendment; but surely, it could not enlarge the time for the commencement of the suit.

Judgment for defendant.

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

EDMUND F. WEBB, EXECUTOR, and others, in equity,

vs.

ADDIE L. FULLER, ADMINISTRATRIX, and others.

Kennebec. Opinion May 31, 1893.

Set-off. Joint Debtors. Probate. R. S., c. 82, § 57.

After a decree of distribution in the probate court, the executor may retain so much of any distributive share as is necessary to pay the indebtedness of the owner of such share to the estate.

This right has been long recognized by the law as existing without any statute.

The other distributive shares will thus be increased to that extent, and distribution will be made accordingly.

ON REPORT.

Bill in equity, heard on bill and answers which admitted the facts stated in the bill.

The case is stated in the opinion.

Webb, Johnson and Webb, for plaintiffs.

Counsel cited: Story's Eq. § § 1431, 1434, 1435, note 2, 1436-7, 1444; *Ex parte Quintin*, 3 Ves. Ch. 248; 1 Pom. Eq. § § 189, 541; 1 Spence Eq. 641-2, 651; 2 Eq. Lead. Cas. pp. 1338, 1347; *Jeffs* v. *Wood*, 2 P. Wms. 129; *Tucker* v. *Oxley*, 5 Cranch, 35; *Ex parte Hann*, 12 Ves. 346.

W. P. Thompson, for defendants.

Counsel cited: R. S., c. 82, § 57; *Peirce* v. *Bent*, 69 Maine, 381; 2 Story's Eq. § 1436; *Preston* v. *Stratton*, 1 Anst. R. 50; 1 Story's Eq. § 137; 2 Red. Wills, 130-1; Schoul. Exors. § 267.

EMERY, J. Ann S. Fuller died intestate leaving an estate to be divided after settlement into four distributive shares. Two of the heirs, to each of whom one share was payable, were jointly indebted to the estate. The administrator recovered upon this indebtedness a judgment against the two heirs. He was not able to collect the whole amount of this judgment, nearly $25,000, remaining unpaid and uncollectible. He settled the estate as far as he could without the balance of the judgment, and the probate court made a decree for a distribution among the heirs of the balance in his hands amounting to a little over $13,000.

The administrator desired to apply to the further payment of this judgment the share of each judgment debtor in the balance to be thus distributed. To this each of the judgment debtors objected and formally demanded that his distributive share be paid to him in full in accordance with the decree. Thereupon the administrator filed this bill in equity to compel the application of these two shares to the payment *pro tanto*, of the joint judgments.

The respondents contend that the right of set-off is solely and entirely a creation of the statute, and hence cannot be exercised in any case unless some statute expressly authorizes it. They further contend that the statute gives the probate court no authority to make such a set-off as is desired here; and that in no case, and in no proceeding does the statute authorize a set-

off of one joint debt against two several debts as asked for in this case. R. S., c. 82, § 57.

It may be conceded that no statute can be cited, directly authorizing the action asked for in this case, but it does not follow that the court in equity is without power of action in the premises. Having now full equity powers the court can do and compel equity in any case except where restrained by some statute or positive rule of law.

The right of an executor or administrator to retain a legacy or distributive share from a debtor to the estate and apply it to the indebtedness has long been recognized by the law as existing without any statute. It is not the technical right of set-off in actions at law. It is rather called in the old cases the right of retainer. It is an equitable right of its own nature, and not at all dependent upon any statute. It is the plain, moral as well as legal duty of the debtor to pay his debt to the estate. He has had the value from the estate. He ought in morals and law to restore it. It needs no statute to affirm this duty. It is self-evident.

The right of a legatee or an heir in the estate of a decedent is not self-evident nor equitable. He has paid no value for it, has not earned it. It is a matter of grace. To make it a legal right needs statute affirmation, and without a statute or some positive rule of law the right would not exist. That the legatee or heir should fulfil his obligations to the estate before receiving the bounty of the decedent is clearly equitable. It is an equity which the court can enforce.

In *Jeffs* v. *Wood*, 2 P. Wms. 128 (*temp.* 1695), the court said: "The legatee's claim is in respect of the testator's assets, without which the executor is not liable; and it is very just and equitable for the executor to say that the legatee has so much of the assets already in his own hands, and consequently is satisfied *pro tanto*." In *Courtney* v. *Williams*, 3 Hare, 539, a legatee filed a bill to compel the executor to pay over a legacy. The executor claimed to retain out of the legacy the amount of a debt owed by the legatee to the estate. The legatee resisted this claim on the ground that his indebtedness was barred by

the statute of limitations. It was held, however, to be equitable to deduct the debt from the legacy notwithstanding the statute. The court said the case might be put to the legatee as follows: "You ask for a portion of the assets of the testator; but you are yourself a debtor to the testator's estate and his assets are diminished *pro tanto* by your default. It is against conscience that you should take anything out of the estate until you have made good what you owe to it." In *White* v. *Cordwell*, L. R. 20 Eq. Cas. 644, the same principle was applied in an intestate estate between the administrator and an indebted heir. The court said, "until the debtor discharges his duty to the estate by paying his debt which he owes to it, he can have no right or title to any part of it under the statute" (the statute of distributions). In *Batton* v. *Allen*, 5 N. J. Eq. 99, one of the seven distributees was indebted to the estate. It was held that the amount of his indebtedness should be added to the surplus and form a part of the amount to be divided; that the debtor's share of the whole amount should be paid *pro tanto* by cancelling his indebtedness, and he receive only the residue of his share if any. *Armour* v. *Kendall*, 15 R. I. 193, was a case of joint indebtedness like the one before us. A legatee and another party were jointly indebted to the estate of the testator. It was held that the executor could retain the legacy as a *pro tanto* payment of the debt due by the legatee and his partner to the estate. In *Tinkham* v. *Smith*, 56 Vt. 187, the heir brought an action at law against the administrator for his distributive share of the decedent's estate as determined by the probate court. He was at the same time indebted to the estate in a larger sum. It was held that the administrator could apply the indebtedness in payment of the share, and judgment was rendered for the defendant.

It appears, however, in this case that one of the two indebted heirs died after the recovery of the judgment against him and his co-heir. This administratrix now contends that she is entitled to his share in Ann S. Fuller's estate in full to enable her to settle his estate. It must be evident, however, that the heirs, creditors, or administrator of a deceased legatee, or dis-

tributee can be in no better position than he, and must be content with the residue, if any, after his debt to the estate is paid. It was so held in *Denise* v. *Denise*, 37 N. J. Eq. 163; *Earnest* v. *Earnest*, 5 Rawle, 213; *Girard Ins. Co.* v. *Wilson*, 57 Pa. St. 182.

In *Wadleigh* v. *Jordan*, 74 Maine, 483, and *Holt* v. *Libby*, 80 Maine, 329, the statute of limitations had barred the debt of the legatee to the estate, and it was held that under our statutes the executor could not apply the legacy in payment of a debt so barred. Neither case, however, questions the power or propriety of such application where the debt is not barred.

In this case there should be a decree substantially as follows: The amount due on the judgment should be added to the amount of the surplus in the hands of the administrator and the sum of these should be reckoned as the amount for distribution. The two shares of this whole amount coming to the two indebted distributees, should be applied to the payment of the judgment against them. The other two shares should be paid, as far as the cash balance extends, to the other distributees according to their respective interests.

It is asked in the briefs that the court order costs and counsel fees for both parties to be paid out of the estate. We do not think it would be equitable to do so. It is not the case of a will or a trust. The case is purely litigious. The two indebted distributees and defendants resisted an equitable right of the plaintiff, and subjected the estate to this litigation by their recalcitrancy. While the plaintiff should be allowed to deduct his costs and reasonable counsel fees, from the balance in his hands after accounting for taxable costs recovered, we see no reason why the two contesting defendants, who are found to be in the wrong, should not pay costs as usual. The decree will so order.

Bill sustained.

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

WILLIAM ENGEL, and another, *vs.* FRED W. AYER.

Penobscot. Opinion May 31, 1893.

Deed. Exception. Profit a prendre. Flats. Booms.

Rights in land, such as *profit a prendre*, may be the subject of a separate grant.

An exception in a deed retains in the grantor some portion of his former estate; and whatever is thus excepted, or taken out of the grant, remains in him as of his former title.

The rule of the common law, that a fee simple cannot be conveyed without the word "heirs," no matter now plainly the intention to do so may be expressed by other words of perpetuity, does not apply to an exception, properly so called, or to an easement appurtenant to other land of the grantor, or of a right to take profit in the soil.

In an action of trespass against the defendant for placing and maintaining booms and fastening them to plaintiffs' piers (used in the ice business) and storing logs therein, on flats owned by the plaintiffs in the town of Brewer, it appeared that the plaintiffs derived title under a deed from the owner of a large tract extending up and down the river, conveying to them a parcel measuring four hundred feet on the river, lying between the river and county road. The deed contained the following clause next after the description, viz: "Excepting and reserving, however, the full right of keeping and maintaining a boom or booms on the flats between high and low water marks of said river along the premises hereby conveyed, either to use myself or to let or sell to other persons." The defendant, a mill owner upon adjoining premises, justified under a subsequent deed of the same grantor conveying to him said right to keep and maintain booms, and, after reciting the above exception, containing the following clause, viz: "Meaning and intending hereby to convey all the lands, shores, flats, privileges and rights to keep and maintain booms which [grantors] owned, . . . between said county road and Penobscot river." . . . . *Held*; That the defendant had acquired an unlimited right to maintain booms "on the flats" throughout their length and breadth with the privilege of using them for the practical purposes for which booms are usually maintained. It is a full right, co-extensive with the area of the flats; *Also*, that the rights excepted and retained by the grantor in and by the first conveyance, now held by the defendant by the second conveyance is not an easement merely, but a profitable interest in the land itself passing to the grantor's heirs upon his death, and capable of being granted by them.

ON REPORT.

The case appears in the opinion,

C. A. Bailey, for plaintiffs.

Plaintiffs contend; *first*, the reservation is of a new right not before in being, and having no words of inheritance, creates a reservation and not an exception, and so limited to grantor's life;

second, it was an easement in gross and limited, *ex necessitate*, by its express terms; *third*, if an easement appurtenant, it was appurtenant to some other estate of the grantor, and not another which grantor did not own; *fourth*, it is only a right to maintain a boom "along" the front of plaintiffs' lot on the flats and does not carry the right to fill such boom with logs; *fifth*, defendant has no right to support such boom by plaintiffs' piers.

Counsel cited: *Ashcroft* v. *Eastern R. R.* 126 Mass. 196; *Curtis* v. *Gardner*, 13 Met. 461; *Buffum* v. *Hutchinson*, 1 Allen, 61; *Sedgwick Laflin*, 10 Allen, 430; *Dennis* v. *Wilson*, 107 Mass. 593; *Amidon* v. *Harris*, 113 Mass. 59; *Davenport* v. *Lamson*, 21 Pick. 72; *French* v. *Marston*, 4 Foster, 440; *Mendell* v. *Delano*, 7 Met. 180-1; *Moulton* v. *Faught*, 41 Maine, 298; *Hankey* v. *Clark*, 110 Mass. 265; *Stanwood* v. *Kimball*, 13 Met. 526; *Foster* v. *Foss*, 77 Maine, 279; *Rollins* v. *Clay*, 33 Maine, 138.

Wilson and Woodard, for defendant.

WHITEHOUSE, J. This is an action of trespass *quare clausum* for placing and maintaining booms and fastening them to the plaintiffs' piers, and storing logs therein, on flats owned by the plaintiffs in the town of Brewer. The case is presented on a report of the evidence.

The plaintiffs derive title from Thomas N. Egery, and the defendant justifies his use of the flats by a subsequent grant of an easement therefor from Egery's devisees.

Egery was the owner of a tract of land lying between the Penobscot river and the county road and extending up and down the river about half a mile. August 23, 1880, in consideration of $1500, he conveyed to the plaintiffs a certain parcel of it, measuring four hundred feet on the river, by deed containing the following clause after the description, viz:

"Excepting and reserving, however, the full right of keeping and maintaining a boom or booms on the flats between high and low water marks of said river along the premises hereby conveyed, either to use myself or to let or sell to other persons."

The Penobscot river at this point is a tidal river, and the flats in question extend outward from the shore line a uniform distance of about two hundred feet, high water mark being about 108 feet from the county road. There was no boom on the premises at the time of this conveyance nor afterward during Egery's life-time; and it does not appear that any mill had been erected on Egery's land. But the defendant's mills located farther down the river were then in existence, and above the plaintiff's premises at Dyer's Cove, and also below his premises, booms were then maintained for the storage of logs to be manufactured at the defendant's mills. It also appears that from the boom at Dyer's Cove down to that at the defendant's mills on the easterly side of the river, no boom has ever been maintained for any purpose except for the storage of logs at the defendant's mills.

The same year of the conveyance from Egery above named, the plaintiffs erected an ice house on the premises between the county road and the river, and constructed a row of piers on and across the flats to support a run or tramway for the transportation of ice to and from the house.

Egery died in 1885, and August 8, 1888, in consideration of $7,000, his children and devisees conveyed to the defendant the remainder of the land above designated, lying between the county road and the river, by deed containing the following language, viz:

"Excepting from the land hereinbefore described a certain piece of land conveyed by said Thomas N. Egery to William Engel and Julius Waterman by deed dated August 23, 1880, said excepted piece of land being described as follows" (same as plaintiff's premises). "And whereas said Thomas N. Egery in his said deed to Engel and Waterman excepted and reserved the full right of keeping and maintaining a boom or booms on the flats between high and low water marks of said river along the premises conveyed by said deed forever, either to use himself or let or sell to other parties, said right to keep and maintain a boom or booms is hereby conveyed; meaning and intending hereby to convey all the lands, shores, flats, privileges and rights

to keep and maintain booms which Thomas N. Egery owned at the time of his decease, between said county road and Penobscot river, and between Dyer's Cove, so called, and the mill now owned by said Ayer in said town of Brewer."

It is not in controversy that, since this conveyance, the defendant has maintained a boom upon the flats of the plaintiffs' premises extending along the entire front near low water mark, and has fastened it by chains to the piers erected by the plaintiffs in connection with their ice business, and has used it for booming logs, keeping the flats covered much of the time with logs, to be manufactured at his mills above mentioned.

This deed to the defendant of August 8, 1888, was undoubtedly effectual to convey to him the full right to maintain booms on the flats in question, as "excepted and reserved" by Egery in the prior deed to the plaintiffs, provided this right was of such a nature and extent in fact and of such a character in law that it survived Mr. Egery and passed by will to his devisees.

When the terms employed in the clause of "exception and reservation" in the plaintiffs' deed, are received and understood in the plain, ordinary and popular sense in which they are used in connection with the subject matter, is their meaning obscure? When examined in the light of the internal evidence afforded by the deed itself, is the purpose doubtful? It is contended in behalf of the plaintiffs that this clause of "exception and reservation" in their deed was never intended to authorize the maintenance of a "boom or booms" involving the use of the entire area of the flats for the storage of logs, but consistently with any facts disclosed by the case, may fairly be interpreted to signify only the right to maintain a series of spars or logs secured in line "along" the front of the flats for the purpose of guiding logs past the premises and preventing them from grounding at ebb tide. But the clause describes "the full right of keeping and maintaining a boom or booms on the flats between high and low water marks of said river along the premises hereby conveyed." It thus appears to be an unlimited right to maintain booms "on the flats" throughout their length and breadth, — an unrestricted privilege comprising the entire extent of the

flats. In the exercise of this right the floating logs which constitute a boom, when fastened together at the ends, could be stretched over any part of the flats and in any direction. Nor would it be reasonable to construe it as a right to maintain a boom without the privilege of using it for the practical purpose for which booms are usually maintained. Any right to maintain a boom on the flats which did not carry with it the right to hold logs in it, would apparently be a barren and illusory one. Such a literal construction would also be incompatible with the relative situation of the property, and the object which the parties manifestly had in view. It has been seen that at this time booms were maintained above and below these premises for the storage of logs to be manufactured at the defendant's mills, and that no boom has been maintained for any other purpose on that side of the river between Dyer's Cove and the defendant's mills. It is also fairly to be inferred that these flats were then known to the parties to be a desirable and convenient place for the storage of logs, for we find they have been used for that purpose by the defendant since his purchase in 1888.

When, therefore, the meaning of the grantor's plain and comprehensive language is further illustrated by the facts and circumstances attending the execution of the deed, the conclusion is irresistible that this booming privilege was retained by the grantor with an intention and in the expectation that it would be made available for any useful and beneficial purpose to which the premises seemed to be adapted, either in storing logs on the flats or in guiding them past. It was the "full right" to maintain and use a boom or booms "between high and low water marks" for any purpose for which a boom or booms could ordinarily be used in driving logs and manufacturing lumber.

Again, it is contended in behalf of the plaintiffs that this clause describes a new right not before in being, and as it contains no words of inheritance it creates, not an exception, but a reservation which was limited to the life-time of the grantor, Mr. Egery; and further, that the right does not appear to be an easement appurtenant to any other land of the grantor, but an easement

in gross attached only to the person of the grantor, and therefore incapable of being granted or devised; and that even if it can be held an easement appurtenant, it must have been appurtenant to some other estate of the grantor, and cannot be used for the benefit of another property which he did not own.

The words "excepting and reserving the full right," etc., "forever, either to use myself or to let or sell to other persons," taken in their ordinary and popular sense, show a clear and unmistakable intention to "except and reserve" a perpetual right inheritable and transferable, and not a personal easement limited by a life-time. But it is an arbitrary rule of the common law that without the word "heirs" a fee simple in land cannot be conveyed by deed, no matter how plainly the intention so to do may be expressed by other words of perpetuity. As stated by the court in *Curtis* v. *Gardner*, 13 Met. 457, "a grant to a man to have and to hold to him forever, or to him and his assigns forever, will convey only an estate for life." See also *Stockbridge Iron Co.* v. *Hudson I. Co.* 107 Mass. 290. This technical and unyielding rule had its origin in the principles of that feudal policy which was swept away more than five hundred years ago, and although it may seem to be a reproach upon our common law that, with all its flexibility and progressive spirit, it still permits the plainly expressed contract of the parties to a deed, to be destroyed by the operation of this "relic of feudal strictness," it has become so imbedded in the law of real property and so interwoven with our system of conveyancing that it will probably be recognized as an imperative rule until changed by the legislature. (See *contra*, *Cole* v. *Lake Co.* 54 N. H. 279.)

But this rule is not applicable to an "exception," properly so called, of an easement appurtenant to other land of the grantor or of a right to take profit in the soil. A "reservation" is said to vest in the grantor some new right or interest not before existing in him, operating by way of an implied grant, and if it does not contain words of inheritance it will give only an estate for the life of the grantor. The operation of an exception on the other hand, is to retain in the grantor some portion of his

former estate, and whatever is thus excepted or taken out of the grant remains in him as of his former title. *Wood* v. *Boyd*, 145 Mass. 179. *Stockbridge Co.* v. *Hudson Co.* 107 Mass. 290. An exception is always of a part of the thing granted and of a thing in being. *Winthrop* v. *Fairbanks*, 41 Maine, 307. The idea is aptly and clearly expressed in Bracton's Latin: "*Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentis, et illa pars quam retinet semper cum eo est et semper fuit.*" Coke Litt. 47a, note b. But the two principles so frequently blend, and the distinction between them is so often found to be uncertain and obscure, that the two expressions have to a great extent been interchangeably employed. A reservation is often construed as an exception in order that the obvious intention of the parties may not be defeated. *Winthrop* v. *Fairbanks*, *supra*; *Smith* v. *Ladd*, 41 Maine, 316; *Bowen* v. *Conner*, 6 Cush. 132.

In the case at bar the right to maintain booms on the flats was expressly "excepted" as well as "reserved." It was a full right co-extensive with the area of the flats. It had always existed as an essential part of the premises. In a legal sense it was a thing in being and not newly created. In *Smith* v. *Ladd*, *supra*, a reservation of a right of way, not definitely located, for the benefit of that portion of the lot remaining in the grantor, was held to be a good exception. So also in *Chappell* v. *Railroad*, a late case in Connecticut (24 Atl. Rep. 997), the right reserved to cross a strip of land conveyed to the defendant was held by the court to be in a certain sense a right existing in the grantor at the date of the deed. "It was," said the court, "a part of their full dominion over the strip about to be conveyed by the deed, and not a right to be in effect, conferred upon them by the grantee. . . . In such cases the rule is well settled that a permanent easement in favor of the retained land may be made without words of limitation."

It is agreed, however, in the case at bar that the excepted right is not for the benefit of or appurtenant to, any other lands owned by the grantor at the time, but was a right retained by him "either to use [myself] himself, or to let or *sell* to other

persons." It would, therefore, be technically classified either as an easement in gross, or a right of profit in land, the latter being commonly termed in the books a profit *a prendre in alieno solo.* "If it be a right of way in gross, or a mere personal right," says Chancellor Kent, "it cannot be assigned to any other person or transmitted by descent. It dies with the person." 3 Kent Com. 420. See also *Ackroyd* v. *Smith*, 10 C. B. 164. But in *Wickham* v. *Hawker*, 7 Mees. & W. 63, it was held that a license "reserved" by a grantor of land not for mere convenience and pleasure, but for profit, implied the right to employ servants and also the right to assign it to others. In *Post* v. *Pearsall*, 22 Wend. 425, which was a claim for a landing and place of deposit for merchandise on the bank of a navigable river, Chancellor Walworth said, "nor can it be sustained as an ordinary easement. . . . Such easements are either personal and confined to an individual for life merely, or are claimed in reference to an estate or interest of the claimant in other lands as the dominant tenement; for a profit *a prendre* in the lands of another, when not granted in favor of a dominant tenement, cannot properly be said to be an easement but an estate or interest in land itself." Mr. Washburn thinks this principle furnishes a clew to reconcile the authorities. "The distinction," he says, "seems to be this: if the easement consists in a right of profit *a prendre* such as taking soil, gravel, minerals and the like from another's land, it is so far of the character of an estate or interest in the land itself that if granted to one in gross, it is treated as an estate and may, therefore, be for life or inheritance. But if it is an easement proper, such as a right of way and the like, and is granted in gross, it is a mere personal interest and not inheritable." Wash. Ease. 13. This was cited with approval in *Fishing Co.* v. *Carter*, 61 Penn. 21 (S. C. 100 Am. Dec. 597). There the plaintiff claimed the right to draw seines on the soil of the riparian proprietor for the purpose of taking fish, not as appurtenant to any dominant estate but as an incorporeal hereditament and easement in gross vested in him and derived from his ancestors in fee simple. Sharswood, J., said: "A right to take fish is a

profit *a prendre in alieno solo*. It implies the right to fix stakes or capstans for the purpose of drawing the seine. . . . The grantee in the nature of things must have exclusive possession for the time he is fishing and for that purpose; the grantor, at all other times, and for all other purposes." In *Goodrich* v. *Burbank*, 12 Allen, 459, the right to draw water from a spring by means of an aqueduct, which was reserved to the grantor, his heirs and assigns, without reference to any other estate with which it was to be used, was held to be the subject of grant and inheritance. See also *Owen* v. *Field*, 102 Mass. 100, and *Dority* v. *Dunning*, 78 Maine, 381. According to Mr. Washburn such a right may be regarded as a *species of profit a prendre* without violating any principle of law, and therefore may be the subject of a separate grant. Wash. Ease. 14-15. In *Hill* v. *Lord*, 48 Maine, 83, it was held that the right to take seaweed from flats was not a mere easement but a right to take profit in the soil. See also cases there cited for other instances of the right profit *a prendre*. But *Littlefield* v. *Maxwell*, 31 Maine, 134, affords a still more pertinent illustration. There the defendant claimed the right to pile wood and seaweed on the land of another for the purpose of sale and shipment, and the court said: "Such a use of another's land must be considered as a profitable one arising to those who exercise it. It is not a claim to carry anything away from the soil, but the direct and continual appropriation of it for the purpose of gain. Indeed it appears to go beyond a mere incorporeal right and in the full extent of its exercise to claim the entire dominion of the land, so as to deprive the owner of any benefit from it. . . . The claim is certainly one of an interest or profit in the soil."

In the case at bar the right to maintain booms involves the right to drive stakes, set posts and erect piers on the soil of the flats for the purpose of securing the logs which compose the booms. The right to maintain booms carries with it by implication in this case the right to use them either for "sheer" booms or storage booms or for both purposes. In the full extent of its exercise the entire area of the flats may be covered with logs. At such times and for such a purpose, it involves practical

dominion and control of the premises. "Such a use of another's land must be considered as a profitable one. . . . It is a direct and continual appropriation of it for the purpose of gain." *Littlefield* v. *Maxwell*, *supra*. The right excepted and retained by Mr. Egery in his deed to the plaintiffs, was, therefore, not a mere easement properly so-called but a profitable interest in the land itself which passed to his children by the devise and was by them granted to the defendant. And it is a satisfaction to observe that this conclusion is not only in harmony with the authorities, but it effectuates the intention of the parties clearly manifested by the language of the exception examined in the light of the attending facts.

But the plaintiffs still claim that the act of the defendant in fastening his boom by chains to the plaintiffs' piers on the flats, was an infringement upon their rights from which some damage is presumed to flow; and it is stipulated in the report that if the plaintiffs are entitled to judgment upon any phase of the case the damages are to be assessed at *nisi prius*; otherwise a nonsuit is to be entered.

It has been seen that after their purchase in 1880, the plaintiffs erected a row of piers across the flats to support a tramway for carrying ice. There were no piers on the premises at the time of the conveyance. By their deed the plaintiffs acquired title to the land as it then was subject to the paramount right excepted and retained by the grantor to use any and every part of the surface of the flats for the purpose of booming logs. As owners of the fee they may still use the flats for any purpose which does not materially impair or unreasonably interfere with this paramount right to use the entire surface for a storage boom. *Morgan* v. *Boyes*, 65 Maine, 124. The only evidence upon this point is the statement in the report that since his purchase from the devisees of Egery, the defendant "has maintained a boom on the flats . . . . and fastened it by chains to the plaintiffs' piers." As between the parties the defendant was entitled to exercise his right to boom logs on the flats without restriction or limitation. If the plaintiffs' piers proved to be a material hindrance to the full exercise of this right, the defendant

might lawfully have removed the obstruction. If, perchance, the plaintiffs' piers occupied the only accessible or available points for the location of a boom, and the alternative was presented to the defendant of removing the piers or chaining his boom to them, the latter course being less injurious to the plaintiffs, could not reasonably be deemed an unlawful invasion of their rights. They could not, it is true, be required to maintain piers for the defendant's benefit and could remove them at their discretion. On the other hand, if the piers did not appreciably interfere with the maintenance of a boom for any purpose, the act of the defendant in subjecting them to his use as a matter of convenience, would be a technical infringement of the plaintiffs' rights.

In the entire absence of any evidence in regard to the manner in which the rights of the parties might have been consistently exercised in conducting their respective business operations, the entry must be,

Plaintiffs nonsuit.

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

PETERS, C. J., did not sit.

FLORA J. WALKER, and others, *vs.* ELLEN R. NEWTON.

Kennebec. Opinion May 31, 1893.

Levy. Estate decreed insolvent. R. S., c. 66, § § 3, 18, 19; c. 76, § 49; Stat. 1869, c. 37.

A decedent's estate is "decreed insolvent" within the meaning of R. S., c. 76, § 49, when commissioners of insolvency are appointed upon a representation of insolvency.

After such appointment of commissioners no levy can be made upon the estate.

ON REPORT.

The case, which is sufficiently stated in the opinion, was submitted on an agreed statement of facts.

C. L. Andrews, for plaintiffs.

We may show collaterally, in this action, that defendant could not extend her execution by a levy. *Thayer* v. *Hollis*, 3 Met. 369. Decisions prior to 1869, like *Wyman* v. *Fox*, 59 Maine, 101, and cases therein cited, do not apply since the change in the statutes. Act of 1869 was consolidated in the

revisions of 1871 and 1883. The first section remains where it was placed, the second being added to R. S., c. 81, § 68, and provides that "all attachments of real and personal estate are dissolved . . . by a decree of insolvency on his estate before the levy or sale on execution." *Hall* v. *Merrill*, 67 Maine, 112; *Pulsifer* v. *Waterman*, 73 Maine, p. 239. It was also added to R. S., c. 76, § 49.

Beane and Beane, for defendant.

No decree of insolvency as required by statute has been made. In *Hall* v. *Merrill*, 67 Maine, 112, the court says, "after the decree of insolvency and the acceptance of the report, . . . the estate is to be settled as an insolvent estate," etc. In *McLean* v. *Weeks*, 65 Maine, 411, BARROWS, J., says, "It should be understood that it is not the representation of insolvency and the decree of the judge of probate for the appointment of commissioners which is regarded as conclusive evidence of the fact of insolvency. The evidence would be imperfect without the report of the commissioners, and the accompanying documents and the decree thereon, together with the other proceedings establishing the amount of the assets." *Bascom* v. *Butterfield*, 1 Met. 536; *Hunt* v. *Whitney*, 4 Mass. 623. There the court says commission of insolvency must be issued, executed and returned, as the basis of the decree upon which insolvency rests.

After representation of insolvency was made and commissioners appointed, their proceedings were irregular, defective, and void; and for this reason their report was never acted upon by the probate judge, and though defendant's action was then pending in court, neither the administrator nor his counsel made any suggestion of insolvency, and the defendant had no notice of any such claim or proceedings.

EMERY, J. This is a real action. The plaintiffs show title as heirs of one Joss, deceased, who admittedly died seized of the demanded premises. The defendant claims title under a judgment against the estate, and a levy of the execution on the demanded premises, according to the statute R. S., c. 76, § 49.

A few days before the judgment and levy, however, the estate had been represented insolvent and commissioners of insolvency had been appointed by the probate court. No report of such commissioners had been made.

The statute cited authorized the defendant's levy, "unless prior thereto his [the decedent's] estate is [was] decreed insolvent." The question, therefore, is whether by the appointment of commissioners of insolvency upon the application of the administrator, "the estate is [was] decreed insolvent," within the meaning of those words in the statute.

The defendant argues that, in probate procedure, to decree an estate insolvent, is to determine that it is in fact insolvent, which fact cannot be determined until the report of the commissioners has been made, and the amount of the claims allowed compared with the amount of the assets returned in the inventory. Hence, it is argued, an estate cannot be decreed insolvent until the report of the commissioners is made, which had not been done in this case.

A perusal of the statutes governing the settlement of estates of decedents will disclose that one method is provided for settleing estates assumed to be solvent, and another and different method for settling estates assumed to be insolvent. According to the one method, each creditor, independently of and even to the exclusion of every other creditor, may pursue his remedy through the ordinary courts, to judgment and levy. According to the other method, every creditor must present his claim to the commissioners, or if he has previously begun an action, must present his judgment to the judge of probate to be entered on the list of debts entitled to a dividend (R. S. c. 66, § § 18 and 19). Which method shall be pursued in the settlement of any particular estate must necessarily be determined early in the proceedings. This determination cannot be delayed until it is finally ascertained whether the estate is in fact insolvent, because that fact cannot be certainly known till the estate is finally settled. Hence it is provided that when it appears to the administrator, that the estate may be eventually insolvent, he may so represent to the court and have commissioners

appointed to adjudicate upon claims (R. S. c. 66, § 3). This appointment of commissioners upon such representation, necessarily determines that the estate shall thereafter be settled as an insolvent estate. The estate is thereby "decreed insolvent." not as to the fact of its actual insolvency, but as to the method of its settlement. The estate must thereafter be settled as an insolvent estate, even though it be in fact abundantly solvent. *Parkman* v. *Osgood*, 3 Maine, 17; *Todd* v. *Darling*, 11 Maine, 34. It is in this sense, that the words "decreed insolvent," are used in the statute. In this statute sense, this estate was decreed insolvent before the levy, and the statute right to levy was thereby barred. The defendant therefore acquired no title by her levy.

Reference to the original statute (1869, c. 37) will make the correctness of our interpretation quite evident. It is there plainly provided in express terms, that the representation of insolvency, and the issuing a commission of insolvency before levy, shall vacate attachments and bar levies. The use of the shorter phrase "decreed insolvent" in the subsequent revision of the statutes, was evidently for conciseness and not for change of meaning.

The defendant urges, however, that the question of the validity of this levy is one solely between the levying creditor, and the other creditors of the estate; that it is not open to these plaintiffs claiming as heirs only. The title, however, descended directly to the plaintiffs, and remains in them until divested by authorized statute procedure. The defendant's procedure was not authorized by statute, and hence did not divest the plaintiffs' title. Their title as heirs must therefore be sustained.

Judgment for the plaintiffs. Damages assessed at one dollar.

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

BOSTON AND MAINE RAILROAD *vs.* JAMES W. SMALL.

York. Opinion May 31, 1893.

Officer. Warrant. Defective Service. Forfeiture of Protection. R. S., c. 27, § 40.

If an officer serving a search warrant under R. S., c. 27, § 40, (commonly called the search and seizure statute,) omits to seize the intoxicating liquors he finds upon the premises described in his warrant, he forfeits the protection of his warrant, and is liable for any injury done by him to person or property while undertaking to execute such warrant.

ON REPORT.

This was an action of trespass in which the plaintiff claimed damages of the defendant, a deputy sheriff, for breaking and entering one of its freight cars on November 7, 1891, at Biddeford, by destroying the lock and seal and a portion of the door; and having entered with a search warrant against certain intoxicating liquors, alleged to be in the car, bored a hole in a barrel of alchohol found therein, seized nothing, and returned upon the warrant that he found no liquors.

The facts appear in the opinion.

George C. Yeaton, for plaintiff.

Warrant insufficient: It contained no direction to search any car while in transit. Such warrant not within *Elsemore* v. *Longfellow*, 76 Maine, 128, and *Small* v. *Orne*, 79 Maine, 78. It is framed upon R. S., c. 27, § 40, when it should have been upon § 31, as finally amended by Stat. 1891, c. 132. *State* v. *Roach*, 74 Maine, 562.

Transit not ended: 2 Benj. Sales (Corbin's 4th Am. Ed.), § 1246, note 12; *Tufts* v. *Sylvester*, 79 Maine, 213; *Allen* v. *M. C. R. R. Id.* 327; *Thomas* v. *B. & P. R. R. Corp.* 10 Met. 472, 477; *Norway Plains Co.* v. *B. & M. R. R.* 1 Gray, 263, 270; *Sessions* v. *West R. R. Corp.* 16 Gray, 132, 134; *Rice* v. *B. & W. R. R. Corp.* 98 Mass. 212; *Barron* v. *Eldredge*, 100 Mass. 455; *Bickford* v. *Metrop. Steam Co.* 109 Mass. 151; *Stowe* v. *N. Y. & P. R. R. Co.* 113 Mass. 521; *Rice* v. *Hunt*, 118 Mass. 201; *Bassett* v. *Conn. River R. R.* 145 Mass. 129.

Deering Neg. § 60, and note; 2 Beach R. R. § § 915, 924, 937, and notes; *Benson* v. *Gray*, 154 Mass. 391, 394.

Interstate commerce: No "arrival" within act of Congress, August 8, 1890, c. 728. *In re Spickler*, 43 Fed. Rep. 653; *In re Van Vliet*, *Id.* 761; *In re Rahrer*, 140 U. S. 545. Transit continues until delivery. *O'Neil* v. *Vermont*, 144 U. S. 323, 352.

James O. Bradbury and *Samuel W. Luques*, for defendant.

Officers should have reasonable protection: *State* v. *McNally*, 34 Maine, 220; *Sandford* v. *Nichols*, 13 Mass. 286. Warrant protects: *Nowell* v. *Tripp*, 61 Maine, 428; *Savacool* v. *Boughton*, 5 Wend. 170; *Earl* v. *Camp*, 16 Wend. 562; *Gray* v. *Kimball*, 42 Maine, 307; *Warren* v. *Kelley*, 80 Maine, 512; *Carle* v. *Delesdernier*, 13 Maine, 365; *Chase* v. *Fish*, 16 Maine, 132. Liquors had arrived at Biddeford and subject to laws of this State: Act of Congress, August 8, 1890, c. 728; *State* v. *Intox. Liquors*, 50 Maine, 506, 513; 69 Maine, 524; *State* v. *Cobaugh*, 78 Maine, 403.

EMERY, J. The plaintiff corporation as a common carrier, had in its possession on one of its side tracks, in Biddeford, a box freight car laden with merchandise for various parties, and locked and sealed. While the car was in this situation and condition, the defendant, a deputy sheriff for York county, armed with a search warrant from the Biddeford municipal court under R. S., c. 27, § 40, broke the lock and door, and entered the car in the night time, soon after midnight. His warrant commanded him to "therein search for intoxicating liquors, and if there found to seize and safely keep the same with the vessels in which they are contained, until final action and decision be had thereon." He did find in the car one barrel of intoxicating liquor,—viz: a barrel of alcohol,—but did not seize it, being of the opinion that it was not intended for unlawful sale. He, however, made upon the warrant the erroneous return that he searched the car and found no intoxicating liquor. The plaintiff thereupon brought this action of trespass for the breaking into its car through the lock and door. The defendant has pleaded a justification under the warrant above described.

Assuming the complaint and warrant and the search under them to have been in other respects legal and regular, the question arises whether the intentional omission "to seize and safely keep," &c., the intoxicating liquors found in the car by the officer invalidates his authority under the warrant and leaves him a trespasser.

Though often obscured in earlier and ruder times, it is a distinctive feature of our common law system of jurisprudence that it so jealously guards the liberty and property of the citizen against the capricious, arbitrary or extra legal acts of government officers, and at the same time insists upon the full performance of their legal duty. English history abounds with instances of the assertion of this principle. Two conspicuous instances are the beheading of one king for over-stepping the law, and the expulsion, some fifty years later, of another king partly for refusing to execute certain laws. The principle is now imbedded in the fundamental law of our republics.

Imbued with this spirit, our law requires of every ministerial officer assuming to execute a statute or legal process against the person or property of the citizen, a strict observance of every provision of the statute and of every lawful command in the process. The law permits to such an officer no discretion in this respect. If he once begin, he must execute the process, the whole process, and nothing but the process. Many extracts from judicial opinions could be quoted stating this rule as strongly and comprehensively. One distinguished jurist has used judicially the following language: "A man who seizes the property or arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, he may not perhaps in the strictest sense be said to become a trespasser *ab initio*; but he is often called such, for his whole justification fails, and he stands as if he never had any authority to take the property, and therefore appears to have been a trespasser from the beginning." Gray,

J., in *Brock* v. *Stimson*, 108 Mass. 521. By substituting the word "injure" for the word "seize" in the above quotation the language of Justice Gray would be literally applicable to this case.

There would seem to be no difference in principle between civil and criminal processes in this respect, and hence illustrations may properly be taken from either class of cases. In *Blanchard* v. *Dow*, 32 Maine, 557, a tax collector regularly sold cattle of the plaintiff upon a tax warrant. He omitted afterward to render "an account in writing of the sale and charges" as required by the statute and his warrant. It was held that this omission deprived him of the protection of his warrant. In *Carter* v. *Allen*, 59 Maine, 296, a tax collector under the same circumstances did render the account in writing and tender the surplus; but the statement of account proved to be incorrect. It was held that this error vitiated the officer's immunity. In *Ross* v. *Philbrick*, 39 Maine, 29; *Brackett* v. *Vining*, 49 Maine, 356; and *Smith* v. *Gates*, 21 Pick. 55, it was held that an omission by an officer to execute a command in the precept at the precise time named therein, invalidated his authority and made him liable as a trespasser to those with whose property he had interfered under his precept. In the last named case, *Smith* v. *Gates*, there was a variation of only twenty minutes. In *Tubbs* v. *Tukey*, 3 Cush. 438, an officer arrested the plaintiff on a criminal process on Sunday, and committed him to jail. On the following Monday morning instead of taking the plaintiff before the police court, as required by law to do, the officer assumed to discharge the plaintiff from arrest. It was held that the omission to take the plaintiff before the court took away from the officer all justification for the arrest. In *Russell* v. *Hanscomb*, 15 Gray, 166, a fish warden as authorized by statute took a seine which was illegally set. He did not, however, as required by statute begin a legal proceeding for the forfeiture. In the words of Shaw, C. J., the court held that the warden's "failure to prosecute was a departure from his authority, and in legal effect deprived him of his justifica-

tion." In *Brock* v. *Stimson*, 108 Mass. 520, a police officer by authority of a statute arrested the plaintiff for being drunk and disorderly in a public place; but instead of taking him before the court for trial, as further required by statute, he released the plaintiff from arrest as soon as he recovered from his intoxication. It was held that this disobedience of the statute took away all protection under the statute. In *Phillips* v. *Fadden*, 125 Mass. 198, upon a similar state of facts the proposition was again asserted that, if an officer fails to do all that the law requires him to do, his whole justification fails. It has also been held and is a familiar principle, that the omission by the officer to obey the final and formal command to make return of the precept, under which he assumes to act, invalidates his authority under the precept, and renders him liable to an action for anything done under it. *Williams* v. *Babbitt*, 14 Gray, 141; *Williams* v. *Ives*, 25 Conn. 568; *Dehm* v. *Hinman*, 56 Conn. 320.

In the *Six Carpenters' case*, 8 Coke, 146, in which the doctrine of trespass *ab initio* seems to have been first formally expounded, it was said that the reason for holding a person acting under authority of law to be a trespasser *ab initio* by any subsequent abuse of such authority, was that his subsequent illegality showed that he began with an unlawful intent. This dictum has been often repeated in various forms. It seems, however, to be artificial and even fictitious. An officer may often, in fact, begin with the best and most lawful intent and yet forfeit his protection by subsequent misconduct. The more solid and sure foundation for such a rule would seem to be public policy. It is inconsistent with both private security and public order, that ministerial officers should assume to determine for themselves how far and in what manner, they will enforce a statute or execute a process. If the safety of the citizen requires that such officers shall do no act not authorized, the safety of the people equally requires that such officers shall omit no act that is commanded.

It was further resolved in the *Six Carpenters' case* that "not doing cannot make the party who has authority or license by law,

a trespasser *ab initio*, because not doing is no trespass." This dictum also has been often repeated, and has at times influenced judicial decisions. The reasoning may seem plausible, but in reality it is a bit of sterile, verbal syllogization. It has borne no good fruit.

It is difficult to see any difference in principle between misfeasance and non-feasance in a ministerial officer. In either case he is forsworn; has disobeyed the statute or process he has sworn to execute faithfully. It is the disobedience, not the act, that deprives him of his authority. The disobedience is the fatal poison which paralyzes the protecting arm of the law; and this disobedience can come as well from acts of omission, as commission.

The learned editor of the American Decisions in the notes to *Barrett* v. *White*, 3 N. H. 210, S. C. 14 Am. Dec. 365, criticizes this dictum of the *Six Carpenters' case*. He says the distinction seems to be merely artificial, and should not be allowed to protect a disobedient officer. He cites many cases in which (he says) the distinction has been practically disregarded. Reference is made to those notes and citations without further quotations from them here.

The courts of Maine and Massachusetts, while sometimes alluding to or quoting this dictum, have practically ignored it when dealing with cases like this one before us. Every case above cited from the decisions of those courts were cases of non-feasance, or omission. The tax collector simply omitted to do some particular thing either entirely or at the specified time. The police officers simply omitted to do some act required. The failure to make return of the process is a simple omission. The New Hampshire court seems to uphold the distinction drawn in the *Six Carpenters' case*, for in *Ordway* v. *Ferrin*, 3 N. H. 69, it held precisely the contrary of our decision in *Brackett* v. *Vining*, 49 Maine, 356. Our stricter rule is firmly established in our law, and we think upon grounds of public policy it is the better and more reasonable rule. While, of course, in a given case an officer may have a sufficient, lawful excuse for his omission, the general, plain, reasonable and

necessary proposition is, that a ministerial officer must faithfully obey every lawful command in the statute or process, or he will be left without its protection in any suit against him for any acts done by him under color of such statute or process. The case of *Hinks* v. *Hinks*, 46 Maine 423, in no way conflicts with this proposition, for there the defendent was not an officer, and was only exercising a private right.

Recurring now to the case before us, it is evident that the principal purpose of the statute R. S., c. 27, § 40, and of the process issued under it, was the seizure of whatever intoxicating liquors were found and the bringing them before the court for determination whether they were intended for unlawful sale. The authority to enter the car and there search was given for that express purpose. The defendant officer exercised the authority to search, but he wilfully and deliberately refused to seize the intoxicating liquors he found, and made a false return that he found none. He assumed to nullify the main command of the statute and of his process. He wilfully defeated the very purpose of the search he assumed to make. Such a flagrant disobedience should, and we think does, destroy the protection he might otherwise have justly enjoyed.

The good faith of the defendant, his strong belief that the intoxicating liquor he found was not intended for unlawful sale, is no excuse and does not mitigate the penalty. As said in *Guptill* v. *Richardson*, 62 Maine, 262, the fact, "that it [the liquor] was not liable to forfeiture would not excuse the officer for disobedience to his precept." The command to seize the liquors was plain. His duty was plain. He was given no discretion; no power to determine what intoxicating liquors he would, or would not seize. He should not have arrogated to himself any such power.

It is urged that it may at times work a great hardship upon an innocent owner, if an officer must in every case seize whatever intoxicating liquors he finds under a search warrant, however evident it is they are not intended for unlawful sale. The policy of the law is that every owner or keeper of intoxicating liquor shall be prepared to defend them, before the courts, and

not before the officer, against the accusation that they are intended for unlawful sale. The convenience of such owner or keeper must give way to the good of the people, and to their undoubted right to protect themselves in this way against the consequences of the traffic in such articles. At any rate the officer must obey the law and his lawful process.

It is urged that the omission to seize the liquors in this case caused this plaintiff no special injury, however much the public may have been harmed. The search however did the plaintiff an injury. The lock and door of its car were broken by the defendant. He might have made that breaking official and lawful by doing his whole official duty. He saw fit, however, to disregard his precept and abandon his duty. This abandonment of duty was also an abandonment of his authority, and left him amenable for all the damage done by him to the plaintiff corporation.

Defendant defaulted. Damages assessed at ten dollars.

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

PETERS, C. J., did not sit.

STATE *vs.* WILLIAM WHALEN, and another.

SAME *vs.* EDWARD LOTHROP.

Knox. Opinion June 1, 1893.

Intoxicating Liquors. Dwelling-House. Search and Seizure. Pleading. R. S., c. 27, § 43.

It is only by the express provisions of the statute (R. S., c. 27, § 43,) that a magistrate is authorized to issue a warrant to search a dwelling-house occupied as such, and in two contingencies:—

(1.) That some part of it is used as an inn or shop, or for purposes of traffic; or,

(2.) Unless he is satisfied by evidence presented to him and so alleged in the warrant that intoxicating liquor is kept in such house or its appurtenances, intended for sale in this State in violation of law.

It is not a sufficient compliance with the statute where the warrant contains the following language: "Satisfactory evidence being presented that intoxicating liquors are kept in said house and its appurtenances, and that said liquors are intended for sale in this State in violation of law."

In criminal proceedings there should be a direct and positive allegation of jurisdictional facts required by the statute, without resort to intendment or inference.

A general appearance, and pleading to the complaint, may be a waiver as to matters of form, but not to jurisdictional defects.

Jurisdictional defects apparent upon the face of the process render it absolutely void.

ON EXCEPTIONS.

These were search and seizure cases argued together in the law court, presenting the same question for decision, and relating to the validity of the warrants issued in the preliminary proceedings, by the police court for the city of Rockland, and, where the parties having been convicted, appealed to this court.

In the first case the defendants after verdict moved in arrest of judgment, and in the second case demurred to the complaint and warrants; both upon the ground of defective warrants as stated in the opinion.

The court overruled the motions and demurrer and the defendants took exceptions.

Washington R. Prescott, County Attorney, for State.

The use of the phrase "satisfactory evidence being presented," in the connection and under the circumstances in which they were used by the magistrate in the cases now before the court, is the equivalent of the expression of the statute "is satisfied by evidence presented to him."

There is no uncertainty in the expression used by the magistrate. When he says that he is satisfied by evidence he does not mean that some one else is satisfied by evidence. He means that the evidence was presented to him, that the matter was laid before him; and that its quality and quantity satisfied him.

And when a magistrate or a judge uses such an expression there is no other interpretation to be placed upon an expression of this kind used under these conditions.

The statute has been substantially complied with. The exact words of the statute have not been used, but the words of the magistrate are words of equivalent meaning. And equivalent expressions have repeatedly received judicial sanction. *State* v. *Robbins*, 66 Maine, 328; 1 Bish. Cr. Proc. § 612. If the allegation is defective in that the words "to said court" are

wanting, the court must come to this further conclusion in the matter,— that from the fact that the magistrate has complied with all the substantial requirements of the statute, having been satisfied by evidence presented to himself, and having so alleged in the warrant, and having failed if at all, in the more formal technical announcement that the evidence was presented to "himself," then the defect is a mere formal defect.

And having appeared generally in the police court and pleaded not guilty to the complaint in this case, the defendants waived the defect which they now attempt to raise. *State* v. *Regan*, 67 Maine, 380; *Com.* v. *Henry*, 7 Cush. 512; *Com.* v. *Gregory*, 7 Gray, 498.

W. H. Fogler, *C. M. Walker* with him, for Burns.

Mortland and Johnson, for Lothrop.

FOSTER, J. Search and seizure process. The warrant, by reference to the complaint, commanded the officer to search the saloon, dwelling-house, out-buildings, and the appurtenances thereof, occupied by the respondents.

Revised Statutes, c. 27, § 43, provides that "No warrant shall be issued to search a dwelling-house, occupied as such, unless it, or some part of it, is used as an inn or shop, or for purposes of traffic, or unless the magistrate before whom the complaint is made, is satisfied by evidence presented to him, and so alleges in said warrant, that intoxicating liquor is kept in such house or its appurtenances, intended for sale in the State, in violation of law."

It is only by the express provisions of this statute that a magistrate is authorized to issue his warrant to search a dwelling-house occupied as such, and in two contingencies: (1) That some part of it is used as an inn or shop, or for purposes of traffic; or (2) unless he is satisfied by evidence presented to him and so alleged in the warrant that intoxicating liquor is kept in such house or its appurtenances intended for sale in this State, in violation of law.

In this case neither the complaint nor warrant alleges that any part of the dwelling-house was used as an inn or shop, or for purposes of traffic.

The important inquiry then is, whether the remaining statute requirement has been complied with so as to authorize the magistrate to issue his warrant to search the dwelling-house.

We think it has not. The warrant does not contain the essential affirmative allegation that the magistrate was satisfied, or that any evidence was presented to him. The only language contained in the warrant from which such inference can be drawn is in these words—"satisfactory evidence being presented," etc. This is not sufficient to meet the explicit requirement of the statute that the magistrate shall allege that he is "satisfied by evidence presented to him."

This is a criminal proceeding. Nothing can be taken by intendment or inference. *State* v. *Paul*, 69 Maine, 215. The jurisdiction of the magistrate is not general, but given and limited by particular enactment. In such case nothing is to be presumed in favor of the jurisdiction of an inferior tribunal, but it must appear upon the face of the proceedings. *Libby* v. *Main*, 11 Maine, 344; *State* v. *Hartwell*, 35 Maine, 129; *State* v. *Staples*, 37 Maine, 228. The language of the statute is prohibitory. The right of procedure is granted conditionally. These statute requirements are absolutely essential to the validity of a warrant to search a dwelling-house, and these requirements must be affirmatively alleged in the warrant, otherwise it is void.

It has been repeatedly held by this court and in this class of cases, that a failure to follow the requirements of the statute renders the warrant not merely voidable, but absolutely void. *State* v. *Staples*, *supra*; *State* v. *Spencer*, 38 Maine, 30; *State* v. *Carter*, 39 Maine, 261; *Jones* v. *Fletcher*, 41 Maine, 254.

Nor was this objection waived by a general appearance before the magistrate and there pleading to the complaint. It is only to matters of form, and not to jurisdictional defects, that the rule applies. *State* v. *Regan*, 67 Maine, 380. Jurisdictional defects apparent upon the face of the process render it absolutely void. There being no sufficient allegation in the warrant that the magistrate was satisfied by evidence presented to him that intoxicating liquor was kept in the dwelling-house or its

appurtenances, intended for sale in the State in violation of law, no jurisdiction is disclosed upon the face of the process. The omission of the necessary statute requirements cannot be said to be defects in form. They are the essentials of jurisdiction.

Exceptions sustained.

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

ROBERT D. METCALF, in equity,

vs.

JOSEPH L. METCALF, and another.

Knox. Opinion June 1, 1893.

Equity. Cancellation. Deed. Evidence.

Upon appeal in equity the verdict of a jury upon an issue of fact submitted to them will be sustained unless there is some weighty or material reason why the verdict does not satisfy the court.

But the findings of a jury in such case must be such as, upon all the evidence, shall satisfy the conscience of the court to found a decree upon or they will be set aside.

The verdict is merely advisory, and the court will disregard it whenever in the judgment of the court it is unsatisfactory.

Where fraud and deceit are alleged as the ground for setting aside a deed between the parties, it is incumbent upon the plaintiff to establish the charge by legitimate evidence. This rule prevails in equity as well as at law.

Whether the deed was obtained by fraud or deceit is to be determined by the facts existing prior to and at the time when the deed was executed and delivered.

Subsequent facts, while admissible in evidence, are alone insufficient to establish a prior fraud.

If a party can read, it is not open to him, after executing the deed to insist, that the terms of it were different from what he supposed them to be when he signed it.

ON APPEAL.

Hearing in equity on a bill praying for cancellation of a deed, and reported to this court with answers and testimony; a decree in favor of the plaintiff having been rendered by the single justice who heard the cause, with the aid of a jury, in the court below.

The bill, after reciting the ownership and possession on the 12th of August, 1889, of a certain lot of land, with the buildings thereon by the plaintiff and of the value of one thousand dollars,

alleges against the defendant: "That on the said 12th day of August, said Joseph L. Metcalf, the son of the plaintiff, caused a deed to be drawn, wherein the plaintiff purported to be the grantor and the said Joseph L. Metcalf was grantee; purporting to convey to said Joseph L. Metcalf the real estate above described, with the following reservation: 'Reserving to myself the sole use and occupancy of the above described premises during my life-time, also reserving to my wife, Lucy A. Metcalf, the use of the premises jointly with myself during her life-time.'

"That the said Joseph L. Metcalf caused the name of the plaintiff to be affixed to said deed by the scrivener without the knowledge of the plaintiff that the same was a deed and without his consent; and caused a certificate stating that said deed had been acknowledged by the plaintiff to be his free act and deed, to be affixed thereto by a justice of the peace, without the knowledge or consent of the plaintiff; and said deed so fraudulently executed and acknowledged, the said Joseph L. Metcalf thereafterwards caused to be recorded in the registry of deeds of said county of Knox, in volume 80, page 401, of said registry.

"(Third.) That upon the 18th day of December, 1889, the said Joseph L. Metcalf executed a mortgage of said real estate to said Dora F. Metcalf, his wife, conditioned to pay to said Dora F. Metcalf the sum of one thousand dollars in five years, and caused the same to be recorded in volume 76, page 527, of the records in the Knox county registry of deeds; and plaintiff avers that said Dora F. Metcalf then and there well knew that the deed aforesaid to Joseph L. Metcalf had been procured by said Joseph L. Metcalf in the manner hereinbefore set forth and was void; and plaintiff further says that said mortgage was wholly without consideration and executed for the purpose of creating a cloud upon the title of the plaintiff and void.

"(Fourth.) That said deed and mortgage so fraudulently executed, acknowledged and recorded are in fact void, although upon their face they appear to be valid conveyances and constitute a cloud upon the title of the plaintiff.

"Wherefore the plaintiff prays that said fraudulent deed and

mortgage may be cancelled and decreed to be void, and that the defendants may be ordered and decreed to surrender the same; that said Dora F. Metcalf may be ordered to discharge said mortgage and said Joseph L. Metcalf may be ordered and decreed to execute a quitclaim deed of said premises; and that he may have such other and further relief as the nature of the case may require."

"Answer of Joseph L. Metcalf, one of said defendants, who answers and says:

"(First.) That he admits that on the 12th day of August, A. D., 1889, the complainant was the owner in fee simple of the real estate described in the bill.

"(Second.) He says that on said 12th day of August, A. D., 1889, the complainant conveyed to him by his deed of that date said real estate, with the reservation set forth in the bill, and that he caused said deed to be recorded in Knox registry, volume 80, page 401.

"(Third.) He denies that he caused the name of the complainant to be affixed to said deed without the knowledge of the complainant that the same was a deed and without his consent; he denies that he caused a certificate stating that said deed had been acknowledged by the complainant to be his free act and deed, to be affixed thereto by a justice of the peace, without the knowledge or consent of the complainant; and avers that said deed was signed, sealed, executed and acknowledged, and delivered to him by the complainant for a good and sufficient consideration, and with full knowledge that it was a conveyance to this defendant of the property therein described.

"(Fourth.) He admits that on the 18th day of December, A. D., 1889, he executed a mortgage of said real estate to his wife, said Dora F. Metcalf, with the condition set forth in said bill; he says that said Dora caused said mortgage to be recorded as stated in the bill; he denies that his said wife knew or had any reason to believe that said deed from the complainant to him was obtained as set forth in the bill, and avers that she knew that said deed had been executed and delivered by the complainant with full knowledge of its contents and effect and

for a good and sufficient consideration; he denies that said mortgage was executed for the purpose of creating a cloud upon the complainant's title; and avers that the same was given for a good and sufficient consideration.

"(Fifth.) He denies that said deed and mortgage were fraudulently executed, acknowledged and recorded; he denies that said deed and mortgage, or either of them, are void; and alleges that said deed is, in fact, as it purports to be, a valid conveyance by the complainant to him, of the premises therein described; and that said mortgage is, in fact, as it purports to be, a valid conveyance, in mortgage, of said premises from himself to his wife, said Dora F. Metcalf."

"Answer of Dora F. Metcalf, one of the defendants, who answers and says:

"(First.) She admits that on the 12th day of August, A. D., 1889, the complainant was owner in fee of the premises described in the bill.

"(Second.) She says that on said 12th day of August, A. D., 1889, the complainant conveyed said real estate, with the reservations set forth in the bill, to said Joseph L. Metcalf by his deed of that date, recorded in Knox registry, volume 80, page 401.

"(Third.) She denies that said Joseph L. Metcalf caused the name of the complainant to be affixed to said deed without the knowledge of the complainant that the same was a deed and without his consent; she denies that said Joseph L. Metcalf caused a certificate stating that said deed had been acknowledged by the complainant to be his free act and deed to be affixed thereto without the knowledge or consent of the complainant; she says that she is informed and believes and therefore alleges that said deed was signed, sealed, executed and acknowledged, and delivered to said Joseph L. Metcalf for a good and sufficient consideration, and with a full knowledge that it was a conveyance to said Joseph L. Metcalf of the property therein described.

"(Fourth.) She admits that on the eighteenth day of December, A. D., 1889, said Joseph L. Metcalf executed and delivered to her a mortgage of said premises with the condi-

tion set forth in the bill, and that she caused said mortgage to be recorded in Knox registry, volume 78, page 527; she denies that said mortgage was fraudulent or void and says that the same was given her by said Joseph L. Metcalf for a good and sufficient consideration.

"(Fifth.) She says that she does not desire to have any controversy or litigation with the complainant, and that on the twenty-third day of May, 1891, she discharged said mortgage by a written discharge under her hand and seal, which she has caused to be recorded in the registry of deeds for Knox county, and she claims no right, title or interest in said premises by virtue thereof."

An issue was framed for the jury upon the question whether the defendant obtained the deed from the plaintiff in the manner charged in the bill. They returned a verdict for the plaintiff.

A decree was made for the plaintiff in accordance with the verdict, and the defendant appealed to this court.

The plaintiff discontinued as to defendant's wife, she having disclaimed, in her answer, any interest in the property.

The case is stated in the opinion.

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

W. H. Fogler, for defendant.

FOSTER, J. This case is before the court on appeal from a decree in favor of the plaintiff, based upon the verdict of a jury.

The issue of fact framed and submitted to them was, whether the deed mentioned in the plaintiff's bill was obtained by the defendant by fraud and deceit.

A full report of the evidence at the original hearing is before us. Upon appeal to the full court in such case, the decision of the court below will not be reversed as to matters of fact, unless it clearly appears to be erroneous. *Young* v. *Witham*, 75 Maine, 536. The burden rests upon the appellant.

But while it is an established principle applicable to courts of equity that the verdict of a jury upon an issue of fact will be sustained unless there appears some material or weighty reason why the verdict does not satisfy the court, it is equally well

settled, and a rule that prevails generally, that the findings of a jury must be such as shall satisfy the conscience of the court to found a decree upon, or they will be set aside. *Larrabee* v. *Grant*, 70 Maine, 79. The verdict is advisory only, and the court will disregard it whenever in the judgment of the court it is unsatisfactory.

Applying these principles to the case before us, we feel that the decision of the jury upon the issue of fact submitted to them was so manifestly wrong that a decree in favor of the plaintiff cannot properly be based upon it.

Since the verdict both the complainant and his wife have died. The defendant is their only living child. There were other children, but they had died leaving heirs, grand-children of the plaintiff. At the time of the trial the son's age was fifty, and that of the father about seventy-eight years. Eighteen years before, the father had had a paralytic shock, and from that time had been unable to perform any labor except to saw a little wood. His hearing was somewhat impaired. Prior to 1889, he lived in a house on Sea street in Rockland, and this constituted his sole property. In that year he exchanged this house for a lot in another part of the city opposite the residence of his son. Upon this lot were the two houses, into the largest of which he moved, and rented the smaller for $4.50 per month. He had an annuity of $50 a year, and this, together with the rent of the small house, constituted his sole means of support.

It is not practicable, within the reasonable limits of an opinion which is of general importance only in regard to questions of law, to enter into the details of testimony. Among other facts which we consider as satisfactorily proved, are the following. That from the time the father was disabled by the paralytic shock up to the time this deed in controversy was given, a period of about eighteen years, and to some extent after that, the defendant had assisted in the support of his father and mother; that before the execution of this deed, which bears date August 12, 1889, there had been an understanding between the father, mother and son that when the old folks were done with the property the son was to have it; that there had been talk between

the mother and son, in the presence of his father, about having "some kind of writing made to hold the property so the grand-children could not get it;" that the son had insisted upon having "writings" that would insure the property to him when his father and mother were done with it, and this had been made known at different times to the father, this plaintiff, before the execution of the deed in question, the claim being that the son was furnishing support to his parents and unless "writings" were made he would stand no better than the grand-children in reference to the property; that shortly before the deed was made there had been talk between the parties in reference to the matter; that upon the strength of what had passed between the parties, the defendant employed Mr. Sherman, register of deeds for that county, to make the deed, which is the subject of this controversy; that he went to the house of the plaintiff, and there the deed was signed by the plaintiff and his wife, the latter signing by her own hand, but the plaintiff being unable to write by reason of paralysis, made his mark. Mr. Sherman's statement of what took place at the time the deed was executed is this: "I went there and told Mr. Metcalf and the old lady I had come there for them to sign a deed to Joseph, and asked them if they wanted to sign a deed to Joseph. The old gentlemen nodded his head. I don't think he made much reply, but he nodded his head and assented to it." The witness was unable to state whether he read the deed to them or not. The plaintiff, on the other hand, denies that he ever signed any deed, or made his mark, or touched a pen or acknowledged any paper. He states that he was able to read writing without glasses, that he did not use them at all, could see much better without them than with them, and could see to read distinctly. The deed was one of warranty, and contained the following reservation: "Reserving to myself the sole use and occupancy of the above described premises during my life-time, also reserving to my wife, Lucy A. Metcalf, the use of the premises jointly with myself during her life-time."

We feel satisfied, notwithstanding there may be some conflicting testimony, that the deed was signed and executed by the parties. It was delivered and recorded. From the whole

testimony it appears that it was the expressed intention of the grantor, from time to time, prior to the signing of the deed that the son was to have the property when he and his wife were done with it. With the reservation as contained in the deed, it amounted to no more than that. The plaintiff and his wife retained the entire use and absolute control of the property during their lives. Whether the deed was obtained by fraud or deceit, must be determined by the facts as they occurred prior to and at the time when the deed was executed and delivered. Subsequent facts may exhibit reflected light from those previously existing, but of themselves alone they are insufficient to establish a prior fraud. They may aid in establishing, but cannot constitute, a prior fraud.

The testimony in this case is absolutely insufficient to prove fraud or deceit on the part of this defendant in obtaining the deed in controversy. The testimony of both parents shows that he had assisted them for many years. No reason is shown for any attempt to practice deceit or fraud upon them, and no such fraud or deceit is disclosed from the evidence as would be necessary to render the deed invalid.

Great stress is placed upon the fact that the deed was not read to or by the plaintiff and his wife at the time it was signed by them. If the plaintiff signed the deed, and we have no doubt of it from the evidence before us, then the fact that he was ignorant of its contents cannot avail him. If he neglected to read it, or to ascertain its contents, it was rather his own negligence than the fraud of the defendant. No deception was practiced upon him; he was under no restraint or coercion; he was neither ignorant nor illiterate, although physically disabled; his eyesight was good, and he was able to read writing readily, as his own testimony shows, even without the aid of glasses; and no reason is suggested why he might not have read the deed and fully understood it, had he so desired; he did not request it to be read, nor was he misled by having the contents of it falsely stated to him. There is no principle of law or equity upon which he can avoid this deed upon the facts presented in this case. "If the party can read, it is not open to him, after

executing it, to insist that the terms of the deed were different from what he supposed them to be when he signed it. Nor could one who is unable to read, be admitted to object that he was misled in signing a deed, unless he had requested to hear it read, and this had not been done, or a false reading had been made to him, or its contents falsely stated." 2 Wash. Real. Prop.* 576. *Thompson* v. *Ela*, 58 N. H. 490, 492. Were it not for the fact that the intervention of the court is strenuously invoked on the ground that the plaintiff had no knowledge of the purpose and effect of such deed, and therefore that the deed should be decreed to be void, we should not consider it necessary to refer to any further authorities in support of the doctrine already laid down. But the principle seems to be well established by the decisions of different courts. *Withington* v. *Warren*, 10 Met. 431, 434; *Hallenbeck* v. *Dewitt*, 2 Johns. 404; *Souverbye* v. *Arden*, 1 Johns. Ch. 252; *Rossetter* v. *Simmons*, 6 Serg. and R. 452; *Taylor* v. *King*, 6 Munf. (Va.) 358 (8 Am. Dec. 746); Devlin Deeds, § 225. 1 Story Eq. § 146. 2 Pom. Eq. § 892. A title by deed would be of little value if it could be avoided for that reason. *Grant* v. *Grant*, 56 Maine, 573. Nor is it sufficient proof of fraud in obtaining it, as the foregoing authorities decide. Fraud is not to be presumed. It must be established by proof. This rule obtains as well in equity as in law. *Abbott* v. *Treat*, 78 Maine, 121. The charge in the bill is fraud and deceit in obtaining the deed. It was incumbent on the plaintiff to sustain the charge by legitimate evidence. The evidence does not support the verdict, and we feel that it should not be regarded as the basis of a decree in favor of the plaintiff nullifying the deed.

Verdict set aside. Decree reversed. Bill dismissed with costs.

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

JOHN H. BRADFORD *vs.* NOAH M. PRESCOTT.

Aroostook. Opinion June 1, 1893.

Promissory Notes. Indorsement. Evidence. Release.

As between original parties to a note, and those occupying their position, the nature of the contract, as well as the consideration upon which it is founded, is open to inquiry.

Thus, the relative time at which the indorsements were made, and the agreement or understanding as to the nature of such indorsements, are proper subjects of inquiry between such parties in determining their relative liability to each other.

But as against an innocent indorsee for value, in the regular course of business, a different rule applies, and prohibits a defendant from asserting any extrinsic matter to vary the apparent liability exhibited by the note itself.

And when one, not a party to a note, either as payee or indorsee, has put his name upon it at its inception, he thereby becomes an original promisor; and if there is no date as to such indorsement, the presumption is that it was made at the time when the note had its inception.

Nor does the use of the words "waiving demand and notice" in the least weaken the effect of this presumption.

A release may be given to one of several debtors, and if the holders' rights are reserved against the others, the debt can still be collected of them.

Nothing but a technical release under seal can operate as a discharge of two joint and several debtors, where a part only of the debt is paid by one.

ON REPORT.

This was an action against the defendant as a joint and several promisor upon a note in the following form:

"$302.00. Caribou, Nov. 22d, 1889.

Four months after date I promise to pay to the order of F. M. York Three Hundred and Two Dollars. Payable at any bank in Maine. Value received. D. M. Moody.

Waiving demand and notice, N. M. Prescott.

Waiving demand and notice, F. M. York."

The plaintiff discounted the note before its maturity, for value, in the form as it appears above, and obtained the note from the payee without notice for whose benefit it was originally given, other than what is shown by the note itself. The defendant contended that his liability was that of a guarantor only; and relied for further defense upon a release given by the plaintiff to said Moody, not under seal, of the following form:

"I, John H. Bradford of Houlton, Aroostook county, Me., in consideration of the payment to me of $130, hereby surrender to said Moody, . . . and release to said Moody, his heirs, executors, administrators and assigns for myself, my executors, administrators and assigns all claim, suits, or causes of action I have against said Moody by reason of the signature of said Moody on a promissory note dated Nov. 22, '89, on 4 mo. for $302, payable to order of F. M. York. John H. Bradford."

At the same time, when this release was given, Moody requested that the note now in suit might be given up with the other notes that were then surrendered. He was informed, however, that it was not to be surrendered; that Prescott was good, and the note was to be collected of him, he not being affected by this agreement.

Madigan and Madigan, and *L. C. Stearns*, for plaintiff.

Wilson and Lumbert, and *Powers and Powers*, for defendant.

Defendant's contract was collateral to that of Moody, and was in its nature a guaranty of Moody's promise. *Stone* v. *White*, 8 Gray, 593; *Colburn* v. *Averill*, 30 Maine, 310; *Bray* v. *Marsh*, 75 Maine, 455. Words, "waiving demand and notice," not meaningless, but notice that defendant signed as a guarantor, and so entitled to notice. *Bray* v. *Marsh*, *supra*; Sto. Pr. Notes, 7th Ed. § 460, Words not redundant. *Heywood* v. *Heywood*, 42 Maine, 229.

Prescott signing as he did has been held as an indorser. *Stoddard* v. *Penniman*, 108 Mass. 369; *Pierce* v. *Mann*, 17 Pick. 244. Being a guarantor only, he was discharged by the release to Moody. Sto. Pr. Notes, 7th Ed. § 485; Edw. Bills, 3d Ed. § 311.

FOSTER, J. The plaintiff, in the regular course of business, purchased of the payee the note in suit before it became due. Upon its face it bore the signature of the maker, and across the back, below the words "waiving demand and notice," was the defendant's name. When the note was transferred to the plaintiff the payee indorsed the same, waiving demand and notice, below the name of the defendant.

The payee, after the execution and delivery of the note to him by the maker, procured the signature of the defendant without consideration, and for the purpose of getting the note discounted. The defendant, therefore, was not a party to the note when it was made, and did not partake in the consideration given. He affixed his name to the note while it was in the hands of the payee. Had the plaintiff been cognizant of these facts at the time he purchased the note he certainly would not be entitled to recover of this defendant, either as an original promisor or guarantor. *Sawyer* v. *Fernald*, 59 Maine, 500.

But the case finds that the plaintiff was an innocent purchaser —that of these facts the plaintiff had no information, except such as he would obtain from an inspection of the note itself.

As between the original and immediate parties to the contract, or those occupying their position and having no superior rights, the nature of the contract, as well as the consideration upon which it is founded, is always the subject of inquiry until once judicially determined. *Sturtevant* v. *Randall*, 53 Maine, 149; *Smith* v. *Morrill*, 54 Maine, 48.

As between such parties, the relative time at which the indorsements were made, as also the understanding or agreement as to the nature of such indorsements, is frequently the subject of inquiry in suits between such parties in reference to their relative liability to each other. As to them the instrument itself is only *prima facie* evidence of the contract implied by law. *Patten* v. *Pearson*, 57 Maine 428.

But as against an innocent indorsee for value, in the regular course of business, a different rule applies, and prohibits a defendant from asserting any extrinsic matter to vary the apparent liability exhibited by the note itself. "By permitting their paper to go into circulation," say the court in *Smith* v. *Morrill*, *supra*, "with no evidence upon it of any other contract than that implied by law, parties in effect represent to *bona fide* holders, and as against them, will be estopped to deny that the implied contract is the true one."

The courts, following the usage and customs prevalent in mercantile circles, invariably hold that the innocent holder for value without notice is to be protected in construing the agree-

ment he has obtained title to, as a reasonable man would construe it. It would be impossible to ascertain the understanding which the parties had privately as to who should or should not be holden. Having failed to make this meaning plain in the written contract, they should be forever estopped, as to such purchaser, from setting up any defense not to be inferred from such contract.

Accordingly, it is held in Maine and Massachusetts, that the obligation which the signer of commercial paper assumes to the taker is to be determined by an inspection of the note as it was when negotiated. *Stevens* v. *Parsons*, 80 Maine, 353; *Bigelow* v. *Colton*, 13 Gray, 309; *Spaulding* v. *Putnam*, 128 Mass. 363, 365.

It is the settled doctrine of these states, that one not appearing to be a party, either as payee or indorsee, to a note payable to a payee therein named or his order, who puts his name on the back of it in blank at its inception and before negotiated, is a joint and several promisor. The legal presumption in such case is that it was done for the same consideration with the contract on the face of the note. And when there is no date as to such indorsement, the presumption is that it was made at the time when the note had its inception. *Colburn* v. *Averill*, 30 Maine 310; *Lowell* v. *Gage*, 38 Maine, 35; *Childs* v. *Wyman*, 44 Maine, 433; *Bank* v. *Lougee*, 108 Mass. 371, 373. This presumption will prevail in favor of an innocent indorsee for value before due, and in the regular course of business; and his rights cannot be infringed by proof of any extrinsic facts which might affect the original parties to the contract or those occupying their position and having their rights only. *Sturtevant* v. *Randall*, 53 Maine, 149, 157; *Smith* v. *Morrill*, 54 Maine, 48, 53; *Malbon* v. *Southard*, 36 Maine, 147.

The plaintiff, having had the note in suit presented to him by the payee, before due, and being ignorant of any facts except such as he might obtain from an inspection of the note itself, found the defendant's name upon it. He had a right to presume it was placed there at the inception of the note and before its delivery to the payee, (*Moore* v. *McKenney*, 83 Maine, 80, 85, and cases cited) and, as to the plaintiff, the defendant must be

considered a joint and several promisor. By signing the note as he did, without date, before transfer or indorsement by the payee by whom it was negotiated to the plaintiff, the defendant left the innocent purchaser to presume that he signed in the usual manner and not after the note's inception.

Nor does the use of the words "waiving demand and notice" in the least weaken or affect this presumption. They are words applicable to an indorser and not to an original promisor, or one primarily liable by presumption of law or in fact, and are therefore mere surplusage. *Malbon* v. *Southard*, 36 Maine, 147; *Lowell* v. *Gage*, 38 Maine, 35; *Childs* v. *Wyman*, 44 Maine, 433; *Pearson* v. *Stoddard*, 9 Gray, 199, 201.

Since the defendant is a joint and several promisor, the writing given by the plaintiff to Moody, the maker of the note, releasing to him, "his heirs, executors, administrators and assigns, all claim, suits or causes of action" which he had against said Moody by reason of his signature on this note, constitutes no defense to this suit. It was not under seal. The defendant was in no way a party to the agreement relied on, nor were any of the rights he might have against the parties to the note impaired or affected. There was no settlement or surrender of the note. On the contrary, it was expressly understood at the time the agreement was made that the debt was not settled. Nothing contained in the agreement cuts the life of the note in the least. It amounts to a promise not to demand money of Moody. It in no way cuts off any rights which the defendant might have against him. The whole tenor of the instrument is to the effect of releasing no rights which the plaintiff had against this defendant. If such reservation be not in express terms, it certainly exists by implication. Undoubtedly a release of one joint debtor, or one joint and several debtor, may be such as to release all. But a release may be given to one of several debtors, and if the rights are reserved against the others, the debt can still be collected of them. This principle is established by numerous authorities, and requires no further discussion. *Bank* v. *Marshall*, 73 Maine, 79; *Benton* v. *Mullen*, 61 N. H. 125, and cases cited; *McAllester* v. *Sprague*, 34 Maine, 296, 297,

298; *Sohier* v. *Loring*, 6 Cush. 537; *Potter* v. *Green*, 6 Allen, 442; *Dickinson* v. *Bank*, 130 Mass. 132.

Nothing short of a technical release under seal, however, can operate as a discharge of two joint and several debtors, where a part only of the debt is paid by one. This matter has been settled too long and ratified too often to admit of any question in this State. It was first declared in *Walker* v. *McCulloch*, 4 Maine, 421, and re-affirmed in *McAllester* v. *Sprague*, 34 Maine, 296; *Drinkwater* v. *Jordan*, 46 Maine, 432, and in *Bank* v. *Marshall*, 73 Maine, 79.

Formerly a more strict and techincal rule prevailed; but the weight of authority now is more liberal, and though technical words of release are used, the intention of the parties is sought in construing the instrument as a whole, the circumstances of the case and the relations of the parties being taken into consideration; and if it is found that it was not intended as a release of the whole debt, it will be construed as only an agreement not to charge the party to whom the release is given, and will not be permitted to have the effect of a technical release. In such case it has no greater effect than an agreement or covenant to discharge, or not to sue, which is never regarded as a release, and when given to one of several joint debtors is never construed as a release to the others. *Lacy* v. *Kynaston*, 2 Salk. 575; *Dean* v. *Newhall*, 8 T. R. 168; *Bank* v. *Messenger*, 9 Cowan, 37; *Walker* v. *McCulloch*, 4 Maine, 421; *McAllester* v. *Sprague*, 34 Maine, 296; *Durell* v. *Wendell*, 8 N. H. 369, 372; *Benton* v. *Mullen*, 61 N. H. 125; *Shaw* v. *Pratt*, 22 Pick. 305; *Pond* v. *Williams*, 1 Gray, 630; *Burke* v. *Noble*, 48 Penn. St. 168; *Bonney* v. *Bonney*, 29 Iowa, 448; *Parmelee* v. *Lawrence*, 44 Ill. 405, 410-413. 1 Pars. Con.* 28.

And the remedy of the party to whom such an agreement is given, if afterwards molested on account of the debt, is by a special action founded upon such agreement; it cannot be pleaded in bar of an action against all, or set up in defense. *Drinkwater* v. *Jordan*, 46 Maine, 432; *Walker* v. *McCulloch*, 4 Maine, 421; *McAllester* v. *Sprague*, 34 Maine, 296; *Berry* v. *Gillis*, 17 N. H. 13; *Benton* v. *Mullen*, 61 N. H. 125, 128.

It would be otherwise in the case of a technical release under seal given to one of several joint debtors.

But the instrument introduced in defense is not of that nature, and constitutes no defense to this action.

Judgment for plaintiff.

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

HALLOWELL NATIONAL BANK

vs.

DANIEL E. MARSTON, and others.

Kennebec. Opinion June 5, 1893.

Promissory Notes. Indorser. Protest. Estoppel. Waiver. R. S., c. 32, § 10.

A statutory provision, that the waiver of demand and notice by an indorser of a promissory note to be valid must be in writing, may be waived by the indorser under such facts and circumstances as will estop him from denying that the note was not duly protested for non-payment.

The principle of equitable estoppel has been incorporated into the law, and is constantly administered in courts of law in the same manner as those of equity, for the purpose not of compelling parties to do right in their dealings but of preventing them from doing wrong.

An indorser of a note residing in this State, where it had been discounted, requested the plaintiff, the holder, who had transmitted it through the usual bank channels for collection or protest in Brooklyn, N. Y., where it was payable, to recall it to save expense of protest,—the indorser having learned that the maker had failed and that his prior indorser, a citizen of Brooklyn, had agreed to meet the note with cash and a new note. The holder assented on condition that the new note should bear the names of all the local indorsers. Three days before maturity the indorser withdrew his request, upon being asked by his prior indorser to have the note forwarded for protest. The holder under the direction of the indorser undertook by telegraph to order the note forward not knowing where it was; but on the day of maturity it came back to the holder's residence and too late for protest.

As the indorser's conduct was designed to have the holder recall the note before maturity and hence without protest, and the holder was thereby induced to recall it, whereby under the circumstances it was put beyond the power of the holder by the most feasible and expeditious mode possible to have the note protested, after the indorser had withdrawn his request, *Held;* That the indorser is equitably estopped to assert any right under R. S., c. 32, § 10, requiring waiver of demand and notice to be in writing.

ON REPORT.

This was an action against three defendants, Fuller, Marston

and McClench, residents of Hallowell, as indorsers of a promissory note payable at Brooklyn, New York, and discounted by the plaintiff bank at Hallowell, in this State.

The note was not presented for payment at the place of payment, Mechanics' Bank, Brooklyn, or notice of its non-payment given to the defendants as indorsers. The plaintiff sought, however, notwithstanding the want of protest and the statute of this State requiring a waiver of demand and notice to be in writing duly signed, etc., to hold the defendant, Fuller, upon the ground of an equitable estoppel arising from his acts which are stated in the opinion.

The declaration alleges due demand and notice in the usual form.

The case is stated in the opinion.

Baker, *Baker and Cornish*, for plaintiff.

Before the statute: *Gove* v. *Vining*, 7 Met. 212, 214; *Leffingwell* v. *White*, 1 Johns. Cas. 99, S. C. 1 Am. Dec. 97, note; *Marshall* v. *Mitchell*, 35 Maine, 224; 2 Dan. Neg. Ins. § § 1102-5; *Kent* v. *Warner*, 12 Allen, 563; *Thomas* v. *Mayo*, 56 Maine, 41 and cases; *Mead* v. *Small*, 2 Maine, 207; *Patterson* v. *Vose*, 43, Maine, 560.

Equitable estoppel where promises have been acted upon: *Fleming* v. *Gilbert*, 3 Johns. 528; Browne Stat. Frauds, § 436; (Waiver) *Hickman* v. *Haynes*, 10 L. R. C. P. 600; Herm. Estop. § 825; *Randon* v. *Tobey*, 11 Howe 493; *Gardiner* v. *Gerrish*, 23 Maine, 47; *Webber* v. *Williams College*, 23 Pick. 302. Other exceptions to Stat. Frauds: *Montacute* v. *Maxwell*, Finch Prec. Ch. 528; Browne Stat. Frauds, § § 443, 444; *Glass* v. *Hulbert*, 102 Mass. 38, 39, 40; *Cookes* v. *Mascall*, 2 Vern. 200; Sto. Eq. § 761; *Green* v. *Jones*, 76 Maine, 563; *Mestaer* v. *Gillespie*, 11 Ves. 638; 2 Pom. Eq. § 867, note; *Gilpatrick* v. *Glidden*, 81 Maine, 150.

Contract made in New York, to be there performed, governed by laws of that state. Bigelow Cont. § 1375; *Denny* v. *Williams*, 5 Allen, 1; *Scudder* v. *Bank*, 91 U. S. 406. Defendant's acts equivalent to protest of note in New York. *Spencer* v. *Harvey*, 17 Wend. 490; *Leffingwell* v. *White*, 1 Johns. Cas.

99; *Crain* v. *Colwell*, 8 Johns. 384; *Agan* v. *McManus*, 11 Johns. 180; *Savage* v. *Bevier*, 12 How. Pr. 166.

Heath and Tuell, for defendants.

Note not protested through fault of bank. Defendants not liable because of want of protest or a written waiver. R. S., c. 32, § 10; *Hall* v. *Flanders*, 83 Maine, 242.

Plaintiff, by his pleadings, must prove demand and notice. Until then defendant need not move. No waiver, that Fuller made efforts to procure payment of the note. *Hussey* v. *Freeman*, 10 Mass. 84. Insolvency of maker does not excuse demand and notice. *Granite Bank* v. *Ayers*, 16 Pick. 394, and cases. Reliance on local indorsers no excuse for non-protest. *Davis* v. *Gowen*, 19 Maine, 447. At common law defendants' acts must amount to a waiver. *Boyd* v. *Bank*, 32 Ohio St. 526, S. C. 30 Am. Rep. 624; *Seldner* v. *Bank*, 66 Md. 488, S. C. 59 Am. Rep. 190; *Gove* v. *Vining*, 7 Met. 212. Proof must show Fuller intended to relinquish his rights. *Kent* v. *Warner*, 12 Allen, 563; *Pratt* v. *Chase*, 122 Mass. 265. Elements of estoppel wanting. Big. Estop. p. 437. Fuller made no statement of fact not known to Bank. He made no promise. A promise can never raise an estoppel. *White* v. *Ashton*, 51 N. Y. 280. That the letter had reference only to future contingencies is fatal to an estoppel. *Langdon* v. *Doud*, 10 Allen, 433. So of a promise acted on by promisee and not performed by promisor. *Brightman* v. *Hicks*, 108 Mass. 246. No fraud, necessary to create estoppel by conduct. Big. Estop. § 467. No one deceived. Plaintiff must legally make out a *prima facia* case before an estoppel against Fuller can operate; that it fails to do before defendant is called on to say anything. Plaintiff might easily have had note protested had it been vigilant. Bank had full knowledge of all facts known to Fuller, and acted on their own judgment as to their safety in trusting to Howell's letter and promises. Bank officers knew the law and should not have ignored the statute.

Contract of indorsement to be performed in Maine. *Hunt* v. *Standart*, 15 Ind. 33, S. C. 77 Am. Dec. 84; 27 Am. Dec. 137, and note, S. C. *Aymar* v. *Sheldon*, 12 Wend. 439; *Cullum*

v. *Casey*, 9 Porter, 131, S. C. 33 Am. Dec. 304; *Allen* v. *Bank*, 22 Wend. 215, S. C. 34 Am. Dec. 289, note p. 317; *Carter* v. *Bank*, 7 Humph. 548, S. C. 46 Am. Dec. 89; *Rose* v. *Park Bank*, 20 Ind. 94, S. C. 83 Am. Dec. 306; *Freese* v. *Brownell*, 35 N. J. 285, S. C. 10 Am. Rep. 239; Big. Bills and Notes, p. 342 and cases; Edw. Bills, p. 185; Sto. Conf. Laws, § 360; Redf. and Big. L. C. p. 712; Rand. Com. Paper, § 38; Dan. Neg. Ins. § § 911, 912.

VIRGIN, J. Assumpsit against the defendants as indorsers of a promissory note.

Undisputed facts. The plaintiff held the Kennebec Maine Ice Company's note for $2500 bearing the personal indorsement of the defendant Fuller, who was its treasurer, and of the other defendants, its directors. The note was overdue and the defendants' liability had become fixed prior to November 1, 1890.

The Kennebec Maine Ice Company held the note of the Ridgewood Ice Company for $2808.05, dated at Brooklyn, N. Y., September 12, 1890, payable in three months, at Mechanics' Bank, Brooklyn, to the order of John Clark who indorsed it "to G. S. Fuller, Treas. Ken. Me. Ice Co." It was also indorsed by Monroe Howell, of New York.

On November 1, 1890, at the solicitation of the defendant, Fuller, the plaintiff accepted the latter note for the former, on the express condition that the defendants,—on whom the plaintiff informed them it would rely,—would personally indorse it as they had the others. Thereupon the latter note was indorsed and the plaintiff paid to Fuller the difference of the amounts of the respective notes and delivered up to Fuller his company's note as paid.

On December 6,—nine days prior to the last day of grace of the note in suit,—the plaintiff, in accordance with the usual course of business among banks, sent the note to its bank correspondent in Boston, for collection or protest. By the usual course of business the plaintiff's Boston correspondent would forward the note to its New York correspondent, which

in turn would transmit it to its Brooklyn correspondent, which would cause it to be collected or at maturity protested if unpaid. By such a well-known business transaction among banks, each in turn only knows its own predecessor and principal, whose directions alone it receives and recognizes.

On December 1, 1890, Howell (Fuller's antecedent indorser) wrote to "Fuller, Treas. Ken. Me. Ice Co." saying: "You hold a note of the Ridgewood Ice Co. with my indorsement. . . . The company has failed and of course it falls upon me to pay the note . . . It would be almost impossible for me to raise the full amount of the note by the 15th" [last day of grace]. "I propose to pay you $1000 in cash then, or after the note is protested, and give you a note of Howell Bros. with my indorsement for the balance in four months."

One week after the date of that letter, viz., on December 8, Fuller called at the plaintiff's bank, informed the cashier of Howell's letter, and requested the recall of the note without protest and the plaintiff's assent to accept part payment and renewal of the balance with the defendants as indorsers.

The cashier informed Fuller that he would recall the note without protest "if he wished it." Fuller replied—"I have no doubt the money will be forthcoming." Cashier rejoined—"I will do just as you say about it." Fuller then said—"I would say recall it without protest to save expense and bother of it." Thereupon the cashier wrote to the plaintiff's Boston correspondent to procure the return of the note without protest, and the plaintiff assented to the proposition of Fuller to accept $1000 in part payment of the note and a renewal for the balance with the defendants as indorsers.

On the morning of December 12, three days before maturity, Fuller came to the bank again and requested the note to be turned back for protest, because of a telegram from Howell to that effect. The cashier replied that he did not know where the note then was; and it was doubtful if it could be seasonably got back to Brooklyn as it would go through three banks each of which would probably require a day. Fuller then asked the cashier "if he could not telegraph to his correspondent and have

the note sent back to New York;" the cashier replied he would try it; and he immediately (at 9.30, A. M.,) sent the telegram according to the suggestion of Fuller. But instead of the note going again to Brooklyn, it turned up in Hallowell on Monday morning, December 15,—the last day of grace, too late to reach Brooklyn in season for protest.

The plaintiff now seeks to hold Fuller as indorser.

Fuller, notwithstanding his conduct in the premises, interposes the statutory provision: "No waiver of demand or notice by an indorser of a promissory note is valid, unless it is in writing signed by him or his lawful agent." R. S., c. 32, § 10.

A statutory, or even a constitutional provision, made for one's benefit is not so sacred that he may not waive it, and having once waived it he is estopped from thereafter claiming it. *Mitchell* v. *Dockray*, 63 Maine, 82; *Marshall* v. *Perkins*, 72 Maine, 343; *In re Application of Cooper*, 93 N. Y. 507, 512, and cases.

In answer to the statutory defense, the plaintiff invokes the application of the principle of estoppel. Not that ancient legal species, confined within certain narrow iron rules, to be strictly construed, applicable to but a few cases and which shut out not only the truth but also the equity and justice of the individual case and was rightfully denominated "odious," Co. Lit. 352 *a*; *Lyon* v. *Reed*, 13 M. & W. 309; *Horn* v. *Cole*, 51 N. H. 289; but of the more modern species, borrowed originally from equity and hence denominated equitable estoppel; which while it shuts out the truth, never fails to uphold the justice of each case to which it is applicable; whose circumstances, like those involving absolute fraud, are of such infinite variety that, its application cannot be confined within the limits of any technical definition or formula which exclude all cases not within its terms; but like other equitable doctrines it is entitled to a fair and liberal application for the promotion of honesty and fair dealing. *Gilpatrick* v. *Glidden*, 81 Maine, 137, 150; *Canal Co.* v. *Hathaway*, 8 Wend. 483; *Strong* v. *Ellsworth*, 26 Vt. 366, 373; *Preston* v. *Mann*, 25 Conn. 118; *Horn* v. *Cole*, *supra*. The principle has been incorporated into the law and is con-

stantly administered in courts of law in the same manner as in those of equity, for the purpose not of compelling parties to do right in their dealings but of preventing them from doing wrong. *Titus* v. *Morse*, 40 Maine, 348, 352; *Bigelow* v. *Foss*, 59 Maine, 164; *Fernald* v. *Palmer*, 83 Maine, 244; *Martin* v. *Me. C. R. R. Co.* 83 Maine, 100; *Horn* v. *Cole*, *supra*.

While no fixed formula can include all cases, still there are certain general rules which aid in the examination of cases. In the case last above cited, Perley, C. J., said: "Equitable estoppels prevent a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth."

The "conduct" of a party in its broad sense of words, acts, silence or negative omission to do anything, is an important factor in this class of estoppels, whose foundation is justice and good conscience. "Its object," said Prof. Pomeroy, "is to prevent the unconscientious and inequitable assertion of enforcement of claims or rights which might have existed or been enforced by other rules of law, unless prevented by estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." 2 Pom. Eq. § 802.

To render conduct such as will make the assertion of the truth inequitable and unconscientious, it must at least be calculated to induce another to act in a particular manner which he otherwise would not have done — such that he was thereby induced to, and did in fact change his course or situation for the worse. *Titus* v. *Morse*, *supra*; *Allen* v. *Goodnow*, 71 Maine, 420; *Caswell* v. *Fuller*, 77 Maine, 105; *Tower* v. *Haslam*, 84 Maine, 86, 90.

Do the facts of this case bring it within the application of equitable estoppel; and shall the defendant Fuller, notwithstanding his conduct in the premises, be heard to say that the note in suit was not in truth and in fact protested?

We are of opinion that the former question should be answered in the affirmative and the latter in the negative.

As seen, nine days before its maturity, the note was started by the bank holder through the usual channel adopted by banks for such business, on its way to its place of payment for collection or protest.

As the maker had become insolvent, the note would undoubtedly have been protested and the liability of Fuller as indorser fixed, if it had not been ordered to be recalled through the defendant Fuller's instrumentality before maturity.

It would not have been thus recalled on the plaintiff's own motion, because protest was necessary,— unless waived,— in order to hold the local indorsers on whom, as they were informed at the time of their indorsement, the plaintiff relied for payment of the note.

It was recalled before maturity and hence without protest, solely by reason of the positive interposition and special request of Fuller.

The circumstances attending the order for recall are worthy of notice. After the request was made but before it was complied with, the plaintiff's cashier said to Fuller —"I will do just as you say about it"— thereby placing upon Fuller the entire responsibility of his own decision and of whatever might result from a compliance with it. Thereupon Fuller deliberately and formally took upon himself the burden of that responsibility when he peremptorily replied: "I say recall it, because I have not any doubt that the papers will be here all right."

Fuller's final determination to assume the responsibility was confessedly inspired by his undoubted reliance upon the personal assurance contained in the letter of Howell,— his antecedent indorser,— that he would pay the $1000 at maturity and renew the balance. Having that confidence, his direction of the recall was not wanting in business sagacity; for from his point of view, he could see his own liability, which in the absence of a recall was about to become absolute, on a New York note against an insolvent ice company, diminished by $1000 at least. On the other hand, the plaintiff had no private object or inclination to take that course. It was amply secured not only by the defendant's indorsement, but by that of the two other local

indorsers of substance. Its only incentive for following the direction of Fuller was a willingness to accommodate one of its customers in his effort to aid himself, although by so doing it took the risk of losing all claim upon the other two local indorsers.

Obviously the plaintiff's course or situation was changed for the worse solely by reason of the voluntary conduct of Fuller, which was expressly designed to bring about that change. It was in no wise induced by any promise that Howell made in his letter, of December 1, to Fuller. That promise induced Fuller's conduct, but not the bank's action. As already seen, the bank's security was ample, and it merely "assented" to the proposition of accepting $1000 cash when the note matured and a renewal for the balance if indorsed by these three defendants.

It matters not that, when he directed the recall of the note, Fuller acted in good faith and entertained no fraudulent or deceitful purpose or design whatever. Because, if the consequences of his conduct would result in an inequitable and unconscientious injury to the plaintiff, provided Fuller were now allowed to set up the want of demand and notice, it is within the well-established principles of equitable estoppel. Herm. Est. § 321; 2 Beach Mod. Eq. § 1095; 2 Pom. Eq. § 803 *et seq*, and notes.

That the most unjust and inequitable results will follow Fuller's successful assertion of his attempted statutory defense, is seen in the fact that the plaintiff's only claim for the payment of the note will be against the insolvent corporation without indorsers.

It is suggested that the plaintiff did not use proper diligence in its effort to have the note sent the second time for protest.

The note was due December, 12–15. On the former date, after the note had been out of the plaintiff's possession six days for the purpose of being protested, Fuller, instigated by Howell's telegram to "have the note protested," called again at the bank, and at that late day, countermanded his previous direction for a recall and requested the plaintiff to send the note to Brooklyn for protest. On the cashier's informing him that he did not

know where the note then was, and that as the time was so limited, "it was doubtful if it could be got to Brooklyn in season," Fuller (as he himself testified), "asked the cashier if he could not telegraph his correspondent and have the note sent back to New York, and the cashier said he would try it." Accordingly, a telegram was immediately (9.30 A. M.,) written and sent. Thus the most expeditious mode possible was adopted at Fuller's own suggestion but without success.

Do these facts relieve Fuller from the responsibility which he assumed in the outset by recalling the note without protest "to save expense and bother?" Not if there is any efficacy in the old equitable doctrine that, "when one of two persons guiltless of intentional moral wrong must suffer a loss, it must be borne by him, who by his conduct has made the injury possible."

To be sure, the note was the property *pro hac* of the plaintiff and no other party had the right without the plaintiff's consent to do or require what was done in relation to it. So Fuller was a party to it, and his conditional liability was rapidly ripening into an absolute liability, and he in turn become owner. All his conduct was directed against the happening of so undesirable a result, and the bank was executing both in letter and spirit his express behests. For, at his special interposition and direction, orders had started through the legitimate channel for business of that character, for the recall. He and not the bank was to reap whatever advantage might result from such action. Before his behest had been fully accomplished, and while the note was somewhere not known to the parties, in transit between Brooklyn and Hallowell, 300 miles distant, he interposed again in order to protect his own interest, and requested that the note be intercepted, again turned back to Brooklyn and protested; and the only feasible and best possible mode, suggested by Fuller, was promptly resorted to.

It cannot be gainsaid that, although the plaintiff was the lawful holder of the note and it could take any action therewith it saw fit, nevertheless in everything that was done, after the note was, on December 6, started toward Brooklyn for protest, the

plaintiff acted in behalf of one of its customers, whose liability of becoming owner of the note, by being compelled to pay it, was so imminent that he was really directing and the bank implicitly following and carrying out as his agent whatever action he deemed necessary to save himself.

As the other defendants, Marston and McClench, took no part in recalling the note, they have done nothing to estop themselves from interposing the statute in their defense. But as Fuller's conduct was designed to have the bank recall the note before maturity and hence without protest, and the bank was thereby induced to, and did recall it, whereby under the circumstances it was put beyond the power of the plaintiff, by the most feasible and expeditious mode possible to have the note protested after December 12, we think Fuller is equitably estopped to assert any right under R. S., c. 32, § 10.

Judgment against defendant Fuller for the amount due on the note. Judgment for Marston and McClench.

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

MARY J. HOBBS *vs.* CAROLINE PAYSON.

Knox. Opinion June 6, 1893.

Deed. Description. Words of Reference.

The words of a grant, "all my right, title and interest in and to all real estate situated in Hope, Warren and Union," are sufficient to convey the grantor's estate there situated.

Words of reference or explanation in a deed do not destroy a specific grant.

ON EXCEPTIONS.

This was a real action in which the plaintiff relied upon two different sources of title; *first*, under a mortgage from John Payson to one Counce, which came to the plaintiff by various mesne assignments; and, *second*, under a quitclaim deed from said Payson, the description of the land conveyed being as follows: "All real estate situated in Hope, Warren and Union, meaning to convey all my right, title and interest in the real estate occupied by me."

The defendant claimed title under said Payson, and it was admitted that the title was in Payson at the time he executed the quitclaim deed.

It appeared from the evidence that the real estate demanded was at the time of the execution of the quitclaim deed, in the actual occupation of the grantor; and that there were other parcels of land covered by the general description in the deed, which, although formerly occupied by the grantor, were not at the time of the execution of the deed actually occupied by him.

The defendant claimed that, inasmuch as the explanatory clause in the quitclaim deed referred to real estate formerly occupied by the grantor, it did not convey the estate which was then actually occupied by him. The court ruled otherwise and the defendant took exceptions.

The title under the mortgage was not passed upon by the court as the quitclaim deed was held sufficient to entitle the plaintiff to judgment.

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

J. H. and C. O. Montgomery, for defendant.

HASKELL, J. The words of a grant, "All my right, title and interest in and to all real estate situated in Hope, Warren and Union," are sufficient to convey the grantor's estate there situated. *Bird* v. *Bird*, 40 Maine, 398.

An explanatory clause in such grant, "meaning to convey all my right, title and interest in the real estate formerly occupied by me," does not limit the grant to such estate only. It rather makes sure that such lands were to be included with those of which the grantor had the visible occupation. They are words of inclusion and not of exclusion.

Words of reference or of explanation never destroy a specific grant. *Maker* v. *Lazell*, 83 Maine, 562. They are useful where the description is imperfect and where it is aided rather than controlled by them. *Hathorn* v. *Hinds*, 69 Maine, 326; *Brunswick Savings Institution* v. *Crossman*, 76 Maine, 577; *Brown* v. *Heard*, *ante*, 294.

The court is of opinion that the quitclaim deed, upon which the plaintiff relies, conveys the land demanded.

Exceptions overruled.

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

FRANKLIN LAWRY *vs.* SYLVESTER ELLIS, and another.

Penobscot. Opinion June 23, 1893.

Sales. Place. Officer. Execution. Delivery.

The general rule is that the sale of personal property by an officer on execution must be had where the property is situated, or so near, that those present at the sale can examine it.

Where there is a sale of a portion of a larger mass of unpressed hay, or of property of like character, and no separation is made of the portion sold, and no delivery is made of any portion of it to the vendee, he has not such title as will sustain an action of replevin.

ON EXCEPTIONS.

This was an action of replevin of ten tons of hay claimed to have been bought by the plaintiff at a sale on execution against the defendant Ellis. Plea, general issue and brief statement that the hay was the property of the other defendant, Pierce, and not the property of the plaintiff.

At the conclusion of the plaintiff's testimony, the court ordered a nonsuit, and he took exceptions.

The case is stated in the opinion.

C. A. Bailey, for plaintiff.

J. B. Peaks, for defendant.

LIBBEY, J. Replevin of ten tons of hay. The pleadings put the title of the plaintiff in issue. After the plaintiff introduced his evidence and stopped, a nonsuit was ordered by the court, and the case is here on plaintiff's exceptions to that order; and the question is whether the plaintiff proved sufficient title and right of possession to maintain his action when it was commenced. We think not.

The facts as shown by the return of the officer and by his testimony are as follows: On the 17th day of October, 1891, plaintiff put into the hands of Smith, constable of Charleston,

the execution in evidence against the defendant Ellis for service, and on the same day Smith went into Ellis' barn, in Charleston and claimed to take "a mow of hay, all the hay there is in the bay, in the north side of said Sylvester Ellis' barn," estimated by him to be eighteen tons. All he did was to put his hand on the posts and say he seized the hay, and then went away leaving it in the possession of Ellis as it was before. On the 24th of October he advertised it for sale at the house of Franklin Lawry, about a third of a mile from the Ellis barn, on the 27th of October, and at the place and time appointed he sold ten tons of the hay, "to wit: ten tons from the top of said mow to said Franklin Lawry," the plaintiff, for three dollars per ton.

The general rule is that the sale of personal property by an officer on execution must be had where the property is situated; or so near that those present at the sale can examine it. There are exceptions, (*Phillips* v. *Brown*, 74 Maine, 549,) but there is nothing in this case to bring it within any exception. In the sale of hay from a mow in a barn it is important that those desiring to purchase should have an opportunity to examine it and determine its quality. There was no such opportunity in this case, which may account for the small price bid for it, hardly sufficient to pay the expense of harvesting.

Another objection is urged by the counsel for the defendant, that by the officer's return and the testimony no title passed to the plaintiff to any portion of the hay for want of a delivery. It is said that the attempted sale was a portion of the mow of hay, ten tons off of the top; and that was not separated from the mass; that, in fact, no hay was present or in sight at the sale and no attempt of delivery of any kind was made by the officer, and that it does not appear that the plaintiff ever saw the hay till taken and delivered to him by the officer who served the writ in this case.

This appears to us to be fatal to the right of the plaintiff to maintain this action. Where there is a sale of a portion of a larger mass of unpressed hay, or of property of like character, and no separation is made of the portion sold, and no delivery

is made of any portion of it to the vendee, he has not such title as will sustain an action of replevin. *Stone* v. *Peacock*, 35 Maine, 385; *Morrison* v. *Dingley*, 63 Maine, 553; *Ropes* v. *Lane*, 9 Allen, 502; *Scudder* v. *Worcester*, 11 Cush. 573; *Keeler* v. *Goodwin*, 111 Mass. 490.

Exceptions overruled.

EMERY, FOSTER, HASKELL and WHITEHOUSE, JJ., concurred.

PETERS, C. J., did not sit.

BENJAMIN B. THATCHER

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion June 23, 1893.

Railroad. Fire set by engine. Negligence. Evidence. R. S., c. 51, § 64.

A railroad company is liable under R. S., c. 51, § 64, for damage to lumber piled in a permanent lumber yard near its track, caused by fire communicated from its locomotives.

Evidence is admissible to show that fires were communicated by defendant's locomotives at different times about the same time and vicinity that the plaintiff's lumber was destroyed.

Also, to show, in a statutory action, an accumulation of dry combustible material within the limits of the railroad location, without proving where the exterior lines of the location are.

Exceptions to the admission of evidence should show that the facts, at the time the testimony was offered, were such as to render it incompetent.

Lowney v. *Maine Cent. R. R. Co.* 78 Maine, 479, distinguished.

ON MOTION AND EXCEPTIONS.

This was an action on the case to recover damages for loss of the plaintiff's lumber by fire communicated by the defendant's locomotive.

The plaintiff's declaration contained four counts; two, framed on the statute, R. S., c. 51, § 64, and two charging negligence at common law. The acts of negligence alleged were defective machinery, the want of sufficient spark arresters, wrongfully throwing sparks and cinders, and the want of suitable section men to watch and tend fires along the railroad. One of the counts upon the statute is as follows:—

"In a plea of the case, for that said plaintiff, at Milford, in said

county of Penobscot, on the sixteenth day of April, A. D., 1890, owned and was possessed of certain property, to wit., certain boards, timber and board sticks, as follows: 2,080,804 feet of pine box boards of the value of seventeen thousand dollars, and 51,851 feet of timber of the value of three hundred and sixty dollars, and 318,000 board sticks of the value of four hundred and seventy dollars, all of which were of the value of seventeen thousand eight hundred and thirty dollars ($17,830) which said boards, timber and sticks were lawfully and properly piled and placed then and there on land of said plaintiff and adjoining the railroad of the said Maine Central Railroad Company, and was then and there and for a long time before had been deposited there, and was then and for a long time before had been insured in the sum of twelve thousand dollars against loss by fire, and was such property as said Maine Central Railroad Company had an insurable interest in and could have procured insurance thereon, and then and there said company, so chartered by the laws of the State, did own and operate a railroad adjoining said property of said plaintiff and did then and there run and use by its servants and agents a locomotive engine and cars attached thereto, and on said day at said Milford while said locomotive engine was being run and used and operated on said railroad by said corporation, said property of plaintiff was injured and destroyed by fire communicated by said locomotive engine so being run and used by said corporation; and said plaintiff avers that his said property above named and so situated as above was totally destroyed at said time and place by said fire, that the sole cause of said fire and such injury and destruction of his property was the fire communicated by the locomotive engine, so being used and run by said corporation."

By agreement of the parties, the question of damages was reserved at the trial to be subsequently determined; and only the question of liability was submitted to the jury, who returned a verdict for the plaintiff.

The defendant took exceptions and filed a general motion for a new trial. The case is stated in the opinion.

J. W. Symonds and *C. P. Stetson*, for plaintiff.

Statute not limited in its application to real estate only. Permanent and insurable property are within the statute. Statute remedial. *Bassett* v. *Railroad*, 145 Mass. 129, and cases cited. Negligence. *Jackson* v. R. R. Co. 31 Iowa, 176, S. C. 2 Am Ry. R. 473; *Kellogg* v. *Ry. Co.* 26 Wis. 223, S. C. 2 Am. Ry. R. 483; *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 470; *Rolke* v. *Ry. Co.* 26 Wis. 537, S. C. 3 Am. Ry. R. 548; *Webb* v. *R. R. Co.* 49 N. Y. 420, S. C. 4 Am. Ry. R. 547; *Spaulding* v. *Ry. Co.* 30 Wis. 110, S. C. 7 Am. Ry. R. 507; *Coale* v. *R. R. Co.* 60 Mo. 227, S. C. 9 Am. Ry. R. 210; *Mo. Pac. R. R.* v. *Platzer* (Tex.), S. W. Rep. 577; *Fent* v. *Ry. Co.* 59 Ill. 349, S. C. 11 Am. Ry. R. 167; *B. & O. R. R. Co.* v. *Shipley*, 39 Md. 251, S. C. 11 Am. Ry. R. 269; *Salmon* v. *R. R. Co.* 38 N. J. 5, S. C. 13 Am. Ry. R. 14; (39 N. J. 299, S. C. 14 Am. Ry. R. 226); *Troxler* v. *R. R. Co.* 74 N. C. 377; 13 Am. Ry. R. 389; *Dean* v. *Ry. Co.* 39 Minn. 413, 12 Am. St. Rep. 659; *L. & N. R. R. Co.* v. *Reese*, 7 Am. St. Rep. 66-69; Whar. Ev. § 360; *Stevens* v. *R. R. Co.* 66 Maine, 76. Case to be submitted to jury. *Sheldon* v. *R. R. Co.* 14 N. Y. 218; *Field* v. *R. R. Co.* 32 N. Y. 339; *O'Neill* v. *R. R. Co.* 115 N. Y. 581; *Webb* v. *R. R. Co.* 49 N. Y. 420.

Exceptions: *Crocker* v. *McGregor*, 76 Maine, 284; *Smith* v. *R. R. Co.* 10 R. I. 22; *Atch. R. R. Co.* v. *Stanford* 12 Kans. 354, S. C. 8 Am. Ry. Rep. 236; *Annap. & E. R. R. Co.* v. *Gantt*, 39 Md. 115, S. C. 11 Am. Ry. R. 210; *Henry* v. *R. R. Co.* 50 Cal. 176, S. C. 12 Am. Ry. R. 168; *Wiley* v. *R. R. Co.* 44 N. J. L. 250; *Piggott* v. *Ry.* 3 C. B. (M. G. & S.) 229; *Aldridge* v. *Ry.* 3 M. & G. 514; Whar. Ev. § 41.

Wilson and Woodard, for defendant.

Lowney v. *N. B. Ry. Co.* 78 Maine, 479 and cases; R. S., c. 51, § 64. Rule of *stare decisis:* 1 Kent Com. 12 Ed. 476; Broom's Leg. Max. pp. 148-153; *Smith* v. *Bibber*, 82 Maine, 34, 39; *Bank* v. *Willis*, 8 Met. 504.

Negligence: *Meyer* v. *R. R. Co.* 41 La. An. 639, S. C. 17 Am. St. Rep. 408; Pierce, R. R. 439, 440, 433; *Hoff* v. *R. R. Co.* 45 N. J. L 201, S. C. 13 Am. & Eng. R. R. Cas. 476; *Texas, &c., R. R. Co.* v. *Levi*, 59 Tex. 674, S. C. 13 Am. and

Eng. R. R. Cas. 464; 2 Rorer R. R. 800-1; Deering, Neg. § § 264, 273; *B. & O. R. R. Co.* v. *Shipley*, 39 Ind. 251.

Exceptions: *Ross* v. *R. R. Co.* 6 Allen, 87, 91; *G. Trunk Ry. Co.* v. *Richardson*, 91 U. S. 454, 470; *Parker* v. *Port. Pub. Co.* 69 Maine, 173-175; *Henderson* v. *R. R. Co.* A. L. Jour. Dec. 12, 1891, Vol. 44, p. 479.

LIBBEY, J. An action on the case to recover damages for the destruction of plaintiff's property by fire communicated by a locomotive engine used by the defendant company in its business. In his writ the plaintiff claims to recover on two grounds. *First*, by virtue of R. S., c. 51, § 64; *second*, on the ground of negligence of the defendant and its agents and servants, in the condition and management of its locomotive, by reason of which the fire was set and communicated to his lumber.

The presiding judge at the trial, for reasons satisfactory to himself, ruled that the plaintiff could not recover under the provisions of the statute referred to, which read as follows: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon." After the ruling of the presiding judge that the plaintiff had no remedy under this provision of the statute, the case was tried out upon the other claim set out in the writ that the fire was communicated by the locomotive used by the defendant, by reason of some defects in it or negligence of its servants managing it, for which the defendant was responsible. The verdict was for the plaintiff upon this ground.

The case comes up on a motion to set aside this verdict, and on exceptions. It is admitted by the counsel for the defendant that, if the ruling of the presiding judge that the plaintiff could not recover under the statute is erroneous, and the evidence is sufficient to authorize the jury to find that the fire was set and communicated by the use of the defendant's locomotive, the question whether the evidence is sufficient to sustain the verdict on the claim of negligence is immaterial. And this presents the

question at once whether the remedy of the plaintiff exists under the provisions of the statute.

On the facts disclosed and admitted by the defendant's counsel, we think the plaintiff may recover in this case under the statute. There have been several cases before the court in this State involving the construction of this statute; but we think none of them upon a state of facts like those claimed by the plaintiff and admitted by the defendant's counsel in this case. The lumber destroyed was a large quantity of boards and other manufactured lumber stuck and piled by the plaintiff upon land in the vicinity of his mills, leased by him of the Bodwell Water Power Company, of about twenty-five acres in extent. The defendant's counsel as is their usual custom, very correctly state the facts upon this part of the case. "The place where the plaintiff's boards were stuck before being used for the purpose to which he, and perhaps others, devoted it, was an uncultivated pasture. Afterwards, as the occasions of business required, boards were extensively stuck upon this place after being sawed at the adjacent mills, several tracks being put upon the place for the purpose of conveniently conveying the boards thereto and removing them therefrom. After being sawed the boards are put on cars by the plaintiff and others; the cars are then hauled to the sticking ground and the boards taken therefrom by the owners and stuck to remain until they are seasoned and sold. Then they are put back on to the cars by the owner and shipped to whatever destination he sees fit to send them. The boards are placed on the sticking ground as they are sawed. Nobody then has any means of knowing how long they will remain there and no notice was given to the railroad company as to the length of time they probably would remain there. As a matter of fact they frequently remain there for a considerable period of time, according to the exigencies of business, some boards of the plaintiff having been there for a year to a year and a half, while all of them had been there nearly six months."

The evidence shows that this piling-ground of the plaintiff had been used by him in connection with the manufacture of lumber at his mills in the manner stated, for six years and more,

the amount piled and stuck there frequently exceeding two millions. The defendant had full knowledge of these facts and had extended to this piling-ground several branch tracks over which the lumber was carried from the plaintiff's mills to it, and when sold by him, taken from it and conveyed over its road. This piling-ground was the place, or at least part of the place for the plaintiff's business, necessary in the prosecution of it, as his lumber must be taken from his mills to be piled and stuck for seasoning and drying for the market.

The construction of this statute was first before the court in *Chapman* v. *Railroad Company*, 37 Maine 92. That action was to recover for the loss of a quantity of cedar posts piled by the plaintiff upon the land of another by his consent some five to eight rods from the railroad track. And after discussing the question of the construction of the statute, the court declared this conclusion: "The conclusion to which we have arrived is, that the liability of railroad corporations, under this statute, extends only to property permanently existing along their route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporation is to be determined by the principles of the common law."

In *Pratt* v. *Railroad Company*, 42 Maine, 579, the court decided that the liability of the company under this statute was not confined to real estate but extended to the destruction of personal property as well. In *Stearns* v. *Railroad Company*, 46 Maine, 95, the plaintiff recovered for the destruction of his large chair factory and all the machinery, tools, and other apparatus necessary for the manufacture of chairs, and large quantities of lumber and other materials used in the manufacture of chairs, and large quantities of chairs, some of which were wholly and others partially completed. In *Bean* v. *Railroad Company*, 63 Maine, 294, the plaintiff recovered for a stock of goods in a store occupied by him near the railroad track.

The last case in this State, in which this statute was involved, is *Lowney* v. *Railway Company*, 78 Maine, 479. It was an action to recover for the destruction of some sleepers owned by the plaintiff and piled near the railroad track, to be delivered

from the place where they were piled to the cars of the defendant. This case is relied upon with a good deal of confidence by the counsel for the defendant; and it is claimed that the facts in regard to the deposit of the sleepers bring the case pretty clearly within the facts of this case. He has produced with his argument a report of the evidence in that case. However the facts may have been as shown by the evidence, the court bases its decision upon the fact that the property destroyed was movable articles, temporarily placed near the railroad track, and likens it to the case of *Chapman* v. *Railroad Company*, *supra*. The element of permanency of occupation of the premises was thought to be lacking.

The court in Massachusetts has put a different construction upon the statute of that state in the same terms as ours, holding it to apply to all property of every kind and in any place where fire may be communicated by a locomotive engine. It does not admit any of the exceptions adopted by our court in *Chapman* v. *Railroad Company*, above cited, and followed to some extent, at least, in the cases subsequently named. *Hart* v. *Railroad Company*, 13 Met. 99; *Bassett* v. *Railroad Company*, 145 Mass. 129, and cases there cited.

And so in New Hampshire, *Hooksett* v. *Railroad Company*, 38 N. H. 244. And so in Vermont on a similar statute, *Cleaveland* v. *Railroad Company*, 42 Vermont, 449. The same construction of the Vermont statute is held by the Supreme Court of the United States, in *Grand Trunk Railway Company* v. *Richardson*, 91 U. S. 454.

We do not intend, however, to overrule any of the previous decisions of this court upon the construction of the statute involved. They do not conflict with our decision upon the facts of this case. Each case should be decided upon its own facts; and we feel clear that no previous decision of this court determines that the railroad company is not liable under our statute in a case like this. It cannot be properly said that the plaintiff's lumber piled on his piling-place, occupied by him in the prosecution of his business as a lumber manufacturer from year to year in such quantities was, placed there for a temporary pur-

pose only. It had the elements of permanency in its character; certainly as much so as the stock of manufactured chairs in the mill of the manufacturer, to be sent away from time to time as he makes sales; or as a stock of merchandise in the store occupied by the merchant, from which he sells from day to day; or the lumber of the lumber merchant piled as he receives it in his lumber yard, from which he delivers it as he has occasion to in the prosecution of his business.

We think the evidence is clearly sufficient to authorize the finding of the jury, necessarily included in their verdict, that the fire was communicated from the defendant's locomotive. This conclusion renders it entirely unnecessary to consider whether the evidence upon the question of negligence was sufficient to authorize the verdict rendered.

The defendant has some exceptions to the ruling of the presiding judge on matters of law.

Its counsel in their argument rely upon two only.

First, they claim that the admission of the evidence from several witnesses, tending to show fires communicated by the locomotives used on the defendant's road at different times about the same time that the plaintiff's lumber was destroyed and in the same vicinity, was erroneous; that it should be confined to the particular locomotive which passed over the road just before the fire, and which it is claimed communicated it. We think its competency, where the issue is whether the fire was communicated from a locomotive, is clearly established by courts of the highest authority. It tends to show the capacity of the inanimate thing to set fires along the road, and when a fire is discovered soon after a locomotive has passed, and there is no evidence tending to show that it might have been caused in some other way, it authorizes the inference that it was caused by the locomotive. *Grand Trunk Railroad Company* v. *Richardson*, 91 U. S. 454, and cases cited. *Crocker* v. *McGregor*, 76 Maine, 284; *Loring* v. *Railroad Company*, 131 Mass. 469.

It is urged in behalf of the defendant that evidence showing the action of locomotives, other than the one that set the fire, should be limited to cases where the plaintiff is unable by

his evidence to identify the locomotive which he claims set the fire; that if he is able to identify the particular locomotive, all evidence in regard to the action of others is irrelevant and ought not to be admitted. There are several authorities declaring that to be the rule, and there are decisions of courts of high authority which declare that the action of other locomotives at or about the time of the alleged fire and in the vicinity is admissible, on the ground that the locomotives used by the company on its road are of a class of like construction, and what one will do others may do under like circumstances. But it is incumbent upon the defendant by its exceptions to show that the facts at the time the evidence was offered were such as to render it incompetent under the modified rule claimed by its counsel. There is nothing in the exceptions showing that the plaintiff by his own testimony or that of his witnesses was able to identify the locomotive claimed to have set the fire. Looking into the report of the evidence, which is made a part of the case, it appears that neither the plaintiff nor any of his witnesses were able to identify the locomotive by name or number; so that when the evidence was admitted by the presiding judge the case was clearly within the modified rule claimed by defendant's counsel. True, the defendant claimed to identify it by its evidence in defense as engine No. 49. But that in no way affected the question of the admissibility of the evidence at the time it was offered and admitted.

Since the argument the defendant's counsel, with the consent of the counsel for the plaintiff, has called the attention of the court to a recent case in Pennsylvania, in which the doctrine is very thoroughly discussed and authorities cited and quoted from; and the admissibility of the evidence in a case like this is sustained by that court, which declares that such evidence should be confined to the negligent operation of the engines of the company at or about the time of the fire with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable. *Henderson* v. *Railroad Co.* 144 Penn. St. 461.

The second point raised by the exceptions is the admission of

testimony tending to show an accumulation of dry grass and other combustible materials within the limits of the defendant's location, for the purpose of proving negligence on the part of the defendant; and the presiding judge submitted the question to the jury to determine whether the combustible materials described by witnesses were within the limits of the defendant's location or outside of it. It is claimed that this was error, because there was no evidence in the case proving the exterior lines of the location. But whether this was improperly admitted and submitted to the jury on the question of negligence or not, under the construction which we have given to the statute it becomes immaterial, because the liability of the company is just the same if the fire was communicated by the defendant's locomotive to combustible materials outside its limits, so near to its road that escaping sparks might be carried by the wind and set the fire, as if it was kindled within its limits.

Motion and exceptions overruled. Damages to be assessed at Nisi Prius as stipulated by the parties.

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

NATHAN C. AYER, and others, in equity,

vs.

CITY OF BANGOR.

Penobscot. Announced at May Law Term, Middle District, 1893. Opinion July 20, 1893.

Moneys received by towns, in trust. Use of principal. Interest. Municipal Indebtedness. Constitution, Art. XXII; R. S., c. 3, § § 51, 52; Stat. c. 300, January 2, 1893.

By a statute enacted in 1873, now embodied in R. S., c. 3, § § 51, 52, cities and towns are empowered to receive money by donation or legacy, in trust, for benevolent, religious or educational purposes. The statute also provides that, "Interest shall be allowed if the fund shall be used by the city or town; otherwise it shall be placed at interest or income, the city or town being hereby made responsible for its security."

Under the will of a testator, which took effect two years after the enactment of the statute above named, the will containing no directions as to how the principal should be invested, the city of Bangor holds, in trust, one hundred thousand dollars, the income of which has been appropriated for the support

of a public library in accordance with the terms of the testator's gift. The principal having been paid into the city treasury by its managers, (called trustees of the Hersey Fund, appointed by a city ordinance,) pursuant to a decree of this court in the case of *Bangor* v. *Beal*, of November 16, 1892. (*ante* p. 129,) the city thereupon voted to use it to erect a public city building, to be known as the Hersey Memorial Building, and paying interest for the money so used at the rate of four and one half per cent.

Upon a petition for an injunction to restrain the city against making such use of the fund,

Held; that none of the objections against this use of the fund can be sustained;

That, the statute fairly implies that the fund may be used for needed municipal purposes; — the language employed implying license and not prohibition;

That, the testator was apparently willing to leave the matter of the investment of the fund entirely to the judgment and discretion of the city, — the trustee selected by him;

That, the court has complete jurisdiction over the fund, and can establish the rate of interest payable by the city, independent of the city council, under Stat. 1893, c. 300;

That, Art. XXII, of Amended Constitution, which took effect January 2, 1878, does not apply to "any fund received in trust by a city or town;"

That, the city's liability for the fund is not increased, since it is now liable for it absolutely; whether it uses the fund or invests it otherwise, the liability cannot be thereby increased or made more than absolute;

That, such use of the fund will not violate the agreement between the city and the Bangor Mechanic Association, which contains no stipulation that the city shall make no change in the management or investments of the principal.

ON REPORT.

This was a bill in equity asking the court to enjoin the city of Bangor from paying and using the Hersey Fund, so-called, given to the city by the will of S. F. Hersey, for building a city hall. The statute in force when the city received said fund, reads as follows: (R. S., c. 3.)

"Sec. 51. Any city or town may receive money by donation or legacy in trust for benevolent, religious, or educational purposes, for the erection and maintenance of monuments, and for the benefit of public cemeteries and lots therein; provided, that the city or town lawfully consents.

"Sec. 52. Interest shall be allowed if the fund is used by the city or town; otherwise it shall be placed at interest or income, the city or town being responsible for its security.

"Sec. 53. The city or town, by its officers or agents, shall apply the fund or its income in accordance with the written directions of the donor or testator, made known at the time when the fund was accepted.

"Sec. 54. If the city or town fails to apply the fund or its income at the times and for the purposes prescribed in said directions, it reverts to the donor, if living; otherwise, to his heirs."

The will provides as follows:

"Finally, in the year 1900 to apportion and divide the entire residue and remainder of the trust estate then remaining in their hands in ten (10) equal parts or shares, as near as may be, and to manage and dispose of same, discharged of said trust as follows: To convey and pay over to the City of Bangor, Maine, where I have been engaged in business for the last forty (40) years, three-tenths (3-10) parts thereof, the principal to be held in trust and the income thereof applied and appropriated by said city to the promotion of education, the health and good morals of the citizens, with the suggestion of a public park, etc.

In the year 1882, it was considered advisable by the city of Bangor to receive and accept one hundred thousand dollars in lieu of the bequest of said three-tenths part, which it would be entitled to have in the year 1900, by the terms of the will; and thereupon the city council authorized the treasurer of the city to release its claim to said three-tenths upon receiving one hundred thousand dollars; and the city of Bangor on August 5, 1882, in its release of that date agreed "to assume the trust and administration thereof of said one hundred thousand dollars, according to the wishes of said testator, Samuel F. Hersey, as by him expressed in his said will and codicil relative to the provisions by him therein made for said city;" and the treasurer of the city in accordance with said vote, and in consideration of one hundred thousand dollars, released said three-tenths of the said estate.

Upon receiving said money, the city council passed a vote submitting the questions of the investment and disposition of said bequest to the mayor and president of the common council for the time being, the living ex-mayors of the city and seven other citizens. This committee gave all parties a hearing and made a report to the city council in which they say: . . .

"The first question considered by the committee was: What rights has the city as receiver of the amount paid by the trustees of Samuel F. Hersey's will, in the adjustment of this bequest?

"So far as the principal, one hundred thousand dollars, is concerned, we are decided that the expenditure of any portion thereof is in palpable violation of the spirit of the bequest and of the letter of the agreement between the city and the said trustees." . . .

"The third question considered was: How shall this trust be executed by the city, so far as relates to the custody of the principal received from the trustees of the will by said city, in adjustment of the bequest?

"We recommend that the principal shall be forever held by the city of Bangor, and kept distinct from any other moneys or funds, held by said city for municipal, or other purposes, meaning that it shall never be expended or absorbed so as to constitute any addition to the indebtedness of the city, but shall be separately invested in approved securities; not intending, however, to forbid its investment in bonds of the city of Bangor."

"The committee recommend that the income of the fund be devoted to the maintenance of a free public library."

This report was accepted, and an ordinance adopted in March, 1883, by the city carrying into effect its recommendation, and the Hersey Fund, so-called, was committed to a board of trustees, who invested said fund in bank stocks, railroad stocks, and city of Bangor bonds, and have since 1883 up to this year devoted the income of the fund to the public library.

The Bangor Mechanic Association had a library of books of the value of $12,000, and a fund of the value of $20,000, and the trustees of said Hersey Fund as authorized by the city council entered into an agreement with that association by which it transferred its library and fund to the city, for the purpose of a public library, and the city agreed to devote the income of the Hersey Fund to said library.

In 1893, a project was conceived of using the Hersey Fund for the purpose of building a city hall, and a decree was obtained transferring the Hersey Fund from the custody of the trustees

appointed under the ordinance of March, 1883, to the treasury of the city. (See *Bangor* v. *Beal*, *ante* p. 129.) The city council afterwards passed votes devoting said Hersey Fund to the building a city hall.

The complainants, inhabitants and tax payers of Bangor, by this bill asked the court to restrain the city from using the fund for this purpose, and alleged that such use would be illegal.

First. Because it would be in violation of the provisions of the terms of said will, and the trusts thereby created, and assumed by the city, in accepting the bequest.

Second. Because it would be in violation of the contract between the city and the Bangor Mechanic Association.

Third. Because it would be in violation of the constitutional provision forbidding a city to create a debt or liability exceeding five per centum of its valuation.

The city denied in its answer that the release, or instrument, executed by it August 5, 1882, imposed upon Bangor any conditions or limitations, in the use or administration of said fund, other than those imposed by the will. It also denied that the proposed use of the principal of said fund was in contravention of said Hersey's will, or of any stipulation or agreement entered into by Bangor with others.

It was admitted that the aggregate debts and liabilities of the city exceed five per cent of its last regular valuation.

It was also admitted that upwards of $78,000 of said fund was invested in bonds of the city; that $21,000 of said bonds mature the present year; and still others thus invested will mature in the near future.

The case was heard in the court below, May 18, 1893, at Bangor, upon bill and answer; and by agreement of the parties was reported for the decision of this court, and transferred for argument to the Middle District, May term, at Augusta.

C. P. Stetson, *Appleton and Chaplin*, for plaintiffs.

Jurisdiction: 2 Dill Mun. Corp. § 909.

City is charged by the statute (R. S., c. 3, § § 51-4) and by common law with the trusts named in the will, and must hold the principal in trust and devote the income to the promotion

of education, the health and good morals of the citizens. Testator intended that the principal should be held in trust, should be prudently invested, and the income devoted to the above purposes. Contemplated use not only a wrongful misapplication and misuse, but also an absolute destruction of the trust fund. Hall built on its own land becomes the absolute property of the city. Rule of investment, same as an individual under a will. *Harv. Coll.* v. *Amory*, 9 Pick. 761; *Dickinson, Applt.* 152 Mass. 186; *Emery* v. *Batchelder*, 78 Maine, 21; *Moulton* v. *Mattocks*, 84 Maine, 545. Will and statute require the income more or less, and not the specific sum of $4,500 anually to be appropriated and applied.

Agreement with Mech. Asso: 1 Dill. Mun. Corp. § 314; 2 High, Injunc. § 1243.

Constitutional law: *Culbertson* v. *Fulton*, 127 Ill. 30; 2 Dill. Mun. Corp. §§ 916-919; *Crampton* v. *Zabriskie*, 101 U. S. 601.

H. L. Mitchell, City Solicitor, *Jasper Hutchings*, with him, and *Charles Hamlin*, of counsel for defendant.

WALTON, J. The city of Bangor holds in trust a hundred thousand dollars, the income of which has been appropriated towards the support of a public library. The city now proposes to use the principal of the fund, or so much of it as may be needed, with which to erect a public city building, paying interest for the money so used at the rate of four and one half per cent per annum.

The complainants (ten taxable inhabitants of Bangor) protest against such a use of the principal of the fund, and pray for an injunction restraining the city against making such a use of it.

It is insisted that such a use of the fund will violate the terms of Mr. Hersey's will, through which the money has been received; that it will violate a contract between the city and the Bangor Mechanic Association; and, lastly, that it will violate that article of our State Constitution which limits the indebtedness of towns and cities.

It is the opinion of the court that no one of these objections can be sustained.

I. Mr. Hersey's will contains no directions as to how the principal of this fund shall be invested. The will declares in general terms how the income shall be employed; but it is entirely silent as to how the principal shall be invested, so as to yield an income. Apparently the testator was willing to leave that matter entirely to the judgment and discretion of the city.

II. The objection that the use of this fund by the city will violate an agreement between the city and the Bangor Mechanic Association lacks support. An examination of that agreement fails to disclose any clause that would be violated by such a use of the principal of the fund. The city proposes to pay for the use of this fund an annual income of forty-five hundred dollars. This is a higher rate of interest than the wealthy and prosperous cities of this State are accustomed to pay at the present time; and at some future time, justice to the tax payers of Bangor may require the amount to be reduced. But that question is not now before us. It may not be improper to add, however, that the court has complete jurisdiction over this fund, and can establish the rate of interest which the city shall be required to pay, and that no action of the city council in relation thereto will be binding upon the court. See act, 1893, chap. 300.

III. The third and last objection urged against the use of this fund by the city is, that the city is now indebted beyond the amount allowed by the Constitution of the State, and, if the city uses the fund for municipal purposes, its liabilities will be thereby increased. We fail to see how any use that can be made of this fund will increase the city's liability with respect to it. The city is now liable for this fund — liable absolutely — and if the city uses the fund, instead of otherwise investing it, we fail to see how its liability can be thereby increased or be made more than absolute.

The fact must not be overlooked that the liability of towns and cities for trust funds differs from that of ordinary trustees. The latter are liable only for good faith and prudence. The for-

mer are liable absolutely. If the fund is lost, good faith and prudence will be no defense. If a town or city uses a trust fund for municipal purposes, of course it is responsible for it. And if it does not use the fund, but otherwise invests it, still, its liability continues. The statute authorizing towns and cities to receive trust funds declares that such towns and cities shall be responsible for the safety of the funds. And this responsibility attaches, is absolute, and continues the same, whatever disposition is made of the fund. The assumption, therefore, that the use of this fund by the city of Bangor will increase its liabilities, is not well founded. So far as this fund is concerned, its liabilities will remain the same, whatever disposition may be made of it. R. S., c. 3, § 52.

And there is another fact that must not be overlooked. That article of our State Constitution which limits the indebtedness of towns and cities does not apply to trust funds. (See Art. XXII of the Amendments.) That article expressly provides that it shall not be construed as applying to any fund received in trust by a city or town. Consequently, the liability or indebtedness of a town or city, occasioned by the reception or use of a trust fund, is not limited by the Constitution. The constitutional limitation does not apply to trust funds.

But if we look at the questions presented in a broader and less technical light, we fail to see any objection to the use which the city of Bangor proposes to make of the Hersey fund. It is admitted that seventy-eight thousand dollars of the fund are now invested in bonds of the city of Bangor. Was not this a prudent and proper investment? And if the city now uses and becomes indebted for the balance of the fund, paying a just and reasonable interest therefor, will not the investment be equally safe and equally proper? Since the city is liable absolutely for the safety of the fund, what better investment can be made of it? No expressed intention of the testator will be thereby defeated. No wrong will be done to any beneficiary. No expressed intention of the legislature will be defeated. The statute declares that interest shall be allowed if the fund is used by the city; but it does not forbid such a use. We think the

language employed in the statute fairly implies that such a use may be made of the fund. The fact that such a use would be liable to be made of a trust fund was evidently before the legislative mind. It was not overlooked. And if the legislature had intended to forbid such a use, we can not resist the conviction that it would have said so in language unmistakable. We think the language employed implies license, not prohibition. The use of the fund for a needed municipal purpose, will not violate the limitation clause of the Constitution, for that clause expressly provides that it shall not be construed as applying to trust funds. And, viewed as a whole, we fail to perceive any reason, legal, equitable, or prudential, for granting the injunction prayed for.

Temporary injunction dissolved and the bill dismissed.

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

FRED E. GARLAND *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion July 22, 1893.

Railroad. Collision at Crossing. Negligence.

While railroads are entitled to a clear and unobstructed track for the running of their trains, still, it is their duty to keep a sharp lookout to avoid collisions at their crossings.

When a team has become stalled on, or so near to their track as to be in danger of being struck by a passing train, railway employees must be prompt and energetic in their efforts to stop the train in season to avoid a collision.

In this case, *it was held*, that there was no evidence of negligence; it appearing that the engineer, as soon as he was aware that the team was stuck, employed every means in his power to stop his train in season to avoid a collision, but was unable to do so.

The court find it unnecessary to consider the question of the plaintiff's negligence.

ON MOTION.

This was a motion to set aside a verdict against the defendant in an action to recover damages to the plaintiff's team at a railroad crossing.

The plaintiff in his declaration alleged that "the defendant then and there not in the use of proper care, or giving signals

of warning, so rashly and negligently and carelessly and with such undue and immoderate speed ran one of its engines with the entire train of cars attached thereto across said public street and highway, that," &c. . . .

The case appears in the opinion.

Heath and Tuell, for plaintiff.

Baker, Baker and Cornish, for defendant.

WALTON, J. The plaintiff has obtained a verdict for $413.82, against the Maine Central Railroad Company for injuries to a pair of horses and a pair of harnesses and a sled, occasioned by a collision with a passenger train of cars at a highway crossing.

The collision occurred February 12, 1891, at a place known as the Pulp Mill crossing, on the east side of the Kennebec river, in Augusta. The plaintiff's teamster undertook to drive across the railroad with a pair of horses and a sled and a load of green hemlock logs. The load weighed probably not less than three tons, and the crossing had no snow on it, and the moment the sled struck the bare planks between the rails, it stuck as fast as if it had been bolted down, and no efforts of the horses — not even with the assistance of four men lifting at the load with pries — could move it further.

While this load of green hemlock logs lay thus stalled directly across the railroad track, one of the regular passenger trains from Bangor came round a curve north of the crossing, and before it could be stopped, it collided with the plaintiff's sled and caused the injuries already mentioned.

The plaintiff claims that this accident was caused solely by the negligence of the railroad company. He does not admit that there was the slightest want of ordinary care in driving on to the bare crossing with a load of green hemlock logs so heavy that the horses with the assistance of four men could not haul it off, and at the very moment too, when a passenger train of cars was due. He does not admit that there was the slightest degree of negligence in attempting to drive over the bare crossing with such a load (weighing probably not less than three tons) without first throwing some snow upon it. He insists that the

collision was caused by the negligence of the railroad company alone, and without the slightest degree of contributory negligence on the part of himself or his teamster.

For the present we will pass over the question of contributory negligence, and consider the question of the alleged negligence of the railroad company.

We concede at the outset that, notwithstanding railway companies are entitled to a clear and unobstructed track for the running of their trains, still, it is their duty to keep a sharp lookout to avoid collisions at their crossings. That if they see that a team has become stalled on, or so near to their track as to be in danger of being struck by a passing train, they must be prompt and energetic in their efforts to stop the train in season to avoid a collision. It is true that all that is required of them in such cases is the exercise of ordinary care. But such a lookout and such efforts are no more than ordinary care. *Purinton* v. *Railroad Company*, 78 Maine, 569.

Assuming such to be the measure of care required of railway companies, we have examined the evidence bearing upon the conduct of those in charge of the train with which the plaintiff's team collided, and we are unable to see that they were in any way in fault. Their train was not moving at an unreasonable rate of speed. The engineer was on the lookout and saw the plaintiff's team as soon as the train had rounded the curve far enough to bring it within the line of his vision. As soon as the engineer became aware that the team was stuck, he employed every means within his power to stop his train in season to avoid a collision, but was unable to do so. That he would be prompt and energetic in his efforts to avoid a collision may very reasonably be presumed. A collision with a load of green hemlock logs might result in very serious consequences. Confronted by such a danger, the presumption that he would act promptly and energetically is very strong. And the evidence leaves no doubt that the engineer did so act. He put on the air-brakes, reversed his engine, and poured sand on the rails. There was nothing else he could do.

It is urged in behalf of the plaintiff that the engineer was neg-

ligent in not sooner comprehending the fact that the sled was stuck. That was a fact not to be ascertained by the sense of sight alone. He could see the load, and he could see that it was not moving. But he could not see that it was stuck and could not move. That was a fact to be ascertained by inference. It could become an ascertained fact only by a process of reasoning. And a principal factor in the process would be the length of time that the load should remain stationary. At first he thought it was moving. A little later, and he saw that it was not moving. A little later still, and he saw the men, standing by, waving their caps. Then the evidence was complete, and the inference that the sled was stuck became a fixed fact in his mind. But all this took time, and the whole transaction occupied but a few moments. After the catastrophe has happened, it is easy to look back and find fault, and point out in how many ways it could have been avoided. But it should be remembered that in sudden emergencies the judgment will not always arrive at correct conclusions in an instant. Men do not often drive on to a railroad track with a load which their horses can not haul off; and we do not think that in this case the engineer was in fault for not sooner comprehending the fact that the plaintiff's teamster had been guilty of such an imprudent act.

Our conclusion is that the alleged negligence of the railway employees is not proved, and that the evidence produced at the trial in the court below was not sufficient to justify the jury in finding that it was proved. And however much we may admire the ability of counsel who can obtain a verdict upon such evidence, we can not for a moment doubt that it is the duty of the court to set it aside.

This conclusion renders it unnecessary to consider the question of the plaintiff's negligence. We rest our decision on the entire absence of proof of the defendant's negligence.

Verdict set aside.

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

FRANCES E. TASKER *vs.* INHABITANTS OF FARMINGDALE.

Kennebec. Opinion July 22, 1893.

Towns. Way. Negligence.

The law does not require towns to make their roads passable over their entire width.

The duty of towns is fully performed when they have prepared carriage-ways of sufficient width to make them reasonably safe and reasonably convenient for travelers who drive over them with reasonable care and caution.

When one intentionally and heedlessly and unnecessarily drives out of the wrought part of a road, he must do so at his own risk.

ON MOTION AND EXCEPTIONS.

This was an action to recover damages sustained by an alleged defective highway. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial and also took exceptions. The view of the case taken by the court renders the exceptions immaterial.

The case appears in the opinion.

A. M. Spear for plaintiff.

Baker, Baker and Cornish, for defendants.

WALTON, J. As the plaintiff (Mrs. Tasker) was driving with two of her children over a road with which she was perfectly well acquainted, having driven over it hundreds of times, she saw an electric car coming. She says that her horse did not appear to be at all alarmed, and that she had him under full control. She, nevertheless, reined her horse out of the road on the opposite side from the car, so as to go as far from it as she could, and the first she knew her carriage wheel dropped down over the end of a culvert, and she and her two children were thrown out. The children were not hurt. But for injuries claimed to have been received by her, she has recovered a verdict against the town of Farmingdale for $1150.

We think the verdict is clearly wrong. We can not doubt that the accident was due entirely to the plaintiff's own thoughtless inattention. The road was smooth and nearly level, and wide enough for three such carriages as the one in which the plaintiff was riding to pass abreast. Her horse was not frightened and she

had him under full control. She so testifies. She intentionally and unnecessarily reined him out of the road. It was in the evening, and the kindliest view that we can take of the plaintiff's conduct is that her attention was so absorbed by the electric car that she gave no thought to the danger she might encounter by driving out of the road. She saw the car, but she did not see and did not think of the culvert. Thoughtless inattention — the very essence of negligence — was the cause of the accident.

It is urged that the culvert was so constructed that it could not be easily seen in the evening. But that is true of most culverts. And there is no evidence that the plaintiff tried to see it. She does pretend that she looked for it. The night was not very dark, and the plaintiff testifies that the width of the road was plainly visible, and she supposed there were culverts. "I mean," said she, "that I would see them as I passed along, but could not place them from memory." But she does not pretend that at the time of the accident she was making any effort to place them. She was using neither her memory nor her sense of sight. She was thoughtless and inattentive to every danger except the electric car. It is no excuse for driving into an unseen and an unlooked-for culvert, that possibly it might not have been seen if it had been looked for. It is negligence to drive out of a well wrought road and into the ditch without first ascertaining whether it will be safe to do so, or at least making an effort to ascertain.

It is further urged that the culvert was too short. It is argued that if this culvert had been only a few inches longer, this accident would not have happened. That is no more than saying that if the plaintiff had not driven outside of the culvert she would not have been hurt; or, if she had kept in the road, or only a few inches nearer the center of it, the accident would not have happened. The distance from the railroad track to the end of the culvert was twenty-one feet. If, as the plaintiff says, her horse was not at all frightened, and she had him under full control, surely twenty-one feet of smooth road was a sufficient width for the plaintiff to have crossed the culvert on, if she had exercised due care not to get out of the road. The

law does not require towns to make their roads passable over their entire width. The duty of towns is fully performed when they have prepared carriage-ways of sufficient width to make them reasonably safe and reasonably convenient for travelers who drive over them with reasonable care and caution. When one intentionally and heedlessly and unnecessarily drives out of the wrought part of a road, he must do so at his own risk. It would be monstrous to hold the town responsible for an accident thus occasioned.

We profoundly regret the plaintiff's injury. But we think it would be a perversion of law and a perversion of justice to allow the town of Farmingdale to be made responsible for it. *Perkins* v. *Fayette*, 68 Maine, 152; *Knowlton* v. *Augusta*, 84 Maine, 572; *Mosher* v. *Smithfield*, 84 Maine, 334; *Gallagher* v. *Proctor*, 84 Maine, 41; *Morse* v. *Belfast*, 77 Maine, 44; *Spaulding* v. *Winslow*, 74 Maine, 528.

Verdict set aside.

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

GEORGE E. KING *vs.* JERRY HURLEY.

Hancock. Opinion July 25, 1893.

Promissory Notes. Indorser. Notice.

In the written notice of the dishonor of a promissory note, the omission to state the names of all the indorsers, and an error in stating the amount of the note, will not vitiate the notice, unless the indorser is misled thereby.

ON EXCEPTIONS.

The only question raised in this case is whether or not the note in suit was sufficiently protested to hold the defendant as an indorser.

The court gave judgment for the plaintiff and the defendant took exceptions.

The case sufficiently appears in the opinion.

A. W. King, for plaintiff.

G. B. Stuart, for defendant.

EMERY, J. This was an action by an indorsee against the indorser of a promissory note. At the maturity of the note, payment was duly demanded of the maker, and was refused, and notice thereof was seasonably sent to the defendant indorser. The defendant makes but two objections to the notice. First, that it did not state who were the other indorsers of the note. Second, that it misstated the amount of the note.

The defendant, however, does not show that he was in the least misled or confused by the omission, or by the mistake. On the contrary it clearly appears that he understood the notice to refer to the note in suit. He was, therefore, fully informed of the dishonor of this note and that the holder looked to him for payment. This was sufficient to fix his liability. *Cayuga Co. Bank* v. *Warren*, 1 N. Y. 413. *Exceptions overruled.*

LIBBEY, FOSTER, HASKELL and WHITEHOUSE, JJ., concurred.

PETERS, C. J., did not sit.

NELLIE M. GRAY *vs.* SACO WATER POWER COMPANY.

Oxford. Opinion August 11, 1893.

Waters. Deed. Diversion. Head.

Water rights acquired by grant, and not by ownership of the soil through which the water flows, depend upon the intention of the parties as expressed in the deed taken in connection with their situation and the subject matter of their transaction at the time of the conveyance.

Under a deed of the right to use as much water out of a pond as would pass through a hole ten inches square, after conveying it to a convenient place to a water wheel erected there, the grantee made an opening through the dam of one hundred square inches, the lower part of which was three feet above the bottom of the dam. The water thus drawn from the dam was conducted by a canal to a water-wheel placed about on the same level as the bottom of the dam, thus obtaining a head of three feet after it left the dam. The defendant, having since acquired the grantor's rights, has during the past six years drawn at various times for the use of its mills in Saco and Biddeford, the water in the pond down nearly to the top of the opening in the dam, but not so low that the water did not fill the entire aperture of one hundred square inches; and the plaintiff holding under the grantee above named, has been deprived at such times of the usual head of water in the pond theretofore enjoyed, and without which the mill cannot run.

Held, that the defendant's acts in diminishing the head of water at the dam are not a wrongful interference with the plaintiff's rights; *also*, that such deed does not call for any head at the dam.

AGREED STATEMENT.

This was an action for the diversion of water. The parties stated their case which appears in the opinion of the court.

A. H. Walker, for plaintiff.
Fairfield and Moore, for defendant.

VIRGIN, J. In 1783, there was erected across the outlet of Moose pond a dam ten feet in height over which the water usually flowed in spring and fall.

On August 1, 1832, and for fifty years at least prior thereto, Barnabas Bracket owned the pond, dam and mills thereon, together with the adjoining territory. The water thus raised,— except so much thereof as was temporarily used in the spring for slipping logs,— was exclusively used for running the mills.

On August 1, 1832, Bracket conveyed about one half acre of land, situated a short distance below the dam, to one Berry, the plaintiff's father, who erected thereon what is denominated in the next deed to be mentioned a "shop."

On October 23, 1839, Bracket conveyed to Berry a certain water right, viz: "The right of drawing as much water from Moose pond and through my dam as will vent off through a gate or opening that is equal to ten inches square, and to draw the same at any and all times, and to carry the water across my land situated between the dam and said Berry's shop, by canal or otherwise, and from the shop to Moose brook on the northerly side of the county road, for the purpose of venting the water off from his water wheel, or said Berry may at his election take the water out through the main dam and carry it down the brook, nearly to the bridge, by a flume or otherwise, and there erect a building twenty feet square for the convenience of his water-wheel. . . . Meaning to convey to said Berry the right of using as much water out of the pond as would pass through a hole ten inches square after conveying it to a convenient place to erect a water-wheel."

Under this deed, Berry made through the dam "an opening" of one hundred square inches, the lower part of which was three feet above the bottom of the dam. And the water thus drawn from the dam was conducted by a canal dug by Berry to his

wheel which was set about on the same level as the bottom of the dam, thus obtaining three feet head after it left the dam.

The Berry mill has ever since been run by the water thus drawn through the dam, until the alleged diversion in 1874, by the defendant.

In 1874, the defendant, through several mesne conveyances, acquired Bracket's entire interest in the premises,—including the pond, dam, mills and privileges,—since which time it has drawn water from the pond for the use of its mills in Saco and Biddeford. And in 1876, on the death of Berry, his interest descended to the plaintiff—his sole heir-at-law.

At various times within the six years next preceding the date of the writ, the defendant has, for the use of its mills in Saco and Biddeford, drawn the water in the pond down nearly to the top of the "opening" in the dam, but not so low that the water did not fill the entire aperture of one hundred square inches. Whereby the plaintiff, during the various times mentioned, has been deprived of the usual head of water in the pond theretofore enjoyed and without which her mill cannot run.

The question is: Are the foregoing acts of the defendant, in thus materially diminishing the head of water at the dam previously enjoyed by the plaintiff, a wrongful interference with her rights.

As the plaintiff and her predecessor acquired no right from being owners of soil through which the water flows, the grant is her sole source of right. *Tourtellot* v. *Phelps*, 4 Gray, 373. Hence the decision of the case depends upon the intention of Bracket and Berry, on October 23, 1839, taken in connection with their situation and the subject matter of their transaction at that time. *Sumner* v. *Williams*, 8 Mass. 162; *Deshon* v. *Porter*, 38 Maine, 293; *Covel* v. *Hart*, 56 Maine, 518, 522; *Butler* v. *Huse*, 63 Maine, 447, 453.

Grants and reservations relating to water and water power are various in their nature and effect. Some refer to a certain extent of water power sufficient for the propulsion of a specific mill or machinery. *Warner* v. *Cushman*, 82 Maine, 168; *Hammond* v. *Woodman*, 41 Maine, 177; *Covel* v. *Hart*,

supra; *Elliott* v. *Shepherd*, 25 Maine, 371. Some to a quantity of water to be restricted to a specific purpose. *Deshon* v. *Porter*, *supra*. Others to "such a quantity of water as the grantor or his predecessor have been accustomed to use." *Avon Manf'g Co.* v. *Andrews*, 30 Conn. 476. Still others, to such a quantity of water as will flow through a gate of specific dimensions under a specific head of water. *Bardwell* v. *Ames*, 22 Pick. 333; *Tourtellot* v. *Phelps*, *supra*. Head is a well-known material factor in determining the quantity of water which will pass through a given aperture in a given time. Em. Hydr. 38; *Canal Co.* v. *Hill*, 15 Wall. 94, 102.

Reading the deed of October 23, 1839, in connection with the situation of the parties and the subject matter of their transaction at the time of the conveyance, we find Brackett owned the entire water privilege — a pond some four to six miles long, the dam and mills thereon and the land about them. The dam built in 1783, had always remained ten feet high, over which the water usually flowed in spring and fall, and was exclusively used for the mills at the dam, — except temporarily in the spring when some of it was appropriated for slipping logs, — until 1874.

Such was the condition of the property, on October 23, 1839, when Bracket conveyed to Berry the right to draw about seven-tenths of a square foot of water from the dam. From what part of the dam is not specified — an option of two different places is given. It was in fact taken, not from the "main dam" and so "down the brook by a flume" to a building 20x20 to be thereafter erected "for the convenience of his water-wheel." But it seems it was taken from a part of the dam by a "canal the bottom of which at the pond was about three feet higher than the bottom of the [main] dam at its lowest point."

The deed in question makes no mention of any head whatever. The size of the "opening" only is given. Neither the dimensions of the Berry mill thereafter to be built, nor the kind, extent or purpose of the machinery to be attached thereto, and operated by this small quantity of water carried several

rods from the dam in a canal, is hinted at. Nothing is said about Berry's sharing the expense of keeping the dam in repair. Nor does the agreed statement shed any light upon these matters.

The last clause in the description of the premises—"Meaning to convey to said Berry the right of using as much water out of the pond as would pass through a hole ten inches square after conveying it to a convenient place to erect a water-wheel"—does not call for any head at the dam. The agreed statement shows that the wheel was placed three feet lower than the opening in the dam, whereby a head of three feet was secured in the Berry canal after the water left the dam.

Therefore, looking solely at the terms of the deed, it would seem that so long as the water in the dam is not drawn down so low but that it "at any and all times" fills the entire aperture whether situated at the dam as the first clause in the deed would seem to place it, or immediately in front of the wheel at the foot of the canal, as the last clause seems to locate it,—the grantee and his assigns have all the water he bargained for.

In the absence of any provision in the deed for any specific head of water in the pond, can it be construed into the deed by any known rule of law? We think it cannot.

It is, however, an established rule of construction, founded on the highest considerations of law and justice that the grant of a principal thing carries all things necessary to the use and enjoyment of the thing granted which the grantor has the power to convey. *Butler* v. *Huse*, 63 Maine, 447, 453. Thus the grant of mills carries also by implication the use of the head of water necessary to their enjoyment owned by the grantor. *Blake* v. *Clark*, 6 Maine, 436; *Rackley* v. *Sprague*, 17 Maine, 281; *Wyman* v. *Farrar*, 35 Maine, 70; and also the right to flow the land of the grantor. *Preble* v. *Reed*, 17 Maine, 169. And the grant of a "mill site" conveys also the water power; the right to maintain a dam for the beneficial appropriation of the water. *Stackpole* v. *Curtis*, 32 Maine, 383. So when the use of a thing is granted everything essential to that use is granted also. Such right carries with it the implied authority to do all that is necessary

to secure the enjoyment of such easement. *Pomfret* v. *Ricroft*, Wm's Saund. 323, note 6; *Prescott* v. *Williams*, 5 Met. 429; *Warren* v. *Blake*, 54 Maine, 276, 286. Thus Berry had the right to enter and clear out the canal and race-way on Bracket's land, through which the water granted necessarily flowed to and from Berry's wheel, whenever such action became necessary to the enjoyment of the use of the water granted. *Prescott* v. *White*, 21 Pick. 341; *Prescott* v. *Williams*, *supra*.

There can be no doubt that whatever was essential to the use of the one hundred square inches of water granted, was also granted. But that cannot include the right to compel Bracket and his assigns to keep up any particular head of water above the plaintiff's tap in the dam. In *Canal Co* v. *Hill*, 15 Wall. 49, the Chesapeake and O. Can. Co. leased to the defendant the right to draw from their canal "so much water as would pass through an aperture of two hundred square inches to be used solely for propelling the machinery of a paper mill and appurtenant works — the lower edge of the aperture not to be nearer the bottom of the canal than two feet." A majority of the court held that the quantity of the water was to be ascertained from the character and depth of the canal, the circumstances under which the water was to be drawn, and the state of things existing at the time the grant was made. And that although no head of water was mentioned in the lease, it was presumed that the parties contracted in reference to such a head as depended upon the usual depth or height of water in the canal. But in that case the use to which the water leased was to be appropriated was specified in the lease. In the case at bar no such intimation is given.

To be sure, Berry and his assigns might enjoy so much head as resulted from the natural accumulations of the water in the pond and thus secure *pro hac* by velocity a larger quantity of water per minute or per hour than when the head was lower. But we do not think the company is bound to keep back the water in the pond for his use and for the sole purpose of feeding his canal. *Whitney* v. *Wheeler Cotton Mills*, 151 Mass. 396, 405. But so long as the water in the pond is kept sufficiently high to fill

the "opening" entirely, whatever the head, he enjoyed the thing granted, and whatever beneficial use belonged to it so far as any head is concerned. The fact that there was more or less head at the dam prior to 1874, is immaterial in the absence of any claim by adverse possession. That was no contemporaneous construction by the parties. Such fact simply resulted from the fact that the defendant's predecessors had no occasion by their comparatively small mills to draw down such a body of water, as the present defendants have. The deed is to be construed with reference to the state of the property at the time of conveyance.

Plaintiff nonsuit.

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

BRUNSWICK GAS LIGHT COMPANY

vs.

UNITED GAS, FUEL AND LIGHT COMPANY.

Cumberland. Opinion August 11, 1893.

Corporations. Sale of Franchise. Contracts Ultra Vires.

Public or *quasi* public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public as well as to their stockholders; and they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties without legislative authority.

A more serious objection to the traffic in corporate franchises is the ease with which such a power could be used to create monopolies.

A gas company, which possesses and exercises the right to lay its pipes in the public streets, can not sell, lease, or assign its corporate rights and privileges to another gas company without the consent of the legislature.

A contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid. The proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of.

ON EXCEPTIONS.

This was an action of covenant broken to recover damages for breach of the covenants in a lease. The case was tried by the justice of the Superior Court, for Cumberland county, without the intervention of a jury, subject to exceptions in matters of

law. From the bill of exceptions, it appeared that the plaintiff was incorporated by special act of the legislature, in 1854, to carry on the manufacture, distribution and sale of gas for street lighting, the laying of pipes in the streets, &c.

The defendant was incorporated under the general laws of Maine, in 1888; and its purposes, under the articles of association, were to operate "a gas process for manufacturing fuel and illuminating gas from oil and other raw products; to light by gas the streets, parks, grounds, buildings and business places of persons and corporations; to manufacture, use, supply, distribute and furnish, light, heat and motive power by gas for heating and manufacturing purposes deemed for the interest of the corporation; to erect and maintain posts and other fixtures, to lay down and maintain such underground pipes and other appurtenances as may be deemed necessary for the objects of the corporation, wherever the same may be lawfully done; to manufacture, lease, purchase and otherwise acquire, deal in, manage, use and sell any and all machinery, fixtures, appurtenances, appliances and plants for using and furnishing light, heat and power and for any and all purposes for which gas is now used or may hereafter be used; to lease, purchase, or otherwise acquire, manage, control, use and sell real and personal estate, patents, patent rights, inventions and processes and improvements thereon, and interests therein and rights thereunder, and any and all other property, privileges and easements, rights and things whatsoever deemed necessary or convenient for carrying on the business of the corporation, with power to authorize other corporations and persons to manufacture, use, sell and operate thereunder, and to do any and all acts and things connected with or deemed necessary for carrying on the business of the corporation and the general business of furnishing and supplying heat, light and power by means of gas; to issue bonds secured by mortgage on the property and franchise of said company for the purpose of raising money for the use of the company; and to have and exercise all the rights and powers and privileges appertaining to corporations under the general laws of the State of Maine."

For several years prior to April, 1889, the plaintiff corporation under its charter had supplied the citizens of Brunswick with gas. Its operations had not been financially successful. At that time it was heavily in debt, not only on account of bonds which it had issued, secured by a mortgage on its real estate, and other property, but a considerable floating debt existed as well. Some of the bonds at that time were overdue, and the holders were threatening foreclosure. At this time B. G. Dennison was the President of the Brunswick Gas Light Company, and Marcus R. Williams was president of the United Gas, Fuel and Light Company.

At the time of the execution of the lease of the Brunswick property, all the directors of the defendant company, including its president, were residents of New York city and its vicinity.

This defendant was the owner of what is known as the Avery process for the manufacture of gas. Not long after the election of these directors, president Williams came to Maine for the purpose of introducing that process in this State.

For some time prior to said first day of April, negotiations had been pending between these two officers relating to a lease of the plaintiff's property by the defendant company; the defendant company prior to this time having entered into possession of the gas plant in Bath, under some kind of an arrangement with the company originally operating the Bath plant. These negotiations terminated on the first day of April, 1889, by the execution of a lease.

Under this lease and on the day of its execution, the defendant company entered into possession of the plaintiff's gas plant at Brunswick.

The case does not show that, prior to the execution of the lease, the directors of the defendant company expressly authorized by formal vote their president, Williams, to execute the lease in their behalf. The defendant company at the trial denied the authority of Williams to execute the lease of the Brunswick plant, but it appeared as facts in the case that the works at Brunswick and at Bath, which the defendant company admitted were operated by its authority, had a common manager,

whose salary was not apportioned between them, kept common books of account and bought supplies in common. And further, that both works at times used the Avery process for the manufacture of gas which the defendant company alone had the right to use.

From these facts, and other testimony in the case the court found that Williams was the agent of the defendant company to arrange with different gas companies in the State for the introduction of the Avery process; that the directors of the defendant company had full knowledge that the works at Brunswick were operated by their company; that they acquiesced in the same and ratified the action of Williams in the premises, — no disavowal of the authority of president Williams to execute the Brunswick lease ever having been communicated to the plaintiff company prior to the commencement of this suit.

The defendant company continued to operate the Brunswick works until September 15, 1890, when voluntarily, and without the fault of the plaintiff company, they abandoned the works and ceased to operate them.

Upon these facts the court ruled as matter of law that the plaintiff company and the defendant company had power to execute the lease in question, and that the defendant company was liable in damages for the breach of the convenants contained in said lease.

The defendant company did not indorse any guaranty upon the outstanding bonds of the plaintiff company, nor did it give any guaranty to the holders of the same further than is contained in the provisions of the lease itself. The damage sustained by the plaintiff on this account is of such an uncertain character that the court allowed the plaintiff nothing for the failure of the defendant to fulfill those covenants contained in the lease.

For prospective damages on account of the breach of covenants of the lease, the court awarded the plaintiff the sum of four thousand five hundred dollars ($4500) less three hundred dollars, the value of defendant's improvements while in possession, the plaintiff having expressed a willingness to make a deduction equal to the difference between the value of the plant April

1, 1889, when the defendant took possession, and its value September 15, 1890, when it abandoned possession.

After hearing the evidence and arguments of each party, and considering the same, the court decided that the said indenture is the defendant's deed in manner and form as the plaintiff in its writ has declared against it, and awarded damages in the sum of four thousand nine hundred and eighty-six dollars and fifty-six cents.

Among other provisions the lease contains the following:

"The lessee covenants and agrees to guarantee during the term of this lease the present bonded indebtedness of the lessor, and its renewal, and a further issue of bonds to liquidate any or all of the lessor's existing floating indebtedness. The lessor covenanting on its part not to increase its total indebtedness during the term of this lease and to use all reasonable efforts to pay the same as it matures. And in all bonds of the lessor purchased by the lessee, the lessee shall receive five per cent interest per annum, payable semi-annually, and may deduct said interest from the rent.

"It is further agreed that the said lessor will sell, assign, and transfer the capital stock of said Brunswick Gas Light Company, the par value thereof being fifty dollars ($50), which stock is to remain at the present amount, twenty thousand dollars ($20,000), at any time within eight years on the following basis: The said lessee is to pay for said capital stock at the rate of forty dollars ($40) per share."

The defendant pleaded *non est factum*, with a brief statement, and after judgment took exceptions to this court.

The defense relied upon by the defendant was that the lease was negotiated and executed by an unauthorized agent whose acts were never ratified; that the plaintiff had no legal right to execute the lease, and that in so doing its acts were *ultra vires* and void; that the defendant company had no right to guarantee the bonds, and its agreement to do so was *ultra vires* and void; and that at the termination of the lease there was due the defendant company in set-off, for extensions, improvements and additions, about $1500.

Barrett Potter, for plaintiff.
G. W. Heselton, for defendant.

WALTON, J. The question is whether a gas company, which possesses and exercises the right to lay its pipes in the public streets, can sell, lease, or assign its corporate rights and privileges to another gas company, without the consent of the legislature.

We think the question must be answered in the negative. Corporations possessing and exercising the right of eminent domain, owe duties to the public from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it may be deprived of its corporate powers and privileges. And they may be lost by the foreclosure of a legally executed mortgage. And they may also be lost by laches in reclaiming them when they have been illegally sold, leased, or assigned. But subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority that public or *quasi* public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and that they can not sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric light companies, telegraph and telephone companies, street railway companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. And this is a duty the performance of which may be enforced by the courts. And one reason why these corporations are not allowed to sell or lease their corporate powers and franchises, without legislative authority, is that if they were able to do so, they might thereby disable themselves from the performance of their

public duties, and thus escape from the power of the courts and of the legislature to enforce their performance.

But a still more serious objection to the traffic in corporate franchises is the ease with which such a power could be used to create monopolies. By its exercise, a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint.

To the argument that similar combinations may be made by individuals, it has been aptly replied that men are mortal, and their combinations short-lived, but corporations are immortal, and their combinations and acquisitions may go on forever; that they may add field to field, wealth to wealth, and power to power, till they become too strong for the government itself; that all experience shows that such accumulations of wealth and power are dangerous to the public welfare; and that while society can endure the accumulations and combinations of mortals, which must end at the grave, it can not endure similar accumulations and combinations of power by corporations, which may continue forever.

In a case in New Jersey, decided in August, 1892, it is said that corporations which engage in a *quasi* public occupation, such as railway, water, gas, telegraph, and similar corporations, are created upon the hypothesis that they will be a public benefit; that they usually possess the right of eminent domain, and not unfrequently the use of the public highways is accorded to them; and that while the state confers upon them these special and extraordinary privileges, it at the same time exacts from them the performance of public duties; that such corporations hold their franchises not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public; and that such corporations can not lease or otherwise dispose of their franchises needful in the performance of their public duties, without legislative consent. *Stockton* v. *Central Railroad*, 24 Atl. Rep. 964.

In a case in Illinois decided in 1887, the court held that reason and the weight of authority were in favor of the doctrine that a corporation has no right to sell or lease its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain, without legislative authority. *Fietsam* v. *Hay*, 122 Ill. 293; 3 Am. St. Rep. 492.

In another case, decided in 1889, a corporation for the manufacture and sale of gas, having a capital of $25,000,000, had obtained by purchase a controlling interest in four other gas companies, having an aggregate capital of nearly $17,000,000; and in the vigorous language of the court, was thus able to destroy the energies of all other corporations of the same kind, and suck the life-blood out of them; and the court held that such a combination could not be tolerated; that the business of manufacturing and distributing illuminating gas by means of pipes laid in the public streets of a city, is a business of a public character; that it is the exercise of a franchise belonging to the State; that the services to be rendered for such a grant are of a public nature; and that any unreasonable restraint upon the performance of such duties is prejudicial to the public interests, and in contravention of public policy, and could not be allowed. *People* v. *Chicago Gas Trust Co.* 130 Illinois, 286; 17 Am. St. Rep. 319.

Equally vigorous is the language of the New York Court of Appeals. In a case relating to the combination known as the Sugar Trust,—a trust that included the Forest City Sugar Refining Company of this State, and so successfully sucked its life-blood out of it that its machinery has since remained as silent as a city of the dead,—the court said that corporate grants are always assumed to have been made for the public benefit, and that any conduct which destroys their normal functions, and maims and cripples their separate activity, must affect unfavorably the public interest; and that this is so to a much greater extent when a combination includes and dominates an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion; that it is not a sufficient answer to say that similar results may

be lawfully accomplished by an individual having the necessary wealth, for it is one thing for the State to respect the freedom of the citizen, and quite another thing to create artificial persons to aid in promoting such aggregations; that the individuals are few who hold such enormous wealth; but if corporations can combine and mass their forces, a tempting and easy road is opened to enormous combinations, vastly exceeding in strength, and in power over industry, any possibilities of individual ownership. *People* v. *Sugar Refining Company*, 121 N. Y. 582 (18 Am. St. Rep. 843).

The law does not assume that all combinations of corporate powers and franchises are necessarily hurtful. It recognizes the fact that they are sometimes beneficial, and provides a way by which they may be lawfully made. But as such combinations are liable to be made for improper purposes and with conditions annexed to them which are inadmissible, sound public policy requires that they be made under legislative supervision and restraint.

In the present case, the Brunswick Gas Light Company undertook to lease all its property, and all its corporate rights and privileges, to the United Gas, Fuel, and Light Company, for twenty-five years. The latter company took possession of the works and held them for seventeen and a half months, making improvements upon them and paying a portion of the agreed rent. It then abandoned the works, and possession was resumed by the lessors.

This is a suit by the lessors against the lessees for a breach of the covenants contained in the lease. It was contended in defense that the lease was illegal and void and that no recovery could be had upon it. The presiding justice ruled, as a matter of law, that the plaintiff company and the defendant company had power to execute the lease, and that a recovery could be had for a breach of the covenants contained in it. We think the ruling was erroneous. No legislative authority for making the lease was shown, and, without such authority, we think the lease must be regarded as *ultra vires* and void. The authorities bearing upon the question are not in

entire harmony; but the weight of authority seems to us to be overwhelmingly in favor of this conclusion. See 2 Beach on Corporations, sections 831 to 856 inclusive, and the six pages of authorities, *pro* and *con*, cited under the section last cited. The cases are too numerous for citation here, and the few cases to which we have referred will furnish a key to all of them.

But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the agreed rent. We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it can not be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Mr. Justice Gray, in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. *Pittsburgh, etc.* v. *Keokuk, etc.* 131 U. S. 371. We think this is the correct rule. 2 Beach on Corp. § 423, and cases there cited.

Exceptions sustained,

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

HENRY J. GOULDING, APPELLANT.
In Re JOHN U. HUBBARD, Insolvent.

Kennebec. Opinion August 11, 1893.

Insolvency. Appeal. R. S., c. 70, § 12.

No appeal lies from the court of insolvency except such as is provided by the statute. R. S., c. 70, § 12.

The attempted appeal in this case is not within the statute.

ON EXCEPTIONS.

It appeared from the bill of exceptions that this case originated in the Insolvent Court of Kennebec county, on petition of creditors of John U. Hubbard in involuntary insolvency; and an appeal was taken by the appellant Goulding, who was an attaching creditor, from the decision of said court adjudging said Hubbard an insolvent debtor.

The appeal was heard before the presiding justice in the court below, who rendered a decision affirming the decision of the judge of the Court of Insolvency, and dismissed the appeal, to which ruling the plaintiff excepted.

It was agreed that all the debts claimed by the petitioning creditors, and set out in the schedule accompanying the petition, together with the debt claimed by the appellant Goulding, were justly due, and were contracted and payable in Maine, and contracted while Hubbard and all the parties thereto were residents of Maine; but said Hubbard has since removed from this State, and that at the date of said petition, and for more than six months prior to the filing thereof, he was and still is a resident of East Douglass, Massachusetts; and at the date of said removal, and of the petition in insolvency, said Hubbard was the owner of real estate in Maine, within the county of Kennebec.

It was further agreed for the purpose of the exceptions only, and without prejudice, that the facts set out in the first and second reasons of appeal are to be taken as true; and that the attachment of said Goulding, was made less than four months prior to the commencement of the proceedings of insolvency.

The reasons of appeal referred to are as follows:

"First, that he is a creditor of said John U. Hubbard by reason

of a contract made in this State between him and said John U. Hubbard, namely, that he is the owner of a promissory note signed by said John U. Hubbard and others, for the sum of $1500 and interest, and dated at Oakland, Maine, February 3, 1888. And that said note has been in no part paid and is now due to said Goulding.

"Second, that said Goulding brought a suit on his said note against said John U. Hubbard on the 20th day of August, 1891; upon which suit the real estate of said John U. Hubbard in this State is attached, and that said suit is now pending."

The appellant contended that the statute, c. 109, of 1891, giving the court of insolvency jurisdiction over the property in this State of non-resident debtors is unconstitutional, being in violation of the provisions of the constitution of the United States that "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States," and "that no state shall enter into . . . any law impairing the obligation of contracts."

He also contended further that the court of insolvency had no jurisdiction in the matter of the insolvency of said Hubbard who was a non-resident.

The arguments of counsel upon these questions are omitted, becoming immaterial by reason of the decision of the court which disposed of the case upon another ground.

W. T. Haines, for appellant.

Baker, Baker and Cornish, *H. L. Hunton*, with them, for petitioning creditors.

WALTON, J. This case is before the law court on exceptions to the dismissal of an attempted appeal from the court of insolvency for the county of Kennebec. We think the dismissal was proper.

Our insolvent law provides that no appeals shall lie from the insolvency courts except such as are therein provided for. R. S., c. 70, § 12. The attempted appeal in this case is not therein provided for. *Exceptions overruled.*

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

APPENDIX.

BAIL COMMISSIONERS. JURISDICTION. POWERS.

Supreme Judicial Court, Law Term, Middle District, 1893.

Whereas questions have arisen in this State respecting the jurisdiction and powers of bail commissioners appointed by the Supreme Judicial Court, it is resolved,—

PER CURIAM:

First: During a term of the Supreme Judicial Court in any county, a bail commissioner is not authorized by the statutes of this State to admit to bail any person confined in jail, or held under arrest by virtue of a precept returnable to said term.

Second: When a person is confined in jail for a bailable offense, or for not finding sureties on a recognizance, and the amount of his bail has been fixed by a Justice of the Supreme Judicial Court, a bail commissioner is not authorized to change the amount of such bail.

QUESTION SUBMITTED BY THE GOVERNOR,
September 7, 1891,
RELATING TO THE REMOVAL AND APPOINTMENT OF COUNTY ATTORNEYS UNDER REVISED STATUTES, CHAPTER 27, SECTION 61, WITH THE ANSWER OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THERETO.

State of Maine.

Executive Chamber, Augusta, September 7, 1891.

To the Honorable JUSTICES OF THE SUPREME JUDICIAL COURT:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Art. VI, Section 3, and believing, that the questions of law are important, and that it is a solemn occasion, I, EDWIN C. BURLEIGH, the Governor, respectfully submit the following statement of fact, and question, and ask the opinion of the Justices of the Supreme Judicial Court, thereon.

Statement. An application has been made to me for the removal of a County Attorney, under the provisions of chapter 27, section 61, of the Revised Statutes, of Maine.

Question. Would a removal, by the Governor, of a County Attorney, upon proper charges, due notice and hearing, under said section 61, and the appointment of a proper person to fill his place be valid?

Very respectfully,
EDWIN C. BURLEIGH,
Governor.

To the Honorable EDWIN C. BURLEIGH, *Governor*,

SIR:—In answer to the question propounded to the Justices of the Supreme Judicial Court, viz:

"Would a removal, by the Governor, of a County Attorney upon proper charges, due notice and hearing under section 61 of chapter 27, of the Revised Statutes, and the appointment of a proper person to fill his place, be vaild," we have the honor to submit the following answer.

We are of the opinion that the facts stated do not indicate that any solemn occasion exists within the meaning of the Constitution of the State, which requires any expression of opinion of the Court upon the question presented. Although the attorney is to be heard upon the charges against him presented to the Governor, he cannot be heard upon the question submitted to us, and we think it inexpedient to prejudice the question before any occasion has arisen calling for its legal determination.

We are more confirmed in this opinion in view of the late statute of the State upon the subject of the tenure of office, under which, if the removal of such official be made and another appointed, the legality of the removal can be immediately contested, by proceedings to be instituted before any judge in any county in the State where either party resides, in term time or vacation, any law questions arising to be speedily considered and determined by the law court.

JOHN A. PETERS, Chief Justice.

CHAS. W. WALTON,
WM. WIRT VIRGIN,
ARTEMAS LIBBEY,
LUCILIUS A. EMERY,
ENOCH FOSTER,
THOS. H. HASKELL,
WM. P. WHITEHOUSE.
} Associate Justices.

QUESTION SUBMITTED BY THE GOVERNOR AND COUNCIL December 31, 1892, RELATING TO THE PARDONING POWER, WITH THE ANSWER OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THERETO.

STATE OF MAINE.

In Council, December 31, 1892.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be respectfully asked by the Governor and Council upon the following statement:

Benjamin Chadbourne was convicted of murder in the first degree at the September term, A. D., 1881, of the Supreme Judicial Court held in Piscataquis County, and sentenced at the February term, A. D., 1883, to be punished by confinement during the remainder of his natural life at hard labor in the State's Prison, at Thomaston, in the County of Knox.

His counsel now makes an application directly to the Governor and Council for pardon.

Question. Have the Governor and Council the power to consider an application for, or to grant a pardon to, a person convicted of murder in the first degree and sentenced to imprisonment at hard labor for life, without application being first made to the Justices of the Supreme Judicial Court as described in Chapter 114, Public Laws, A. D., 1876.

In Council, December 31, 1892.

Read and passed by the Council and by the Governor approved.

NICHOLAS FESSENDEN,

Secretary of State.

Augusta, May Law Term,
Western District, 1893.

To the Honorable HENRY B. CLEAVES, *Governor*,
and the Honorable Members of the EXECUTIVE COUNCIL:

Sirs:—In answer to the question propounded to the Justices of the Supreme Judicial Court, viz.

"Have the Governor and Council the power to consider an application for, or to grant a pardon to a person convicted of murder in the first degree and sentenced to imprisonment at hard labor for life, without application being first made to the Justices of the Supreme Judicial Court as described in chapter 114, public laws, A. D., 1876."

We have the honor to answer in the affirmative. The act referred to must be considered a permissive and not exclusive method of application for pardon in such cases; otherwise the act must be held to be unconstitutional.

JOHN A. PETERS, Chief Justice.
C. W. WALTON,
ARTEMAS LIBBEY,
LUCILIUS A. EMERY,
ENOCH FOSTER,
THOS. H. HASKELL,
WM. P. WHITEHOUSE,
ANDREW P. WISWELL. } Associate Justices.

In Memoriam.

State of Maine.

Executive Department.

Augusta, January 23d, A. D., 1893.

To the Honorable SENATE

and HOUSE OF REPRESENTATIVES:—

It is with feelings of great sadness that I announce to you the decease of Honorable WILLIAM WIRT VIRGIN, a member of the judicial department of the State government, who died at his home in Portland early this morning.

He was an honored citizen, an able and upright judge, of untiring industry, of the strictest integrity, faithful in the performance of every duty, and one whose decisions were always grounded upon the broad and safe principles of truth and right.

I recommend that proper action be taken by the Legislative branch, as a tribute of respect to the memory of the distinguished jurist, whose judicial labors have become a part of the history of our State, and will long be remembered and appreciated by the people of Maine.

During the funeral services, the Executive Department will be closed.

HENRY B. CLEAVES.

PROCEEDINGS OF THE CUMBERLAND BAR IN RELATION TO THE DEATH OF

HONORABLE WILLIAM WIRT VIRGIN,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT, FROM DECEMBER 26, 1872, TO JANUARY 23, 1893, ON WHICH DAY HE DIED AT HIS RESIDENCE IN PORTLAND, IN HIS SEVENTIETH YEAR.

At a meeting of the Cumberland Bar held in Portland on Monday, the 23d day of January, 1893, Messrs. Symonds, A. Strout, A. H. Walker, B. D. Verrill and F. C. Payson were appointed a committee to prepare resolutions on the death of JUDGE VIRGIN to be presented to this Court and entered on its records. The committee subsequently submitted a resolve which was unanimously adopted.

At the July term of the Law Court for the Western District held at Portland, Thursday, August 10, 1893, Chief Justice PETERS, and WALTON, EMERY, FOSTER, HASKELL and WHITEHOUSE, JJ., being present,—

HON. S. C. STROUT, President of the Cumberland Bar Association, rose and said:

May it please your Honors: I am charged with the painful duty of announcing to the Court the death of HONORABLE WILLIAM WIRT VIRGIN, late a member of this bench. The sad event occurred on the twenty-third day of January last.

As a soldier JUDGE VIRGIN achieved honor; as a lawyer he was for many years in the front rank of his profession; as a Judge he was able, cautious and conscientious, and was endowed with a power of analysis and strong common sense, which, accompanied by large acquirements in legal lore, enabled him, almost unerringly, to arrive at correct results.

As a man he deserved and enjoyed the confidence and esteem of the entire community.

We, of the Bar, who knew him most intimately, loved him

as a friend, and to us his loss is a great and irreparable, personal grief. His memory will long be cherished and kept green by the Bar of this State.

My personal relations with JUDGE VIRGIN commenced very shortly after my admission to the Bar. I first met him at court in Oxford county. He was then a young man, but a few years at the Bar. At once I conceived a strong liking for the man. In the subsequent years, while he remained at the Bar, I frequently came in contact with him as opposing counsel, where the contest was sharp and the struggle ardent. While his blade was keen and incisive, it was used legitimately for the protection of his clients, and never wielded in malice. He was always the honorable man and warm friend, and nothing ever marred the kindly relations existing between us from our first meeting to our last.

Nature gave him a robust body and mind, which promised a fuller measure of years than fell to his lot. These, accompanied by his well known industry, and studious habits, to human apprehension, ought to have permitted a longer life of usefulness to the community and of honor to himself. But a higher wisdom than ours decreed otherwise.

> "More moderate gifts might have prolonged his date,
> Too early fitted for a better state."

With the passing away of the present generation, the memory of those qualities of his mind and heart, which we have learned to know and appreciate by personal contact with him, and which have greatly endeared him to us, must necessarily fade; but he has left an enduring monument of his ability and learning in his opinions contained in the Maine Reports. They will live as landmarks of the law long after his personality shall have merged into a mere name.

Fame is ordinarily evanescent, and rarely long survives its possessor. The practicing lawyer, however eminent, leaves little behind him, beyond the personal recollections of his contemporaries, to perpetuate his name or achievements. His arguments, however able or eloquent, are mainly oral, and pass into and are dissipated in the air, and nothing remains but a

pleasing memory with his living hearers, and when they are gone, all is gone. But the record made by an able and upright judge rests upon a solid foundation, which will be read and appreciated by the Bar and Bench for centuries. Mansfield, Holt, Hale, Marshall, Story and Kent are now only names; but their fame as jurists is as bright and shining as when they were in life. So JUDGE VIRGIN'S lucid expositions of the law will long continue to instruct the lawyer, and redound to the honor of their author. They illustrate the conscientious, studious and able lawyer, and command the admiration and respect of the thoughtful, which is a much more desirable and more enduring fame than the applause of the unthinking and unstable multitude.

While we mourn his loss, perhaps we should feel that,—

> "Since every man who lives is born to die,
> And none can boast sincere felicity,
> With equal mind what happens let us bear,
> Nor joy nor grieve for things beyond our care,
> Like pilgrims to the appointed place we tend,
> The world's an inn, and death the journey's end."

It is not within my province to pronounce his eulogy. That office will be fittingly and lovingly performed by a committee of this Bar, which has been specially appointed for that purpose; and with your Honors' permission that committee will now report.

Hon. J. W. SYMONDS, chairman of the committee on resolutions, addressed the court as follows:

It is now more than half a year since the members of the Bench and of the Bar were assembled upon the news of JUDGE VIRGIN'S death to join in the last solemnities at his grave. For a long time he had borne the burden of failing health and, perhaps, had been conscious that the close of life was approaching, but he bore the burden so bravely, the mien of cheerfulness was so well maintained, that his friends had no thought death was so near. He had labored to the end and had fallen, it might almost be said, in the active discharge of the duties of his high office. The ink was still fresh upon the manuscript opinions of the court on which the last effort of his life had been expended.

The term of court in York, which by a supreme effort he had undertaken to hold but which he had been able only to open, was still in progress, in charge of his learned associate who, at his request, when he found he could do no more, had come to his aid. He died as he would have wished to die, at his work. Only the final illness called him from it.

Throughout Maine the news of his death was received with a universal feeling and expression of regret. The Governor of the State made formal announcement of it to the Legislature in session, and the State in all its departments, executive, legislative, judicial, paused to pay respect to his memory; to the memory of one whom the State had honored and who had honored the State. The courts in all the counties were closed. The Governor, the Executive Council, the Legislative Committees, the Court, the Bar, citizens and friends, drew near in a common sorrow and sense of loss when the last rites were observed and what was mortal of this learned and good man and judge was given again to the dust.

It was a dark day, in the very dreariness of mid-winter, when we met at his burial, and now in the beauty of summer, at this first Western Law Term held since his death,—a term from which he was never absent during his whole judicial experience and from which during the present year he has been missed as but few men are ever missed from their accustomed places,—we meet again in memory of him, to enter of record, if the Court please, some true memorial of his life and character.

Born on the eighteenth day of September, 1823, he died on the twenty-third day of January, 1893, in the seventieth year of his age. His birthplace was in the town of Rumford, in this State, where his early life was passed. His father, Peter Chandler Virgin, was the first, and for many years the only lawyer of the town. He was a native of Concord, New Hampshire, a grand-son of one of the founders of that town. He had studied at Phillips Academy in Exeter, and at Harvard College, and had come into what were then, I suppose, the wilds of interior Maine, to settle upon lands which had been granted to his family and to begin the practice of his profession. He became

identified with the new county of Oxford and was for many years one of its leading practitioners. He was a representative to the legislatures of Massachusetts and of Maine; member of the convention which assembled in 1819 to form a constitution for the new State of Maine, and during his life held many other places of trust and responsibility. He died at a great age in 1871. He is described as a gentleman of the old school, with all the old-time courtesy and dignity and universally respected.

WILLIAM WIRT VIRGIN, after his boyhood at Rumford, was fitted for college at the Bridgton and Bethel academies and graduated from Bowdoin in 1844 in a class several members of which distinguished themselves in the law in Maine. JUDGE VIRGIN always seemed to me to retain in large measure the tastes and the habits of his early life in the country. He loved the morning hours and had often been long at his work before the life of the city had wakened to its accustomed labors. In the midst of whatever difficulties, perplexities or anxieties, he always seemed to choose, before taking a decisive step, to review the situation in the morning light. As long as he lived he delighted, too, in the simple open-air amusements to which he had early been accustomed. To wander at will through the fields and woods, or to float upon the lake, with his rod and line in hand, was as much pleasure to him in manhood as it had been in youth. It distracted the man from care, as it had amused the leisure of childhood. He liked what seemed to him the real things of life, and was perhaps a little too impatient of conventionalities. His mind was tenacious of early impressions. Early associations, early friendships, were strong in him. Some of the intimacies of his college course remained to the date of his death without a cloud upon them, bright and warm as half a century ago. How much could be told us of this by his oldest and nearest friend, Major Hastings of Fryeburg, if we had not to regret his absence by reason of infirmity to-day! Mr. J. S. Palmer of this city, whose death so soon succeeded his own, was another college classmate outside the profession, with whom JUDGE VIRGIN maintained a lifelong intimacy.

JUDGE VIRGIN studied law in his father's office immediately

after leaving college, and upon admission to the bar began practice in the village of Norway where he remained until he removed to Portland in 1872. He had at the outset the advantages which a young man always has who follows his father's profession, many incidental advantages of earlier experience and easier knowledge. The facts of his professional career are so familiar here that I should not dwell upon them. He became a leading member of the Oxford Bar, and prominent throughout the State. He was the attorney of the State in Oxford county. He published two digests of the reports of Maine and was for seven years the Reporter of the Decisions of the court, a place which has always been recognized as requiring a high degree of legal talent and knowledge. His preferment to the Bench, in 1873, was the recognition and reward of the industry and ability which he had displayed in his previous professional career.

It was upon his appointment to the bench that my intimate acquaintance with JUDGE VIRGIN began; it was as a judge that I knew him. He had had an earlier public career with which as a younger man I had not been personally familiar. He had been President of the State Senate, had held the rank of Major-General in the Militia, and had been Colonel of the Twenty-Third Maine Regiment during the war.

I believe no man ever entered upon a judicial career with a more sincere determination than he to fit himself thoroughly and perfectly for the discharge of its duties. He meant to be a good judge. He devoted himself to his work with a full sense of its importance and subjected himself to a most patient discipline for it. At *Nisi Prius* he sought to hold the scale with an even hand and to watch only "the trepidations of the balance." If there was sometimes a tendency for the grand, strong lines of his mind to darken a little towards prejudice, if there was on any subject or in any instance, I will not say a tendency, but even a possible danger of this, he was himself the first to be conscious of it and was always on his guard against it. If a mood of feeling obscured his sight he was receptive of the influences that removed the cloud.

As one of the law judges of the State, he labored most diligently for excellence of substance and of style in all his legal work. He was fond of the fine things in literature and read and re-read his favorite masters of the English language.

He loved to study the law historically, to trace the course of authority, to follow down its top-most growths to the common branch which sustained them all and so to direct the tendency of the future development of the law in a way to give symmetry to the whole. No judge ever had a heartier contempt than he for a brief in which the authorities were thrown together pell-mell, with little regard to their pertinency or value. To him it was like handling carelessly the jewels of the law; the rays from which, when rightly set, are truth and justice. And Emerson says: "Truth is the summit of being; justice is the application of it to affairs." Such a brief was the polar opposite of an opinion drawn by him. He stated the clear result of the law, and very likely with a minute and elaborate citation of authorities of the utmost value to anybody investigating the subject. He wrote and re-wrote his opinions with the most studied care and his grate blazed with the manuscript pages, martyrs for a single fault. He shrank from no labor to have his judicial opinions right in substance and in form, and he believed the result was worth all it cost.

With judicial standards like these unflinchingly followed for twenty years, it is not strange that his place is assured in the high estimation of the bench and the bar and the community which he served.

He loved his work, the place to which he had worthily risen, the field for intellectual activity it afforded, the laborious days which enabled him to act so well his part therein. He sought no place in what might distract his attention from it, or unfit him for it, or affect his action in it.

While our friends are with us, we are not disposed to analyze, to attempt even to separate into its constituent elements, the pleasure we take in our relations to them, in simply being with them. That we like them is the ultimate fact and is sufficient to itself. It was so with us during his life, I imagine, as to

our learned friend whom we recall to-day; but sometimes since his death, when a feeling of the vacancy he has left grows clear and strong we appreciate more than ever the force of character, the individuality, there were in him, the marked personality he was,— that after all the one great charm about him was that he was always so perfectly and so genuinely himself. He might be reserved, for he was a far more sensitive man than his manner might indicate to a stranger, but he was never a pretender. He did not ask you to agree with him. He might not like you better for doing that. He surely would have liked you less for any pretense about it. If his view of a subject did not strike you as altogether admirable, it would have been a title to his respect for you to say so. He lived his own life. He did his own work. He holds, and will hold, his own place, distinct, peculiar, in the history of the Court and the State.

Mr. SYMONDS, then read the following memorial and resolve:

At a meeting of the Bar, held in Portland almost immediately upon the announcement that Judge Virgin had ceased to live, a committee appointed by the president was directed to prepare a resolution expressive of the high appreciation entertained by the members of the Bar for his public life and services, of their sincere respect for him and deep sensibility at his death, and this resolution subsequently approved by the Bar it is now my duty to present to the court, with the request of the Bar that it may be entered of record.

Resolved: That by the close of the life of the HONORABLE WILLIAM WIRT VIRGIN, an Associate Justice of the Supreme Judicial Court, a period has been set to a judicial career of eminent ability, usefulness and devotion to official duty; that the court has thereby sustained the loss of one of its oldest and most distinguished members, whose impartial learning and judgment have illustrated its opinions in many most important cases; that while we regret the loss to the court and the profession by his death, we, at the same time, feel most deeply the sundering of the pleasant relations between the Bench and the Bar, hitherto unbroken during all the period of his incumbency of the judicial office; and that the Bench, the Bar and the community alike

may well grieve that the kind, strong man, the genial companion, neighbor, friend, the good citizen, the soldier and patriot, the faithful public servant, the upright judge, is now no more.

Remarks of Hon. A. A. STROUT.

May it please the Court: In accepting this opportunity to pay my humble tribute to the memory of the late WILLIAM WIRT VIRGIN I shall not attempt any labored eulogy. The language of elaborate praise, and the sounding phrases of commemorative oratory, however pertinent and appropriate to other occasions, would not be in keeping with the modest simplicity of the great man whose career has just ended. He never solicited the unstable clamor of public applause, and yet he was not unmindful of that just recognition by mankind which is sure to come as the reward of the faithful and conscientious performance of public duties. And now that he has passed from the presence of living men, I can pay no more fitting tribute to his memory than to speak simply of some of the more prominent traits of his character which attached him by the strongest ties to those who knew and loved him best, and which for so many years rendered him an honored and useful citizen in the State where he spent his life.

It often happens that men are fortunate, not only in their ancestry, but in the place of their birth. From the one source they inherit intellectual strength and moral qualities which render them illustrious in after years, and from the other they derive the opportunities for the best development of those qualities, undisturbed by the excitement and allurements to a life of pleasure, often found in great cities.

It was my good fortune to know the father of JUDGE VIRGIN. When I first came to the bar, he was venerable in years but was still in active practice and attended the various sittings of the Maine courts. He was a thorough gentleman of the old school, tall, erect, and affable to all; with snow-white hair and dignified bearing he was always a conspicuous figure whatever might be the circumstances by which he was surrounded. For more than sixty years he practiced law in

Oxford county and there met the most distinguished members in the profession throughout the State. The Fessendens, Shepleys, Randolph A. L. Codman, Judge Howard, Judge Edward Fox, Francis O. J. Smith, Judge Clifford, the Goodenows and many other distinguished lawyers and advocates were accustomed to attend the Oxford sittings and take part in the fierce legal contests which took place in the old court house on Paris Hill. But amongst them all the courtly old lawyer held his own, and filling many places of trust and honor, acquitted himself in all the walks of life with credit and deserved applause.

I never saw the mother of JUDGE VIRGIN, and I only know that she came of a good New England family, and judging from the the traits of her distinguished son, she must have been a woman possessing an amiable disposition, and strong intellectual endowments.

But if JUDGE VIRGIN was fortunate in his ancestry, he was equally fortunate in the place of his birth. In a peaceful village situated in the beautiful valley of the Androscoggin were spent the days of his childhood and early youth. Within its secluded borders no tumult of the outer world came to disturb his studies and meditations. Amidst the quiet beauty of its landscape of meadow and mountains, of blended sky and forest and murmuring river flowing onward to the sea,— a landscape changing with the varying season,— he drank in that love of woods and streams which in after years led him to seek relief from the fatigue of official labors, not in fashionable resorts of pleasure, but in cool retreats upon lake and river, and beneath the bending forests where nature communed with him in tones not less intelligible because they were not in the form of human speech, and whispered to him of those mysteries from which the veil has now been lifted.

The early education of JUDGE VIRGIN was acquired at the country school, at Gould Academy in Bethel, and the Academy at North Bridgton. It is true that in some respects these academies did not afford all the advantages of the more popular schools, such as Phillips and Andover. But all will agree with me that the student was quite as likely to obtain the training and experience

necessary to the practical affairs of life at these more humble resorts of learning as at the larger fitting schools. All afforded sufficient opportunity to him who really desired to get knowledge, neither could do much for the careless and unthinking idler.

He entered Bowdoin College in eighteen hundred and forty, at the age of seventeen, and graduated in eighteen hundred and forty-four. He was a classmate of many men who have been distinguished in their various vocations. His genial nature and frankness, his aversion to deceit and meanness, and his unswerving fidelity in his friendships, made him a favorite with his college associates. It was here that he strengthened his intimacy with Major David R. Hastings, who came to be his trusted and life-long friend. They had known each other at the Academy, but it remained for the relations of classmate and room-mate, to unite them by those ties which are found only in college life and which cannot be analyzed or described by words. And this friendship was well worth having. A good lawyer, an excellent man of business, a manly, generous, warm hearted friend, he was trusted and respected by all who knew him. And when as it happened in these last years that, striken by an incurable disease, his faculties were paralyzed, and his once clear and powerful mind became clouded and weakened, it was touching to see him turn and instinctively grope after the friend of his early youth and later manhood, and ask again and again for the consolation of his presence. Nor was he forsaken or forgotten. Until his final sickness JUDGE VIRGIN never ceased to visit and console him. And who shall say that the threads of this friendship, like many others, shall not be gathered up again, when another life shall dissolve the shadows of disease and free the immortal spirit from the limitations of this less perfect existence?

Immediately upon leaving college, JUDGE VIRGIN entered his father's office as a student, and in eighteen hundred and forty-seven was admitted to the bar and commenced the practice of law which he continued until eighteen hundred and seventy-two, when he was appointed a Judge of the Supreme Judicial Court,

which position he filled at the time of his decease. But his life as a lawyer was not confined to the usual duties incident to the practice of the profession. He was early elected prosecuting attorney of the county where he resided and discharged the duties of the office with ability and fidelity. When the civil war broke out, both he and his friend Major Hastings, although belonging to opposite political parties, zealously enlisted in defense of the Union. Major Hastings went to New Orleans under General Shepley and JUDGE VIRGIN, who had previously been made a Major General of the Militia of Maine, recruited the twenty-third regiment of volunteers of which he was elected colonel, and with which he served until its term of service expired. His regiment was detailed with others to defend the approaches to Washington, and although he was not engaged in those sanguinary struggles which have immortalized the army of the Potomac, he showed marked executive ability, good judgment, kindness and judicial fairness which was recognized by his superior officers and endeared him to those under his command. After his return, in eighteen hundred and sixty-six, he was elected to the State Senate, and in the succeeding year became the President of that body. He was appointed Reporter of Decisions for two successive terms and discharged the duties of this important and difficult office with distinguished and conspicuous ability. I think my legal brethren will agree with me that to be a good reporter requires ability of no common order, and that the reports prepared by JUDGE VIRGIN will compare favorably with those of any State of the Union.

I am prepared by personal experience to speak of him as a lawyer, because before his elevation to the bench I was frequently associated with him and opposed to him in the trial of causes. He was clear headed and quick sighted and when the cause was of any magnitude, was always well prepared. He was an antagonist always to be dreaded. I think his natural modesty led him to shrink from performing the part of an advocate, but when he did address a jury his argument was clear and cogent and often ingenious, and was so filled with common

sense that he generally captured the judgment of the panel and won his case. When he left Oxford county and came to Portland, in eighteen hundred and seventy-one, he enjoyed the largest practice in that county and was the recognized leader of bar.

A single word concerning his judicial career and social characteristics. From the time of his first appointment to the bench more than twenty years ago until his decease, the reports of the supreme court of Maine bear the best witness to his learning, his care, his lofty sense of justice, and his unswerving integrity. But to us, who knew him well, there was much which added to his fame that his recorded opinions would only partially disclose. No labor was too great, no burden too weighty for him to undergo in order to get at a right decision. The labors of counsel however helpful, were not alone regarded as conclusive in the cause. He examined for himself the underlying principles of the case and the decisions of other tribunals relating to the same questions in order to make no mistake in laying down the true rule of action to govern the facts before him; and when his decision was made, he spared no pains in finding the exact words to convey his meaning. Patient to hear, and anxious to receive all the light possible from all sources, he brought to the decision an untiring research, great powers of analysis, clear and logical reasoning and an honest desire to get at the right regardless of parties or counsel, which made him the great judge that he was. And then he never forgot that he was once a practicing lawyer himself. His intercourse with the bar was always genial and delightful; but no one thought for a moment to take advantage of his familiarity with his former associates in the profession, to violate the proprieties due to his exalted office, or fail in the respect which his personal worth demanded. His modesty forbade him to assume any position of mere personal superiority which would not be connected with the dignity of his high office. He had little regard for the pomp and circumstance of official place separated from the duties which that place involved. He was companionable without fear of losing the respect of others, he was loved because he did not forget the rights of those who practiced before him, because he was firm without

judicial tyranny, because he was just without favor. And while he was just, he was merciful. It pained him to sentence the criminal for his crime, it gave him exceeding pleasure to set the innocent at liberty. His tenderness to even the guilty has been witnessed many times, although it cannot be said that for this reason he failed to do justice. I could cite many instances of these characteristics of his judicial career, but perhaps the best evidence lies in the fact that no judge was ever more widely lamented by the bar, and all classes of the community, than JUDGE VIRGIN.

His relations with his associates upon the bench were always pleasant, and while tenacious of his convictions when he felt he was right, he was never possessed of that mere pride of opinion which is born of self-complacency. He was an eminent jurist whose fame and memory will extend far beyond the generation of men to whom he was personally known.

Of his social qualities I speak as one who has suffered a personal loss. From the time he came to Portland, in eighteen seventy-one, we were near neighbors and saw much of each other. He shrank from the more formal requirements of social parties and receptions, but in his own house and to those who were favored with his friendship he was always hospitable and delightful. He was a reader of books and with his wife and son pursued many paths of intellectual inquiry. When the labor of the day was over he delighted to discuss the latest phases of social progress and development. Then it was when he threw aside the habit of office and unfolded his stores of learning and humor, that he was both instructive and delightful.

He was a constant attendant at church and I think his creed may be found in the melodious measures of that sweetest of poems entitled, "The Eternal Goodness," which he was so fond of repeating,—and with its inspired author he might well declare,—

> "I know not where His islands lift
> Their fronded palms in air;
> I only know I cannot drift
> Beyond His love and care."

It is said that there is one occasion at least when the estimation in which men are held is fully tested, and that is the time of their death. But no one could stand in the presence of the solemn concourse of eminent men from all portions of the State and of his sorrowing neighbors and friends who came to express their grief at his decease and do honor to his memory, without feeling that a great man had fallen, whose loss was deplored by all who knew him.

In the beneficent ordering of Providence he has passed that mysterious gate through which we may not gaze in mortal life. We cannot call him back. But we may cherish the recollection of his many virtues, and be comforted in remembering—

"That Life is ever Lord of Death,
And Love can never lose its own."

Remarks of Hon. A. H. WALKER.

Your Honors: The crisis of JUSTICE VIRGIN'S insidious disease overtook him holding court in the county where he held his first term immediately upon his appointment. This was Tuesday. Anticipating the term's labors and confinement, on Thursday morning preceding he took the train of the White Mountain Division Railroad to Bridgton, intending to be driven by team to Fryeburg, a distance of fourteen miles, that he might receive the benefits of a ride in the open air before entering upon the expected term's confinement, so little conducive, from many causes, to health; and that he might visit his great friend, Brother D. R. Hastings, between whom and him had existed the closest friendship from their academic days and through their college life as classmates and room-mates and all along the line of life-time ambitions and vicissitudes. But Mr. Hastings had become a permanent invalid to such a degree that the interview, JUDGE VIRGIN had in mind, devolved upon Mr. Virgin.

A more beautiful New England winter day never dawned. The air was mild, pure and invigorating; and, when arriving at Bridgton, he was at once challenged by friends to spend yet another day in the open air upon a lake but a few miles away

and easily accessible by rail in that seductive sport, the charms of which from his youth had grown with his growth and strengthened with his age; waning not a whit with advancing years, he sprang to accept the invitation. From this lake were seen standing out in bold prominence in the bright, soft sunlight, nearest by, Pleasant Mountain Range, next Mount Kearsage, and the lofty White Mountains in snowy vestures all so white as to constitute a literal fulfilment of the name given them. Again and again the beauty of the sunny-bright and mild day and the charming environments of the lake, near and remote, provoked his enthusiastic remark. It was a happy day to him. The next morning, being Friday, he returned home, reporting himself tired but not sick. Saturday he was slightly ill. Though he did not improve, yet on Tuesday by dint of his great will-power he opened his court at Saco, but thereupon returned to his home where he was immediately prostrated and survived but a few days.

It needs no double assurance that JUDGE VIRGIN enjoyed the days that I have mentioned, spent off duty, when we reflect that he was born and reared on the intervale banks of the Androscoggin river, in Rumford, in a neighborhood too small to be called a village, upon a spot surrounded by many natural charms of brook and river, hill and mountain and a thousand other surrounding attractions; and that he had a nature which was kindly in sympathy with the life, animate and inanimate, wherein he lived during those years.

Moreover the domestic atmosphere of those days of JUDGE VIRGIN was favorably educational to him in these respects. His father, the Hon. Peter C. Virgin, was a gentleman of the old school, who enthusiastically loved nature and whose very bearing towards the things of nature was directive and highly educational to his children. He was a very prominent figure in his community and county and the State a long time, and held high and important private and public trusts. I recollect him in advanced life as the embodiment of dignity and culture. I know nothing of JUDGE VIRGIN'S mother except to hear her spoken of in exalted terms. In view of what others, on this

occasion, have to say upon the subject, I enter no farther into JUDGE VIRGIN'S ancestral relations but pass to consider very briefly a few more personal matters.

He was a great admirer of nature and particularly natural scenery. Many a time when revisiting, perhaps for the hundredth time, a place affording choice scenic views of nature, I knew him to invoke of his companions unbroken silence, apparently that the view and voice of nature might be undisturbed.

I do not learn that he was specially studious in his academic youth. I am told he was quick to learn and thereby enabled to make good recitations upon small amount of study — but uninclined to sacrifice a whit of full measure of time to engagements quite foreign to the regular curriculum — not indolent, but otherwise engaged than in the service directed and dictated by those entitled to command his time. In all this he seemed to be dictated not by the choicest ease but by an independence of taste and bent peculiarly his own. Sacrifice was not a special enjoyment of this boy, I apprehend, if it is of any boy. It took time, contact and attrition, I suspect, to induce a disposition in him of cheerfulness in offering sacrifice. I apprehend this disposition survived even his college life and experiences. Emerging from scholastic life into the professional practice later enjoyed by him, he, no doubt, often arrived at the sacrificial altar. Ambitiously successful and successfully ambitious in his practice, natural choices were inevitably forced to yield very often to circumstances, and soon professional success, at first slightly delayed, became fully assured.

Early in his practice it became self-evident to the public that he was a young man of capacity and of breadth and power of thought and mind. He rose rapidly at the bar of Oxford county to its very fore-front and became not only a thorough and able lawyer but an advocate inferior to none at a bar where were able and powerful advocates. Graduated in 1844 from Bowdoin College at the age of twenty-one years, studying law with his father until 1847, he was admitted to practice. Locating in Norway, 1849, he remained there till about 1871 when he removed to Portland. He was elected county attorney of

Oxford county and tried during his term of office criminal cases of magnitude with marked ability and success. He was appointed Reporter of Decisions two terms, editing nine volumes of the Maine Reports from 52 to 60 inclusive. He published Virgin's Digest and Virgin's Supplemental Digest, digesting thirty-five volumes of these reports in a manner evincing profound study and solid ability, as every lawyer of the State will testify. All this work of prosecuting officer and reporter of decisions and digesting reports was in direct line and encouragement of his profession and highly promotive of professional erudition and success.

Notwithstanding these arduous engagements, as early as 1855 he became actively and zealously engaged in military affairs and was commissioned first Captain of the Norway Light Infantry. In 1859 he was elected by the Legislature of Maine one of the three Major-Generals of the militia, a position held by him at the outbreak of the civil war in 1861. His discharge of the duties of this office won the commendation of his chief executive of State and of all other parties. In 1862 he was commissioned Colonel of the 23d Maine Reg't and commanded it in the South during the period of its service to the complete satisfaction of the military authorities of the nation and State and the soldiers of his regiment. In 1865 and 1866 he represented his county in the State Senate and in the latter session he was chosen its president.

In 1872 he was appointed Associate Justice of this court, a position which he held by successive appointments till his decease January 23d, 1893, except a very brief period owing to a temporary reduction by law of the number of the justices of this court. The honorary degree of Doctor of Laws was conferred upon him by his *alma mater* in 1889. In this long list of elevated positions no mention is made by me of many minor offices held by him. In them all, from the least to the greatest, WILLIAM WIRT VIRGIN was eminently successful, judged by the lofty standard and crucial test of marked fulfilment of the duties they involve. This is high eulogy of the mental strength and calibre of the man and of his popularity among men of very different ranks, grades and conditions.

Perhaps a particular word directed especially to his judicial work will not be amiss.

At *Nisi Prius* he was affable, considerate and pleasant, directing court with impartiality and dignity. Upon questions of law formally determined at *Nisi Prius*, and necessarily upon but a partial investigation and consideration, he was habitually thoughtful and considerate in his rulings. To law questions and cases carried forward, he habitually gave great consideration, careful investigation and profound study. If he were ever in error in his legal opinions and conclusions, it was never the error of indifference or negligence of examination, want of investigation and study. He had in a very wholesome degree that power of self-restraint which preserves judicial equipoise. This with an earnest interest in the cause sufficient to provoke full investigation of fact and law, supported by strong mental force and ability, pretty surely insures judicial success. No lawyer independently of some conceived grievance, in all this State, would venture to join issue upon the question of JUDGE VIRGIN'S success in this particular direction. The Maine Reports, containing the court's opinions, a thousand times furnish demonstration of the fact.

I am unable to turn aside from this branch of the subject without a general remark upon the man. As he lay almost *in extremis* there burst in soliloquy from his pale lips, unprovoked by suggestion, the expression that in all administrations of the law he had endeavored that justice should prevail. Who doubts the endeavor? Who doubts the propriety of the endeavor by him who holds judicial authority in his control? But this is not the occasion for a protracted review of JUDGE VIRGIN'S life, for anything above a brief summary of the salient features of his positions in the various departments of our government, and an averment of the strong affection with which so many grappled him to their hearts with "hooks of steel."

Shall we join him, and that, too, in an eternal home of love, and individual development and growth? So he believed. Then may we not fitly wish to congratulate him upon the termination of life's vicissitudes, though opportunity for further

achievement here below by transition to a life of achievement above be lost forever, since the summons of that pallid messenger, who goes not forth except with the inverted torch, can have no terrors for him, though he be described,

> "Black as night,
> Fierce as ten furies, terrible as hell,
> He shook a dreadful dart,"

the edge of which loses its power of hurt in the sublime faith that,—

> "There is no death: what seems so is transition;
> The life of mortal breath
> Is but a suburb of life elysian,
> Whose portal we call death,"

whether, as it has been expressed, it be a journey thither of but a single step across an imperceptible frontier, or as again described, it be an interminable ocean, black, unfluctuating and voiceless, stretching between these earthly coasts and those invisible shores? The skeleton foot of death enters with frequent and familar step the lives of those who from age constitute JUSTICE VIRGIN'S most familiar associates. To his survivors the hour furnishes its admonition. There is aptness in those words of another: "We are walking with unerring steps to the grave, and each setting sun finds us nearer the realms of rest. The fleetness of time, our brief and feeble grasp upon the affairs of earth, the certainty of death and the magnitude of eternity all crowd upon the mind at such a moment as this. They call upon us to think and speak and live in charity with each other; for the last hours that must come to all will be sweetened by recollection of such forbearance and grace in our own lives as we invoke for ourselves from that merciful Father into whose presence we hasten."

Remarks of B. D. VERRILL, *Esq.*

May it please the Court: When a friend answers the last summons and breaks the narrowing circle, the admonition of our mortality is powerful. Reminiscences fill the mind and sadden

the heart. Long years of the past unfold their records. The memories of a life-time are crowded into a day.

At this hour, full of such memories, I find my own thoughts reverting rather to the man — the old-time neighbor and friend, — the attractive, companionable personality, stronger upon me perhaps by reason of his maturer years, than to the lawyer and judge. I think of him as I knew him in the quiet village life of his early manhood,— genial as the uneventful days were long,— known far and wide in the country of his home and mine, and liked wherever known; taking an active interest in the various village organizations for public improvement, easily a leader where he would lead, and frequently honored by his fellow citizens.

A marked characteristic of the man in those days and always since was his detestation of sham and pretense. Such bubbles he delighted to prick whenever and wherever his quick perceptions detected them; while for himself he proclaimed no standards which he did not reach. If he was your friend you knew it. His heart was the tender heart of a woman, little as he wished his friends to suspect it; but his manhood, was sound and strong.

Possessing literary ability of no mean order, his tastes in earlier life, I might say throughout his whole life, ran strongly in that direction. As a letter writer, entertaining in thought and felicitous in expression, he had few equals. He excelled, when he undertook it, in a light form of essay racy with dry humor. I have often thought he might have won laurels in a literary career. But the sequel of his life demonstrates that the Bench was doubtless best adapted to his tastes and talents. WILLIAM WIRT VIRGIN loved the law. He was true to his love. He has earned the eulogies that have been pronounced. He has won honor in an honorable and distinguished body of men. More I need not say. Less, no man who has known him for a generation, would think of saying.

Remarks of FRANKLIN C. PAYSON, *Esq.*

May it please the Court: The loss of such a man as JUDGE VIRGIN cannot fail to arouse the deepest feelings of sincere regret in the minds of those who have been so long, so intimately and so pleasantly associated with him as have been the members of the Bench and Bar of this State. And it is eminently fit that we to-day turn aside from our accustomed duties and cares to commemorate his public services as well as his private character and virtues, and to give public expression to our sense of loss when we realize that he has "passed to that dreamless sleep that has no awakening."

Those who have already spoken have enjoyed for many years an intimate personal acquaintance and friendship with him, and have brought here bright garlands of esteem and affection gathered from these relations. They have told of his boyhood and young manhood; of his career in the army, at the Bar and upon the Bench, and it is not becoming that I should dwell upon any of these. But, in behalf of the younger members of the Bar, who because of difference in years have not known him intimately, but have appeared before him chiefly in his judicial capacity, I wish to add a brief tribute to the many so feelingly given. The younger members of the Bar, not only of this county, but of the State at large, were always glad to appear before him, because of his kindly feeling for young men, and his resulting, friendly and generous treatment of them. He invariably received them with a pleasant greeting; listened to them courteously; often voluntarily made suggestions of much value, and was never aught but patient and considerate. Such qualities in a judge especially endear him to the young attorney, whose early steps in his profession are so often halting and uncertain; and JUDGE VIRGIN will ever be kindly remembered by the many who have in this way been aided by him.

But, as with the young, so with the older. He had the regard and esteem of all. He had friends everywhere, enemies nowhere. He was a man of quiet tastes and rugged honesty, who left to his family the priceless heritage of a spotless and unsullied

name. Almost his only recreation was found in gratifying his love for nature. He loved the woods and fields, "the shady dells, where crystal streams and placid pools seemed made for lovers of the angler's art." He was an ardent sportsman, and his passion for the rod and gun continued strong in him to the day of his death. His companions in these days of pleasure will find it hard to fill his place. As one of them said to me not long ago: "I feel lost without him. I don't know where to look for his equal as a companion. He was like a boy on our trips. Enthusiastic, patient, generous, instructive, entertaining, in short, royal good company." He knew how to be cheery and bright as well as serious and grave. His talk was full of anecdote and remark drawn from extensive reading and observation. He had a fast hold upon the confidence of those with whom he came in contact, and was especially strong and secure in the affections and esteem of those who enjoyed his more intimate friendship, and his memory will by all be ever warmly cherished. But we are left to speculate yet a while upon the future. Our friends leave us one by one, but we know not where they go. No matter what our convictions, we like to think that death is not the end of all. That in some other existence, at some time, we may make up for opportunities thrown away here.

"We question vainly. Yet it somehow pleases,
When they have said the last good-by,
It somehow half the pain of parting eases,
That in the sky,
In the vast solitude of stars and space,
There may be consciousness, and life and hope;
And that when we must yield to death's embrace,
There may be scope for the unfolding of the better powers,
So sadly stifled in this life of ours."

At the conclusion of Mr. PAYSON'S remarks CHIEF JUSTICE PETERS, in behalf of the Court, made the following response:

Gentlemen of the Bar: The sentiments expressed in your resolution and addresses on this occasion are very much appreciated by the court. We feel deeply interested in the tributes of respect paid by you to the memory of our late and much beloved associate, tributes so graceful and eloquent, discriminating and just.

You have feelingly spoken of JUDGE VIRGIN'S early personal history, of his successful professional career, and of the services rendered by him at the call of his country in the late civil war; and we are happy to concur in the high commendations which you accord to his memory in those respects. We need add nothing thereto.

To most of us, however, who were his long time associates on the bench, he was much the best known as the honorable and able judge and jurist. And even in this view of his character we can add but little light to the fine delineations of his judicial life which we have listened to from the bar.

It must be universally conceded that JUDGE VIRGIN possessed in an eminent degree all the sterling intellectual qualifications necessary to constitute him a successful judge. His perceptive faculties were strong, quick and clear, and nature had endowed him with sound judgment and a sturdy common sense. His mind loved simplicity and directness. It delighted in the investigation of new subjects and principles, and in the discovery of new legal lore. And his memory, a valuable accompaniment of such qualities, being good and strong, kept faithful guard over all the treasures which his studious habits of investigation brought to him.

His moral qualities were in admirable accord with his mental. In the broadest sense, in every possible sense, he was a man of integrity. No temptation or consideration could allure him to do an act which he thought could possibly be deemed objectionable. He was inclined to be over-sensitive in matters affecting his own conduct or his interest. He was sincere and straight-

forward in thought and speech and a reverential lover of the truth.

These mental and moral powers stimulated, as they were, by a laudable ambition and by remarkable patience and perseverance, qualities which are of themselves "sure masters of victory" in most men, with fine physical health and constitution added thereto, were likely to win for their possessor high professional and judicial distinction. His record was excellent in all branches of judicial service. Immediately upon assuming the duties of his office he gained an enviable reputation as a *nisi prius* judge. His fine legal sense and other practical abilities were most valuable in this department. He had an easy and business-like way of disposing of cases with satisfactory results. He had the faculty of presenting ideas to common minds in a manner that would be understood and appreciated by them. Usually he did not trouble juries with any presentation of general rules and principles, which they are likely to accept and apply or not as they please, and that too according to their prejudices, but he was himself skillful in applying admitted principles to the facts of a case, observing Lord Hale's policy of telling the jury "where the main question or knot of the business lies." In this way he had a good deal of rightful influence in guiding juries to right results. He analyzed the evidence in a trial with absolute clearness and force. It is error to suppose that the best ability is not indispensable for a successful *nisi prius* judge. Really, a very high grade of judicial skill is required.

Being disposed to conduct a trial in an orderly and quiet manner himself, JUDGE VIRGIN would show impatience occasionally when an attorney undertook to pervert the facts of a case, or indulge in loud and senseless declamation, and, as he was sensitive to any kind of noise which was out of place, although extremely fond of melody and music, he exceedingly disliked, as I think all judges should, the indecorous habit, which some advocates have, of slapping their hands loudly together, or of pounding railings, desks and tables, or anything else in their way, as an accompaniment of their argument. But he was decidely popular with the lawyers and suitors at the trial

terms of court, and he accomplished in that line of duty during his twenty years on the bench a surpassing amount of business of vast usefulness to honest litigants and to the State.

But a greater field for fame, while as great a field for usefulness also, was open to him as a member of the law court. Here he acquired a high reputation for the erudition and ability displayed in his written opinions — many of which are notable and not a few of them masterful. Some of them are but little short of clear and concise treatises on the questions discussed, learnedly illustrated by an examination of the leading pertinent authorities. His own mind is visibly seen through the pages of our printed reports. Even a casual reader would not fail to observe in these pages conclusive evidence that care and caution, industry and perseverance, and a love of work and of investigation were among his leading characteristics. He saw things in a plain light and described them plainly and effectively. "An honest tale speeds best, being plainly told," says the great poet. I will venture the assertion that not a sentence can be found in any of his written judgments which will bear a double or doubtful meaning. There is a clear tone and accurate expression running through them from beginning to end.

Not that he did not also see things in their finest relations to each other when for sufficient cause he sought to do so. On the contrary he had a rare ingenuity of reasoning out results in cases, without offense against established legal principles, when it was in the furtherance of justice that such results be attained. Quite a number of his important legal opinions will attest this asseveration.

His mind was of a mechanical turn, and he constructed an opinion with as much artistic care as an engineer would construct a government fortification. The grounds for a foundation would be carefully surveyed, simple and solid materials selected, and then be in orderly fashion embodied together, with every point guarded against weakness or attack. All his work was in a mechanical sense nicely consummated.

Some judges are not accustomed as much as he was to avail themselves of the use of authorities and precedents. But his characteris-

tic care and caution instinctively inspired in him the desire of knowing what others before him had thought and said. Study the past if you would divine the future, says a legal author. Of course, a mere collection of adjudged cases in support of a proposition may not amount to anything, while the deduction derivable from a philosophical study of both agreeing and conflicting authorities is of the first importance for the elucidation of legal truth. The report of a British commission on this subject some years ago very correctly said: "The comparative weight of authority to be given to conflicting authorities, is a matter of professional science, which is not regulated by any determinate rule." To attain proficiency in the practice of such professional science requires a peculiar ability, an abundance of which the legal writings of JUDGE VIRGIN prove that he possessed.

Such, briefly told, are my own estimations of the judicial life and work of our deceased friend, a laborious, useful, dignified and honorable life, full of satisfaction to his admiring friends. The only compensation which he personally received for these almost life-time services, besides such an ordinary livelihood as the judicial salary affords, was the consoling reflection while he lived, that every duty devolving upon him had been fully and conscientiously performed, and that he should after this life leave an honorable record behind.

And so will it be. He will not soon be forgotten either by the bar or the people of his State. In a high and conspicuous niche in the portrait gallery of the distinguished judges and jurists of Maine will forever stand the figure of WILLIAM WIRT VIRGIN, a stately figure, grand and picturesque.

I cannot refrain from brief allusion to the private and social life of one who was for many years a personal friend. JUDGE VIRGIN was very companionable and genial, possessing rare wit and humor, and stores of anecdotes and incidents which he would relate with an indescribably pleasing effect. He was affectionately fond of those friends who were near and dear to him, and "he grappled them to his soul with hooks of steel." There were no false sides to him. He was a sincere man. He was not

perhaps very communicative with strangers and especially not so with persons whom he did not personally fancy, and such persons did not understand him nearly as well as his intimates did. He was naturally independent in all things with all men, and would not ordinarily trouble himself much to explain his motives or acts to any one; acting on the belief that his honest conduct would be its own best vindication. It would not be strange, therefore, if he were supposed by some persons to have been peculiar in some respects. He certainly was so, in the sense that some of his characteristics were more strongly marked in him than the same might be found to be in many other persons. Every man is exceptional. No man in the world is an exact copy of any other man either in mental or moral endowment. And although the differences between many men may be so slight as not to be noticeable to the great mass of mankind, still they are enough to mark for each person his own distinct and independent individuality, constituting the lights and shadows in the picture which give expression and character to such individuality. I have thought of our friend as not inappropriately comparable, in some of his characteristics, to that specimen among the precious gems known to scientists, which sheds no luster as you turn it about, until you come to a particular angle and then it shows deep and beautiful colors. If you saw into his soul you would have discovered its deep and beautiful colors. Taking him all in all, his was an original and very interesting personality. It is the general effect of character, as of a painting, that creates the inspiration.

His death removes the last but one of those who were upon this bench when I came upon it twenty years ago, my friend at my right being the last survivor. The quickly-flying cycles have already removed most of those who were our seniors or contemporaries in the profession. Most of the old familiar faces are gone from us.

The fatal sickness came upon our deceased brother quite suddenly and without much notice of its coming, while still in the very heat of the battle of life, when holding an arduous term of court, full of heart and hope for a much longer earthly exist-

ence. But the summons could not be resisted; the last struggle was soon over; and death at last smiled upon him as smiles the calm and peaceful night upon the weary traveler. With hope and faith, with courage and without fear, he met the fate inevitable to all. His death brought sadness to his family and friends, to the bar and bench, to his native and much loved State and to all classes of its citizens. The public and private manifestations of grief for the event were most significant. With his judicial associates the memory of their friend will be beautiful and lasting. For a time loneliness dwells in these halls where we were wont to receive his cordial grasp and pleasant greeting.

And now the bar and bench have come together on this solemn occasion to unite in expressing their admiration of the character and services of our late brother, and for the purpose of paying our last honors to his memory. And it falls to me to say the last sad word, farewell!

Let us be inspired with the belief that, although we have bid our friend on earth good night, we shall in some other sphere bid him again good morning. The thought is comforting that for him,

> "The day has come, not gone;
> The sun has risen, not set;
> His life is now beyond
> The reach of death, or change,
> Not *ended* but *begun*."

The court cordially concurs in the resolution, and the clerk will spread it upon the records. And in further honor of the memory of the deceased the court will now be adjourned.

In Memoriam.

PROCEEDINGS OF THE YORK BAR IN RELATION TO THE DEATH OF

HONORABLE RUFUS P. TAPLEY,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT, FROM DECEMBER 21, 1865, UNTIL DECEMBER 21, 1872. HE WAS BORN IN DANVERS, MASSACHUSETTS, JANUARY 2, 1823, AND DIED AT HIS HOME IN SACO, APRIL 10, 1893.

At the May term, held at Alfred, Messrs. John M. Goodwin, George C. Yeaton and James O. Bradbury, were appointed a committee in behalf of the York Bar to prepare resolutions on the death of Honorable RUFUS P. TAPLEY.

On Tuesday, June 6, 1893, Mr. Goodwin offered the following resolutions, in behalf of the committee, to the court, Honorable WILLIAM PENN WHITEHOUSE, Justice Presiding:

Resolved: That in the death of Honorable RUFUS P. TAPLEY the members of the York County Bar recognize the loss of one of its ablest members; one who as advocate, counsellor and judge attained an honorable and high position in the judgment of the profession and in the estimation of the public.

Resolved: That this court be requested to order this testimonial to his worth and character to be entered upon its records, and that a copy thereof be forwarded by the clerk to the widow and family of the deceased.

Mr. Goodwin followed the introduction of the resolutions by remarks. Judge Burbank, Samuel Came, Esq., Hon. Nathaniel Hobbs and Hon. J. O. Bradbury responded; and Ira T. Drew, Esq., of Alfred, an active practitioner at York bar for fifty-two years, spoke appropriately of Judge TAPLEY'S relations with the courts and the public during his active life.

The remarks of the members of the bar which have come to the Reporter's hands, and the response made by MR. JUSTICE WHITEHOUSE, will be found below. The proceedings were closed by the following order of the court:

Ordered: That the resolutions be entered upon the records of the court, and as a further mark of respect for the memory of the deceased, that the court do now adjourn.

Remarks of Hon. JOHN M. GOODWIN.

May it please your Honor: RUFUS P. TAPLEY was born in Danvers, Mass., January 2, 1823, and died at his home in Saco, Maine, April 10, 1893. When a boy he was without the advantages of wealth and social position or family influence to push his way in life. He was early accustomed to rely upon his personal industry and exertions to provide the means necessary for his education, and to afford him the opportunity to enter upon the road to a professional life, for which in his early manhood he developed a controlling desire and an ardent ambition.

Having obtained the best education chiefly in the common schools of his native town, which his opportunities and circumstances permitted, at the age of twenty-three he came to Saco and entered the law office of Bradley and Haines, a firm composed of those eminent members of this bar, Samuel Bradley and Wm. P. Haines. Mr. Haines, soon after that, withdrawing from the firm, his place was filled by the no less eminent lawyer, Philip Eastman, thus constituting the firm of Bradley and Eastman and which in June, 1849, was dissolved by the death of Mr. Bradley.

Brother TAPLEY, with his ardent nature and indomitable resolution, did not loiter on the way, but pressed his course with characteristic energy and celerity and in May, 1848, was admitted a member of the York county bar.

Early in his practice he formed a co-partnership with L. D. Wilkinson, a young and rising attorney who a few years later removed to Chicago.

The firm of Wilkinson and Tapley became well-known throughout the county and secured a good share of practice. After

the removal of Mr. Wilkinson, Brother TAPLEY remained alone in the practice of his profession several years, till he associated with himself Mr. E. B. Smith, well-known to the profession as a distinguished lawyer, now in practice in the city of New York. The firm of Tapley and Smith did not continue long, however, Mr. Smith removing from Saco to Washington and receiving the appointment of an assistant attorney general and Mr. TAPLEY receiving the appointment of judge of the Supreme Court of this State.

Prior to this, he held the office of county attorney for six years and had represented the city of Saco in the legislature for the years 1858 and 1864. He was senator from York county in 1885-6.

He was appointed judge of the Supreme Court in December, 1865, and held the office for the term of seven years. He was again elected to the legislature in 1874, and for several years held the position of city solicitor of his adopted city of Saco.

His long practice in the county made him one of the best known and well-remembered persons in the county. His service upon the bench also made him widely and generally known in the State.

Considering the field of his labors, his practice may be called varied and extensive.

Few cases of importance arose in his county in which he was not engaged on one side or the other.

His knowledge of law was wide and deep. No man more thoroughly investigated the grounds of the cases in which he took any part. Every part was explored with untiring industry, until he was master of his own and his adversary's every ground of attack and the defense. His powers of analysis were unusually penetrating and enabled him to seize upon and comprehend with great clearness all the vital points of a subject which he might be studying.

His reasoning was clear, logical and forceful and he was able to present his ideas in language that made it easy for his hearers to understand them just as he intended. He had a ready command of language and when he chose, or his subject required

it, could naturally and easily rise to flights of eloquence to please or profoundly impress his auditory. In his intercourse with his brother members of the Bar he was always courteous and gentlemanly. All his words and conduct were the outflow of a kindly heart, a gentle and pleasant nature.

In a constant intercourse of more than forty years I do not recall a single instance of a disagreeable interview, or a remark to leave a sting behind.

As a judge upon the bench he ranked favorably with his able associates, and in his opinions in the published reports has left ample evidence of his great talents, his thorough acquaintance with the law and his independent and impartial spirit in its administration. The appropriate opportunity is not now presented for a review of his judicial decisions. An example of his learning and independent spirit of investigation may, however, be referred to, in the case of *Goddard* v. *Grand Trunk Railroad*, in Maine Reports, volume 57, in which he drew a dissenting opinion filling forty pages of the Report, mainly devoted to a discussion of the law concerning punitive damages, as applied to a corporation for the wrongful acts of an employee or servant. Judge TAPLEY here dissented from the opinions of his very able associates in the application of the law in the case before the court.

It deserves to be mentioned here, however, that Judge TAPLEY'S honesty of opinion and correctness of judgment have recently been vindicated in a way that must be very gratifying to his friends, by a decision of the United States Supreme Court.

To many of us who for so many years have been accustomed to his kindly greetings, his cordial hand-shake and pleasant face, beaming with kindness and sympathy at every term of this court, it is hard to realize that Judge TAPLEY is no longer one of our number; that we never are to greet his presence again; and that he has forever closed his earthly career, so useful, so honorable, so ennobling to himself and to all dependent upon or related to him; and passed into the court and under the jurisdiction of that great Judge, of whose law it has been said that "her seat is the bosom of God, her voice the harmony of

the world; all things in heaven and earth do her homage; the very least as feeling her care and the greatest as not exempted from her power." To me, who for more than forty years have journeyed onward by his side in the pathway of life, his presence will be greatly missed and his absence keenly felt.

"Green be the turf above thee,
Friend of my better days,
None knew thee but to love thee,
None named thee but to praise."

And now my brother,

"Fare thee well; and if forever,
Still forever, fare thee well."

Remarks of SAMUEL M. CAME, *Esq.*

May it please your Honor: As a member of the committee of the bar to call the attention of the court to the death of our lamented brother, Hon. RUFUS P. TAPLEY, I would join in the request that the resolutions presented by Brother Goodwin be entered upon the records of this court. It seems appropriate thus to pay a tribute of respect to one so long an eminent and honored member of our profession. While the many cases in our Maine Reports, in which Judge TAPLEY, took part as an advocate, and others in which, as one of the justices of our Supreme Court he drew opinions, may be considered as the best and most lasting monument to his legal abilities and will long make his name familiar and respected throughout this State, yet there is another phase of his character which, I think, endeared him more especially to the members of the York county bar. I allude to the kindly interest manifested by him in the conduct of litigated cases here in this county, whether he was personally engaged as counsel in them or not. For many years Judge TAPLEY occupied a singular position in that respect. It might be characterized as his home-life in distinction from his public acts contained in the reported decisions. I venture the assertion that nowhere in our State has a single member of the bar been so uniformly sought for counsel and advice by brother attorneys as was Judge TAPLEY.

He never appeared to follow his profession so much for pecuniary reward as from an inherent love of investigation and search for the truth. I feel sure that, if for the advice so freely given these many years, he had received a fair compensation and that money had been safely invested, he would have from that source alone left a fair competence to his family.

Although he was most accessible to all and ever ready to assist with advice, yet he was a man who never flattered and seldom praised a brother attorney; while his criticisms of seeming wrongs were frequent and sometimes caustic, yet through it all and under it all there was this kindliness of feeling and readiness to help, we all so much appreciated.

He was especially thoughtful in memory of the dead. When death invaded our ranks and we were called to attend the funeral of one of our number, no matter how far it was from his home or how busy he was, we expected to find Judge TAPLEY present and were seldom disappointed. He was especially interested that these memorial exercises, which we are sometimes apt to overlook, should be properly observed. Nor did his thoughts centre solely in the busy cares of this life. He often spoke of the hereafter. I well remember some two years since, while conversing with some brother attorneys of the future, he made this remark: "We should all be careful to speak no word and do no act here in this life which we shall be ashamed to meet 'beyond the river.'"

And now that his earthly career is ended, I know of no better wish for him than to express the hope that the many kind words spoken and the many friendly acts done by him while with us may all "meet" him in his present life "beyond the river," and that they may be so many that he may hear the welcome verdict, "Well done, good and faithful servant."

Remarks of Hon. HORACE H. BURBANK.

May it please your Honor: Because of the visit to the Pacific coast of Brother Fairfield, longer in practice by the side of our deceased brother TAPLEY, and by the courtesy of the bar, the sad duty (not utterly void of its pleasure, however,) of bring-

ing tribute from the scenes of an eventful professional life, has fallen to me. While another might have more fitly voiced the thoughts which we all entertain at this hour yet no one could more cordially render this service than I do.

For I knew Judge TAPLEY as a neighbor and fellow-citizen for seventeen years, as a predecessor in the office of prosecuting attorney of this county, (ever ready to impart the benefit of his large experience and knowledge,) as a comrade in his brief military career; and I bear cheerful testimony that, in these varied paths, I knew him as a friend to the younger practitioner, as a safe, ready, cheerful, thoughtful associate, an industrious and wise counselor, seeking first the best interests of his client, the higher standard of professional duty, and the welfare of the community. From this standpoint I may briefly touch some of the salient points of his professional life.

RUFUS P. TAPLEY was born in Danvers, Mass., January 2, 1823, a son of Rufus and Rebecca Tapley. Not reared in luxury or wealth, he was educated in the public schools of his native town, and was early thrown into vocations which demanded daily toil, self-reliance and self-support for a time, until in 1846 he came to Saco, to pursue the studies of an exacting profession, to which field his ambition positively pointed. Under the direction of faithful, competent and eminent leaders, Samuel Bradley, William P. Haines and Philip Eastman, he read law two years; in May, 1848, was admitted to practice and began his labors in Saco, where he continued and concluded his life-work. Ambition, aptitude, and industry brought him to the front where he met many advocates of talent, skill and legal acumen. He was county attorney from 1859 to 1865, city solicitor nine years, Associate Justice of the Supreme Court of this State for seven years — 1865-1872; representative to the legislature in 1858, 1865 and 1875, and state senator in 1885-6. His forty-five years of legal work was interrupted only by a few months of service as colonel of the 27th Maine Infantry Volunteers, in which place he found uncongenial surroundings for which he was neither responsible nor could remove, and from which he sought relief by voluntary return to the pro-

fessional arena, with undiminished love for his country's cause, and watching with unabated zeal the ever-varying panorama of defeat and victory.

This mere outline recalls some of the many places of honor, trust and responsibility which as a citizen, lawyer, legislator and jurist he honorably occupied, and whose duties he faithfully, diligently and successfully discharged.

It hardly becomes me in the presence of the court and older members of this bar, — witnesses of his earlier and later forensic triumphs,—to essay an extended analysis of his professional career, his legal ability, or the elements of mind and character which elevated him above the many. He had certain attributes in a remarkable degree, not the least of which was the care and patience which he brought to the consideration and management of any and every cause.

Cautious in advising the institution or defense of a suit, once launched into the sea of contention, he promoted his client's cause with exhaustive study, unswerving fidelity and persistent energy.

Thorough investigation, careful discrimination, unceasing toil fully equipped him for every contest and every contingency.

Of course, often called suddenly to assist in the conduct of causes for which he had no sufficient opportunity to prepare, (as he viewed preparation) how vividly can we recall his disgust that he was forced to trial so summarily, and even a victory did not compensate him for such trials. In such emergencies sleep was no balm for him. When, however, he could command the progress of his case, his skill in its development, his tact in parrying the attacks of his adversary, his quick perception of the weak points in his opponent's armor, his masterly ability in marshaling evidence before a jury, and his logical and eloquent arguments, won universal admiration, and made him a forensic foeman alike feared and fearless. These qualities were especially marked when he was in the vigor of his manhood, and through long years of success, ere the hand of disease had diminished his ardor or weakened his physical powers.

Judge TAPLEY was ardently attached to his profession, absorbed in it and by it, entertaining higher motives and seeking higher reward than mere mercenary remuneration. Such was his pleasure in his chosen field, and so profound was his sense of responsibility to the court as to his clients, that money was no adequate recompense to him for duty discharged. Perhaps this conception wrought injustice to him, for some of us know that much of his toil had little or no pecuniary remuneration, yet as soon would the true soldier think of pay and rations in the hour of conflict on the field of battle.

Judge TAPLEY'S own words in court on an occasion similar to this, best convey his conception, namely: that "the position of a faithful lawyer and counselor of the court was second in honor and influence to none filled by men."

In this presence I shall not presume to advert to his judicial life, but I will leave this tribute to other lips. I would add a brief word touching Judge TAPLEY'S life as a citizen. In early manhood his associations brought him in touch with the popular heart and in line with better public sentiment.

In whatever conduced to the public weal, in town, county and state, his aid and counsel were freely, cordially given; and these early surroundings so left their impress on his young mind, that they shaped his later opinions and acts, and so, all along his civil pathway, he ever sought to promote whatever, to his mind, was the greatest good of the greatest number. In the cause of temperance his brain and his voice were potent forces, indeed a tower of strength in "times that tried men's souls." A local writer has recently awarded to Brother TAPLEY the credit of largely framing the prohibitory law of 1858, a law which, prior to the much tinkering and patchwork of recent years by unskilled hands, was a credit to our statutes.

To this he added the power of outspoken sympathy, cordial encouragement and personal example. In short, he was a citizen whose ability, whose counsel, whose habits all conspired to elevate the standard of citizenship, and alleviate the misfortunes and sufferings of humanity. In court, in civil life, he was tolerant, sympathetic, courteous, forbearing, yet was ever ready to

strike hot and vigorous blows to "every wrong that needs resistance," and for "every right that needs assistance."

As in recent years he was forced to yield to physical weakness, and surrender to others the work which had animated his more active life, he yet gave warmly of his sympathy and counsel in all subjects which sought the better civilization,—the upbuilding of community and state. Because of these qualities of mind and heart, his removal will leave a void in his adopted city which will not soon be filled.

His neighbors and fellow citizens will sincerely mourn with an afflicted family in their great grief, even although he had spanned the allotted term of life.

Brethren of York Bar, we may wisely heed our departed brother's example of patience, diligence and energy, seeking as he did, the repression rather than the encouragement of litigation, and while reasonably sensible of the emoluments of an honorable profession, which demands much of its votaries, be true to our oath, serving our clients, and the court and public as well, in integrity of purpose, and faithfulness in duty.

Remarks of Hon. J. O. BRADBURY.

May it please the court: My personal acquaintance with Judge TAPLEY was of a brief space of time, less than three years. With so many gentlemen of the profession present who enjoyed a much more intimate association with him than I possessed, it ill becomes me to consume the time of the court at this hour and in these impressive ceremonies.

Very often the inner man, the jewels of the soul, are hidden by the turmoil and confusion incident to the affairs of every day life. Events at times touch the sentiments of the heart and invest rare thought in garments of choice rhetoric. On April 19, 1865, at Saco, in obedience to the general call of a grief stricken city, Judge TAPLEY delivered the eulogy "Abraham Lincoln," to an audience exceeding five thousand people, from a stand appropriately draped in mourning.

It contained sentiments of religion that bespeak deep rever-

ence, faith and appreciation of the relations existing between the Creator and humanity. It was replete with fervid patriotism, true love of the Republic and a painful sense of the perils of the clouds of war hardly then departed the political firmament:

It was strong and sturdy in its abiding conviction, in a full and final restoration of a discordant Union. As a gem of eloquence it has but few equals in the literary efforts ascribed to the sons of Maine. It demonstrates the fact that the sensitive nature of Judge TAPLEY was electrified into thought and speech and was commensurate with the great issues and terrible causes of his time.

If any member of the bar has not read the effort referred to, it is to be regretted.

The sound judgment of Judge TAPLEY was ever exercised in the administration of the municipal affairs of his town and city and his name is associated in the growth of the various departments of its government.

But, sir, everything animate and inanimate is in transition. The chilly, gloomy days of winter are always pressingly followed by the warm, bright hours and luxuriant foliage of spring; and so with us other mortals as with Judge TAPLEY, as we devoutly pray, may the winter of life be endured in hope of that era of celestial spring-time when the soul, free from the encumbrance of flesh and disentangled from the limitations of time, may delight its industry and feed its desire for knowledge with the universe of God, and not one tiny world as its recourse and habitation.

Response of MR. JUSTICE WHITEHOUSE.

I entirely concur in the sentiment of the resolutions as well as in the expressions of approbation and words of eulogy with which they have been presented.

It is always gratifying to observe on the part of the legal profession these thoughtful endeavors to perpetuate the memory of every faithful and honorable member of their brotherhood.

The fame of the practicing attorney, however brilliant and distinguished in his day, is at best but transitory; his forensic triumphs are ephemeral; and it should be held a sacred duty to commit to the permanent records of the court such memorials as may aid in guarding the names of departed brothers against the encroachments of time. And when death has removed one who was not only eminent as a practitioner at the bar but was for seven years an honored Associate Justice of this Court, it seems peculiarily fitting that in this temple of justice, which for forty-five years was the principal scene of his labors, triumphs and joys, we should pause in the midst of the duties which he loved so well, to contemplate his achievements and virtues and lay upon the enduring monument of his own judicial work our tribute of respect and love for his memory.

> "Too oft the flowers that deck the bier
> Had better brightened living eye,
> And eulogy — that public tear—
> Falleth a distilled sophistry
> O'er genius that deserved and sighed,
> Yet being dead is deified."

And if the pathway of the living is ever to receive a helpful illumination from the example of private virtues and public principles illustrated by the lives of those gone before, we must draw the portraiture with a discriminating hand, with fidelity and truth to the original; "nothing extenuate, nor set down aught in malice,"— shunning fulsome eulogy on the one hand, and withholding no true merit on the other.

It is not required that I should attempt a detailed sketch of the life, or an elaborate analysis of the character of our deceased brother. That duty has been performed faithfully and well by his brethren of this bar. Judge TAPLEY was more than ordinarily endowed intellectually, and although he did not receive the advantages of a liberal education he manifestly acquired in early life the habits of correct observation and analytical thought; for he seemed to possess in a remarkable degree that clearness of apprehension which is the basis of all useful knowledge, and that directness and simplicity of statement which gave it exceptional

power. At an early age he was thrown upon his own resources and an unusual degree of practical energy was developed under the incentive of that necessity for personal exertions, which has been the groundwork of the finest type of New England character.

A partial recompense for the loss of a college training was afforded by an untiring industry in self-culture and a rigid self-discipline. In all his studies and nearly all the habits of his mind, he exemplified the line of Milton:

> "That not to know at large of things remote
> From use, obscure and subtle, but to know
> That which before us lies in daily life
> Is the prime wisdom."

Yet he possessed extraordinary intellectual acumen and was peculiarly qualified for the toil of mastering what the poet has termed,

> "That lawless science of our law;
> That codeless myriad of precedent,
> That wilderness of single instances
> Through which the few by wit or fortune led
> May beat a pathway out to wealth and fame."

And upon his admission to the bar he promptly and easily took rank among the reliable counselors and well-informed and successful practitioners at the bar.

He not only became exceptionally familiar with the statutes and decisions of our State, but developed a clear and ready insight into the principles and science of the law. With keen discrimination, he seized promptly upon the salient points at issue in a cause and quickly perceived the true relation of the facts in evidence. His preparations for trial were full, careful and systematic. In every case his idea of the law was tested and verified by reference to the latest authorities and he sought to enter the forum minutely equipped for the contest with every contingency anticipated. While he delighted to surprise his opponent by the interposition of some technical and fatal objection to the pleadings, his plan of campaign always held the most substantial forces in reserve. His arguments whether to

court or jury, were not specially discursive or rhetorical, but were always characterized by clear and logical reasoning and often by refined and subtle distinctions. His service upon the bench of the Supreme Judicial Court extended from 1865 to 1872, and thirty-one judicial opinions published in the volumes of the Maine Reports from the 53d to the 60th volume inclusive, bear testimony to his accurate conception of legal principles, his profound research, his directness and force of statement, and the independence and strength of his convictions.

But of all these efforts the one best known to the profession is doubtless his elaborate dissenting opinion in the case of *Goddard* vs. *Grand Trunk Railway Company*, comprising forty pages of the 57th volume of the Maine Reports. This was an exhaustive analysis of the grounds of a carrier's liability for the misconduct of its servant towards a passenger and a vigorous protest against the doctrine of exemplary damages in suits against corporations for malicious torts of a servant not directly or impliedly authorized or ratified by the corporation. As a beam of light comes through a crystal prism broken into its component colors, so this subject came through the marvelous prism of a philosophical intellect with its constituent elements clearly distinguished. He earnestly contended that such a doctrine was "wrong in principle, inequitable and unjust in practice and utterly wanting in precedent." And his painstaking differentiation of the numerous decisions of English and American courts on this question is characteristic of his thoughtful and critical mind. It is a noteworthy fact that the views there expressed by Judge TAPLEY have very recently been substantially adopted by the Supreme Court of the United States in *Lake Shore and Michigan Southern R. R. Co.* vs. *Prentice* (147 U. S. Rep., page 102), announced last January; and in the opinion of Mr. Justice Gray reference is made to *Goddard* vs. *Grand Trunk R. R. Co.*, and to the "strong dissenting opinion" in that case. Attention is here called to that fact for the obvious purpose of conveying the compliment thus implied to the ability and judicial independence of Judge TAPLEY and not at all for the purpose of suggesting any doubt respecting the sound-

ness of the masterly opinion of the majority of the court as applied to the facts in the Grand Trunk case; for there the retention of the offending servant in his place by the company, after his misconduct was known to them, may well have been deemed a practical ratification and approval of his conduct.

Judge TAPLEY always seemed to me to have,—

> "No envy of another's fame;
> * * * * * *
> "Nor rustling hear in every breeze,
> The laurels of Miltiades."

On the contrary he was prompt to recognize and generous to commend the ability and learning of his associates, both at the bar and on the bench, and to the youthful and deserving practitioner such approval brought not only what Lord Mansfield termed the "sensibility which praise from the praiseworthy never fails to give," but often the encouragement needed for continued effort and higher exertion. One of the most commendable traits of his character upon the bench was his uniform courtesy and patience toward the inexperienced members of the profession, and after renewing practice at the bar I have reason to know that he merited and received the love and gratitude of many of the young men, whose embarrassments were often relieved by his timely suggestions and kindly aid.

In his deportment in social life he was dignified, courteous, and affable, but he did not "wear his heart upon his sleeve." His intimate friends knew the sympathetic gentleness of his nature and the kindness of his heart. If he had frailties, and who has not? the recollection of them is lost in the fragrant memory of these kindly virtues. For, "though I speak with the tongues of men and angels and have not Love, I am become as sounding brass or a tinkling cymbal; and though I have the gift of prophecy and understand all mysteries and all knowledge and have not Love, I am nothing."

Although Judge TAPLEY had for forty years rendered loyal and devoted service to his chosen profession, and had lived a little beyond the allotted age of man, yet until his strength and

activity had been impaired by disease, I was never able to think of him as an old man. Something of the elastic spirit, vivacity and general appearance of youth lingered about him, reminding one of the observations of Cicero "*De Senectute*," "As I like a young man in whom there is something of the old, so I like an old man in whom there is something of the young; and he who follows this rule may indeed become old in body but never in mind." "It is better," says Dr. Holmes, "to be seventy years young than forty years old."

"For age is opportunity no less
Than youth itself though in another dress;
And as the evening twilight fades away
The sky is filled with stars invisible by day."

As our brother "in the fullness of age" approached the

"Suburb of the life elysian,
Whose portal we call death,"

it is not doubted that he entertained the hope and received the comfort of this reflection in "Eternal Goodness,"—

"And so beside the silent sea
I wait the muffled oar;
No harm from Him can come to me
On ocean or on shore.

"I know not where His islands lift
Their fronded palms in air;
I only know I cannot drift
Beyond his love and care."

ASSIGNMENT OF JUSTICES.

Law Terms, 1892.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May. Sitting: PETERS, C. J., WALTON, VIRGIN, EMERY, HASKELL and WHITEHOUSE, JJ.

EASTERN DISTRICT, at Bangor, Third Tuesday of June. Sitting: PETERS, C. J., VIRGIN, LIBBEY, EMERY, FOSTER and WHITEHOUSE, JJ.

WESTERN DISTRICT, at Portland, Third Tuesday of July. Sitting: PETERS, C. J., WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ.

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ERRATA.

For stat. *1883*, *c. 334*, read *1885*, *c. 334*, in opinion, pp. 118, 120.
For *c. 82*, § *82*, read *c. 81*, § *82*, in head note, 121.
For *c. 20*, § *3*, read *c. 24*, § *3*, in head note and opinion, pp. 126, 127.
For *plaintiffs* read *defendant*, in first line, p. 145.
For *c. 79*, § *11*, read *c. 97*, § *11*, p. 224.
Strike out "*See 84 Maine, p. 190*," p. 284.