REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By CHARLES HAMLIN,

REPORTER OF DECISIONS.

MAINE REPORTS,

VOLUME LXXXVI.

PORTLAND, MAINE :
LORING, SHORT & HARMON.
1894.

PRESS OF CHARLES E. NASH, AUGUSTA, MAINE.

JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN A. PETERS, CHIEF JUSTICE.
HON. CHARLES W. WALTON.
HON. WILLIAM WIRT VIRGIN.*
HON. ARTEMAS LIBBEY.†
HON. LUCILIUS A. EMERY.
HON. ENOCH FOSTER.
HON. THOMAS H. HASKELL.
HON. WILLIAM PENN WHITEHOUSE.
HON. ANDREW P. WISWELL.
HON. SEWALL C. STROUT.¶

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* Died, January 23, 1893.
† Died, March 15, 1894.
¶ Appointed, April 12, 1894.

Justices of the Superior Courts.

HON. PERCIVAL BONNEY, CUMBERLAND COUNTY.
HON. OLIVER G. HALL, KENNEBEC COUNTY.

ATTORNEY GENERAL.

HON. FREDERIC A. POWERS.

CHARLES HAMLIN, REPORTER OF DECISIONS.

ASSIGNMENT OF JUSTICES.

Law Terms, 1893.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May. Sitting: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL and WISWELL, JJ.

EASTERN DISTRICT, at Bangor, Third Tuesday of June. Sitting: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE and WISWELL, JJ.

WESTERN DISTRICT, at Portland, Third Tuesday of July. Sitting: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL and WHITEHOUSE, JJ.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

DAVID A. BUTLER *vs.* ALFRED TAYLOR.

Franklin. Opinion August 11, 1893.

Trespass, q. c.; Deed, without possession.

Quitclaim deeds, or deeds which purport only to convey the grantor's right, title and interest in the land, are not *prima facie* evidence of title; and without proof of possession at the time by the grantor, or an entry by the grantee, though admissible in evidence, are not sufficient to prove possession.

In an action of trespass *quare clausum fregit*, the question was whether the plaintiff had shown such possession, actual or constructive, as would enable him to maintain it.

It appeared that his only evidence of title was an administrator's deed of all the decedent's right, title and interest in a tract of land, admitted to contain ten thousand acres, and of which the land where the alleged trespass was committed was a very small part; and that there was no evidence that the decedent ever had title to any portion of it, or that he, or the plaintiff, ever had so much as a momentary seizin of the land. The consideration expressed in the deed was twenty-five dollars.

Held; that the inference is irresistible that the parties to the deed did not understand that the one was selling, or that the other was buying, an interest of any substantial value; *also*, that such a deed alone, and without any other evidence in support of it, is insufficient to maintain the action.

The defendant, in this case, justified his supposed acts of trespass as the servant of one who claimed title derived through a sheriff's deed, antedating the plaintiff's deed nearly four years.

Held; that however defective the sheriff's proceedings may have been, his deed is sufficient to give his grantee seizin and color of title, which, if allowed to continue for a sufficient length of time, will ripen into a valid title, even as against the true owner.

Also, to maintain an action of trespass *q. c.* against them, or their servants or successors in title, the true owner must regain his possession by an actual entry or by judgment of law; that till then he is disseized, and while he allows that disseizin to continue, he cannot maintain an action of trespass *q. c.* against the original disseizors or their successors in title.

ON REPORT.

Trespass for entering land in Eustis, Franklin County, formerly belonging to Miles Standish, deceased, and cutting and carrying away pine trees.

The plaintiff claimed title to the premises by virtue of a deed from the administrator of said Standish's estate, dated February 29, 1888, conveying "the following described real estate, to wit, all the right, title and interest the said Miles Standish had at the time of his decease in a certain piece or parcel of land lying in Eustis, Franklin County, and known as the Buxton tract." . .

The defendant justified as agent of Seth B. Hersey, who claimed title under a sheriff's deed, dated February 12, 1884, made to Woodman, True and Company upon an execution sale, according to R. S., c. 76, § 33, and conveying "one lot of land called the Buxton lot or tract containing two thousand acres, more or less, situate in the southeast quarter of the Buxton Tract, so-called."

It was admitted that said Hersey had acquired and held, at the time of the alleged trespass, the title of Woodman, True & Co., and that the defendant Taylor made the entry alleged upon the premises, and that in making such entry he acted by permission and under the authority of said Hersey under his claim of title as aforesaid.

It was also agreed and admitted that the Buxton Tract, so-called, was, at the date of the sheriff's deed, a well known and well defined tract of land, containing about ten thousand acres in the south half of the town of Eustis. Both deeds were duly recorded; and it was admitted that the plaintiff had actual knowledge of the sheriff's deed to Woodman, True & Co., at the time he took and accepted the deed from the administrator of said Standish.

The land upon which the trespass is alleged to have been committed is in the northeast quarter of the Buxton tract, and the plaintiff claimed that it was not included or embraced in the

description contained in the sheriff's deed. The plaintiff also claimed that the sheriff's sale was void for irregularities; but the view taken by the court renders a report of them unnecessary.

C. A. Wilber, Walton and Walton, with him, for plaintiff.

Title of both parties comes from same source, Miles Standish. The defendant's entry being admitted, the question is who has the best title to the real estate described in plaintiff's writ. The words of the general description in the sheriff's deed are controlled by the particular description. *Stewart* v. *Davis*, 63 Maine, 539 and cases there cited; *Smith* v. *Strong*, 14 Pick. 128, and cases. Sheriff's deed invalid for want of notices posted in Coplin and Flagstaff plantations adjoining Eustis. "Town" includes "Plantation." R. S., c. 1, § 6, cl. 17; *Kimball* v. *Rockland*, 71 Maine, 142; *Small* v. *Lufkin*, 56 Maine, 31; *Blood* v. *Bangor*, 66 Maine, 155; *Townsend* v. *Meader*, 58 Maine, 288. If "Town" does not include "Plantation," notices of sale should have been posted in the shire-town. Sale void in either event. Taylor, being Standish's administrator is estopped by his deed to Butler to deny plaintiff's title.

Symonds, Snow and Cook, for defendant.

Possession indispensable to support trespass *q. c. Jones* v. *Leeman*, 69 Maine, 489; *Harvey* v. *Byrnes*, 107 Mass. 522; *Shepard* v. *Pratt*, 15 Pick. 34. Plaintiff had neither actual nor constructive possession. His deed does not support constructive possession. 2 Greenl. Ev. § 619; *Melcher* v. *Merryman*, 41 Maine, 601. No evidence of actual possession. Burden to prove possession is on the plaintiff. *Tabor* v. *Judd*, 62 N. H. 288; *Coffin* v. *Freeman*, 82 Maine, 578.

Particular description in sheriff's deed not a limitation upon the general terms of the grant. Particular description may be discarded for error. 2 Dev. on Deeds, § 1041; *Ely* v. *Card*, 2 N. H. 175; *Wing* v. *Burgis*, 13 Maine, 114; *Vose* v. *Handy*, 2 Maine, 322. Statement of quantity and description of location being erroneous will not prevail against general description. *Field* v. *Huston*, 21 Maine, 69; *Abbott* v. *Pike*, 33 Maine, 207, and cases; *Pierce* v. *Faunce*, 37 Maine, 68; *Abbott* v.

Abbott, 53 Maine, 360; *Cilley* v. *Childs*, 73 Maine, 133; *Jones* v. *Buck*, 54 Maine, 304.

Notices of sale not required to be posted in adjoining plantations. Laws 1821, c. 60, § 17. Counsel also cited: *Virgie* v. *Stetson*, 77 Maine, 523; *Buffum* v. *Deane*, 8 Cush. 35; Big. Estop. p. 327.

Plaintiff in reply.

Deed to plaintiff, without the statement that both parties claim through Standish, carries with it the legal presumption that seizin follows title, and that they correspond with each other, and this deed duly acknowledged and registered is by statute equivalent to livery of seizin. R. S., c. 71, § 23; *Ward* v. *Fuller*, 15 Pick. 189; *Blethen* v. *Dwinel*, 34 Maine, 133; quitclaim from one having title is sufficient. Where both parties claim under the same person it is *prima facie* sufficient to prove the derivation of title from him without proving his title. 2 Greenl. Ev. § 307. Sheriff's deed not a voluntary conveyance of Standish, to be construed most strongly in favor of grantor; therefore nearly all of defendant's authorities do not apply. His deed does not cover the land on which the trespass was committed.

SITTING: PETERS, C. J., WALTON, VIRGIN, LIBBEY, FOSTER, HASKELL, JJ.

WALTON, J. This is an action of trespass *quare clausum fregit*, and the question is whether the plaintiff has shown such a possession, actual or constructive, as will enable him to maintain it.

We think he has not. His only evidence of title is a deed from the administrator of Miles Standish of all the decedent's right, title, and interest in a tract of land, admitted to contain ten thousand acres, and of which the land on which the alleged trespass was committed is a very small part, and there is not a *scintilla* of evidence that the decedent ever had a title to any portion of it, or that he, or his administrator, or the plaintiff, ever had so much as a momentary seizin of the land on which the defendant's trespass is alleged to have been committed.

Clearly, such a piece of paper is not sufficient to maintain an action of trespass *quare clausum fregit*.

It was formerly held that such an action could be maintained only by a person in actual possession of the *locus in quo*; that a mere legal or constructive possession was not sufficient. It was so held in a very learned opinion by Chief Justice Robertson, in *McClain* v. *Todd's Heirs*, 22 Am. Dec. 37 (5 J. J. Marsh. 335).

And such was undoubtedly the rule of the common law. But this rule, however well adapted to England, where most of the land is in actual occupation of some one, was thought to be not suited to this country, where there was so much wild and uncultivated land. And it soon became a prevailing rule in most of the states that, where there is no adverse possession, a legal title draws with it a constructive possession sufficient to maintain the action. And such is undoubtedly the law in this State.

But, says Professor Greenleaf, though proof of possession, actual or constructive, will maintain the averment of the plaintiff's possession, yet a deed of mere release or quitclaim, without proof of possession at the time by the grantor, or of an entry by the grantee, is not sufficient to prove possession. 2 Gr. Ev. § 619. And in support of this proposition he cites *Marr* v. *Boothby*, 19 Maine, 150.

On turning to that case we find that the action was trespass *quare clausum fregit*, and that the alleged acts of trespass were the same as in this case, namely, cutting and carrying away pine trees. To sustain his action, the plaintiff offered in evidence an administrator's deed to himself and a tax collector's deed to John Sands, and a quitclaim deed from Sands to himself. But there being no evidence that the plaintiff had taken possession of the premises under either of his deeds, he was non-suited by the presiding Justice (SHEPLEY) and the full court sustained the nonsuit. To the same effect is *Bartlett* v. *Perkins*, 13 Maine, 87.

In that case the action was trespass for cutting and carrying away grass. The defendant had levied upon the land as the property of the plaintiff's tenant at will. Of course nothing passed by the levy. And the court so held. And if the plaintiff

had brought a writ of entry instead of an action of trespass, he would have prevailed. But the court held that, although the levy was void, it gave the defendant a color of title, and a sufficient seizin to defeat the plaintiff's action of trespass *quare clausum fregit*. And in this particular a sheriff's deed has the same effect as a levy. Buswell on Limitations and Adverse Possession, § 259, and cases cited in the notes. Any deed, says the author, purporting to convey title, no matter on what founded, gives color of title, and renders the grantee's possession under it, adverse, however groundless the supposed title may be.

In the present case, the defendant justifies his supposed acts of trespass as the servant of one who claims a title derived through a sheriff's deed. The sheriff's deed, antedates the administrator's deed (through which the plaintiff claims), nearly four years. However defective the sheriff's proceedings may have been, his deed was sufficient to give the grantees a seizin and a color of title, which, if allowed to continue for a sufficient length of time, would ripen into a valid title, even as against the true owner. And to maintain an action of trespass *quare clausum fregit* against them or their servants or their successors in title, the true owner must regain his possession by an actual entry or by judgment of law. Till then, he is disseized, and while he allows that disseizin to continue, he can not maintain an action of trespass *quare clausum fregit* against the original disseizors or their successors in title. In the case last cited, (*Bartlett* v. *Perkins*, 13 Maine, 87) the court say that the plaintiff was disseized by the levy, and could not prosecute an action for any act of the disseizor subsequent to the levy, until he had entered, or recovered judgment for the land.

So, in this case, whether the proceedings of the sheriff were or were not regular, his deed gave the grantees seizin of the land which he undertook to sell, and, until that seizin is purged, an action of trespass *quare clausum fregit* can not be maintained against them, or their successors in title, for any acts done by them upon the land subsequent to the sale. And the evidence to show that the seizin (or disseizin) has been purged is entirely wanting. The plaintiff's proof therefore is fatally defective.

Plaintiff's counsel contend that a deed duly executed and recorded is *prima facie* evidence of title. That proposition is true only of warrantee-deeds, or deeds which purport to convey the land. It is not true of quitclaim deeds, or deeds which purport to convey only the grantor's right, title and interest in the land. *Rand* v. *Skillin*, 63 Maine, 103; *Tebbetts* v. *Estes*, 52 Maine, 566.

The plaintiff's deed from the administrator purports to convey only the decedent's right, title, and interest in the land therein mentioned; and there is not a *scintilla* of evidence that the decedent ever had any title to the land,— not so much, even, as a momentary seizin. The deed covers a tract of land admitted to contain ten thousand acres. The consideration, as expressed in the deed, was twenty-five dollars. The inference is irresistible that the parties to the deed did not understand that the one was selling or that the other was buying an interest of any substantial value. Such a deed, alone, and without any other evidence in support of it, is clearly insufficient to maintain an action of trespass *quare clausum fregit*. *Bell* v. *Peabody*, 63 N. H. 233 (56 Am. Rep. 506). *Judgment for defendant.*

VIRGIN, J., died before the decision of this case.

NATHAN D. HOXIE *vs.* JAMES T. SMALL.

Androscoggin. Opinion August 11, 1893.

Sales. Misrepresentations. Fraud.

When a vendor sells shares of corporation stock, or shares in a real estate contract, the law will not allow him to misrepresent the amount which the corporation has received for its stock, nor the amount which the owner of the land has received on the contract. These facts affect too directly and immediately the value of such shares to be misrepresented with impunity.

Where the defendant sold to the plaintiff a fractional interest in a contract for the purchase of real estate and represented that the share was paid for and that there were no more assessments or payments to be made on it, and that he was selling it to the plaintiff for precisely what it cost,

Held; that these statements are material, affecting directly the value of the interest which the defendant was selling; and, if false, will amount to a fraud of which the law will take cognizance.

ON EXCEPTIONS.

The jury having returned a verdict for the defendant, in an action of money had and received, the plaintiff took exceptions which appear in the opinion.

Before the trial, the plaintiff filed by direction of the court the following specifications of the alleged false representations upon which the plaintiff claimed a recovery:

"1st. That he, the said defendant, was then the owner of one share in the Wilson Addition, New England City, Georgia; that he had bought one share in the Wilson Addition to New England City, Georgia; that he had secured an additional share for the plaintiff and four others, which is the share towards which the money sued for was advanced; that he had bought and paid for one share as above, as his own, in addition to the share secured for the plaintiff and others, which last is the share towards which the plaintiff advanced the money sued for.

"2nd. That the share towards the purchase of which plaintiff advanced the money which is sued for was fully paid up; that there was nothing more to be paid on it; that there could be no assessments on it; that there would be no more payments on it.

"Which representations plaintiff says were both false and fraudulent."

Drew and Roberts, and *Savage and Oakes*, for plaintiff.

Counsel cited: *Nowlan* v. *Cain*, 3 Allen, 261; *Bostwick* v. *Lewis*, 1 Day, 250; S. C. 2 Am. Dec. 78, note; *Spaulding* v. *Hodges*, 2 Pa. St. 240; *Smith* v. *Richards*, 13 Pet. 26; Cool. Torts, pp. 474, 483, note, 488, note; *Harris* v. *McMurray*, 23 Ind. 9; *Cressler* v. *Rees*, 46 N. W. Rep. 363; *McAleer* v. *Horsey*, 35 Md. 439; *Bean* v. *Herrick*, 12 Maine, 269; *Saunders* v. *Hatterman*, 2 Ired. 32 S. C. 37 Am. Dec. 404; 2 Kent Com. 487; *Shackleford* v. *Handley*, 1 A. K. Marsh. (Ky.), 496, S. C. 10 Am. Dec. 753; *Griswold* v. *Sabin*, 51 N. H. 167; *Mead* v. *Bunn*, 32 N. Y. 281; *Fitzsimmons* v. *Joslin*, 21 Vt. 129; S. C. 52 Am. Dec. 46; *Reynolds* v. *Palmer*, 21 Fed. Rep. 433; *Williams* v. *McFadden*, 23 Fla. 143; S. C. 11 Am. St. Rep. 345; *Coles* v. *Kennedy* (Iowa), 46 N. W. Rep. 1088; *Page* v. *Parker*, 43 N. H. 363; *Brackett* v. *Griswold*,

112 N. Y. 454; *Frenzel* v. *Miller*, 37 Ind. 1; S. C. 10 Am. Rep. 65.

Newell and Judkins, for defendant.

Neither of the representations is actionable, even though false and intended to deceive. Parties stood in relation of buyer and seller. No relation of agency or any fiduciary capacity. Plaintiff knew he was not getting a title to land, because he received no deed. Plaintiff alleges no false or fraudulent representation concerning the "quality or condition" of the "share," the subject of the sale. Jury found that the defendant owned the share.

Counsel cited: *Watson* v. *Poulson*, 7 E. L. & Eq. Rep. 588; *Holbrook* v. *Connor*, 60 Maine, 578, 585. Cases of misrepresentation held actionable as pertaining to quality or condition: *Long* v. *Woodman*, 58 Maine, 49; *Atwood* v. *Chapman*, 68 Maine, 38; *Martin* v. *Jordan*, 60 Maine, 531; *Rhoda* v. *Annis*, 75 Maine, 17; *Savage* v. *Stevens*, 126 Mass. 207; *Ladd* v. *Putnam*, 79 Maine, 568; *Hazard* v. *Irwin*, 18 Pick. 95; *Nowlan* v. *Cain*, 3 Allen, 261.

The seller, however, may express his opinion of the value of the thing he offers for sale, and praise it *ad libitum* without incurring liability. It is not actionable for the seller to falsely represent "that the lands had large deposits of oil in them, and were of great value for the purposes of digging, boring for, and manufacturing oil," when the lands had never been tested, *Holbrook* v. *Connor*, 60 Maine, 568; to represent to purchaser of a business that he would have the same right in a store — a tenancy at will — that a prior tenant had enjoyed, the alleged damage being an ejection after thirty days notice, *Danforth* v. *Cushing*, 77 Maine, 182; to represent that a buyer could make large profits out of the article bought, *Bishop* v. *Small*, 63 Maine, 12; to induce a conveyance of real estate by representations of a promissory nature, *Long* v. *Woodman*, 58 Maine, 49; to misrepresent what the law will or will not permit to be done, *Abbott* v. *Treat*, 67 Maine, 121.

The general rule of law as above stated admits, however, of an exception. False representations, concerning the value of

the thing sold, former offers for it, the price paid for it, etc., are not actionable. While this is not universal rule of law, it prevails in this State and Massachusetts by an unvarying line of decisions. *Medbury* v. *Watson*, 6 Met. 246; *Brown* v. *Castles*, 11 Cush. 348; *Belcher* v. *Costello*, 122 Mass. 189; *Hemmer* v. *Cooper*, 8 Allen, 334; *Manning* v. *Albee*, 11 Allen, 520; *Gordon* v. *Parmelee*, 2 Allen, 212; *Richardson* v. *Noble*, 77 Maine, 390; *State* v. *Paul*, 69 Maine, 215; *Bishop* v. *Small*, 63 Maine, 12; *Holbrook* v. *Connor*, 60 Maine, 578; *Bourn* v. *Davis*, 76 Maine, 223, and cases cited; *Banta* v. *Palmer*, 47 Ill. 99; *Tuck* v. *Downing*, 76 Ill. 71. Cases of *Van Epps* v. *Harrison*, 5 Hill (N. Y.), 63; *Sanford* v. *Handy*, 23 Wend. 268; and *Page* v. *Parker*, 43 N. H. 369, overruled in this State in *Richardson* v. *Noble*, 77 Maine, 390.

SITTING: PETERS, C. J., WALTON, VIRGIN, LIBBEY, FOSTER, HASKELL, JJ.

WALTON, J. This is an action to recover back money claimed to have been obtained by fraud. The defendant sold to the plaintiff a fractional interest in a contract for the purchase of real estate, representing to him, as the plaintiff claims, and as the evidence tends to prove, that the share which he was selling to the plaintiff was paid for, and that there were no more assessments or payments to be made on it, and that he was selling it to the plaintiff for precisely what it cost. The exceptions state that the presiding justice "regretfully and reluctantly," instructed the jury that these statements, though false, would not amount to a fraud of which the law could take cognizance.

We do not think the ruling can be sustained. Such statements, if made, were clearly material. They affected directly the value of the interest which the defendant was selling. The defendant was not selling tangible property. He was selling a fractional interest in a contract. And the value of that contract depended largely, if not wholly, upon the amount of the payments that had been made upon it. A contract for the purchase of real estate, a mere option, on which nothing has been paid may

possess little or no value. But if the price has been paid, though no deed has been given, an equitable title is thereby vested in the holder of the contract which is equal in value to a legal title. It is plain, therefore, that the payments upon such contracts are important facts and cannot be misrepresented with impunity. As well might the payments which have been made upon a mortgage be misrepresented when selling the right to redeem.

A vendor can sometimes misrepresent with impunity the price which he paid for the property he is selling; but he can not do so when the amount paid creates or directly affects the value of what he is selling. In *Coolidge* v. *Goddard*, 77 Maine, 578, the plaintiff sold the defendant five shares in an electric light company, representing to him that he and all the other stockholders had paid to the company the par value of the stock, and that he was selling to the plaintiff at the same price which all the other stockholders had paid; and the court held that these statements were material and important, as they affected directly the value of the stock, and, if false, constituted a legal fraud. It was there urged, as in this case, that statements of what the seller had paid was mere "dealer's talk," and created no liability; and the same authorities were cited in support of the proposition which are cited in this case; and the ruling at the trial was substantially the same in that case as in this. But, said Mr. Chief Justice PETERS, "the learned judge evidently had not at the moment in mind the distinction between what the plaintiff had paid and what the company had received for the stock." If the company had received the par value of its stock, then it would have a working capital equal to the amount of stock issued. But if it had sold its stock to the stockholders for one third of its par value, which was the fact, then its working capital would be correspondingly less. And as the value of stock depends upon the amount of capital possessed by a corporation, any statement which misrepresents the amount, is important and material and can not be made with impunity.

The law allows a vendor to indulge in a large amount of misrepresentation without making himself responsible for it. Many of the statements of the defendant in this action are of

that character. His professions of friendship and his pretended anxiety to do the plaintiff a favor are examples of that class. A buyer who relies upon the professed friendship of a seller, and his pretended desire to force a favor upon him, must look to the same source for indemnity in case he is cheated. But a vendor's right to misrepresent facts has its limits; and when he is selling shares in corporation stock, or shares in a real estate contract, the law will not allow him to misrepresent the amount which the corporation has received for its stock, nor the amount which the owner of the land has received on the contract; for these facts too directly and immediately affect the value of such shares to be misrepresented with impunity.

Exceptions sustained.

VIRGIN, J., died before the decision of this case.

FRED P. SARGENT *vs.* CHARLES C. HUTCHINGS.

Hancock. Opinion August 11, 1893.

Sales. Evidence. Practice.

In an action to recover the price of land sold and conveyed by the plaintiff to the defendant the conveyance was admitted, but the defendant denied that it was a sale, claiming that it was conveyed to him as trustee. The plaintiff introduced in evidence a writing signed and sworn to by the defendant admitting that he owed the plaintiff and others for land which defendant had conveyed to a land improvement company, therein stating the prices that he agreed to pay and the sums already paid. The defendant sought to weaken the force of such admission by testifying that the paper was intended to show for what amount each lot was put into the land scheme, and what each owner would be entitled to receive in trustee certificates, and that his attention was not called to the phraseology. To corroborate his testimony the defendant offered the testimony of two witnesses to the effect that their conveyances, referred to in the writing, were not sales but outright conveyances of land to be held in trust by the defendant; but the testimony was rejected by the court. *Held*, that the evidence was rightly excluded.

The defendant having introduced and read a letter of one of plaintiff's witnesses, during his cross-examination, without objection, *Held*, that the letter was then legally in the case.

The defendant cross-examined the witness with respect to the contents of the letter, and again offered it in evidence as tending to contradict the witness, and it was excluded. The proceeding seems to have been irregular; and as

the defendant's counsel was the cause of the irregularity, *Held*, that the defendant cannot complain of it.

ON EXCEPTIONS.

The court excluded testimony offered by the defendant upon the trial of the case and thereupon he took the exceptions which are stated in the opinion.

J. A. Peters, Jr., for plaintiff.

B. E. Tracy, Deasy and Higgins, for defendant.

SITTING: PETERS, C. J., WALTON, LIBBEY, VIRGIN, FOSTER, HASKELL, JJ.

WALTON, J. It is the opinion of the court that the exceptions in this case can not be sustained.

It is an action to recover the price of land, sold and conveyed by the plaintiff to the defendant. The exceptions state that the defendant admitted that the land was conveyed to him, but denied that it was a sale. He claimed that it was conveyed to him as trustee.

In addition to other evidence, the plaintiff introduced a writing, signed by the defendant, admitting that he owed the plaintiff and others for land which he (the defendant) had conveyed to a land improvement company, therein stating the prices which he had agreed to pay, and the sums which he had already paid. The defendant had not only signed the paper, but he had made oath to the truth of the statements therein contained. He sought, however, to weaken the force of the admission contained in this paper by testifying that the paper was intended to show for what amount each lot was put into the land scheme, and what each owner would be entitled to receive in trustee certificates, and that his attention was not called to the phraseology; and to corroborate his testimony, he offered the testimony of Wilbur F. Vose and William F. Hutchings, to the effect that their conveyances referred to in the writing "were not sales but outright conveyances of land to be held in trust by the defendant." The testimony was objected to by plaintiff's counsel, and the objection was sustained.

We have examined all of the testimony of the defendant which is reported, and we are unable to discover that the testimony offered and rejected would either corroborate or contradict him. It is urged in argument that it would tend to show that the defendant signed the writing unconsciously. The defendant did not testify that he signed it unconsciously; and the evidence could not corroborate him on a point in relation to which he had not testified. The most that could be claimed for the evidence was that it might show that the relation of trustee and *cestui que trust* existed between the witnesses and the defendant, and that the jury might then infer that the same relation existed between the plaintiff and the defendant. But such an inference would be unjustifiable. It would by no means follow that because the witnesses had been willing to make a trustee of the defendant, that therefore the plaintiff had consented to do the same thing. We can perceive no possible ground upon which the evidence offered and rejected was admissible, and we think it was rightly excluded.

Another exception is to the exclusion of a letter written by Stephen L. Kingsley. Kingsley was a witness for the plaintiff, and while he was being cross-examined by the defendant's counsel, the letter was shown to him and he admitted that he wrote it. It was then optional with the defendant's counsel to have it read immediately, or to defer reading it to some future time. He chose to have it read immediately. He required the witness to read it, and he did read it aloud. And no objection to the reading appears to have been interposed. The letter was then legally in the case as evidence (1 Gr. Ev. § 463), and the defendant's counsel proceeded to cross-examine the witness with respect to its contents. The exceptions state that the letter which had been thus read to the jury, was again offered in evidence by the defendant, as tending to contradict Kingsley's testimony, and was excluded. This was a proceeding which we are unable to comprehend. The letter being already in the case as evidence, why it should be again offered, or why, when so offered, it should be excluded, we are unable to understand. The proceeding seems to have been irregular, and, as the

defendant's counsel was the cause of the irregularity, we think the defendant can not be allowed to complain of it. Besides, an examination of Kingsley's testimony, and of the contents of the letter, fails to satisfy us that it was admissible for the purpose for which it was offered.

Exceptions overruled.

VIRGIN, J., died before the decision of this case.

ELIZA A. SKOLFIELD *vs.* EBEN H. SKOLFIELD.

Franklin. Opinion August 11, 1893.

Divorce. Recrimination. Evidence.

Upon the trial of a libel for divorce alleging cruel and abusive treatment by the husband, and provocation is pleaded by him, evidence of the provocation need not be confined to the times of the alleged abuse. A knowledge of it may not come to the husband for many days or weeks even after it occurred.

ON MOTION AND EXCEPTIONS.

The case is stated in the opinion.

Joseph C. Holman and *Frank W. Butler*, for plaintiff.

H. L. Whitcomb, for defendant.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, JJ.

WALTON, J. This is a divorce suit. A wife complains of cruel and abusive treatment. The husband pleads provocation. The presiding justice ruled that the evidence of provocations must be confined to the times of the alleged abuse; that provoking and annoying conduct on Monday would not excuse abuse on Tuesday; and excluded evidence offered by the husband of his wife's misconduct at times other than those to which her evidence of his cruel and abusive treatment related.

We think the ruling was too restrictive. A wife's conduct may be exceedingly provoking, and yet a knowledge of it may not come to the husband for many days or weeks even after it occurred. The mere continuance or repetition of slight an-

noyances may at last exhaust a husband's or a wife's patience and excuse an outburst of passion and the use of language which would otherwise be inexcusable. We do not feel quite sure that the husband was much prejudiced by the ruling in this case; but he may have been; and, as we think it was erroneous, our conclusion is that the entry must be,

Exceptions sustained.

SAMUEL D. WARREN, and others, in equity,

vs.

WESTBROOK MANUFACTURING COMPANY.

Cumberland. Opinion October 5, 1893.

Waters. Partition. Islands. Equity.

Where there are two natural channels in a river caused by an island, the owners of the island are riparian owners as well as the owners of the main land opposite the island.

The riparian owners upon each of such channels are entitled to have flow through that channel as much of the water of the river as will naturally flow there and no more.

The riparian owners upon either of such channels must acquiesce in the flow through the other channel of as much of the water of the river as will naturally flow there.

In such case the waters of the river are divided by nature between the two channels, and the two sets of riparian owners; and however unequal that division may be, the court has no power to make it equal.

In such case a bill in equity by the riparian owners upon one channel against the riparian owners upon the other channel asking for a division between them of the whole flow of the water of the river cannot be sustained.

ON REPORT.

Bill in equity, heard on bill and demurrer, praying for a partition and division of the water of the Presumpscot River and of its use at Saccarappa Upper Falls between the riparian owners.

To accomplish this end the bill specially prays that, under the supervision of the court, provision may be made for dividing such water between the plaintiffs and the defendant according to their respective rights; and that for this purpose surveys and measurements of the water may be had and the said parties may be assigned their aliquot parts by such devices as are in common

use by hydraulic engineers to measure and allot water; also, that if necessary, a commissioner may be appointed by the court to take such measurements, and to do such other things as may be necessary, to provide the means by which the amount of water that the plaintiffs and defendant are entitled to draw at different stages of water, may be ascertained at all times.

The case is stated in the opinion.

Strout, Gage and Strout, and *Warren and Brandeis,* for plaintiffs.

Equity jurisdiction: R. S., c. 77, § 6; *Rowell* v. *Jewett,* 69 Maine, 293, 303; *Stinchfield* v. *Milliken,* 71 Maine, 567, 571. Legal remedy inadequate: *Bemis* v. *Upham,* 13 Pick. 169; *Lehigh V. R. R. Co.* v. *Soc. etc.* 30 N. J. Eq. 145, 161; *Lyon* v. *McLaughlin* 32 Vt. 423; *Bardwell* v. *Ames,* 22 Pick. 333, 354; *Lockwood Co.* v. *Lawrence,* 77 Maine, 297, 312, 313; *Lawson* v. *Menasha Co.* 59 Wis. 393, 398; *Harris* v. *Mackintosh,* 133 Mass. 228, 230. Multiciplicity of suits: *May* v. *Parker,* 12 Pick. 34, 40; *Belknap* v. *Trimble,* 3 Paige, 577, 600; 1 Pom. Eq. § 245; *Ballou* v. *Hopkinton,* 4 Gray, 324, 328; *Cadigan* v. *Brown,* 120 Mass. 493; *Reid* v. *Gifford,* Hopk. 416, 419, 420; *Murray* v. *Hay,* 1 Barb. Ch. 59; *Carlton* v. *Newman,* 77 Maine, 408; *Clowes* v. *Staffordshire Potteries Co.* L. R. 8 Ch. 125; *Thayer* v. *Brooks,* 17 Ohio, 489; *Hazeltine* v. *Case,* 46 Wis. 391. Continuous trespass and private nuisance: 1 Pom. Eq. § 245; *Burden* v. *Stein,* 27 Ala. 104, 112; *Livingston* v. *Livingston,* 6 Johns Ch. 497, 500; *Tuolumne Water Co.* v. *Chapman,* 8 Cal. 392; *Webb* v. *Portland Mfg. Co.* 3 Sumn. 189; *Corning* v. *Troy Iron Co.* 34 Barb. 485, 492; S. C. 39 Barb. 311, 327; *Holsman* v. *Boiling Spring Co.* 14 N. J. Eq. 335; *Carlisle* v. *Cooper,* 21 N. J. Eq. 576. Remedy in equity: *Nash* v. *Simpson,* 78 Maine, 142; *Monroe* v. *Gates,* 48 Maine 463, 466; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9, 21; *Frey* v. *Lowden,* 70 Cal. 550; *Adams* v. *Manning,* 48 Conn. 477; S. C. 51 Conn. 5; *Burnham* v. *Kempton,* 44 N. H. 78; *Ranlet* v. *Cook,* 44 N. H. 512, *semble*; *Hanna* v. *Clarke,* 31 Gratt. 86; *Patten Paper Co.* v. *Kaukauna*

W. P. Co. 70 Wis. 659. Means of division: *Scovil* v. *Kennedy*, 14 Conn. 349; *Cooper* v. *Cedar Rapid W. P. Co.* 42 Iowa, 398; *Arthur* v. *Case*, 1 Paige, 447, 450; *Smith* v. *Smith*, 10 Paige, 470; *Olmstead* v. *Loomis*, 9 N. Y. 423; *Salem Co.* v. *Salem F. M. Co.* 12 Or. 378, 387. Counsel cited on the merits, besides the above: *Butman* v. *Hussey*, 12 Maine, 407; *Munroe* v. *Stickney*, 48 Maine, 462; *Soltan* v. *De Held*, 2 Sim. N. S. 133; *Morrill* v. *Morrill*, 5 N. H. 134; *Adams* v. *Briggs Iron Co.* 7 Cush. 361, 364; Gould on Waters, § 540.

The title of the plaintiffs to a fixed proportion of the water power is alleged in the bill, and admitted by the demurrer, and it is to enable the plaintiffs to make an immediate use of water to which they are entitled that the present bill is brought. The plaintiffs have alleged that they have "immediate use for all the water and water power rightfully belonging to them at Saccarappa Upper Falls, and are desirous of using and fully intend to use all they are entitled to." It is impossible for the plaintiffs to make this use of the water while the defendant persists, as for three years past it has done in spite of their protests, in using a large part of the water to which the plaintiffs are entitled, and, as alleged in the bill, "it will be impossible to secure hereafter to the several parties their respective rights to the use of the water" without providing some means of regulating the use by each.

W. L. Putnam, for defendant.

Rights must be admitted or established at law. Ang. Wat. § 447; *Pierce* v. *Rollins*, 83 Maine, 172, 177; *Nash* v. *Simpson*, 78 Maine, 142-150.

No allegations in bill that title is clear, admitted or established at law. It does not appear that defendant claims to use more than one half of the water, or what it does claim to use. Defendant may lawfully use the whole power of the river until plaintiffs desire to use their proportion. Bill shows no present or existing controversy. It should allege the precise amount of water or power the plaintiffs are entitled to.

Plaintiffs do not state a title. All their allegations concerning their title proceed on the hypothesis of a division of "water,"

and of the right to "water," which flows through a particular channel, or through a particular part of the channel. They make a title in no other way. But the rule is that parties on each side of a river are entitled *per my et per tout* to the water of the river for the purpose of creating their share of the power, subject only to the qualification that where, from a peculiar formation of the bed of the river, or the channel, the water at low stages will naturally run to one man's mill, instead of to another, his mill may run longer than the mill of the other.

SITTING: PETERS, C. J., WALTON, LIBBEY, EMERY, FOSTER, WHITEHOUSE, JJ.

EMERY, J. This equity cause was heard on bill and demurrer. The case stated, independent of the legal inferences drawn, is substantially as follows. The Presumpscot River, a non-tidal stream, as it flows through Saccarappa Village at the place called Saccarappa Upper Falls, forms an island about three hundred and fifty feet long, and one hundred and fifty feet wide. In forming this island, the river divides itself into two branches or channels; one flowing on the easterly side, and the other on the westerly side of the island. In each of these branches or channels, are falls affording valuable water power. A dam has long been built across each channel. These dams are substantially in line with each other, and form with the island a continuous dam across the whole river. There are several mills on the island, and other mills on each side of the main river opposite the island. The mills on the eastern mainland, and on the eastern side of the island, are supplied with water from the dam across the eastern channel. The mills on the western mainland and on the western side of the island, are supplied with water from the dam across the western channel. The bill does not expressly describe the mills and their location, but the facts are so well known and conspicuous, they may properly be added to the description of the general situation.

The plaintiffs, other than Mary Little Hale Dana, own the western side of the island, the land under the western channel,

and the land on the west side of the river opposite the island. They also own the dam across the western channel and the mills supplied by it.

Mary Little Hale Dana, one of the plaintiffs, has some interest on the west side of the river. She also owns the eastern side of the island and the adjoining land under the water to the middle line of the eastern channel. She further owns so much of the dam across the eastern channel as is on her land, together with the mills on the easterly side of the island, supplied from this dam.

The defendant company owns the land on the east side of the river opposite the island and the adjoining land under the water to the middle line of the eastern channel, or to the land of Mrs. Dana. It also owns so much of the dam across the eastern channel as is on its land, together with the mills on the eastern main shore which are supplied from this eastern dam.

All the plaintiffs are therefore the sole riparian owners on both sides of the western channel, and owning the land under that channel. Mrs. Dana is the sole riparian owner on the west side of the eastern channel, and owning to the centre line. The defendant company is the sole riparian owner on the east side of the eastern channel, and owning to the centre line.

We are now to consider the various rights and duties of these different riparian owners, in the flow of the water of the Presumpscot River to and past their lands. It should be continually borne in mind that we are considering the legal rights and duties based on the situation of the parties, and unmodified by any statutes, contracts, grants or prescriptions. None of these latter matters are stated in the bill, and their possible modifying effects are not considered here.

As against other riparian owners up the river from them, they are all entitled to have all the water of the river flow down to their lands to the extent it would naturally flow there, subject to a reasonable use of the flow by such upper riparian owners as it passed their lands. As against riparian owners below, they are entitled to have the water flow from their lands to the same extent. So far their rights are similar and equal if not identical.

But at the head of the island the flow of water in the river is divided by the island. Part of the water thence flows through the western channel past the lands of the plaintiffs, and does not touch in its flow any of the land of the defendant, nor any of the land of Mrs. Dana on the east side of the island. The other part of the water thence flows through the eastern channel past the land of Mrs. Dana and the land of the defendant, and does not touch in its flow any of the land of the other plaintiffs.

The island, in thus dividing the flow of the waters in the river, has divided the rights of the parties to this suit. The plaintiffs are entitled to have flow through the western channel, past their lands on and under that channel, so much of the water of the river as would naturally flow there and no more. The defendant and Mrs. Dana, on the other hand, are entitled to have flow through the eastern channel, past their lands on and under that channel, so much of the water of the river as would naturally flow there and no more. As between the channels, neither party can lawfully do anything by sheer dams, or by widening or deepening his channel, or by any other means, to cause a greater proportion of the water to flow through his channel. On the other hand, neither party is obliged to maintain dams or any other appliances on his channel to check the natural flow there, and thus turn more into the other channel. Either party may remove all existing dams from his channels and leave the water to flow there naturally, unimpeded by artificial obstructions. This may lessen the hitherto accustomed flow in the other channel, but as it would not lessen the natural flow there, it would not infringe upon any legal rights of the party on that channel. At the same time, if either party checks the natural flow through his own channel by dams, closed gates or otherwise, and thereby increases beyond nature the flow of water through the other channel, the other party on that other channel can lawfully make use of such extra flow. He can lawfully use all the water that nature or other parties send to him. He is not bound to let it go to waste. In fine, either party on his own channel as against the other party on the other channel, may do as he will with his land and the water flowing past it;

through his channel, so long as he does not thereby cause a lessening of the natural flow through the other channel.

If by reason of the greater natural width or depth, or fall of one channel, a greater proportion of the water of the river flows through that channel than through the other, this greater proportion is the proper natural advantage of the party located on that channel. It is the proper natural advantage of the location for which he presumably paid when he acquired the land on the more favored channel. It is an advantage he cannot be required to share with the party on the other and less favored channel. Such other party cannot avoid the natural disadvantages of his less desirable location. This inequality, when it exists, is natural not legal. It is decreed by nature, and human courts are powerless to correct it.

The foregoing propositions seem almost elementary — not needing any citation of authorities to sustain them. See however 3 Kent Com. 428; Ang. on Waters, § § 16, 44, 49; Gould on Waters, § 166; *Crooker* v. *Bragg*, 10 Wend. 260; *People* v. *Canal Appraisers*, 13 Wend. 355, 371; *Kimball* v. *Gearhart*, 12 Cal. 29; *Nevada Canal Co.* v. *Kidd*, 37 Cal. 282; *Fulmer* v. *Williams*, 122 Pa. St. 191; *West* v. *Fox River Paper Co.* 82 Wis. 647, 655 *et seq.* Indeed, the plaintiffs in their bill have assumed the correctness of the main proposition. In the second paragraph of their bill, they state that they at one time sold the right to take a certain quantity of water power from their dam across the western channel. They apparently did this without consulting the riparian owners on the other channel.

Having considered the situation and consequent legal rights of the various parties in this suit, we now turn to the plaintiffs' complaint and prayer as stated in their bill. These are based on the following assumptions, viz: 1, — that the defendant is entitled to only one fourth of all the water flowing to and through both channels. 2, — that the plaintiffs are entitled to three-fourths of all the water so flowing, and now desire and are planning to use it. 3, — that the defendant against the protest of the plaintiffs has been drawing out of the dam across the eastern channel, and using to turn his mill on the east side of

that channel more than his one fourth of all the water in the river. They admit, however, in the fifth paragraph of their bill that they some time ago shut down a large saw-mill on the westerly side of the western channel which had been using a large quantity of water. This shutting down of the saw-mill on the western channel undoubtedly increased the flow of water through the eastern channel. That the defendant used the increased flow thus voluntarily turned to it by the plaintiffs affords them no legal ground of complaint, even upon their own assumption. But however that may be, the plaintiffs say they now desire and are planning to use all the water and water power rightfully belonging to them, and want their three-fourths share of all the water of the river flowing to and through both channels ascertained and marked out for them.

Their prayer is that the court will make a division of the waters of the Presumpscot River at Saccarappa Upper Falls between the plaintiffs on the one hand and the defendant on the other, and mark out for each party his share; and that to this end the court will cause skilled engineers to make surveys and measurements of the waters of the river, (meaning all the waters flowing to and through both channels,) and provide instrumentalities for determining and indicating each party's aliquot part or share of the water at all times.

As between opposite riparian owners upon the same channel the court might have jurisdiction to equalize each owner's use of the water, and to mark out beforehand each owner's share, and this by any appropriate proceedings and instrumentalities. If Mrs. Dana as riparian owner on the west side of the eastern channel, opposite the defendant, should desire such relief, it might perhaps be within the power of the court to act and accomplish the desired result. Opposite riparian owners upon the same channel have a common and equal right to the use of all the water flowing in that channel as it passes their opposite lands. If the volume and flow of water be limited, the use by each opposite riparian owner may be limited by judicial action in proportion, so that the enjoyment be kept equal, like the right.

Where, however, the waters of a river are divided by an island so that, as alleged in the bill, they flow past the island in two distinct channels, and where the island is itself divided in ownership as also alleged in the bill, the riparian owners on the two main shores opposite the island, are not opposite riparian owners with common and equal right to the use of all the water flowing between them. On the contrary, each such owner has for an opposite, the owner of that part of the island facing his land. Their equal and common right is confined to the flow of the water in the channel between them. They have no legal right in common or in severalty in the water naturally flowing between other owners on another channel on the other side of the island where they have no land.

The fallacy in the plaintiffs' reasoning is their assumption that because they own among them three shores out of four, that is, one main shore and the two island shores, they are therefore entitled to three-fourths of the water of the river flowing between the two main shores without regard to the island. Indeed, we are urged to take a broad view of the subject; to overlook the island, and see one river, one current of water, one dam, one water power with the defendant on one side and the plaintiffs on the other, and then proceed to ascertain, determine, define, and indicate each person's aliquot part of the whole water of the whole river. Should we do so, we must inevitably measure off to the defendant one half of that whole flow. If there is only one current between him and the plaintiffs, his right in that current is equal to theirs. What the plaintiffs really seek to have us do is, not to overlook the island, but to notice it, and then assume that the two channels are equal and the two currents equal, and hence that the defendant is only entitled to one half of one half (*i. e.* one fourth) of the water of the river. If the assumption be correct, there is no need for the court to intervene farther than to regulate the use of the flow in each channel by itself, in case the owners upon that channel are in conflict among themselves. The island has made a preliminary even division which need not be re-examined. If, however, the assumption be incorrect, and one channel, say the

eastern, is visibly wider, deeper and with a better fall than the other, then, as has been said above, the defendant being a riparian owner on the eastern or larger channel is entitled to one half of the use of all the natural flow of water in that channel, even though it be three-fourths or more of all the water flowing down the river.

But we cannot overlook the island. It is there, populous and conspicuous. Nature placed it there. She divided the waters of the river into these two channels by its means. Whether this division was equal or extremely unequal, the parties found it already made when they located and invested there. They presumably accommodated themselves to that natural division. If they have not done so, they should. They may attempt to equalize matters to any extent by contract, but if either owner refuses to yield his natural advantage of location, the court cannot be expected to attempt to make equal what nature has made unequal.

It is particularly urged that, the two dams being in the same line, the island is only a part of one whole dam across the whole river and should be so considered. When it is recalled, however, that Mrs. Dana and the defendant own the whole of the eastern dam, and could lawfully remove that dam entirely without consulting the owners of the western dam, it becomes evident there are two dams instead of one. In the same way it also becomes evident there are two water powers instead of one. We are satisfied that the bill states no ground for the interposition of the court between the present parties. The plaintiffs have submitted their present case upon this bill, and the judgment must be that the bill cannot be sustained. If there are any other grounds for relief between some or all of these parties, they can be stated and considered upon a new bill. This bill must be dismissed with costs, but out of abundance of caution such dismissal should be without prejudice.

Bill dismissed with costs but without prejudice.

WILLIAM F. CURRAN *vs.* WILLIAM Z. CLAYTON.

Penobscot. Announced July 19, 1893. Opinion November 8, 1893.

Elections. Australian Ballot Law. Defective Ballots. Decision of Board of Aldermen,—when reviewable. R. S., c. 4; Stats. 1880, c. 193; 1891, c. 102; 1893, c. 260.

The elective franchise must be exercised under such regulations and restrictions as the legislature may deem reasonably necessary to maintain order at elections, prevent intimidation, bribery and fraud, preserve the purity of the ballot box and thus secure a genuine expression of public sentiment.

Statutes designed to secure complete and inviolable secrecy of ballots cast at public elections should be construed, under established rules, with reference to the mischief to be remedied and the object to be accomplished; and interpreted, if practicable, so as to promote and not destroy the purpose of their enactments.

The enactment of the Stat. of 1891, c. 102, popularly known as the "Australian Ballot Law," was designed to inaugurate an important departure from the mode of voting which had existed in this State prior to its passage.

Its distinguishing feature is its careful provision for a secret ballot.

Under this statute giving the voter a clear opportunity to designate by a cross mark (×) his choice of candidates, the place and method of marking the ballot being regulated and defined in the statute, *it was held* that ballots defectively and illegally marked as follows should be rejected:—

(1.) Where the cross (×) was placed above the name of the candidate, and not in the appropriate place at the right of it;

(2.) Where there was a cross (×) above and also one beneath the candidate's name, but none at the right of it;

(3.) Where the cross (×) was placed at the left of the name of the candidate;

(4.) Where there was a cross (×) under the party name at the head of the ticket and one at the left of the defendant's name on another party ticket;

(5.) Where there was no cross (×) whatever, but a short, straight line drawn across the square at the right of the party name at the head of the ticket;

(6.) Where there was a cross (×) in the square at the right of the name of each candidate except that for Mayor, on one party ticket, and a cross (×) in the square at the right of the party name on another ticket.

The board of aldermen in the city of Bangor re-examined the ballots cast for alderman in ward seven, counted for defendant the six ballots above described, and declaring that there was no choice, ordered a new election to be held. The defendant securing a majority of the ballots then cast claimed to hold the office by virtue of the second election; that the subject matter

was within the exclusive jurisdiction of the board of aldermen; and that the ballots alleged to be defective and irregular were properly counted for him. The plaintiff thereupon began his proceeding in equity under R. S., c. 4, and Stat. of 1893, c. 260, amendatory thereto, asking the court to take jurisdiction of the matter, and require the defendant to surrender the office to the plaintiff. *Held;* that the decision of the board of aldermen is subject to review by this court; that the city charter is to be construed as affording a cumulative or primary tribunal only, and not an exclusive one; that it does not preclude a contestant from resorting to the court for a revision of a question of law; and that the decision of the board of aldermen involved the determination of a question of law and not an issue of fact, or a matter of discretion.

IN EQUITY.

This was an appeal from a final decree in equity rendered in the court below, in favor of the plaintiff, where there was a hearing upon the bill, answer and testimony. The case upon the appeal was certified to the Chief Justice and argued in writing.

Both parties claimed to have been elected alderman in ward seven, in the city of Bangor. The case is stated in the opinion. The plaintiff's bill, omitting the jurat, is as follows:

"State of Maine. Penobscot, ss.

"To the Supreme Judicial Court. As in Equity.

"William F. Curran, of Bangor, in the County of Penobscot, petitions and complains against William Z. Clayton, of Bangor, in said County, and says:

"That he, said Curran, is a natural born citizen of the United States, of the age of twenty-nine years; that he is now and has been for several years past continuously a legal resident in and duly qualified voter of, Ward Seven, in said City of Bangor; that he is legally qualified to be elected to and hold the office of Alderman from said Ward Seven, in the City Council of Bangor.

"That he was duly elected and qualified as Alderman of said Ward Seven, in March, 1892, and held said office for the municipal year then next ensuing; that at the regular annual city election in said Bangor, on the second Monday of March, 1893, duly and legally held under the provisions of law and especially of Chapter 102 of the Public Laws of 1891, he was a candidate for re-election as Alderman for said Ward Seven, in

the City Council of said Bangor, for the municipal year then next ensuing; that as such candidate his name was duly and properly placed upon the official ballot to be used at said city election in said Ward Seven; that of the qualified electors of said Ward Seven, at said election of March, 1893, he received a clear majority over all the other candidates voted for as Alderman at said election in said Ward Seven, in that of the different candidates for Alderman, whose names appeared upon the official ballots cast at said election in Ward Seven, the qualified electors of said Ward, by proper cross upon the official ballot indicated their choice as follows, viz:

"The respondent, William Z. Clayton, had 295 votes.

"Said William F. Curran, had 310 votes.

"John S. Ellis, had 12 votes.

"The whole number of ballots cast for Alderman was 617 votes.

"Necessary for a choice, 309 votes.

"And your petitioner was duly declared elected as said Alderman.

"That at said election in Ward Seven, all the votes given in for the several offices, including the said office of Alderman, were properly sorted, counted, declared and registered in open Ward meeting by the Warden of said Ward, in the presence of the Clerk of said Ward, who caused the names of the persons voted for and the number of votes given for each to be written in words at length, and duly and properly recorded.

"And the Ward Clerk of said Ward Seven did within twenty-four hours after said election, to wit, in the evening of the said second Monday in March, 1893, deliver to said Curran, a certificate of his election as Alderman for said Ward Seven, in said City Council as aforesaid.

"And said Clerk of Ward Seven did forthwith deliver to the City Clerk of said Bangor, a certified copy of the records of said election; that on the third Monday of March, 1893, the Aldermen and City Council elect, duly met in convention, when and where, no one protesting, the oath of office was duly administered to your petitioner to perform the duties of Alderman

from Ward Seven in the City Council of Bangor, for the municipal year then next ensuing, whereupon your petitioner assumed the duties of said office, and continued to perform them until the unlawful assumption of the same by the respondent as hereinafter stated.

"That at a meeting of the Board of Aldermen of said city, held on the 5th day of April, 1893, said board against the protest of your petitioner improperly and illegally went behind the said returns of said Clerk of Ward Seven, in so far as they related to the election of an Alderman, and recounted the ballots cast at said election in Ward Seven, and by counting as cast for said respondent six ballots so defectively, improperly and illegally marked as to make it impossible to determine the voters' choice for Alderman, (five of said six ballots having been properly and legally rejected and marked as defective in the said counting at said ward meeting, and one of said six ballots having been counted for Mayor only and properly not counted for Alderman at said ward meeting,) the whole number of votes cast for Alderman in said election was claimed to be increased from 617 to 622, and therefore said 310 votes cast for your petitioner were claimed not to constitute a majority of said 622.

"Your petitioner further says that said recount showed an error in the ward count of one too many votes for said Clayton, so that the actual legal votes cast at said election for said Clayton were 294 instead of 295, which 294 together with said six ballots illegally counted for said Clayton made a total of 300 votes claimed at said re-count as cast for said Clayton; and thereupon said Board of Aldermen voted that there was no election of Alderman at said election of 2d Monday of March, 1893, in Ward Seven, and ordered a new election against the protest of your petitioner, who says that said attempted re-canvas of the votes cast at said election in Ward Seven, on 2d Monday of March, 1893, was improper and without authority of law.

"The acts of the ward officer in the absence of fraud or willful misconduct, in declaring your petitioner elected were conclusive in the premises and not subject to review by the

Board of Aldermen, and even if they were a subject of review by the Board of Aldermen, they acted illegally in counting said six defective ballots, as indicating the voter's choice of said respondent or any one else for Aldermen.

"And your petitioner through the City Committee, and directly himself, notified the City Clerk that he should take no part in said second election, and not to print his name upon the official ballots, and his name was not printed thereon, and he in no manner participated in said election, which was held on the eighth day of May, 1893, whereat said respondent claims to have been elected to the office of Alderman of Ward Seven, in said City Council for the municipal year 1893 and 1894.

"That said respondent holds a certificate of election to said office issued to him in pursuance of said election of May eighth, 1893, by Ward Clerk of Ward Seven, and said respondent was sworn in to said office on the 9th of May, 1893, and now claims to hold said office in pursuance of said election of May 8th, 1893, to the exclusion of your petitioner.

"Your petitioner, William F. Curran, a person eligible to said office and claiming to be elected to said office of Alderman from Ward Seven, in the City Council of Bangor for the municipal year 1893 and 1894, as hereinbefore more fully set forth, proceeds against said respondent, William Z. Clayton, who claims to hold said office as hereinbefore more fully set forth. And your petitioner as a part of this bill of complaint begs leave to refer to and produce in court, in so far as the same may be pertinent to the issue, the records, or certified copies thereof, of said Ward Seven, and of said City, and to produce for the inspection of the court the aforesaid ballots cast, and claimed to have been cast at said election of 2d Monday in March, 1893.

"And your petitioner prays that time and place may be set for hearing upon this petition, and said adverse party notified thereof as provided by law, and that said adverse party may be required to file at said time and place of hearing, an answer traversing the facts hereinbefore set forth, which he does not mean to admit, and that all the facts hereinbefore stated not denied by the respondent shall be taken as admitted by him.

"And your petitioner further prays that if judgment is awarded in his favor an order of court may be issued against said respondent commanding him to yield up said office, and that your petitioner may be allowed to enter upon the duties of said office, the forms of all which orders are particularly specified in sections 53 to 57 of Chapter 4 of the Revised Statutes, and acts additional thereto, and amendatory thereof especially of Chapter 260, of Public Laws of 1893; and your petitioner prays that costs may follow judgment, in his favor.

"Bangor, Maine, May 12, 1893. WM. F. CURRAN."

The defendant's answer discloses two grounds of defense; first, that the board of aldermen had exclusive jurisdiction of the subject matter under § 25 of the city charter; and, second, that the ballots alleged to be defective and irregular, were properly counted for the defendant.

Matthew Laughlin, for plaintiff.

1 Dill. Mun. Corp. 2d Ed. c. 9, § 141. Language of city charter does not exclude common law courts from power to review acts of the aldermen. If court, previous to act of 1893, had such power, there can be no question that it has additional power now.

A single straight line does not constitute a cross. Wigmore's Aust. Ballot Law, page 178, citing Indiana statute of 1889. Five ballots defective under Stat. of 1891, § 10. See R. I. Stat. of 1889, § 6, and opinion of the Justices. If the rule of "intention," as contended by defendant, governs, it applies to all the ballots, and we shall have no rule at all, instead of the plain and precise rules laid down by the legislature for printing and marking ballots. The rule of "intention," cannot be a fixed one, and, if adopted by the court, must be left to the varying and partial judgments of different sets of presiding officers. Their judgment would in turn be reviewed by a single justice, to be reviewed again by all the judges; so that this court is to be made the final counting and canvassing board in every case, great or small, when a candidate may think the presiding officials at the polls doesn't guess at the voter's intention in the way the candidate himself might desire.

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

City charter gives the board exclusive jurisdiction unless it is affirmatively shown that the decision was arrived at through prejudice, undue influence, corrupt motives, or illegal methods amounting to a legal wrong. It must appear that the acts of the board were illegal. *Rounds* v. *Smart*, 71 Maine, 380; *Sanders* v. *Getchell*, 76 Maine, 158; *Pierce* v. *Getchell*, *Id.* 216; *Opinion* of *Justices*, 70 Maine, 560. Analogous cases in which the court will not assume to review proceedings of tribunals or bodies acting within their limits of jurisdiction are towns and juries. *Googins* v. *Gilmore*, 47 Maine, 9; *Williams* v. *Bunker*, 49 Maine, 427; *Peabody* v. *Hewett*, 52 Maine, 33; *Farnum* v. *Virgin*, *Id.* 576; *Drown* v. *Smith*, *Id.* 141; *Hovey* v. *Chase*, *Id.* 304; *Gleason* v. *Bremen*, 50 Maine, 222; *Folsom* v. *Skofield*, 53 Maine, 171; *Darby* v. *Hayford*, 56 Maine, 246; *Fessenden* v. *Sager*, 53 Maine, 531.

Legislature should not deny right of suffrage, either directly or by making it so difficult or inconvenient as to amount to a denial, *Dewitt* v. *Bartley*, 146 Pa. St. 592. Section 24 of Stat. 1891, c. 102, is directory how to prepare and deposit ballots. Section 27 makes it the duty of the proper officers to give full force and effect to the vote, to count it for the candidate that the elector intended it, thus give effect to the statute in accord with the decisions of this court heretofore given relative to the right of suffrage secured to the citizen by the constitution. All the statutes relating to the same subject matter should be taken into consideration. *Smith* v. *Chase*, 71 Maine, 164; *Collins* v. *Chase*, *Id.* 434. Comparing the Stat. of 1891 with the Constitution and all laws heretofore enacted, it is the duty of the warden or municipal officers to count all votes in favor of the candidates that the canvassing board understand, by inspection of the ballot, the elector intended to vote for.

Ballot with only one mark, a cross over defendant's name shows, beyond doubt and argument, an intent to vote for defendant as alderman. Ballot which has two crosses, one over the defendant's name and the other under it, the rest of the ticket being without marks, shows that the elector intended to vote for

the defendant as alderman, and the candidate, (the mayor,) whose name is above the defendant's, and for no other candidates.

As to ballots marked at the left of the candidates' names, there is no provision in the statute requiring the rejection of the ballot. The provision for placing the mark at the right of candidates' names is directory and not arbitrary; intended as an instruction in preparing ballots that confusion may be avoided in adopting this method of election.

In *Parvin* v. *Wimberg*, 130 Ind. 561, the court held that the construction of an election law that had been accepted and acted upon by the officers, whose duty it was to administer the law, will not be ignored by the court unless it is palpably wrong.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. At the municipal election held in the City of Bangor, on the second Monday of March, 1893, the parties to this proceeding were opposing candidates for the position of Alderman, from Ward Seven.

The plaintiff was declared by the warden to have 310 of 617 ballots cast for Alderman, received from the ward clerk a certificate of his election as Alderman, took the qualifying oath and entered upon the discharge of the duties of the office.

Subsequently, however, the Board of Aldermen re-examined the ballots cast for Alderman in Ward Seven, counted for the defendant six ballots which had been rejected by the warden as defectively and illegally marked, and declaring that there was no election of Alderman in that ward, ordered a new election to be held on the eighth day of May. In this second election the plaintiff refused to participate, and the defendant, securing a majority of the ballots then cast, claimed to hold the office by virtue of the second election. Thereupon the plaintiff instituted this proceeding in equity in accordance with the provisions of chap. 4, R. S., and chap. 260 of the Public Laws of 1893,

amendatory thereof, asking the court to take jurisdiction of the matter and require the defendant to surrender the office to the plaintiff.

The cause was heard by a single justice sitting in equity, and a decree rendered in favor of the plaintiff, declaring that he was legally elected Alderman in ward seven, on the second Monday of March, and that the second election was without authority and void.

The defendant now brings the case to this court, by an appeal from that decree, claiming in the first place that the subject matter was within the exclusive jurisdiction of the Board of Aldermen; and secondly, that the ballots alleged to be defective and irregular, were properly counted for the defendant.

I. The six ballots in question were properly rejected by the warden, and improperly counted for the defendant by the Board of Aldermen.

It is provided in sect. 10 of chap 102 of the Public Laws of 1891, popularly known as the Australian Ballot Law, that "The ballots shall be so printed as to leave a blank space at the right of the name of the party or political designation, and also at the right of the name of each candidate, so as to give to each voter a clear opportunity to designate by a cross mark, (×) therein his choice of candidates."

In the official ballots prepared under the act, at the right of the party name at the head of a group of names, and also at the right of the name of each candidate of the party group, a blank space was accordingly left, and the outlines of a square or rectangle printed therein.

It is also provided by sect. 24 of the act in question that, "The voter shall prepare his ballot by marking in the appropriate margin or place a (×) as follows: He may place such mark opposite the name of a party or political designation, in which case he shall be deemed to have voted for all of the persons named in the group under such party or designation; or he may place such mark opposite the name of the individual candidates of his choice for each office to be filled."

It is further provided by sect. 27 that, "If a voter marks

more names for any office than there are persons to be elected to such office, or if for any reason it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office."

It will be observed that this act of 1891 contains no express provision for *squares* on the ballot.

With respect to the ballots in controversy it appears that on the one designated "No. 2," the (×) was placed by the voter above the name of the defendant as candidate for Alderman, and not in the appropriate place at the right of it; on "No. 3," there was a cross above and also one beneath the defendant's name, but none at the right of it; on "No. 6" the cross was placed at the left of the defendant's name; on "No. 7" there was a cross under the party name at the head of the ticket, and one at the left of the defendant's name; and on "No. 8" there was no cross, (×) whatever, but a short, straight line drawn diagonally across the square at the right of the party name, on the defendant's ticket.

On "No. 48," not marked defective, there was a cross in the square at the right of the name of each candidate except that for Mayor, on the defendant's ticket, and a cross in the square at the right of the party name on another ticket.

It is contended by the defendant that, notwithstanding these deviations from the literal requirements of the statute, the elector's intention in each instance was sufficiently disclosed by the marks actually made; that it was not "impossible to determine the voter's choice;" and that these provisions of law respecting the preparation of the ballot by the voter should be construed as directory and not mandatory, in order that the intention of the elector may be effectuated and not defeated whenever it can be discovered by an inspection of the ballot.

Whatever weight this argument may have been entitled to, or may have received, under the system which formerly prevailed in the conduct of elections, it must be remembered that the act of 1891, now under consideration, was designed to inaugurate an important departure from the mode of voting which had existed in this State prior to its passage.

It is a recognized and familiar principle that the elective franchise, though guaranteed by the constitution as a sacred privilege to the persons there named as electors, must still be exercised under such regulations and restrictions as the legislature may deem reasonably necessary to maintain order in the elections, prevent intimidation, bribery and fraud, preserve the purity of the ballot box and thus secure a genuine expression of public sentiment.

It is not claimed that there is anything unreasonable or difficult to be understood in the regulations established by the act in question.

Its distinguishing feature is its careful provision for a secret ballot. The leading purpose of it was to give the elector an opportunity to cast his vote in such a manner that no other person would know for what candidate he voted, and thus to protect him against all improper influences and enable him to enjoy absolute freedom from restraint and entire independence in the expression of his choice. It was designed to secure complete and inviolable secrecy in that respect, and under established rules of construction it should be examined with reference to the mischief to be remedied and the object to be accomplished, and interpreted, if practicable, so as to promote and not destroy the purpose of its enactment.

With respect to four of the ballots it has been seen that the cross mark was placed either at the extreme left or midway above or below the name of the party or candidate, and not in the appropriate "blank space at the right" of such name, left for that purpose as required by the act of 1891; while on one of the ballots a short, straight line was used to mark the ballot instead of a cross.

If it be conceded that the intention of the voter may be correctly inferred from the mark actually made by him in each of these instances, it is still a fatal objection to the ballot that such an irregular and unauthorized mode of marking it might readily be, and probably would be, agreed upon with the voter as a distinguishing mark to identify the ballot cast by him whenever identification was desired. Such a palpable disregard of the

plain requirements of the act strikes at the root of the secret ballot system.

Furthermore, if such marks were to be held effective, embarrassing questions respecting the intention of the voter would constantly arise upon inspection of the ballots, and great uncertainty and confusion inevitably result.

The recent case of *Parvin* v. *Wimberg*, 130 Ind. 561 (30 Am. State 254), brings in question the construction of a similar statute, which, however, prescribes the form for a ballot with squares printed on it, and requires the squares to be stamped by the voter as the means of casting his vote.

The court say: "The legislature has declared that the mode by which the elector shall express his choice shall be by stamping certain designated squares on the ballot.

There is nothing unreasonable in the requirement, and it is simple and easily understood. If he does not choose to indicate his choice in the manner prescribed by law he cannot complain if his ballot is not counted. If ballots are to be counted when no square is stamped, at what distance from the square shall the stamp be placed before it can be rejected? One board of election officers may reach one conclusion as to a class of ballots when the squares are not stamped, and another board may reach another and a different conclusion. If we hold this statute to be directory merely and not mandatory, we are left entirely without any fixed rule by which officers of elections are to be guided in counting the ballots."

In the State of Rhode Island the statute, like ours, makes no express provision for squares on the ballot but declares that the ballot shall be so printed as to give each voter a clear opportunity to designate his choice by a cross mark "in a sufficient margin at the right of the name of each candidate," and that the elector "shall prepare his ballot by marking in the appropriate margin or place a cross opposite the name of the candidate." As in this State, however, the official ballots appear to have been prepared with squares outlined upon them at the right of each name.

In 1890 the question was submitted to the Supreme Court by

the Governor, whether any mark other than a cross placed in the square at the right of a name could be counted as a vote, and the court say: "Our opinion is that a cross is the only mark that can be counted as a vote." But in answer to a second question, the court hold that inasmuch as their statute does not distinctly provide for squares upon the ballots, "a cross placed in the margin of the ballot on the right of, and opposite to the name of a candidate, should be counted as a vote for the candidate opposite to whose name it is placed, whether the margin have a square in it or not, and, if there be a square in it, even though the cross is without or partly without the square. *In re the vote marks*, 17 R. I. 812.

The elector who marked ballot "No. 48" effectually marked the names of two candidates for Aldermen from ward seven, and by the plain terms of the statute his ballot could not legally be counted for such office.

II. The decision of the Board of Aldermen is subject to review by this court. True, the City Charter of Bangor says of the City Council that "each board shall judge of the election and qualification of its own members," but this is to be "construed to afford a cumulative or primary tribunal only, and not an exclusive one." Dillon's Mun. Corp. § 202. It will not preclude a contestant from resorting to the court for a revision of a question of law.

"The principle is that the jurisdiction of the court remains unless it appears with unequivocal certainty that the legislature intended to take it away." Dillon's M. C. § § 202, 203, and authorities cited. See also *Andrews* v. *King*, 77 Maine, 224, where the supervising power of the court was carefully considered.

It has been the policy of the legislature of this State to enlarge rather than to restrict the admitted power of the court to inquire into the regularity of elections.

Chapter 198 of the laws of 1880 (incorporated in R. S., ch. 4), authorized a special proceeding in equity by a contestant for any county office, and chap. 260 of the laws of 1893, extended the scope of this statute to include a contestant for any

municipal office "who has been declared elected thereto by any returning board or officer."

In the case at bar it has been seen that the decision of the board of Aldermen brought in question the construction of the statute of 1891. It involved the determination of a question of law and not an issue of fact or a matter of discretion.

The ruling of the single justice that their action was subject to revision by this court, was clearly correct.

Decree below affirmed with additional costs.

CITY OF ROCKLAND, in equity, *vs.* ROCKLAND WATER COMPANY.

Knox. Opinion November 29, 1893.

Nuisance. Equity. Rights to be first settled at law. R. S., c. 17, § 5; c. 77, § 6, cl. XI; R. S., 1841, c. 96, § 10; Stat. of 1874, c. 175. Stat. 1893, c. 217.

A bill in equity will not be maintained to restrain a nuisance created by a dam that raises water to so great a height as to flow out a highway, whereby the plaintiff has been put yearly to expense in its repair, when it appears that the statute remedy giving damages and process for abatement, has not been invoked, and there is no imminent danger of irreparable injury.

Statute of 1893, c. 217, *held* not to apply to pending cases.

ON REPORT AND EXCEPTIONS.

Bill in equity to restrain a nuisance. The defendant filed a general demurrer to the bill, which was overruled. The case was reported to this court where a hearing was then had on the bill, answer and testimony.

The plaintiff complained in its bill that the defendant corporation, by unlawfully raising the waters of Tolman's pond, overflowed a certain highway in the city of Rockland, thereby obstructing said way, rendering it unsafe and inconvenient for public travel at certain portions of the year, subjecting the city to loss and expense, and tending to totally obstruct and destroy the way in question.

The arguments upon the merits of the case are omitted.

W. H. Fogler, city solicitor, for plaintiff.

Obstruction of highway a public nuisance. R. S., c. 17, § 5;

Morton v. *Moore*, 15 Gray, 576; *Charlotte* v. *Pembroke Iron Works*, 82 Maine, 391-394; *Com.* v. *King*, 13 Met. 115; Gould on Waters, § 212. Jurisdiction not only by statute but under general equity powers. R. S., c. 77, § 6, cl. V; 2 Story's Eq. § § 921, 924; 1 Pom. Eq. § 331; 1 High, Inj. § 759; *Mayor, &c.* v. *Alexandria Canal Co.* 12 Pet. 91. No length of time will legalize a public nuisance, or prescribe for its continuance. *Charlotte* v. *Pembroke Iron Works*, 82 Maine, 391; *Com.* v. *Upton*, 6 Gray, 476; *Cross* v. *Mayor of Morristown*, 18 N. J. Eq. 305. Injunction proper remedy. 1 High, Inj. § 816; 2 Story's Eq. § 923; *Springfield* v. *Conn. R. R.* 4 Cush. 63; *Needham* v. *N. Y., &c., R. R.*, 152 Mass. 61. Bill by municipality: 1 High. Inj. § 819; 3 Pom. Eq. § 1349; 2 Story's Eq. § 924; *Springfield* v. *Conn. R. R.* 4 Cush. 63; *Needham* v. *N. Y. &c., R. R.* 152 Mass. 61; Bill by municipality: 1 High, Inj. § 819; 3 Pom. Eq. § 1349; 2 Story's Eq. § 923; *Springfield* v. *Connecticut R. R.* 4 Cush. 63; *Quincy* v. *Boston*, 148 Mass. 389; *Needham* v. *N. Y., &c. R. R.* 152 Mass. 63. Rule that rights must first be settled at law does not apply to public nuisance. 2 Story's Eq. § § 921-925; 1 Pom. Eq. § 252, n. 2, § 267; 3 *Id.* § § 1349, 1350; *Eastman* v. *Amoskeag Co.* 47 N. H. 71, 79; *Coe* v. *Leach*, 37 N. H. 254; *Burnham* v. *Kempton*, 44 N. H. 78; *Van Bergen* v. *Van Bergen*, 2 Johns. Ch. 272, 287. Rule in Maine cases applied to private nuisances only. Party not authorized by act of Legislature to overflow existing highway. *Calais* v. *Dyer*, 7 Maine, 155; *Com.* v. *Stevens*, 10 Pick. 247. Defendant liable, though the city, may, at reasonable expense, prevent damage to the highway. *Monmouth* v. *Gardiner*, 35 Maine, 247.

Mortland and Johnson, for defendant.

SITTING; PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, JJ.

HASKELL, J. Bill in equity to restrain a nuisance in the form of a dam that raises water to so great a height as to flow out a highway, whereby the plaintiff has been put yearly to expense in its repair.

The statute, c. 17, § 5, *et seq.*, gives a remedy at law. It gives damages and appropriate process for abatement of the nuisance. This remedy has not been invoked; and the bill does not show any special reason why the right of the parties should not be first settled at law. The supposed nuisance has long existed, and there appears to be no imminent danger that the threatened injury will result in irreparable damage.

The equity side of this court has been given jurisdiction by statute piecemeal. The revision of 1841, c. 96, § 10, first formulated the equity jurisdiction by specific classes of causes, eight in number. From time to time changes have been made in those classes and new ones added. In 1874, c. 175, equity jurisdiction was conferred "in all other cases where there is not a plain, adequate and complete remedy at law," R. S., c. 77, § 6, cl. XI, so that our equity jurisdiction then became complete, according to the course of courts of chancery. *Stinchfield* v. *Milliken*, 71 Maine, 567. The want of legal remedy, always gave jurisdiction to courts of equity, and the limitation of our various statutes, "where the remedy at law is not plain, adequate and complete," means no more than the usual limitation applied to all equity jurisdictions. It does not mean that our equity jurisdiction shall be limited and shorn by conferring more plenary powers upon courts of law to grant relief, unless the statute plainly says so or intends it.

Since the act of 1874, the equity side of the court has exercised general chancery jurisdiction, like the judiciary of the United States, under the III Article of the Constitution, which provides that "the judicial power shall extend to all cases of law and equity arising under the constitution and the laws of the United States," &c., more plainly fixed by the judiciary act of 1789, c. 20, § 16. R. S., U. S. § 723, "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." And, as said by Mr. Justice Story in *Boyle* v. *Zacharie*, 6 Pet. 658: "The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and the rules of decision are the same in all;" *Neves* v. *Scott*,

13 How. 268; and, explained by Mr. Justice Curtis in his lectures: "That is, it is one uniform system throughout the whole United States. The same in Massachusetts as in Georgia or California; and, in general, the sources of the law are to be found, first, in the decisions of the Supreme Court of the United States; second, in the decisions of the Circuit Courts as reported in the reports of the Circuit Courts; and lastly, and, perhaps I ought to say mainly, in the equity law of England; . . . and, whatever may have been the modifications made of the English Equity law in the different states by statute or by custom, they have no effect in the courts of the United States." *Mississippi Mills* v. *Cohn*, 150 U. S. 202.

The Supreme Court has always held its equity powers measured by the jurisdiction of the English chancery. Our jurisdiction may be limited from time to time by statutes bestowing equitable remedies upon courts of law, if the statute expressly so provides or plainly so intends; 1 Pom. Eq. § § 276-281, and cases cited; but it cannot be enlarged, otherwise the right of trial by jury, according to the course of the common law, might be denied in violation of Art. 1, § 20, of our Constitution that is similar to the VII amendment of the constitution of the United States, already considered by the Supreme Court. *Scott* v. *Neely*, 140 U. S. 106; *Whitehead* v. *Shattuck*, 138 U. S. 146.

Nuisance has always been within the jurisdiction of courts of chancery, although legal remedies are applied to that class of cases. *Props. Me. Wharf*, v. *Props. Custom House Wharf*, 85 Maine, 175; *Westbrook Manf. Co.* v. *Warren*, 77 Maine, 437.

But the right must first be settled at law, except in particular cases, where the remedy in equity would be more complete, as where it is invoked to prevent a multiplicity of lawsuits and save the parties vexatious and interminable litigation, *Lockwood Co.* v. *Lawrence*, 77 Maine, 297; or where it has been long enjoyed without interruption, *Morse* v. *Machias, &c., Co.* 42 Maine, 119; or imminent danger be threatened that will result in irreparable damage, *Mfg. Co.* v. *Warren*, *supra*.

In *Varney* v. *Pope*, 60 Maine, 192, the bill to restrain a nuisance was dismissed because the parties had not first settled

their rights at law, no irreparable damage being threatened or other cause shown for the intervention of a court of equity. *Davis* v. *Weymouth*, 80 Maine, 307, was decided upon the same ground, and the Court says: "The remedy thus provided by an action at law, is plain, adequate and complete, and there is no occasion for a resort to a bill in equity." Certainly not. The law gave a complete remedy to settle the rights of the parties. When once settled, at law, if further remedy should be needed in equity, to complete the full enjoyment of those rights, the equity side of the court that always supplements the law, would be open. Moreover, "it must appear by the bill, where an action at law may be maintained, that the remedy by it is not plain, adequate and complete." *Porter* v. *Land & Water Co.* 84 Maine, 195.

The foreclosure of mortgages is a good illustration of our equity jurisdiction. Early in the history of our State when the equity jurisdiction comprised only certain classes of causes, the foreclosure of mortgages was one of them; and the enactment of statute methods of foreclosure was held to take it away. *Chase* v. *Palmer*, 25 Maine, 345.

And when complete chancery powers were conferred in 1874, the court held, that although the foreclosure of mortgages was a subject of general equity jurisdiction, the trend of legislation plainly showed that it was not intended to confer equity jurisdiction upon the subject, except in particular cases, where the statute methods were insufficient to give complete remedy, as they might be, for instance, in the foreclosure of mortgages upon stock in process of manufacture, where it is necessary for the court to assume control of the property in order to prevent its loss by waste or decay, or in the foreclosure of railway mortgages and the like. *Titcomb* v. *McAllister*, 77 Maine, 357.

The statute of 1891, c. 91, specially giving equity jurisdiction over the foreclosure of mortgages, may not mean more than to declare the law and make it plain in such matters. That is, give an equitable remedy where the nature of the case requires special aid from the equity side of the court, to make the remedy complete and save the parties, perhaps, from irreparable loss.

Manifestly the statute periods of redemption are not repealed or otherwise modified.

In the present case, the plaintiff should settle its right at law, and there have its damages assessed, inasmuch as it shows no cause for asking relief from the equity side of the court.

The statute of 1893, c. 217, does not apply to pending cases, and therefore the entry is,

Bill dismissed with costs.

DAISY WHITEHOUSE, in equity, *vs.* AMBROSE P. CARGILL.

Waldo. Opinion November 30, 1893.

Will. Devise. Charge upon real estate. Procedure.

Where a codicil, dealing only with a certain parcel of real property that the will gave in fee to the son, subjected it to a life estate to the widow and a legacy to the daughter, *Held;* that the testator intended to distribute that parcel among the widow, daughter and son according to the proportions named.

No other fund being provided by the will, out of which the payment was to be made, such annuity or legacy is a charge upon the land.

See *Merritt* v. *Bucknam*, 78 Maine, 504, for the method of procedure where land is thus charged.

ON REPORT.

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

The case is stated in the opinion.

The codicil which the plaintiff claimed made her legacy a charge upon the real estate is as follows:

"Whereas, I, Ambrose A. Whitehouse, of Montville, in the County of Waldo and State of Maine, on the eleventh day of March, A. D. 1871, made and executed my last will and testament in writing, and whereas by said will I gave and bequeathed to my son, Preston Whitehouse, my store now occupied by J. O. Johnson and Willis Mitchell, now I do hereby make this writing to be a codicil to my said last will and testament to be annexed to and taken and allowed as part thereof, and I do give and bequeath to my beloved wife, Clara E. Whitehouse, the rent and income of the store now occupied by J. O. Johnson and Willis

Mitchell during her natural life. I also will that my son, Preston Whitehouse, shall pay to my daughter, Daisy Whitehouse, the sum of five hundred dollars when she arrives at the age of eighteen years."

J. W. Knowlton, for plaintiff.

R. F. Dunton, for defendant.

Counsel cited : *Wright* v. *Denn*, 10 Wheat. 204 ; *Larkin* v. *Larkin*, 17 R. I. 461.

This real estate not being specially charged is not liable to contribute to the payment of legacies on the deficiency of personal assets. *Hayes* v. *Seaver*, 7 Maine, 237.

SITTING : PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

HASKELL, J. Bill to subject land devised, to the payment of a legacy.

"When the same sentence or clause, by which land is devised, imposes upon the devisee the duty of paying an annuity or other sum of money, and no other fund is provided, out of which the payment is to be made, such annuity or legacy is a charge upon the land." *Merrill* v. *Bickford*, 65 Maine, 119. An acceptance of it imposes an obligation to pay it. *Fuller* v. *Fuller*, 84 Maine, 475.

So much of the will, in this case, as is material, gave to the son Preston, the defendant's grantor, the homestead, subject to a life estate of the widow, and a store ; to one daughter a life insurance policy of $1000 ; to the other daughter, a minor, a note for $500. The will was executed in March, 1871. The next October the testator executed a codicil, reciting, in substance that, whereas he had devised the store to his son, he now makes a codicil "to be annexed to and taken as a part" of his will, and gives his widow the rent of his store during life, and directs that "my son, Preston Whitehouse, shall pay to my daughter, Daisy Whitehouse, the sum of five hundred dollars when she arrives at the age of eighteen years." That made her legacy equal to that of the other daughter.

It is clear enough that the intention of the testator was to encumber Preston's title to the store with its rent for the widow during life and with a legacy from it of $500 to the plaintiff.

Preston accepted the legacy and conveyed the store to the defendant. The codicil, dealing only with the parcel of property that the will gave to the son, changed the devise of it in fee and subjected it to a life estate of the widow and a legacy to the daughter. No language could convey more plainly the testator's intent to distribute that parcel of real estate among the widow, daughter and son according to the proportions named; and this appears from the same clause in the will.

It is averred in the bill that defendant wrote both the will and codicil and witnessed both; that he became guardian of the plaintiff. These averments are not denied. He had full knowledge of the terms of the will, and took a conveyance of the store with his eyes wide open. He has no moral defense, even, to the plaintiff's claim. She became eighteen years of age, February 28, 1887. On that day her legacy became her due, and it has never been paid. The land must stand charged with its payment and interest. Appropriate procedure is pointed out in *Merritt* v. *Bucknam*, 78 Maine, 504.

Bill sustained with costs.

JOHN H. WHITE, in equity, *vs.* ANSEL T. MOORES and GEORGE B. HAYWARD.

Aroostook. Opinion November 30, 1893.

Equity. Specific Performance. Description. Trust. Notice.

In a written contract to convey real estate, the words, "Store lot on corner of Presque Isle and Marsardis streets in Ashland," are a sufficient description to enable the vendee to maintain a bill for specific performance.

The vendor, one of the defendants, after the date of the memorandum of sale, conveyed the lot to the other defendant, who had notice of the previous sale of the land to the plaintiff. *Held;* that the other defendant having acquired the legal title with notice of the trust is chargeable with its terms and may properly be compelled to comply with them.

ON APPEAL.

Bill in equity praying for specific performance of a written contract for the sale of land, on which there was a hearing on bill, joint answer and testimony, and a decree in favor of the plaintiff. The contract was as follows:

"Received of J. H. White twenty-five dollars on account of Store Lot on corner of Presque Isle and Masardis streets in Ashland. The price of said lot is five hundred dollars, the balance to be four hundred and seventy-five dollars to [be] paid when deed of lot is made.

"Ashland, Me., May 1st, 1891. A. T. MOOERS."

The plaintiff alleges a tender and demand for a deed, on the fifth day of May following, of the defendant Mooers who refused to make and deliver a deed, but on the fifteenth day of the same month sold and conveyed the land to George B. Hayward, the other defendant, who well knew of the agreement and part payment. He, thereupon, prayed for a specific performance of said agreement; "that in purchasing lot of land, said Hayward may be adjudged and decreed a trustee for him, the said plaintiff, and as now holding said lot in trust for him, the said plaintiff; that the said respondents may be ordered to convey said lot to him, the plaintiff, upon payment of said unpaid balance of said purchase money, which said balance the said plaintiff now in court offers to pay," &c.

The defendant Mooers admits, in his answer, the making of the contract, and replies that no definite bounds of the lot were talked of between himself and the plaintiff, or contained in the memorandum; that he had measured off and staked out, previous to the date of the memorandum, a twenty-four foot strip on the east side of the lot and which he had talked of selling to another party for fifty dollars; that he did not intend to include this strip in the memorandum; and that he intended to sell and convey to the plaintiff only so much of the tract as lies west of said twenty-four foot strip, &c.

He also denies the tender and refusal to make and deliver a deed of the land in accordance with the agreement, but on the contrary avers that he was willing and ready to make and deliver a deed of all of said tract lying west of said twenty-four foot

strip in accordance with his said agreement: "but the said White refused to take such deed unless the said Mooers would include in said deed said twenty-four foot strip; that thereupon said Mooers offered to pay back to said White said sum of twenty-five dollars as said White claimed that he did not understand said agreement as said Mooers did; and said Mooers is now and ever has been, ready and willing and hereby offers to pay back to said White said twenty-five dollars; and that upon the refusal of said White to accept such deed, he the said Mooers considered himself discharged from any further obligation under his said agreement," &c.

The defendant, Hayward, denied knowledge of the agreement until after he had received his deed of the premises, which was on May fifteenth following; and further says in his answer "that he was informed that said Mooers had received of said White said sum of twenty-five dollars in part payment of a lot of land about the boundaries of which the said White and Mooers had disagreed, but not as a consideration for the making and delivery of any agreement; and that he purchased said premises described in paragraph first of the bill, in good faith without knowledge of any claim, legal or equitable, that said White might have to the same," &c.

The decree, omitting formal parts, from which the defendants appealed is as follows:

"That the said Ansel T. Mooers and George B. Hayward shall make, execute, acknowledge and deliver to the said complainant, John H. White, a deed of quitclaim, with special covenants of warranty against incumbrances created by them, of the premises described in the bill of complaint within twenty-one days from the date of this decree; provided that before said deed is delivered and conveyance is made, and within said period, said complainant, John H. White, shall have deposited in said court, to be paid to said George B. Hayward, the sum of four hundred and seventy-five dollars less the complainant's costs in this action."

The description of the lot contained in the deed to Hayward will be found in the opinion of the court. Arguments of counsel on the facts are omitted.

George H. Smith, for plaintiff.

Counsel cited: *Berry* v. *Berry*, 84 Maine, 542, and cases; *Connihan* v. *Thompson*, 111 Mass. 270; *Knapp* v. *Bailey*, 79 Maine, 196; *Hull* v. *Noble*, 40 Maine, 480-1; *Mead* v. *Parker*, 115 Mass. 431, and cases; *Simpson* v. *Blaisdell*, 85 Maine, 199.

Powers and Powers, for defendants.

Plaintiff does not show a case where damages in an action at law would not be an adequate remedy; and the case shows so plainly a misunderstanding of the parties as to boundaries that specific performance ought not to be decreed. *Mansfield* v. *Sherman*, 81 Maine, 365; *Porter* v. *Frenchman's Bay, &c., Co.* 84 Maine, 195.

SITTING: PETERS, C. J., LIBBEY, HASKELL, WHITEHOUSE, WISWELL, JJ.

HASKELL, J. Bill to compel specific performance of an agreement in writing for the conveyance of land. The agreement is admitted, but is claimed to refer to a narrower lot than claimed by the plaintiff. The agreement is for a "store lot on corner of Presque Isle and Masardis streets in Ashland." The store had been burned and the lot was vacant, being eighty by one hundred feet. It was all the land owned in one parcel by the vendor. The defense insists that a strip on one side of the lot, twenty-four feet wide, was not included in the memorandum of sale. The vendor, one of the defendants, after the date of the memorandum of sale, conveyed the entire lot to the other defendant, who is shown to have had notice of the previous sale of the land to the plaintiff.

Equity assumes that to be done which ought to have been done; and therefore, the vendor in this case stands seized of the land in trust for the plaintiff. He is the real owner of the land, and the vendor of the purchase money. The other defendant, having acquired the legal title with notice of the trust, stands charged with its terms and may properly be compelled to comply with them. *Ricker* v. *Moore*, 77 Maine, 292;

Linscott v. *Buck*, 33 Maine, 530; *Foss* v. *Haynes*, 31 Maine, 81; *Cross* v. *Bean*, 83 Maine, 61.

The memorandum of sale describes the premises as "store lot on corner" of two streets. The vendor owned but one store lot at that locality. The writing could refer to none other. There is no ambiguity about it. It is sufficient in law. *Hurley* v. *Brown*, 98 Mass. 545; *Mead* v. *Parker*, 115 Mass. 413; *Williams* v. *Robinson*, 73 Maine, 186; *Nugent* v. *Smith*, 85 Maine, 433.

The evidence fails to identify as the "store lot" anything short of the entire lot. There is no mistaking what the parties intended as the subject of the purchase. Fourteen days after the memorandum of sale had been made, the vendor conveyed to the other defendant, for a consideration of fifty dollars in excess of that stipulated in the sale to the plaintiff: "The lot that my store set on that was burned last fall and bounded as follows: bounded on the south by lot sold by me to Edwin Clark; bounded on the east by lot sold by me to Mrs. Westley Martin; bounded on the north by Presque Isle road; and bounded on the west by the State road or road to Masardis." Further comment as to what was intended by the "store lot" seems unnecessary.

Decree below affirmed with additional costs.

LUCY A. BARRON, and another, in equity,

vs.

CHARLES C. BURRILL, and others.

Hancock. Opinion November 30, 1893.

Corporation. Creditor's Bill. Unpaid Stock. Date of Debt. Abatement. Practice. R. S., c. 46.

Upon a creditor's bill against a shareholder of a corporation to enforce payment of unpaid stock, ownership of stock may be proved by payments therefor although no written subscription is produced.

Ownership of stock is none the less real because its usual evidence,— certificates of shares,— have not been issued.

The date when the plaintiffs' debt was contracted by the corporation is immaterial in this proceeding, it appearing that the defendants' ownership of

stock was prior thereto and continued until after suit was brought against the corporation and within one year before the defendant had transferred his stock.

Held; that one of the plaintiffs having died since the bringing of this bill, it has abated as to him; and that the survivor, being admitted to be the only party really interested in the judgment sought to be enforced,—the original plaintiffs being husband and wife,— may properly prosecute the bill.

Held, also; that the bill originally filed against four parties be sustained against one of the defendants and dismissed as against the other three, the plaintiff having moved to discontinue as to them.

See also *Barron* v. *Burrill, post*, p. 72.

ON REPORT.

Bill in equity, heard on bill, answers and proofs brought under R. S., c. 46, § § 44-48, to collect a judgment of the defendants as stockholders of the Bar Harbor Land Company.

The bill was originally brought by Lucy A. Barron and George A. Barron, her husband, against the defendant, Burrill, and three others. The defendant, Burrill, answered and also replied as a special matter of defense that other parties, nearly eighty in number, were jointly liable and should have been joined as defendants in the bill. The plaintiffs subsequently moved to be allowed to discontinue their suit against the other defendants; and the death of George A. Barron having been suggested, the survivor asked leave to prosecute the suit as sole plaintiff.

It was admitted that Mrs. Barron was the sole owner of the property sold to the Bar Harbor Land Company and from which sale the cause of action arose upon which the above judgment was obtained. She was, therefore, the sole party interested in this suit.

The defendant, Burrill, contended that the motion to discontinue as to the other three defendants should not be allowed; that he never subcribed for or agreed to take more than one share of stock, and that the debt of the corporation was not contracted during his ownership of stock. He also claimed the right to offset a note of the corporation for $3500, which he held as a gift to him from the holder,— one Clark,—after this suit was brought.

The case including the motions for amendments was reported by the presiding justice to this court for determination.

J. A. Peters, Jr., for plaintiff.

Counsel cited: *Barron* v. *Paine*, 83 Maine, 312; *Libby* v. *Tobey*, 82 Maine, 397; *Grindle* v. *Stone*, 78 Maine, 176; *Sampson* v. *Bowdoinham*, 36 Maine, 81; Cook on Stock, etc. § § 5, 10, 753; *McAvity* v. *Lincoln P. & P. Co.* 82 Maine, 504; *Hawley* v. *Bremagin*, 33 Cal. 394; Morawetz Corp. § 258; *Hawes* v. *Anglo Saxon, etc. Co.* 101 Mass. 385; *Field* v. *Pierce*, 102 Mass. 261; *Braman* v. *Dowse*, 12 Cush. 228; *Furnas* v. *Durgin*, 119 Mass. 500; *Locke* v. *Homer*, 131 Mass. 93. Offset: *Price* v. *Tyson*, 3 Bland. Ch. 392, 22 Am. Dec. 284; *Russell* v. *Loring*, 3 Allen, 125; R. S., c. 46, § 48; *Swith* v. *Ewer*, 22 Pa. St. 116, (60 Am. Dec. 73,) and notes.

Amendments: *Hatch* v. *Dana*, 101 U. S. 885; *Hewett* v. *Adams*, 50 Maine, 276; Story Eq. Plead. 10th Ed. c. VII, § 361; *Maine Benefit* v. *Parks*, 81 Maine, 81.

Charles P. Stetson, for defendant.

The amendments should not be allowed. Bill should be brought against one or all, not part. R. S., c. 46, § 47; *Pratt* v. *Bacon*, 10 Pick. 123, 127; *Merchant's Bank* v. *Stephenson*, 7 Allen, 489, 491-494.

The liability sought to be enforced is a statutory liability, and in order to prevail, the plaintiff must bring his case within the statute by proving that he has a lawful and *bona fide* judgment against the corporation, based upon a claim in tort or contract or for any penalty recovered within two years next prior to this action; that the defendant subscribed for or agreed to take stock in the corporation and has not paid for the same as defined in c. 46, § 45; that the cause of action upon which his judgment against the corporation was founded was contracted during the defendant's ownership of such unpaid stock, and that the proceedings to obtain this judgment against the corporation were commenced during the defendant's ownership of such unpaid stock or within one year after its transfer was recorded in the books of the corporation. *Libby* v. *Tobey*, 82 Maine, 397.

The individual liability of members for the debt of a corporation is a departure from the established rules of law, and is founded solely upon grounds of public policy, depending entirely

upon express provisions of statute law. The defendant, if chargeable at all, is chargeable upon a statute liability as having subscribed for or agreed to take stock in said corporation and who has not paid for the same. The contract was not made with him or on his account. There was no contract, express or implied, between him and the plaintiff; such liability is therefore to be construed strictly and not extended beyond the limits to which it is plainly carried by such provisions of the statute. *Libby* v. *Tobey*, *supra*, 404.

Burrill, defendant, was the owner of one share of the corporation. He never subscribed for or agreed to take any other stock. Made no subscription or agreement with the company.

Plaintiff cannot maintain his bill unless there was such a contract between him and the corporation as would sustain an action by the corporation against him for unpaid subscriptions. There is no evidence in the case which would sustain an action against Burrill by the corporation for unpaid subscriptions — no evidence of a subscription or agreement on his part to take or pay for stock.

No stockholder is liable for the debts of the corporation not contracted during his ownership of such unpaid stock.

The debt was not contracted during the ownership of stock by Burrill. If the debt was contracted June 14, 1887, at the time of deed of Barron to Bar Harbor Company, Burrill was not then the owner of any stock in said Company except one share. This is also true if debt was contracted at the maturity of the Burrill mortgage. By § 48, c. 46, it is provided that defendant in such suit may prove the invalidity of such judgment in any particular which could avail the corporation on a writ of error, or that said judgment was not *bona fide*.

The writ sets out that the defendant agreed to pay a certain mortgage, and to save plaintiffs harmless thereon, and alleges that defendant has never paid said mortgage, but it does not allege that plaintiff has paid the same or any part thereof, or that the plaintiff has been ousted by said mortgagee; it does not allege that plaintiff has sustained actual loss or injury, or has had to pay money to remove the incumbrance. Plaintiff

was entitled only to nominal damages until he removed the incumbrance or was ousted. 3 Wash. R. P. 421; *Prescott* v. *Trueman*, 4 Mass. 627.

SITTING: LIBBEY, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. Creditor's bill against the shareholder of a corporation for unpaid stock.

The books of the corporation show the par value of the shares to be $5 and that defendant paid "on acct. stock" June 8, 1887, $500, August 25, $200 and September 28, $300, in all $1000. The certificates had not been issued. On October 16th following, Burrill directed the treasurer to issue the stock standing "to my credit on your books, not issued," to B. T. Sowle. In pursuance of that order, November 10, 1888, Burrill receipts for 400 shares in the form, "C. C. Burrill by E. F. Brewer," and on the same day Sowle in the same form, "B. T. Sowle by E. F. Brewer," receipted for the transfer of the same. So it appears that 400 shares were owned by Burrill at the time the credits were entered upon the books of the corporation for money paid "on acct. stock." The first credit was June 8, 1887, and of course on that day Burrill had taken the 400 shares. The evidence in the case shows a prior understanding that he should take that number of shares, although no written subscription is produced.

On May 27, 1887, it was voted by the directors, the defendant, president of the corporation and one of the incorporators, being present, "to allow each incorporator to purchase an amount of stock not to exceed $2000 at ($2.50) two and one half dollars per share." Again, on June 9, "voted to instruct Clark to notify the incorporatory who have not already signed for preferred stock to do so on or before June 13." The first payment of Burrill for his stock was on June 8th. He therefore must have signed for his stock prior to that date, for he hardly would have paid $500 "on acct. stock" that he had not agreed to take. He paid for the 400 shares at the price fixed by the directors, although

some of the incorporators evidently had not, for it was voted on October 5th "that the incorporators pay the balance due on the incorporatory stock on or before January 1, 1888." Burrill's ownership of the stock was none the less real because the usual evidence of ownership — certificates of shares — had not been issued. He, therefore, became liable to pay the balance of their par value, viz. $1000.

The plaintiff's debt arose from a covenant by the corporation made June 14, 1887, to save the plaintiff harmless from the payment of a mortgage before that time given to another on a parcel of land that day conveyed by her to the corporation. That mortgage debt fell due December 3, 1887. Whether the plaintiff's debt was "contracted" by the corporation June 14th or December 3d, 1887, is immaterial, for the defendant's ownership of stock began before the first date and continued until after the last. He transferred his stock November 10, 1888; suit was brought against the corporation April 15, 1889, within one year thereafter. The defendant, Burrill, is liable, therefore, to the plaintiff for $1000 due on unpaid stock with interest from the bringing of this bill, as there is no proof of any sums due him from the corporation, that may properly be credited to him as payment for the stock, above the cash items already mentioned.

One of the plaintiffs died since the bringing of this bill, and the same has abated as to him. The survivor, being the only party really interested in the judgment sought to be enforced, may properly prosecute this bill to enforce the same.

The bill was originally filed against the defendant Burrill and Alley Bros., Nash and one Holmes. Each of the four defendants severally answered the bill, and plaintiff moved below to discontinue against the last three, which motion was opposed by Burrill and not there decided, but reported for consideration here. The bill must be sustained against Burrill with costs, but dismissed as to the other defendants with costs for each one to the time of motion to discontinue as to them.

Decree accordingly.

LUCY A. BARRON, in equity, *vs.* CHARLES C. BURRILL.

Hancock. Opinion November 30, 1893.

Corporation. Unpaid Stock. Creditor's Bill. Taking stock in name of third party. R. S., c. 46, § 47.

The actual taking of shares in a corporation is equivalent to a subscription for or an agreement to take them under R. S., c. 46, § 47.

Upon a creditor's bill against a shareholder of a corporation for unpaid stock, it was an issue of fact whether the defendant had subscribed for its stock within the meaning of R. S., c. 46, § 47. It appeared that the shares stood in the name of A and were receipted for and taken by B, the defendant, without the knowledge or authority of A. *Held;* that it was the defendant B's own transaction, although the shares were issued in A's name; and that the defendant, not having A's authority to take the shares for him, must be considered as the real taker and owner of them.

When no transfer of shares appears on the books of a corporation, ownership of the same may be presumed to continue accordingly.

Stockholders who have not fully paid in their subscriptions for stock are not personally liable by R. S., c. 46, § 47, to contribute to the payment of a mortgage debt of the corporation. But where the corporation buys lands subject to mortgage which it assumes and agrees to pay, *held*, that the agreement of the corporation to pay such mortgage does not make it a mortgage debt of its own; and such stockholders are liable to contribute to the payment of such debt.

McAvity v. *Lincoln P. & P. Co.* 82 Maine, 504, affirmed.

Barron v. *Paine*, 83 Maine, 312, affirmed.

See *Barron* v. *Burrill*, *ante*, p. 66.

ON REPORT.

Bill in equity, heard on bill, answer and proofs, brought to recover the amount of one hundred shares, par value five dollars, of unpaid stock taken by the defendant in the Bar Harbor Land Company, against which the complainant has an unsatisfied judgment.

The case was heard with the preceding; and it was agreed that the evidence of that case may be regarded, as far as it is material and pertinent, as evidence in this case; and it was admitted that the receipt for each of the three certificates of stock, "J. E. Parsons by C. C. Burrill," was in defendant's handwriting."

J. E. Parsons, cashier of the defendant's bank, was called as a witness by the plaintiff, and testified :-

"Q. The records of the corporation show that, in addition to the fifty shares, there were one hundred shares issued to you the same day. Did you authorize the issuance of those shares? A. I have no knowledge of anything more than fifty shares."

"Q. Did you pay any money for these hundred shares? A. No, sir."

"Q. Have you ever ratified the issuance of that stock to you? A. I have never seen the certificates."

The defendant denied the allegations of the bill except the recovery of the judgment and the organization of the corporation.

The defendant contended that there must be proof that the defendant subscribed for or agreed to take stock in the company ; that he was owner of the stock, when the debt was contracted ; and that there was no evidence of the latter.

The facts of the indebtedness of the corporation to the plaintiff, and upon which she obtained her judgment, are stated in full in *Barron* v. *Paine*, 83 Maine, p. 315, in par. 4, of the defendant's answer.

J. A. Peters, Jr., for plaintiff.

Counsel cited : *Barron* v. *Paine*, 83 Maine, 312 ; *Gordon* v. *Lowell*, 21 Maine, 251 ; R. S., c. 46, § 47 ; *Davis* v. *Stevens*, 17 Blatch. 259, and cases.

It is said in Cook on Stock, etc. 2d. Ed. p. 541 : "Stock is often placed in the name of a 'dummy' by men who subscribe for or buy stock and do not wish to be subject to the liabilities of a regular stockholder. The dummy is generally a relative, a child, an agent, an employee or a friend. The real owner supposes that he thereby escapes liability ; and so he does, if he can conceal the fact that he is the real owner of the stock. But if he is discovered then he is liable. The corporation or the corporate creditors may reach him. The dummy is the agent and the real owner is the principal. The agent is liable and so is the undisclosed principal. The device to escape liability fails. Chief Justice WAITE of the Supreme Court of the United

States clearly established this principle of corporation law in the year 1879."

Charles P. Stetson, for defendant.

Statute is to be construed strictly and defendant should not be holden unless upon clear evidence bringing his liability within the terms of the statute. *Libby* v. *Tobey*, 82 Maine, 397. It must appear that he subscribed for and agreed to take the stock; that he has not paid for the same. There is no evidence that Burrill subscribed for or agreed to take the stock issued to Parsons; no evidence that it was not fully paid for. There is no evidence that Burrill was the owner of the stock.

The court should not hold defendant liable by reason of mere inference. Plaintiff should be required to establish his case by clear testimony upon all points of the statute making the liability. It is not necessary to the validity of a transfer that there should be a consideration, and a party may give his stock and avoid liability. It is a well-settled rule of law that a transferrer of stock cannot be charged with corporate indebtedness incurred after the transfer has been regularly made and duly recorded in the corporate books. This rule follows as a matter of course, from the fact that after registry of a transfer, not only has transferrer ceased to have any interest in the corporation, but by the registry he has given notice to all future creditors of the corporation that they cannot look to him as security for their debts, although the object and purpose of the transferrer might have been to avoid liability. *Holyoke Bank* v. *Burnham*, 11 Cush. 187.

The creditors of the company have notice by the books of the company, who are the stockholders at the time the debt is contracted, and cannot complain that the person in whose name the stock is at that time is not the *bona fide* owner.

SITTING: LIBBEY, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. Creditor's bill against the shareholder of a corporation for unpaid stock.

I. Plaintiff avers a judgment in her favor against the corporation, recovered January 30, 1890, and execution thereon wholly unsatisfied. Defendant's answer does not deny the fact.

II. Plaintiff avers the legal existence of the corporation. Defendant admits the organization of the corporation, but not its legality. Neither does he deny it.

III. Plaintiff avers that defendant took one hundred shares of stock June 4, 1887, and has not paid for the same, "either in cash or in any other matter or thing at a *bona fide* or fair valuation thereof, or made payment in any manner required by law." He does not aver what the par value of the shares was to be. Defendant denies the taking or ownership of the same.

IV. Plaintiff avers that the cause of action in her said judgment accrued while the defendant was the owner of said stock, and that her action was commenced during such ownership or within one year thereafter. Defendant denies all this.

The first issue of fact is whether defendant subscribed, within the meaning of R. S., c. 46, § 47, for one hundred shares of stock in the corporation. It appears from the receipt for the same, dated June 4, 1887, admitted to have been signed by defendant, in the form "J. E. Parsons by C. C. Burrill," that he did take the same, and that Parsons neither authorized nor knew of the transaction. It was defendant's own transaction, although the shares were issued in the name of Parsons. He, not having authority from Parsons to take the shares for him, must be considered as the real taker and owner of them. An actual taking of shares is equivalent to a subscription for an agreement to take. Either comes within the meaning of the statute. *McAvity* v. *Lincoln P. & P. Co.*, 82 Maine, 504.

The receipt of defendant places the shares at three dollars and fifty cents each. He does not pretend that he ever paid that amount for them, or that it ever has been paid by anybody. He, therefore, became liable for par value of the same to the corporation as assets, and by force of the statute to its judgment creditors. The amount of his liability is five hundred dollars with interest from the filing of the bill. He fails to show any debt of his own against the corporation that may be applied to the payment for his stock.

The second issue of fact is, whether plaintiff's debt was contracted during defendant's ownership of the stock, and whether suit was brought meantime or within one year after its transfer on the books of the corporation. No transfer of the shares appears to have been made, and his ownership of the same may be presumed to continue. *Grindle* v. *Stone*, 78 Maine, 176. The debt arose from a mortgage given by plaintiff September 7, 1885, to a bank, that the corporation, on purchase of the land from the plaintiff, June 14, 1887, assumed and agreed to pay, as a part of the purchase money. There is much force in the suggestion that it is secured by the mortgage and therefore is a mortgage debt of the corporation; but that is *res judicata*. Such debt is held not to be a mortgage debt of the corporation. *Barron* v. *Paine*, 83 Maine, 312.

One of the plaintiffs died after this bill was filed and before the trial below. As to him the bill abated, and is prosecuted by the survivor, the sole party interested in the judgment sought to be enforced.

Bill sustained with costs.

INHABITANTS OF FOXCROFT *vs.* DAVID R. STRAW.

Piscataquis. Opinion December 9, 1893.

Taxes. Tenant. Exemption. R. S., c. 1, § 4, rule X; c. 6, §§ 3, 6, cl. II; c. 6, § 9.

The defendant built a cottage upon a lot of land under a parol license expressed as a lease *in perpetuam*, given by a campmeeting association, the owner of the land. *Held;* that he thereby became a tenant in possession of the land; and that the cottage and land were rightfully assessed as real estate to him as tenant in possession.

Also, that the lot was not exempt from taxation as it was not occupied by the corporation for its purposes within the meaning of R. S., c. 6, § 6, cl. II.

See *Foxcroft* v. *Piscat. &c., Assoc. tpost*, p. 78.

ON REPORT.

This is a statutory action of debt for taxes, assessed on a building and lot situated in Foxcroft on the campgrounds of the Piscataquis Valley Campmeeting Association. The defendant admitted that the assessment and all the other proceedings are

regular in form, but he denied his liability to be assessed, claiming that the property was exempt from taxation; and, if not exempt, that the building should have been taxed as personal property to him as resident of the town of Guilford.

W. E. Parsons and C. W. Hayes, for plaintiffs.

Henry Hudson and J. S. Williams, for defendant.

The buildings are personal property. *Doidge* v. *Bowers*, 2 M. & W. 365. Property is exempt from taxation. *Keyser* v. *School Dist.* 35 N. H. 477, 483.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

HASKELL, J. Debt for a tax laid upon defendant's cottage as real estate. The cottage was built by defendant upon a lot of land, under a parol license, expressed as a lease *in perpetuam*, given by a campmeeting association, the owner of the land, for the consideration of ten dollars. He thereby became a tenant in possession of land. Real estate may be assessed "in the town where the estate lies, to the owner or persons in possession thereof," R. S., c. 6, § 9; and real estate for the purposes of taxation includes "all lands, . . . and buildings erected on or affixed to the same," R. S., c. 6, § 3; and the word land includes "all tenements and hereditaments connected therewith, and all rights thereto and interests therein." R. S., c. 1, § 4, rule X.

The cottage and land on which it stood might properly be assessed as real estate to the defendant as tenant in possession. *Paris* v. *Norway Water Co.*, 85 Maine, 330; *Kittery* v. *Portsmouth Bridge*, 78 Maine, 93; *Hall v. Benton*, 69 Maine, 346; *Flanders* v. *Cross*, 10 Cush. 514; *McGee* v. *Salem*, 149 Mass. 238.

But it is asserted that the land was exempt from taxation as the property of a benevolent and charitable institution incorporated by this state, and that the building cannot be assessed as real estate exclusive of the land, and, therefore, the tax is void, as not having been lawfully laid upon land.

It may be that, if the land were exempt, there would be no taxable real estate upon which the tax could be laid. In *McGee* v.

Salem, *supra*, the land was assessed to the owner, and the greenhouse to the tenant, who owned and occupied the same; and the court held the tax upon the greenhouse, apart from the land and assessed as real estate, invalid. In the other cases cited, the assessments were: on "store on turnpike in Lawrence;" on "that part of Fairfield Boom situated in Benton;" on "that part of Portsmouth Toll Bridge situate" in Kittery; on "aqueducts, pipes, conduits, hydrants," &c., "situate in the town of Paris;" all as real estate. The description of each class of property included land appertaining to the several subjects of taxation, and the tax of each one was, therefore, properly laid upon real estate against the parties in possession of the same.

In the case at bar, the tax was laid upon a "campground lot and building thereon;" and whether, if that lot were exempt from taxation, the tax upon the building would be invalid as a tax upon real estate, it is unnecessary to consider, for we are of opinion that the lot was not exempt from taxation, as it was not occupied by the corporation for its own purposes, within the meaning of R. S., c. 6, § 6, division two, for the reasons stated, *post*, in *Foxcroft* v. *Piscataquis Valley Campmeeting Association*.

Defendant defaulted.

INHABITANTS OF FOXCROFT

vs.

THE PISCATAQUIS VALLEY CAMPMEETING ASSOCIATION.

Piscataquis. Opinion December 9, 1893.

Taxes. Exemption. Over-valuation. R. S., c. 6, clauses II and IV.

Where land belonging to a religious society, or benevolent and charitable institution, or both, is used for the stabling of horses for hire, let for victualing purposes, and for the use of cottagers, it is not occupied by the association for its own purposes within the meaning of the statute, R. S., c. 6, § 6, clauses II and IV, so as to exempt it from taxation.

A tax may be recovered at law, although laid in gross, if any part of the land be taxable.

See *Foxcroft* v. *Straw*, *ante*, p. 76.

ON REPORT.

This was a statutory action of debt to recover a tax, for the year 1891, assessed on the defendant's stable and campground, being its land and real estate in Foxcroft outside of and except its houses of religious worship, vestries, tabernacle, pews, seats and furniture within the same, or any parsonage and the land on which it stands, and that occupied by tents and cottages.

The only question reserved in defense was that of exemption from taxation, the defendant claiming that the property sought to be taxed is included in the exempting clauses of the statutes.

W. E. Parsons and *C. W. Hayes*, for plaintiffs.

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

Defendant a charitable and benevolent institution. *Jackson* v. *Phillips*, 14 Allen, 556; *Maine Baptist Miss. Conv.* v. *Portland*, 65 Maine, 93; *Chamberlain* v. *Stearns*, 111 Mass. 268; *Saltonstall* v. *Sanders*, 11 Allen, 446 and cases; *Wesleyan Academy* v. *Wilbraham*, 99 Mass. 599. Premises are exempt. *Monticello Seminary* v. *People*, 106 Ill. 398, S. C. 46 Am. Rep. 702; *Trustees, &c.*, v. *State*, 46 Iowa, 275, S. C. 26 Am. Rep. 138; *Straw* v. *Societies*, 67 Maine, 494; *Trinity Church* v. *Boston*, 118 Mass. 162.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

HASKELL, J. Debt for a tax laid upon the real estate of a campmeeting association situated in Foxcroft, organized "to furnish and maintain a campmeeting with its religious privileges to the people of the Piscataquis Valley and its vicinity, to the glory of God and the saving of souls."

The real estate of the association consisted of ten acres of land, a part of which was used for an auditorium where religious meetings were held, a part for lots let to members for the erection of cottages, a part for a stable and stable yard where horses were stalled for hire, and a part let for an eating house or victualing purposes. The assessors say that the tax was laid upon that part only used for stabling and victualing purposes, that part used for cottagers lots having been taxed to the

individual occupiers of them. The tax is of land in gross, and, therefore, if any part of the property assessed be taxable, the plaintiff must have judgment for the tax, inasmuch as over-taxation can only be remedied by abatement proceedings that are ample to give the necessary relief. It is not a defense to a suit for a tax. *Rockland* v. *Rockland Water Co.* 82 Maine, 188.

Whether the association be a religious society or a benevolent and charitable institution, it is of no moment to inquire, inasmuch as the tax was laid, in either case, upon property not exempt from taxation. If the association be a religious society the property taxed is expressly subjected to taxation by R. S., c. 6, § 6, clause IV. If it be a benevolent and charitable institution, the property used for the stabling of horses for hire, let for victualing purposes and for the use of cottages is clearly not occupied by the association for its own purposes within the meaning of R. S., c. 6, § 6, clause II. It is property from which revenue is derived — just as much business property as a store or mill would be.

That part used for an auditorium or tabernacle,— used for the accommodation of the association, where its meetings are held, is used for a common purpose — for "its own purposes" within the meaning of the statute and is exempt from taxation.

Defendant defaulted.

ISAAC G. WILLIAMSON *vs.* ANDREW LACY.

Lincoln. Opinion December 5, 1893.

Immunity of judicial officers. Public Trials. Trial Justice.

Trials in court, as a rule, must be public. It is a public rather than an individual right to have proceedings in court conducted with open doors. In criminal cases the accused cannot be deprived of the presence of his friends. Judges have a discretion to be exercised in regulating the number and kind of spectators at criminal trials, but not an unlimited discretion.

A trial justice exercises his discretionary power erroneously who causes to be ejected from his court room during a criminal examination all persons but parties and their witnesses, including in the number many leading and influential citizens in attendance as spectators, when the only justification for

their exclusion is that the trial was to be upon an accusation of adultery in the presence of several female witnesses.

A judge of a court of record is not liable at common law for any act done by him as judge while acting within his jurisdiction, and no action lies against him therefor, whatever may be the act or his motive for it. The protection is absolute upon grounds of public policy.

The same public policy also affords a great degree of protection, although not absolute protection, to magistrates whose courts are not by the common law courts of record. All reasonable presumptions are allowed in their favor.

A trial justice is not personally liable for an injury to another which is the result of an honest error of judgment on his part, when he has jurisdiction in the case and the act done is not of a strictly ministerial character.

Where a trial justice, or other inferior magistrate, does an act unreasonably and arbitrarily, or from malicious motives, which causes an injury to another, he may be sued for the consequences of his wrongful act by the person thus injured. But it must be the case of a direct injury or indignity to the individual, and not merely an offense or wrong against the public generally.

ON REPORT.

The case appears in the opinion.

This was an action of trespass against the defendant, a trial justice for the county of Lincoln, on the ground that the plaintiff, who was a spectator at a trial before the justice was, with other spectators, ordered from the court-room and finally removed by an officer under the direction of the court, but without the use of force.

Plea, general issue, and a brief statement of special matter of defense that said defendant, deeming it wise in the interests of justice and the proper and orderly conduct of the trial that all spectators should be excluded from the trial, and the same be conducted in the presence of the parties and witnesses only, requested said plaintiff to depart from said room, which the plaintiff wholly refused to do, but continued therein in contempt of the defendant as trial justice aforesaid, and to the disturbance and violation of good order and decency in the administration of justice and to the great hindrance thereof; and thereupon said defendant as trial justice aforesaid requested an officer of said court, to remove said plaintiff from said room, and said officer thereupon gently laid his hands upon the plaintiff and led him therefrom, using no more force in so doing than was necessary, proper and legal.

W. E. Hogan, for plaintiff.

Counsel cited: *Sikes* v. *Johnson*, 16 Mass. 389; *Brown* v. *Perkins*, 1 Allen, 89; *Woodbridge* v. *Conner*, 49 Maine, 353. No court in this State has the power or authority to expel a spectator, who is present, conducting himself quietly, from the court-room.

Baker, Baker and Cornish, for defendant.

There is a distinction taken by some of the courts between the power of an inferior tribunal not of record to punish for contempt and its power to remove from the court-room any person whose conduct or presence is prejudicial to the administration of justice. Many cases hold that inferior courts, though not of record, have power even to punish for contempt, and to restrain all disorders or the conduct or presence of any person prejudicial to the interests of justice, according to the sound discretion of the magistrate. *Clark* v. *People*, Breese, 340 (12 Am. Dec. 180, 181 and notes); *State* v. *Woodfin*, 5 Ired. Law, 199 (42 Am. Dec. 161, note); *Neel* v. *State*, 9 Ark. 259 (50 Am. Dec. 209 and note); *Ex Parte Adams*, 25 Miss. 883 (59 Am. Dec. 234, notes); *In re Monroe*, 46 Fed. Rep. 52.

But even where the power of inferior courts to commit for contempt is denied, their authority is fully recognized to remove from the court-room any persons whose conduct or presence is prejudicial to the administration of justice; and this, if done in the exercise of sound judicial discretion, would seem to be conclusive, and is a defense to trespass. *Rhinehart* v. *Lance*, 43 N. J. Law; 25 Albany Law Journal, 49, 52. Counsel also cited: *Garnet* v. *Ferrand*, 6 B. & C. 611; *State* v. *Copp*, 15 N. H. 212.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. It is an undeniable proposition, to start with in this discussion, that courts of justice should be open to the public. That is the rule. History brings to us too vivid pictures of the oppressions endured by our English ancestors at

the hands of arbitrary courts ever to satisfy the people of this country with courts whose doors are closed against them. They instinctively believe that it is their right to witness judicial trials and proceedings in the courts.

It is true that courts have discretionary powers to be exercised in such a matter,— but not an unlimited discretion. The almost boundless authority exercised by the court of Star Chamber in England was the seed of its own destruction, and was its historical infamy. Its lessons are not lost on the courts of to-day. We never knew of any court of general jurisdiction in this State conducting a strictly private criminal trial, nor, before this, of such a trial before a common magistrate. The defendant testifies that he never before held a private court during his eighteen years' experience as a magistrate.

Mr. Cooley, in his book on Constitutional Limitations, p. 312, remarks on the general subject as follows:

"It is also requisite that the trial be *public*. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly met with if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would be drawn thither by a prurient curiosity, are excluded altogether."

We cannot doubt that it was an unwise exercise of discretion

for the defendant to expel forcibly from his court-room on the occasion in question all persons but the parties and witnesses. The accused persons had no witnesses, and they were left without the presence of friends. There was room enough for all the spectators to be seated without the discomfort of any one. There was no inclination on the part of anyone to create a disturbance, nor was any such state of things apprehended. The magistrate testifies that his order was not based on any such ground, and he declined as a witness to specify any reason for the order, further than to say that he acted upon his judgment that the demands of justice required it. It appears that one of the prisoners who were to be tried was complained of for adultery, and that he and his wife were complained of for an affray; and the cases were tried separately and privately. The complainant in the two cases, whose daughter was to be a witness, requested private trials, but the magistrate does not admit that her request influenced him at all, although he states that there were to be five female witnesses at the trials. The prisoners were committed to jail for want of bail, where they remained many months until the grand jury met, which found a bill that was abandoned without a trial.

It is better for the public interest that such trials be conducted in the presence of a responsible portion of the community. Public trials have a tendency to prevent waste of the public money. The persons ejected from the court-room were among the principal citizens of the county, comprising leading members of the bar, county commissioners, clerk of the courts, county treasurer and others of the highest respectability in that community. It is idle to charge against such a body of men that they crowded the court-room for any unjustifiable purpose. Much more decorous would it be to conceive that they distrusted the propriety of the prosecutions, and were present because they were interested in the orderly and economical administration of justice. Apparently some of them were present because they were acquaintances and friends of the accused. They were gentlemen capable of being good judges of their own conduct.

There is a lack of particular authority on the questions arising in this case, for the reason that so few private trials have anywhere been held. *State* v. *Copp*, 15 N. H., 212, is cited by the defense. There a person was removed from a court-room because he offensively insisted in keeping a seat so near to the magistrate as to personally embarrass him in the performance of his duties. And the court there remarks: "But the law does not authorize any court to act arbitrarily, and unreasonably exclude persons, but the right to have the courts open is the right of the people and not of the individual." It would seem that in the case at bar the public right was well represented by the numerous personages who sought to be present in court.

Garnet v. *Ferrand*, 6 B. & C., 611, the other case cited by the defense, was a case where a person unreasonably and obnoxiously intruded himself before a coroner's inquest held upon the body of a deceased person of no interest personally to the intruder. That case went upon the ground that a coroner's court in England is a court of record, and of high privilege, and that no action is maintainable against any coroner for an act done by him when sitting in a judicial capacity and acting within his jurisdiction.

But the more practical question in the present case is as to the rule of the liability of judges who commit errors in the proceedings in their courts injuriously affecting other persons. It is universally admitted that a judge of a court of record is not liable at common law for any act he does as judge, while acting within his jurisdiction. No action lies against him, whatever his act or the motive for the act may be.

The same policy of the law which affords such absolute protection to the judges of the higher courts for their acts, also affords a very great immunity to those who administer justice in courts that are of a lesser grade than strictly courts of record. The same policy prevails in either case, affording in the one instance a complete protection against a liability to private action, and in the other a reasonable though partial protection.

Lord Tenterden, in the case of *Garnet* v. *Ferrand*, *ante*, hits the subject with these observations:

"This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be. And it is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better, even, that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also, are neglect of duty and misconduct in it. For these, I trust, there is and will always be some due course of punishment by public prosecution."

The general rule of liability, therefore, of a judge of a court not of record, as deducible from the authorities, is that a judge of such a court is not liable personally for any injury sustained by anyone which is the result of honest error of judgment, in a matter where the court has jurisdiction, and where the act done is not of a purely ministerial character. See on this subject a collection of cases and the discussion of them in 15 Amer. Law Rev. 427.

If an inferior magistrate, however, acts unreasonably and arbitrarily, or from malicious motives, and thereby inflicts an injury upon a person he may be liable in an action therefor. But it must be a case of direct injury or indignity to the individual.

We cannot with any certainty decide, from the facts before us, that the defendant did not act from honest motive and according to his best judgment. He seems to have been in some degree influenced by suggestions from the officer in attendance upon his court, and in all probability he actually believed, however mistakenly, that the delicacy of the situation would justify the proceedings with closed doors.

Plaintiff nonsuit.

FREDERICK FOX, in equity, *vs.* ELIZA A. GIBBS, and others.

Cumberland. Opinion December 2, 1893.

Will. Charitable Trust. Benevolent and Charitable Purposes.

A residuary clause in a will, which gives to trustees all of the testator's estate, real and personal, remaining after the payment of certain other bequests, to be expended by such trustees at their discretion only for "benevolent and charitable purposes," is not void for its generality and indefiniteness; nor because the word benevolent is used with the word charitable to express the testator's wishes.

While a devise or bequest to trustees for such benevolent purposes as are not also charitable would be void, the two words when coupled together in a testamentary gift will be taken to mean no more than the word charitable implies when used alone and in a legal sense; unless a different construction is clearly established by other portions of the will. The purposes are to be both benevolent and charitable, and not benevolent, or liberal, or generous, merely.

ON REPORT.

Bill in equity, heard on bill and answer, brought by Frederick Fox, surviving executor and trustee, to obtain the construction of the residuary clause in the will of Joseph Walker, of Portland, deceased.

From the joint and several answers of the respondents, it appears that the residuary fund remaining in the hands of the executor, after payment of debts and legacies, amounts, at the appraisal, to $225,000; and that the respondents are all heirs-at-law of said Walker, and are all of them legatees under said will, and have all received the legacies given them thereby.

Answering further they say, "that they are advised and believe and therefore allege, that the trusts attempted to be created in and by the thirty-seventh item of said will are invalid and void, and that all the said residuary fund descends as undevised property to said respondents," &c.

The clause of the will in question is stated in full in the opinion.

Frederick Fox, *Symonds*, *Snow and Cook*, for plaintiff.

Nathan and Henry B. Cleaves, Stephen C. Perry and Henry W. Swasey, for Albert D. Walker.

While respondent admits that the residuary clause contains the words charities, schools, libraries, hospitals and other general words such as have become recognized as terms within charitable uses, yet the respondent's contention against same is that these terms are so undefined with respect to testator's intention with specific reference to them, and they are so involved with other terms and language not terms of charitable intent, as to leave it entirely uncertain what testator intended to do.

The whole tenor of the introductory, interlocutory and explanatory portion of the clause is not with reference to any charities existing and well-defined in testator's mind; but is a process of ratiocination and a theorizing on problematical premses; and is not an expression of a certain, well-defined, deliberate testamentary intention with reference to any specific charity or well-defined class of charities.

The words constitute a most general, indefinite and unlimited and unclassified declaration of a desire and wish so broad and universal, and whose scope is so undefined that there is in this expression of testator's wish no guide or limit for the direction of those who should undertake to administer the attempted trusts. The objects and purposes of the will are not only uncertain and vague, but are not confined to charities. While the term, "benevolence," may be subject to have its purposes defined and limited by its connection with the term charity, and benevolent by its connection with charitable, yet no such limitation exists in the case at bar. The fair construction of the whole clause leads legitimately to the conclusion that the testator's hope, wish and desire was as broad and wide as any and all the schemes and language of the clause unfettered by any limitation of any terms. Benevolence, pure and simple, is not charity within the limits of a charitable use. 1 Bigelow's Jarman, 6th ed. p. 170. *Chamberlain* v. *Stearns*, 111 Mass. 267. So as to, "worthy individuals needing aid," this has elasticity and breadth enough to extend a bounty under the will, "for the benefit of particular individuals to benefit whom would

be of no general or public advantage." It is too indefinite to be carried out. *Sheedy* v. *Roach*, 124 Mass. 476; *Nichols* v. *Allen*, 130 Mass. 211; *Olliffe* v. *Wells*, *Id.* 221. In *Beekman* v. *People*, 27 Barb. 260, a bequest was of the residue to executors in trust to pay and apply same in such sums and at such times as they should think fit, to one or more societies for the support of indigent respectable persons, giving them full discretionary power as to the disposition of the same, but so that it shall be applied to objects of charity; held void for being for a general, indefinite charitable purpose without fixing any particular object.

This is not a case of ambiguous or contradictory terms to be so construed as to support some definite charity within testator's specific testamentary purpose, as in *Jackson* v. *Phillips*, 14 Allen, 556; for neither the preamble nor the disposing part of this article shows any specific and definite intention with reference to any distinct object.

The personal discretion conferred on the trustee cannot be controlled or enforced by the court. *Meggison* v. *Moore*, 2 Vesey, Jr., 630.

The testator has wholly failed to describe any existing charity; he has not created any definite charitable use; he has not specified any distinct benevolent purpose; and he has not described any particular class of individuals worthy of his aid and for whom and which, or for the benefit of whom or which, the court might order the attempted trusts to be administered as near as may be. The bequest is general and does not define or describe what proportion or what part of the residue shall be for charities, what for, "benevolence," or what for, "worthy persons needing aid." Trustee cannot by his administration of the trust make a charity out of what the language of the will does not clearly and definitely create as a charity. Nor can trustee ignore testator's, "wish, hope and desire," touching what we claim was his disposition for and towards, "benevolence," pure and simple, or for and towards, "worthy persons needing aid;" for this would be to obliterate such portion of the will as shall not fall within the definition of a charitable

use. Such a power was held void in *Adye* v. *Smith*, 44 Conn. 60. The bequest must be limited to the purposes of a charity by interpretation, if at all, and not by the power of the court over it after the limit is established. 2 Red. Wills. p. 506; *Rotch* v. *Emerson*, 105 Mass. 433; *Nichols* v. *Allen*, 130, Mass. 211; *Kelly* v. *Nichols*, 17 R. I. 306.

The doctrine of *cy pres* does not apply to a bequest which is not made to a charitable use. 2 Story Eq. § § 1154-1157; Adams Eq. (8th Ed.) p. 73; Perry Trusts, § 729; 1 Bigelow's Jarman (6th Ed.), p. 212, citing, *Re Joy*, *Purday* v. *Johnson*, 60 L. T. 175; *Kelly* v. *Nichols*, *supra*.

To determine the nature of the bequest, the question is not alone what result did testator hope to subserve, but what did he order to be done. And if a gift is not to be a charitable use, the court cannot make it such, simply because testator hoped its effect would be to accomplish a charitable end. *Kelly* v. *Nichols*, *supra; Fire Ins. Patrol of Phil.* v. *Boyd*. 120 Pa. St. 624.

Everett v. *Carr*, 59 Maine, 325, and cases cited therein, each and all imply that the object of the charity must be clearly ascertainable, as by a nomination to some definite body that is imperfectly or improperly designated, to some distinct association or body not then *in esse*, or to some definite class of persons in general comprising some distinct charity, or to charity, as such, absolute and unqualified, thus giving occasion for exercise of the *cy pres* doctrine.

Counsel also cited *People* v. *Dashaway Association*, 84 Cal. 114.

S. C. Strout, *H. W. Gage and C. A. Strout*, for Eliza A. Gibbs, and others.

The fund was designed to be used for three objects, education, charity and benevolent purposes. To couple, "charitable" and "benevolent," together so that they shall mean charitable only, deprives the word benevolent of its meaning. It is used no less than six times. Testator did not make use of the word so many times for no purpose whatever. All the cases make a distinction between the words. It cannot be treated as surplusage,

and if synonymous with charity, as in some cases, nothing appears here to show such intention; on the contrary, it clearly appears the intention to make three distinct objects and purposes. As the fund is not apportioned it cannot be upheld as to the benevolent objects by reason of uncertainty, and the entire bequest fails.

Counsel also cited: *Knight* v. *Knight*, 3 Beav. 148; *Wright* v. *Atkyns*, 1 T. & R. 143; *Morice* v. *Bishop of Durham*, 10 Ves. 521; *Going* v. *Emery*, 16 Pick. 107; *Drew* v. *Wakefield*, 54 Maine, 297; *Sanderson* v. *White*, 18 Pick. 328; *Maine Bap. Miss. Conv.* v. *Portland*, 65 Maine, 92; *Williams* v. *Kershaw*, 5 Cl. & Fin. 111. Void bequests: *James* v. *Allen*, 3 Mer. 17; *Ellis* v. *Selby*, 7 Sim. 352; *Brown* v. *Yeall*, 7 Ves. 50; *Bridges* v. *Pleasants*, 4 Ired. Eq. 26; *Chamberlain* v. *Stearns*, 111 Mass. 267; *Vesey* v. *Jamson*, 1 S. & S. 69; *Morris* v. *Thompson*, 4 C. E. Greene, 307; *Mitford* v. *Reynolds*, 1 Phill. 185; *Nash* v. *Morely*, 5 Beav. 177; 2 Story's Eq. § § 979, 1141, 1155, 1157-8; Redf. Wills, Part II, pp. 773, 779, 781, 830; Hill Trust, pp. 452, 454; 1 Jar. Wills, 399, 404; 2 Perry Trusts, 711; Tudor Char. Trusts, 223.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. Joseph Walker, the testator, dying childless, left a will containing thirty-six bequests of public and private donations, and ending with the following residuary clause:

"*Thirty-seventh.* Inasmuch as there may be charities, in Portland, or the vicinity thereof, and which if I were living, I might desire to assist, or benevolent and charitable objects and associations, which if I were alive, I might desire and wish to promote and strengthen by gifts, and pecuniary help; or schools and places of learning, or hospitals, or libraries, which if aided financially would increase the benefits and advantages derived from education and instruction; or worthy individuals needing pecuniary assistance to obtain knowledge; or institutions and

associations formed and organized for the welfare, advancement, benefit and good of the public, and which if living, I should manifest an interest therein, and therefore aid and assist the same; and with the intention, hope, wish, and desire that the rest, residue, and remainder of my estate, may be used to benefit society, relieve pain and distress, assist worthy and deserving charitable and benevolent associations and objects, give instruction and education to those who are seeking for the same:—in order therefor to carry out my views and wishes, I do, therefore, for the proper execution of these purposes hereby give, devise, and bequeath in trust, unto Frederick Fox and Albert B. Stevens, both of said Portland, and the survivor of them and to their successors as my trustees, and upon the following conditions and trusts, all the rest, residue, and remainder of my estate of every description, real, personal and mixed, together with any and all estate and bequests, residue or any other part or portion of my estate which by the terms and items of this my last will and testament have, shall, or may become, make and form a portion of said remainder and residue of my said estate; and said gifts, bequests, and devises are made to said Fox, and said Stevens, and the survivor, and their successors as my trustees, upon the following conditions and trusts, and for the due performance by my trustees of the following duties and trusts, viz: my said trustees as aforesaid, shall within fifteen years from my decease, use, give, and expend, also distribute said rest, residue and remainder of my estate with interest, dividends, income, and all accumulations arising or growing out of the same, for the causes of education, and learning, for the promotion, assistance and growth of benevolent, and charitable associations and objects. Said trustees as aforesaid, shall not be restricted in this work. They are to be the sole judges in what manner said residue and remainder of my estate shall be so used and expended; and to whom, to what organizations and objects; in what amounts; and at what times; in what manner, and under what restrictions, conditions and regulations the same shall be given, used, expended, and distributed;—the only restrictions and conditions I put upon said trustees as aforesaid being, that all

of said residue, and income and accumulations as aforesaid, shall be used, given, expended and distributed by them for worthy, educational, charitable, and benevolent purposes and objects, and not for any other purposes whatever; said duties and acts of my said trustees to be done and performed within the County of Cumberland, State of Maine, and during said fifteen years from my decease.

"The charities I have remembered in this my last will and testament, if thought advisable by my trustees, may be further assisted; hospitals, schools, seats of learning, charitable and benevolent associations not organized or created at the date of this will, but which shall or may be created hereafter, and worthy individuals needing aid are to be helped by my trustees from said remaining trust estate and the income thereof, if said trustees think it wise so to do and under the restrictions I have placed upon said trustees."

Some of the heirs-at-law of the testator oppose the approbation of this residuary bequest by the court, contending that it is void for its indefiniteness and uncertainty. This objection is not taken, however, by all the counsel for the different contestants.

It is maintained by some writers that the very omission of specification as to persons and objects in a bequest of this kind is a distinctive test of its true charitable character, and that the trustee or the court can supply a much better scheme for the distribution of the fund than is apt to be found in the many wills where testators have imagined that their wishes could be subserved by annexing impracticable restrictions and conditions to their bequests. Be that as it may, we deem the question as not now an open one in this State, as the objection here presented has been repeatedly overruled by our own decisions. It would be useless to review the doctrine anew either upon the general authorities or upon principle. *Howard* v. *American Peace Society*, 49 Maine, 288; *Swasey* v. *American Bible Society*, 57 Maine, 523; *Simpson* v. *Welcome*, 72 Maine, 496; *Dascomb* v. *Marston*, 80 Maine, 223; *Everett* v. *Carr*, 59 Maine, 334. In the last case cited, a bequest was sustained

which directed funds to be annually paid to a person for such person "to use for charitable purposes and objects." The Massachusetts cases take the same view of this question. *Bullard* v. *Chandler*, 149 Mass. 532; *Minot* v. *Baker*, 147 Mass. 348; and cases there cited.

The other and principal objection to the bequest in question is that it empowers the trustees to use the funds, intrusted to them, for benevolent purposes which are not charitable. This objection must be fatal to the validity of the bequest if such was the intention of the testator. Trusts cannot be upheld which are devoted to mere benevolence, or liberality, or generosity. And if these trustees can appropriate any of the funds to benevolence they can use all of them for that purpose.

But the question arises as to the meaning of the word benevolent in its connection with all the other terms of the will. Benevolence may or may not be charitable in the legal sense. The perplexity comes from the fact that the word is used with different meanings according to circumstances, it sometimes signifying liberality and generosity and sometimes charity in the technical sense of the word. Charity may be benevolence, but all benevolence is not necessarily charity. Here the questionable phrases are "benevolent and charitable objects and associations," "worthy and deserving charitable and benevolent associations and objects," "worthy educational, charitable and benevolent objects and purposes."

We are much impressed with the belief that neither the scrivener or testator supposed that they were constructing any but charitable bequests. The word benevolent was inserted to intensify the word charitable rather than otherwise. The two words are coupled as one expression. It is charitable *and* benevolent, and not *or* benevolent. There is much on the face of the will to induce this conclusion. The testator makes numerous bequests of a specific character which may be denominated benevolent, and no doubt made as many as he contemplated of that kind of gift. His mind seems to have been intensely imbued with ideas of "schools and places of learning," of "hospitals and libraries," of the "advantages of education and instruction," of "worthy

individuals needing pecuniary assistance to obtain knowledge,' and of using his residuary estate "to benefit society and relieve distress and pain." He speaks of "institutions organized for the welfare and advancement, benefit and good of the public." His mind dwells somewhat on "organizations and associations," thinking no doubt of charitable institutions. He speaks in several instances of "charities," and not of benevolences. He limits the use of his estate to the general purposes named by him, and cautions his trustees that the funds are to be so used "and not for any other purpose whatever." All the clauses of this final bequest are impressive evidence of the desire of the testator that his remaining estate should be disposed of for the public good. The bequest breathes the spirit of charity in all its lines and nothing else. We think it would have shocked the testator to believe that two or three hundred thousand dollars of his property might by any possibility be expended by his trustees for purposes not strictly charitable. In his own mind the words benevolent and charitable were undoubtedly regarded as synonymous terms.

But does the law permit us to adopt the construction which we have indicated? We have no hesitation in answering this inquiry in the affirmative. Such a decision will be in consonance with the liberal views and expressions of this court in its interpretation of all kindred subjects and questions. In fact, the words in question as occurring in our statutes on the subject of taxation have already been interpreted by this court. In *Maine Baptist Missionary Convention* v. *Portland*, 65 Maine, 92, it is said in the opinion: "It may be difficult to say what a 'benevolent institution' is if it differs from one that is merely charitable." And in *Bangor* v. *Rising Virtue* [*Masonic*] *Lodge*, 73 Maine, 428, APPLETON, C. J., remarks for the court: "The statute upon which the defendants rely, uses the word benevolent, but there is no question that this word, when used in connection with charitable, is to be regarded as synonymous with it and as defining and limiting the nature of the charity intended."

There are precedents strongly advocating the principle in several of the New England states, and it is now the doctrine

of the English courts. The doctrine is also accepted in some other of the American States and rejected in others. A few cases only need be cited for present purposes. *Saltonstall* v. *Sanders*, 11 Allen, 446, an exhaustive case; *Rotch* v. *Emerson* 105 Mass. 431; *Suter* v. *Hilliard*, 132 Mass. 412. See *Chamberlain* v. *Stearns*, 111 Mass. 267, for citation of cases on both sides of the question, including English cases. *Pell* v. *Mercer*, 14 R. I. 425; *Goodale* v. *Mooney*, 60 N. H. 528. In the last two cases cited the word benevolent, without being coupled with the word charitable, is construed from the context to have the meaning of the latter word. Those cases hold that the two words may be regarded as equivalent or analagous expressions. Mr. Perry and Mr. Boyle strongly approve of the general doctrine which we adopt as applicable to the present facts. Perry on Trusts, (4th ed.) § 712; Boyle on Charities, pp. 286-299.

It follows, therefore, that the surviving trustee is entitled to receive from himself as surviving executor the estate and property described in the residuary clause, being bequest thirty-seven, and as such trustee he is entitled to control and administer all the same according to the terms of such residuary clause as herein construed; and there must be a

Decree accordingly.

JAMES A. PULSIFER, and another,

vs.

W. ETIENNE D'ESTIMAUVILLE.

Androscoggin. Opinion December 5, 1893.

Sales. Holmes Note. Conditional Title.

A person who sells a piano, taking therefor a Holmes note which reserves title in the piano to the seller until the note be paid, does not become deprived of his title to the piano because it turns out that the note, supposed by him to be genuine was either unauthorized by the signer or forged.

ON MOTION AND EXCEPTIONS.

Replevin of a piano by the assignees of Louis Roberge, insolvent debtor. The jury gave a verdict for the defendant.

The case appears in the opinion.

J. A. Pulsifer, *Savage and Oakes*, for plaintiffs.
McGillicuddy and Morey, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. It was shown at the trial of this case that one Laughton sold a piano to some member of the family of Louis Roberge, taking therefor, and duly recording, the following Holmes note:

"Lewiston, Me., April 11, 1888.

"$350.00.

"For Value Received, I promise to pay N. J. Laughton, or order, the sum of Three Hundred and Fifty Dollars, payable at his office in Lewiston, Maine, in installments, viz: Fifty Dollars on the 12th day of April, 1888, and Fifteen Dollars on the 12th day of each month thereafter, until the whole sum is paid, with interest at six per cent.

"This note is given for one K. & B. Piano bargained and delivered to me, and made by K. & B. Piano Co. Style C., No. 20490 and which it is agreed shall remain the property of the said N. J. Laughton, until this note is paid in full.

Witness, Flora I. Laughton. Louis Roberge.
No. 1032. By G. O. Roberge."

Roberge going into insolvency, the plaintiffs, his assignees, supposing the piano to be his, took from Laughton to themselves an assignment of Laughton's title to the piano and note, there being a certain amount of the original sum payable which remained due and unpaid; and thereupon replevied the piano from the defendant in whose possession it was found. And the plaintiffs produced some evidence tending to show ownership of the piano, subject to the amount due thereon, in Roberge, whose name is signed as maker of the note.

The contention of the defendant at the trial was that the piano was not purchased by Roberge, but by his daughter, wife of the defendant, and that the business was done by her and her brother, the latter using his father's name without the father's knowledge

or consent; the excuse for such irregularity being that the daughter was a minor and not capable of contracting in such form herself. There was evidence supporting these allegations, and also tending to show that she had paid from her own earnings and money the sums already indorsed on the note. These facts, however, were not disclosed to Laughton, and he supposed that the sale was to Louis Roberge and that the note was authorized by him.

The plaintiffs contended at the trial that, even if not entitled to complete ownership in the piano, as assignees of Roberge, they were entitled to the possession of it under their title from Laughton until the note is fully paid; and that they could maintain this action of replevin therefor, even if the note was not authorized by Roberge, and whether the real transaction was between the father and Laughton or not, as long as Laughton did not know that he was not dealing with him. And the plaintiffs asked from the judge presiding an instruction substantially to that effect, which the judge declined to give.

We think the requested instruction should have been given. No title was to pass until that particular note should be paid. If the note had been valid there would be no question about it, and it would be strange if the seller is to be worse off because an unauthorized or forged note is imposed upon him. The fraudulent vendees are estopped from setting up as a defense the invalidity of the note.

Exceptions sustained.

RICHARD H. NOTT *vs.* GEORGE F. OWEN.

York. Opinion December 5, 1893.

Landlord and Tenant. Rent. Implied Promise. Co-owners.

Where the owners of three quarters of a store, holding in common and undivided with the owner of the other quarter, rented their three fourths to a tenant who necessarily occupied the entire store in order to avail himself of the occupancy of the three fourths, such tenant or occupant, being unable to agree upon any terms for the occupancy of the one fourth with the owner thereof, becomes liable, by an implied promise created by the relations of the

parties, to pay to such owner a reasonable rent for his interest in the premises; and no further or greater liability rests upon such tenant for his occupancy. The court finds that, on the facts presented, the plaintiff has already received such reasonable amount of rent for the period covered by the declaration in his suit.

ON REPORT.

Assumpsit on account annexed to recover rent claimed by the plaintiff as assignee from a part owner of the premises.

The case appears in the opinion.

R. H. Nott, for plaintiff.

J. O. Bradbury, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. The plaintiff, representing the ownership of one undivided quarter of a store, had rented his quarter at the same rate that the other quarters were rented, there being separate contracts between the different owners and the tenant. Becoming dissatisfied with the amount of rent so received he undertook to terminate the tenancy as far as his undivided quarter was concerned, and notified the tenant that if he occupied his share of the premises after a certain date the rent would be at an increased rate, and that the tenant's continued occupation would be regarded as an acceptance on his part of the new terms proposed. As the tenant did not acquiesce in the proposal of the plaintiff, this suit is brought to recover the amount of rent claimed by the plaintiff, the defendant persisting in a continued occupation of the whole property in pursuance of contracts with the other owners.

The plaintiff's proposition that the tenant cannot rightfully occupy the store at all unless there be an agreement with him for the occupancy of his one quarter is far from tenable. Were he a sole owner he could manage his own property in his own way. But as an owner of property in common with other owners he is not entitled to dictate the management of their interests, as well as his own, without their consent. The error of the plaintiff lies in regarding the tenant as in possession of the store under

some agreement with him. The defendant is forbidden by the plaintiff to be his tenant. He is occupying the premises by virtue of an agreement with the other owners, and in occupying their undivided shares he necessarily occupies the whole store. And for the beneficial use of the plaintiff's share of the same he becomes liable to pay him a reasonable rent therefor.

Were it otherwise any tenant in common would have the power by his perverseness to actually destroy the valuable use of the common property. The plaintiff is really in more controversy with his co-owners than with the occupant of the store. The law frowns upon the idea of any such despotic power being possessed by an owner in common over the common property.

The plaintiff has already received rent at the same rate as that received by his co-owners, which he credits in partial payment of his claim; while we think it should be in full satisfaction thereof. He has already received a reasonable rent.

Plaintiff nonsuit.

ELIZABETH S. BRIARD, Appellant,

vs.

BENJAMIN N. GOODALE, Guardian.

York. Opinion December 16, 1893.

Probate. Appeal. R. S., c. 63, § 23; c. 71, § 25.

By R. S., c. 63, § 23, any person "aggrieved" by a decree of the probate court, may appeal to this court.

Persons "aggrieved" are those only who have rights enforceable at law, and whose pecuniary interest might be established, in whole or in part, by the decree.

The appeal will be dismissed unless the right to appeal is affirmatively alleged and established by the case presented.

Where a sister appealed from the decree of the probate court appointing a guardian to her sister as a person of unsound mind, and neither specified in her reasons for the appeal, nor alleged in her exceptions, that she is an heir apparant or an heir presumptive of the ward, *held;* that the exceptions should be overruled and the appeal dismissed. *Non constat* that a sister is an heir. There may be nearer relatives; the ward may have children living.

It does not appear affirmatively that the appellant is legally interested in the ward's estate, and is, therefore, not a person "aggrieved."

ON EXCEPTIONS.

The case appears in the opinion of the court.

R. H. Nott, for appellant.
John M. Goodwin, for appellee.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. This is an appeal from the decree of a judge of probate appointing a guardian to a person of unsound mind. The appellant is a sister of the ward, and the presiding justice ruled that she was not a person aggrieved by the decree within the meaning of Section 23, Chap. 63 of the Revised Statutes. The case comes to this court on exceptions by the appellant.

Unless the appellant's right to appeal is affirmatively established by the case presented, the appeal will be dismissed. *Pettingill* v. *Pettingill*, 60 Maine, 419; *Deering* v. *Adams*, 34 Maine, 41.

"The persons indicated by the statute under the term 'aggrieved' are not those who may happen to entertain desires on the subject, but only those who have rights which may be enforced at law, and whose pecuniary interest might be established in whole or in part by the decree." *Deering* v. *Adams*, *supra*, and cases cited.

With respect to the petition of a guardian for the sale of his ward's estate, it is provided by § 25, chap. 71, R. S., that "All heirs apparent or presumptive of the ward shall be considered interested in the estate;" and in *Lunt* v. *Aubens*, 39 Maine, 392, it was held that an heir presumptive of the ward was entitled to have an appeal from a decree appointing a guardian.

But, in the case at bar, it is neither specified in the reasons for the appeal, nor alleged in the exceptions, that the appellant is either an heir apparent or an heir presumptive of the ward. It is stated in the exceptions that she is a sister of the ward; but *non constat*, that a sister is an heir. There may be nearer relatives; the ward may have children living. It is neither alleged nor proved that the appellant is an heir. It does not

affirmatively appear from the case presented that the appellant is legally interested in the ward's estate. It is not established that she is "aggrieved" within the meaning of the statute or the purview of the authorities cited.

All questions of fact involved in the case were finally determined by the presiding justice. His ruling upon the question of law presented was undoubtedly correct.

The appeal being a nullity, the court has no jurisdiction to affirm or reverse the decree. *Gray* v. *Gardner*, 81 Maine, 558; *Milliken* v. *Morey*, 85 Maine, 342. The entry must accordingly be,

Exceptions overruled. Appeal dismissed.

STATE *vs.* HERBERT A. EDWARDS, and another.

Aroostook. Opinion December 19, 1893.

Mills. Public Use. Legislative Control. Constitutional Law. R. S., c. 57, §§ 5, 6; c. 92; Stat. 1885, c. 332.

Where the defendants operated a public grist-mill erected under the mill act, offering to grind grain for all comers, *held;* that they have dedicated their mill to public use, and must comply with legislative regulations of its use, so long as they keep their mill public.

They are bound by the statute to receive grain at their mill there tendered to be ground, and cannot take toll in excess of the amount therefor specified by the statute; any agreement for toll in excess of such amount is void.

The statute is constitutional.

ON EXCEPTIONS.

This was a complaint under the statutes charging two offenses; first, for refusing to receive the complainant's grain to be ground, and, second, for taking excessive tolls for grain received and ground by the defendants.

The case was heard by a trial justice and was brought on appeal by the defendants into the Superior Court, for Aroostook County, where the defendants offered to prove that, on tendering the grain mentioned in the first charge, they refused to grind it unless the complainant would pay a toll in excess of one sixteenth part, whereupon he took the grain away to another mill.

In defense to the second offense, the defendants offered to prove that a contract had been entered into between them and

the complainant whereby he had agreed to pay them one eleventh part of the grain as toll for grinding the same; that thereupon they had received the grain and ground and charged according to the contract one eleventh, and no more, for grinding the grain.

The presiding justice ruled that, under the statutes, the defendants were bound to receive the grists of grain offered and grind it for the toll specified by statute. He also ruled that the contract relied on by defendants, under the second count in the complaint, was void.

Under these rulings the jury returned a verdict of guilty, and the defendants took exceptions.

Charles F. Daggett, County Attorney, for State.

Louis C. Stearns, for defendants.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. The defendants were convicted under R. S., c. 57, § § 5 and 6, as amended by the Act of 1885, c. 332, on two several counts; first, of refusing to receive grain at their grist-mill there tendered to be ground; second, of taking excessive toll. The defendants have exception to the ruling of the court that they were bound to receive the grists of grain offered, and grind the same for the toll specified by the statute, and that an agreement for toll in excess of that fixed by statute would be no defense.

The case does not show what kind of a mill the defendants operated, nor whether it was a public or private mill, nor whether it was a water mill, steam mill or wind mill. It assumes, however, that it was a grist-mill, used for grinding grain for the public.

Exceptions must show sufficient facts to make the ruling erroneous. *Reed* v. *Reed*, 70 Maine, 504. In this case, therefore, if the ruling excepted to be correct, and the statute under which the conviction was had be constitutional when applied to any kind of a grist-mill, judgment must be entered

on the verdict. And it may be assumed that defendants' mill was a public grist-mill, propelled by a head of water obtained under authority of the mill act, R. S., c. 92.

Assuming the mill to be a public mill, and the statute under which the conviction was had to be valid, an agreement between the owner of the grain and the defendants, for toll in excess of the statute quantity, can be no defense. The act of the defendants in taking excessive toll was just as much in defiance and violation of the statute, when taken by agreement with the owner of the grist, as if taken without his consent. The defendants' act is prohibited by the statute. They were required to run their public mill for statute toll, with equal dispatch for all the patrons of their mill. They were required to receive grists and grind them in their turn, without motive for unequal dispatch to those willing to pay an extra price for it. The taking of usury by agreement with the borrower of money is analogous. Freedom from blame on the part of the lender is not a bar to the borrower's right to recover back the usury. *Houghton* v. *Stowell*, 28 Maine, 215. The statute under which the conviction was had imposes no such condition.

But it is stoutly asserted that the statute is unconstitutional as an invasion of the private right of enjoyment of property. The mill act of Maine applies to all water mills; and whether its validity results from the exercise of eminent domain, as supposed by many cases, *Jordan* v. *Woodard*, 40 Maine, 317; *Great Falls Mfg. Co.* v. *Fernald*, 47 N. H. 444; *Olmstead* v. *Camp*, 33 Conn. 532, and others cited by Gould on Waters, § 253, and by the Supreme Court in *Head* v. *Amoskeag Mfg. Co.* 113 U. S., 9, or from the proper regulation of the rights of riparian owners, so as to best serve the public welfare, having due regard to the interests of all, as held in *Head* v. *the Amoskeag Mfg. Co. supra*, and in *Murdock* v. *Stickney*, 8 Cush. 113, and remarked by the Court in *Lowell* v. *Boston*, 111 Mass. 466, it is unnecessary now to consider.

It is conceded by all authorities that the public use of property by the individual is within the scope of legislative control. And it matters not whether the use be authorized by express statute

or dedicated by the individual proprietor. If it be a public use, it is within the supervision and control of the legislature. The troublesome question is, whether the use be public. *Tyler* v. *Beacher*, 44 Vt. 648. In most branches of business the public has an interest. That interest varies according to the surrounding conditions of the particular business in question. If it be a monopoly, the interest of the public to be fairly and conveniently served is much greater than when the monopoly ends by force of wholesome competition. A distinction must be made between a public use and a use in which the public has an interest. In the former case, the public may control, because it is a use within the function of government to establish and maintain. In the latter case, it is a private enterprise that serves the public and in which it is interested to the extent of its necessities and convenience. The former is clearly within the control of the legislature, while the latter may not be. Many authorities, however, go to that extent. *Munn* v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517, and cases cited. The public is interested to be well and reasonably served at the store of the tradesman, the shop of the mechanic and the office of the professional man, and yet, all these vocations are private. The goods on sale in the store, material furnished by the mechanic, and the skill employed by the professional man are the individual property of each one respectively. Their vocations are exercised for their own gain, and they have a right to the fruits of their own industry without legislative control. It must not be understood that each one may not be properly subjected to suitable police regulations as to the manner of his business; 2 Kent, 340; but the business cannot be thereby controlled and the profits to be gained therefrom destroyed, taken away or limited by the establishment of prices; otherwise we should have a paternal government that might crush out all individual liberty, and the declaration of our constitution would become as valueless as stubble.

It is conceded by all authorities that common carriers, common ferries, common roads, common wharves, common telegraphs and common telephones, etc., and common grist-mills and

common lumber mills are of that public nature to be put under public control, whether operated under the authority of charters from the state, or by individual enterprise. Each of those cases is within the function of government to establish and maintain, and, therefore, to control, by whomsoever exercised. *Blair* v. *Cuming County*, 111 U. S. 363; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9; *Stone* v. *Farmer's Loan and Trust Co.* 116 U. S. 307; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418.

Mills for the grinding of grain and for the sawing of lumber for all comers have been aided or established by the legislature from the earliest colonial times. Those mills were usually water mills; but it is of no moment what the propelling power may be. *Burlington* v. *Beasley*, 94 U. S. 310. They have always been considered so necessary for the existence of the community that it was proper for government to foster or maintain them; and in the absence of government aid, the individual proprietor, not pretending to serve the public, might maintain such mills as private mills, free from legislative interference, precisely as he might maintain a store, shop or other private business; but when such proprietor makes his mill public, assumes to serve the public, then he dedicates his mill to public use and it becomes a public mill, subject to public regulation and control. He is not compelled to continue such public use, but so long as he does, he becomes a public servant and may be regulated by the public.

In the present case, the mill must be considered a public mill and rightfully within legislative control. No suggestion is made that the statute regulation is unreasonable, and therefore it is unimportant to consider whether the reasonableness of the statute regulation be a legislative or judicial function.

Exceptions overruled.

MANUFACTURERS NATIONAL BANK

vs.

DUDLEY HALL and DUDLEY C. HALL.

Penobscot. Opinion December 20, 1893.

Insolvency. Discharge. National Banks. Foreign Creditors. R. S., c. 70. Acts of Congress, July 12, 1882, § 4; Aug. 13, 1888.

A discharge in insolvency by a court of insolvency having jurisdiction of the debtor and creditor, will bar a suit in any other jurisdiction to recover a debt that was provable in the insolvency court.

A national bank is subject to the jurisdiction of the courts of the State in which it is located, and hence is bound by a decree of the insolvency court of such State.

See *Stetson* v. *Hall, post*, p. 110.

ON REPORT.

This was an action of assumpsit by the plaintiff bank of Boston, Massachusetts, as holder and owner of the defendants' promissory note for $5000 payable at any bank in Boston to the order of Dudley C. Hall, one of the defendants, and by him indorsed. It was dated at Boston, November 6, 1890, and became due March 6—9, 1891. The action was brought in Penobscot County, March 10, 1891, and the defendants' real estate in that County was attached on the same day; in Piscataquis County on March 11th, and in Aroostook County, March 12, 1891.

The defendants pleaded a discharge in bar of the action granted to them by the Court of Insolvency for the County of Middlesex, Massachusetts, under proceedings begun in that County, March 27, 1891. The surviving assignee of the defendant, Dudley C. Hall, both in Maine and Massachusetts, appeared and pleaded the general issue and for brief statement of defense claimed that under the proceedings begun in Maine, May 11, 1891, the attachments in this State were dissolved.

The plaintiff contended that it was not bound by the discharges granted in Massachusetts; that the attachments in this State were not dissolved, and that, if for any reason a judgement *in personam* could not be rendered, a judgment *in rem* should be given to the plaintiff.

The arguments of counsel relating to the dissolution of the attachments, &c., will be found in the following case of *Stetson* v. *Hall*, p. 110.

Charles P. Stetson, for plaintiff.

The insolvent laws of Massachusetts can have no force in this State. A discharge under them is not a bar to an action in this State. *Ogden* v. *Saunders*, 12 Wheat. 213; *Phœnix Nat. Bank* v. *Batcheller*, 151 Mass. 589.

Plaintiff not a citizen of Massachusetts. *Paul* v. *Virginia*, 8 Wall. 168. U. S. statutes cited by defendants apply only to actions in U. S. Courts.

Charles H. Bartlett, *W. B. French*, of the Boston bar with him, for defendants.

Discharges of defendants a bar. *Channing* v. *Riley*, 4 Cranch, C. C. 528; *Ballantine* v. *Goulding*, 1 Cooke's Bank. L. 347; *Potter* v. *Brown*, 5 East, 124; *Baker* v. *Wheaton*, 5 Mass. 511; *Watson* v. *Bourne*, 10 Mass. 357; *Blanchard* v. *Russell*, 13 Mass. 10; *Braynard* v. *Marshall*, 8 Pick. 197; *Ogden* v. *Saunders*, 12 Wheat. 217; *Stone* v. *Tibbetts*, 20 Maine, 116; *Felch* v. *Bugbee*, 48 Maine, 9; *Clark* v. *Cousins*, 65 Maine, 42.

National banks subject to be bound by State insolvent laws. *Mercantile Bank* v. *New York*, 121 U. S. 138-154; *National Bank* v. *Commonwealth*, 9 Wall. 362; *Wait* v. *Dowling*, 94 U. S. 532. Same under bankrupt law of 1867. *Bank* v. *Hunt*, 11 Wallace, 391; *Traders Bank* v. *Campbell*, 14 Wall. 87; *Merchants Bank* v. *Cook*, 95 U. S. 342; *Grant* v. *National Bank*, 97 U. S. 80.

The laws of one nation or state will be executed in another where rights of individuals are concerned when the laws of the foreign State are not contrary or prejudicial to its interests. *Minor* v. *Cardwell*, 37 Mo. 350, 354; *Olivier* v. *Townes*, 14 Martin (La.), 93-102; *Gebhard* v. *Canada S. Ry. Co.* 17 Blatchf. C. C. 416; *Cole* v. *Lucas*, 2 La. Ann. 946-952; *Mary* v. *Brown*, 5 La. Ann. 269; *Tatum* v. *Wright*, 7 La. Ann. 358; *Groves* v. *Nult*, 13 La. Ann. 117; *Hughes* v. *Klingender*, 14 La. Ann. 52;

Blanchard v. *Russell*, 13 Mass. 1-6; *Prentiss* v. *Savage*, 13 Mass. 20-24; *Tappan* v. *Poor*, 15 Mass. 419-422; *Ingraham* v. *Geyer*, 13 Mass. 146; *West Cambridge* v. *Lexington*, 1 Pick. 506; *Hinds* v. *Brazealle*, 3 Miss. (2 How.) 837; *Martin* v. *Hill*, 12 Barb. 631; *Kanaga* v. *Taylor*, 7 Ohio St. 134; *Crosby* v. *Huston*, 1 Tex. 203.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

EMERY, J. This action is upon a contract made and to be performed in Massachusetts. The defendants, residents of that State, have pleaded in bar a decree of the proper Court of Insolvency in Massachusetts, discharging them from their debts. That court admittedly had jurisdiction of the subject matter and of the person of the defendants. The proceedings and decree seem to be regular and to include this debt, although the plaintiff bank did not appear in the court. If then the plaintiff bank, located in Massachusetts, was within and subject to the jurisdiction of the courts of Massachusetts, the decree pleaded is valid and effectual as a bar. Full faith and credit would be given to it in Maine. It would bar this action. *Stone* v. *Tibbetts*, 26 Maine, 110; *Felch* v. *Bugbee*, 48 Maine, 9; *Clark* v. *Cousins*, 65 Maine, 42.

The plaintiff bank, however, is a National Bank, incorporated solely under the statutes of the United States, and it contends that hence it is not subject to the jurisdiction of the State Courts in Massachusetts, and so not bound by their decrees. The United States statutes do not support this contention. Act of Cong. July 12, 1882, § 4, and Act of Cong. August 13, 1888, expressly subject national banks to the jurisdiction of the courts of the state in which they are located, and forbid the federal courts exercising any other jurisdiction over them, than such as they might exercise over State banks, except of course in official suits. These statutes make the plaintiff bank subject to the jurisdiction of the courts of Massachusetts. Should it be sued in one of those courts by a citizen of Massachusetts, it could not

remove the suit to the federal courts on the ground of diversity of citizenship. *National Bank* v. *Cooper*, 120 U. S. 778; *Whittemore* v. *National Bank*, 134 U. S. 527.

The plaintiff further contends that, if the decree does bar its claim to recover a personal judgment, it does not bar the claim to recover a special judgment against the real estate of the defendants situated in Maine and attached on the writ. The argument is, that the debtors' real estate in Maine cannot be disposed of by the Massachusetts court even for distribution among their creditors; that such real estate remains the property of the debtors after the conclusion of the insolvency proceedings, and hence should be subject to seizure by their non-participating creditors upon process from the courts of Maine. There is force in the argument, but the decree of the Massachusetts court has full effect upon the parties even when they come into Maine. Its effect is not merely to bar actions against the persons of the defendants, but is to discharge the debt and deprive it of all legal obligation. It prevents any recognition of the debt by the courts without a new promise. It prevents a recovery of any judgment founded on the contract declared on in this action. *White* v. *Cushing*, 30 Maine, 269; *Everett* v. *Henderson*, 150 Mass. 411.

Plaintiff nonsuit.

GEORGE STETSON *vs.* DUDLEY HALL and DUDLEY C. HALL.

Penobscot. Opinion December 20, 1893.

Insolvency. Attachments. R. S., c. 70, § 33; Stat. 1891, c. 109.

By R. S., c. 70, § 33, attachments made within four months of the filing of a petition in insolvency are dissolved by the assignment.

Chapter 109 of the Statutes of 1891, authorizing insolvency proceedings against non residents, does not affect contracts made before its passage.

The property of a non-resident debtor was attached in this State by a resident creditor prior to the passage of the above statute. The assignee, appointed under insolvency proceedings begun thereafter, appeared in the action and pleaded the proceedings in dissolution of the attachment. The attaching creditor was not a party to the proceedings in insolvency. *Held;* that the question of the dissolution of the attachment did not arise for determination in this action.

On report.

This was an action of assumpsit brought by the plaintiff, a resident of Bangor, Penobscot County, against the defendants, residents of Medford, Massachusetts, upon their promissory note for $10,000, dated Boston, September 6, 1890, payable to the order of the defendant, Dudley C. Hall, and by him indorsed. It fell due March 6–9, 1891; and the writ is dated March 10, 1891, on which day an attachment of real estate in Penobscot County, was made. An attachment of real estate in Piscataquis County was made March 11, and in Aroostook County, March 12, 1891.

After the bringing this action, the insolvent law of this State was amended by an act approved March 27, 1891, being chap. 109 of the statutes of 1891, by which proceedings were authorized against a non-resident debtor, in the county where he may have real or personal estate. Under the law, as thus amended, the creditors, but not including the plaintiff, filed a petition in insolvency, on May 11, 1891, against the defendant, Dudley C. Hall, in Penobscot County, and after due proceedings, an assignment was made to George W. Chipman and William C. Haskins, assignees.

Said Chipman, surviving assignee of said Dudley C. Hall, appeared by leave of court, and pleaded the general issue; and for brief statement of further defense, alleged that the attachments made on the plaintiff's writ were dissolved by the proceedings in insolvency, which had been instituted within four months of the filing of the petition in insolvency.

It was not contended in defense of the action that the discharges granted the defendants by the court of insolvency in Massachusetts, under proceedings begun March 27, 1891, in Middlesex County, were a bar to this action; but the assignee claimed that the attachments of the plaintiff were dissolved and that the property attached should be held by him as assignee, free and clear of such attachments.

This case was argued at the same time together with the preceding case, *Manufacturers National Bank* v. *Hall*, *ante* p. 107.

Charles P. Stetson, for plaintiff.

The act of March 27, 1891, cannot affect this action, and the attachments made March 10, 1891. *Denny* v. *Bennett*, 128 U. S. 489, p. 494; *Owen* v. *Roberts*, 81 Maine, 439; *MacNichol* v. *Spence*, 83 Maine, 87; *Deake, Applt.*, 80 Maine, 50, p. 55; R. S., c. 1, § 5.

As to the effect of the proceedings, &c., in insolvency in Massachusetts, upon the two actions here, counsel argued that they do not reach land situate in another State, and that a creditor will not be disturbed in his attachments of such land. *Chipman* v. *Manfrs. Nat. Bank*, 156 Mass. 147; *Osborn* v. *Adams*, 18 Pick., 247; *Blake* v. *Williams*, 6 Pick., 285, p. 306; *South Boston Iron Co.* v. *Boston, &c. Works*, 51 Maine, 585.

By the attachments made here before commencement of proceedings in Massachusetts, plaintiff obtained a vested right in the real estate attached. They would not be dissolved by a discharge granted under insolvent laws of Massachusetts. *Nason* v. *Hobbs*, 75 Maine, 396; *Hussey* v. *Danforth*, 77 Maine, 17. Massachusetts statutes have no force to dissolve attachments here, and cannot affect attachments of lands in this State.

Charles H. Bartlett, *W. B. Clarke*, of the Boston bar with him, for defendants.

Attachments dissolved: R. S., c. 70, § 33; *Wright* v. *Huntress*. 77 Maine, 179.

Act of March 27, 1891, applies to existing attachments, and does not impair a vested right. *Ex parte Foster*, 2 Story, 131, 145; *Coffin* v. *Rich*, 45 Maine, 507-514; *Kingley* v. *Cousins*, 47 Maine, 91, and cases; *Harrison* v. *Sterry*, 5 Cranch, 289-299; *Baldwin* v. *Buswell*, 52 Vt. 57; *Kilborn* v. *Lyman*, 6 Met. 299, and cases; *Blount* v. *Windley*, 95 U. S. 424; *Curtis* v. *Whitney*, 80 U. S. 513. Retroactive as to remedy. *Berry* v. *Clary*, 77 Maine, 482; Drake Att. 6th Ed. § 412; Myers' Vested Rights, § 1145; *Frost* v. *Illsley*, 54 Maine, 351 and cases; *Westerman* v. *Westerman*, 25 Ohio, 500-507.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

EMERY, J. Within four months after this action was begun, one of the defendants, a resident of Massachusetts, was adjudged an insolvent debtor, by the Court of Insolvency for Penobscot County, upon the petition of his creditors, under Ch. 109, Pub. Laws of 1891, authorizing insolvency proceedings against non-residents. The plaintiff was not a party to any of these proceedings.

The act of 1891, which alone authorized insolvency proceedings against this defendant, was enacted after this debt was contracted, and after this action was begun. The defendants have appeared in the action after acknowledging notice according to the order of court, but they make no defense by plea or otherwise. The plaintiff is therefore entitled to judgment against them. *Schwartz* v. *Drinkwater*, 70 Maine, 409; *Ross* v. *Tozier*, 78 Maine, 312.

But the assignee of the insolvent defendant also appeared by leave of court, and pleaded the above adjudication of insolvency, not in bar of the action so much as in dissolution of the attachment of his insolvent assignor's real estate. The question of the effect of the proceedings in insolvency upon the attachment does not, of course, arise in this action, and we must decline to consider it. We have no authority to determine it. The parties or their privies can litigate that question again, whatever opinion we might express here. No judicial opinion should be expressed upon a question of such importance, until the question is regularly presented in such a way that the opinion will be authoritative. *Defendants defaulted.*

ABBIE E. C. WRIGHT *vs.* HARTWELL L. WOODCOCK and others.

Waldo. Opinion December 20, 1893.

Water Companies. Easement. Exclusive Possession. Ice. Trover. Special Laws, 1887, c. 94.

A water company having by authority of its charter taken, as for public uses, land and the water of a stream flowing through it for the purpose of obtaining a sufficient supply of water and for the construction of reservoirs, is

entitled to the exclusive possession of such land and to the enjoyment of such riparian rights as appertain to the land.

The original owner cannot maintain an action against any person for taking ice from the stream flowing through such land, as such taking is no injury to the reversion.

ON REPORT.

This was an action of trover for the conversion of a quantity of ice.

The defendants admitted the taking and conversion but justify under a contract with the Belfast Water Company.

The Water Company, by authority granted by its charter, took and flowed lands of the plaintiff lying upon Little River in Northport for the purpose of obtaining a water supply for the city of Belfast. The ice in controversy was taken from the waters of the pond so flowed which covered the plaintiff's land so taken and flowed, and the right to take the ice in question was sold, at an agreed price per ton, by the Water Company to the defendants by whom it was harvested and sold.

The question to be determined was whether the ice when it was formed belonged to the plaintiff or to the Water Company.

Wm. H. Fogler, and Wm. P. Thompson, for plaintiff.

John C. Coombs, Joseph Williamson and *W. M. Payson*, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. The Belfast Water Company was incorporated by ch. 94 of Special Acts of 1887, "for the purpose of furnishing to the people of Belfast a supply of pure water for domestic, mechanical and manufacturing purposes, and to the city of Belfast, water for the extinguishment of fires and other public uses." To effect these purposes, the company was authorized by its charter to "take as for public uses any real estate or easement therein, including the water of any ponds, streams, springs, or artesian wells, necessary for obtaining a sufficient supply of water, for the construction of reservoirs, and the laying of pipes," &c. It was also authorized to "erect and maintain all necessary

dams, reservoirs, stand-pipes and hydrants." Under this charter the company took from various owners, in the manner provided in the charter, and for the purposes therein named, a strip of land on each side of a stream called Little River in Northport. The land taken extended from near the mouth of the stream up both sides of the stream some two thousand feet, more or less, and included upland on each side of the stream, and the flats and the land under the stream. The company also in the same way condemned "the water of the stream."

A section of this strip of land was taken from the plaintiff out of a larger parcel of land belonging to her. The section taken from her was about one hundred feet wide including upland, the flats and the land under the stream to the middle line of the stream. The tides of the sea flowed at highwater up this stream past the plaintiff's land, but ebbed entirely out at low water leaving only the fresh water stream. The plaintiff sought for, and obtained payment of her damages for this taking of her land.

The company afterward built a dam across the stream below the land taken from the plaintiff, by which dam an artificial pond of fresh water was formed, and the inflow of the salt water was prevented. From this pond, the water was pumped into the company's pipes to supply the people and the city. Ice was cut and removed by persons in the employ of the company, from that part of the artificial pond over the strip of land taken from the plaintiff. For this removal of ice, this action of trover was begun by the plaintiff, and is brought to the law court on report.

The plaintiff, before the condemnation of her land, had no property in the water of the stream either in its liquid or frozen state. Her rights in either kind of water were simply those of an ordinary riparian owner, to take of the water, as it flowed past or rested upon her land, such limited quantity as would not appreciably diminish the flow or supply to the riparian owners below. In the absence of modifying deeds or contracts, this riparian right is annexed to the possession of the land, and belongs to and may be exercised by the tenant in possession, however small his estate, even if he be tenant at will only. It is evident, there-

fore, that if the company after condemnation, became the tenant in possession of this strip, and had the right of exclusive possession, then this action cannot be maintained, as there was no injury to the reversionary interest. We think the company did become at least a tenant in possession and has the right of exclusive possession so long as it occupies the strip for the purposes for which the land and water were taken.

The plaintiff urges that her remaining rights in the land and water are equal and similar to those of a riparian owner whose land is flowed under the Mill Act and she confidently cites *Stevens* v. *Kelley*, 78 Maine, 445. There is, however, a manifest difference between the two cases and the two situations. Under the Mill Act, the mill owner is not authorized to take land, nor does he assume to take land. He is merely authorized to flow the land, and that is all he assumes to do. The land owner retains his possession, and with it all his riparian rights, except the right to have the water flow from his land as freely as it naturally would. The flowing of his land puts no other restraint upon his use of the water.

The plaintiff again likens her right to that of a land owner, over whose land a highway has been laid out. She cites many cases illustrative of that right. Here again the difference is plainly seen. When a road is located, the land is not "taken" in the technical sense of that term. No authority is given any person or corporation to "take" land for a highway. The highway is located or "laid out" over the land directly by public authority. Such laying out is simply imposing a public easement upon the land. The public acquire only the right of passage, with the incidental right of facilitating that passage by constructing and keeping in repair a road within the lines of the location. The exercise of this right by the public does not ordinarily require the continual and exclusive occupation of the entire width of the location, hence the land owner retains such rights of possession, as the public does not need.

The Belfast Water Company is required by its charter to furnish the city and people of Belfast with an abundant supply of pure water, at all seasons. It must care for the quality, as well

as the quantity of water to be supplied. It must, therefore, provide large reservoirs for the storage of water, and must guard the water in them against all danger of contamination. It has made a reservoir of large extent by taking land for a long distance under and on both sides of Little River and by building a dam near its mouth. This reservoir it must maintain, control and guard at all times, so as to preserve the quantity and purity of the water. To do this, requires in the company the right of exclusive possession of all the land under and about the pond, or reservoir, — of all the land taken. It must have the right to keep every person away from the water and the reservoir. *City of Reading* v. *Davis*, 153 Pa. St. 360, (26 Atl. Rep. 62.) The riparian rights which the plaintiff insists that she retains are the very rights the company most needs to effectuate the purposes of its charter. They are the rights which the company sought for in selecting the land taken. It is to be presumed that the value of these attendant riparian rights was considered in the appraisal of the damages and was included in the award. *Ham* v. *Salem*, 100 Mass. 350. By its condemnation of this land, the company has paid for and obtained not the fee perhaps, but certainly something more than a mere easement in the land. It has acquired the right of exclusive occupation and with this all the attendant riparian rights for such time as it holds the land under its charter.

The rights of a water company in land taken for the purposes of its charter are analogous to those of a railroad company in land taken for its railroad. The rights of the latter to the exclusive possession of such land are satisfactorily expounded in *Hayden* v. *Skillings*, 78 Maine, 413; *Lander* v. *Bath*, 85 Maine, 141; and in *Pierce* v. *B. & L. R. R.* 141 Mass. 481. These cases will shed light upon the question which has been considered here.

It follows that the plaintiff cannot maintain this action.

Plaintiff nonsuit.

DAVID W. MANSFIELD, and another,

vs.

MARTHA E. MCGINNISS.

Waldo. Opinion December 20, 1893.

Co-tenants. Disseizin. R. S., c. 95, § 5.

An occupation of the common land by one co-tenant openly, notoriously, continuously and exclusively for more than twenty years is not of itself even *prima facie* evidence that the occupation is adverse to the other co-tenants.

For such an occupation to work a disseizin of the other co-tenants they must have been actually ousted or excluded.

ON MOTION.

This was an action on the case in the nature of waste under R. S., c. 95, § 5, to recover three times the damage alleged to have been done by the defendant in cutting wood and lumber on a certain four acre lot described in the plaintiff's declaration. The plaintiffs claimed that they and the defendant are tenants in common of the premises.

The defendant pleaded the general issue and set up title by disseizin in a brief statement of further defense.

The jury returned a verdict for the defendant, and the plaintiffs moved to set it aside because it was against the weight of evidence and against the law.

Other facts are stated in the opinion.

Jos. Williamson and Son, for plaintiffs.

Wm. P. Thompson, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

EMERY, J. This is a statute action (R. S., ch. 95, sec. 5) by one tenant in common of an undivided tract of land, against a co-tenant for cutting trees upon the land, without giving previous notice. The defendant claims to have disseized the plaintiff and thus to have acquired a title to the whole tract by an adverse possession for more than twenty years.

There is a manifest difference in character between the

possession of a stranger and that of a co-tenant. A stranger has no right of possession. His occupation, therefore, would be in itself some evidence of an adverse claim, at least in the absence of any evidence of license. A land owner seeing indications of occupation by a stranger, would be on his guard against the nature of the stranger's claim. A co-tenant on the other hand, has full right of possession of the whole undivided land. His occupation therefore would not be the slightest evidence of any adverse claim. It would be presumed to be in accordance with his right as part owner. A tenant in common seeing indications of occupation by a co-tenant, would have no reason to apprehend a denial of his own equal right.

As between co-tenants, evidence of long-continued, visible, uninterrupted and even exclusive occupation by one co-tenant, is not enough to bar the rights of the other co-tenants. There must be evidence from which an ouster, a putting out and a keeping out, of the other co-tenants, can be inferred.

This was a small tract of land only about four acres in extent. It was unequally divided by a small stream of water, leaving about three quarters of an acre on the east side, and three acres or more on the west side. Neither parcel had been enclosed by fences. The defendant and her predecessors in title had paid the taxes on the whole lot. They had cleared the east side parcel, and taken the grass annually for their own use. The west side parcel, the larger parcel, was covered with a growth of wood and small timber. On this west side, the defendant and her predecessors had cut wood and hoop-poles in small quantities from time to time. They had also occasionally cut small timber and at one time some pump sticks. They did not cut any large quantity at any one time, until the occasion of bringing this suit. This parcel does not appear to adjoin the homestead of the defendant nor to be a part of her farm.

Whatever may be the case as to land on the east side of the stream, the defendant clearly has not shown by the above evidence an ouster of the plaintiff from the west side, where the cutting complained of was done. *Thornton* v. *York Bank*, 45 Maine, 158; *Hudson* v. *Coe*, 79 Maine, 93, 94.

Motion sustained. New trial granted.

JOHN C. SMALL, and others, EXECUTORS, in equity,

vs.

HARRIET C. JOSE, and others.

Cumberland. Opinion December 20, 1893.

Life Insurance. Beneficiaries. Widow. Grandchildren. Will.

In 1870 the insured took out a policy of life insurance payable to his legal representatives, "for the benefit of his widow, if any, and his then surviving children in equal shares to each." At his death in 1892, he left a widow, by a second marriage, one daughter, and a grand-daughter, the child of another deceased daughter. *Held;* that the widow and surviving daughter took one half each of the policy; and that the grand-daughter was not a beneficiary within the meaning of the policy.

A policy of life insurance payable to the legal representatives of the insured, "for the express benefit" of his wife and two daughters, is presumed to go to the three beneficiaries in equal parts to each; and their rights as such become vested and transmissible upon the issuance of the policy.

At the time of the death of the insured, the only surviving beneficiary was a daughter, who was also sole legatee under the will of the mother. *Held*; that the daughter took one third in her own right, and one third also as legatee; that the remaining third belongs to the heir of the other deceased daughter.

The statutes of this State make special provisions for the distribution of money derived from life insurance. To change such distribution by will, the testator must make specific expression of such intention. *Held;* that these statutes do not affect insurance vested in, or derived by the testator, as a beneficiary under a policy upon the life of a third person. Such rights will pass by will without special designation.

Hathaway v. *Sherman*, 61 Maine, 466, distinguished.

ON REPORT.

This was a bill in equity, in the nature of a bill of interpleader, brought by the executors of the will of the late Horatio N. Jose, of Portland, to determine the construction of two policies of insurance in force upon the life of Mr. Jose, at the time of his death, and the legal rights of the opposing claimants to the insurance moneys received by the executors. The case was reported to the law court, and heard on bill and several answers.

The facts were not in dispute, and are stated in the opinion.

Edward M. Rand, for Harriet C. Jose, widow, and Helen J. Pierce, daughter.

Symonds, Snow and Cook, for Gwendolyn Cummings, and her guardian, Lincoln C. Cummings.

The word, "children," is equivalent to issue, and may include children and grandchildren, alike, even in deeds and wills. *Bray* v. *Pullen*, 84 Maine, 188; *Stetson* v. *Eastman*, *Id.* 366, 376; *Osgood* v. *Lovering*, 33 Maine, 464. Policies of life insurance for the benefit of a man's family should be so construed. *Robinson* v. *Duvall*, (Ky. 1881,) cited in 12 L. & E. Rep. 466; *Martin* v. *Ætna L. Ins. Co.* 73 Maine, 25; *Conn. M. L. Ins. Co.* v. *Fish*, 59 N. H. 126; *Continental L. Ins. Co.* v. *Palmer*, 42 Conn. 60. The phrase, "then surviving children," should be construed as referring to branches of the family, and not to individuals. *Cooper* v. *McDonald*, L. R. 16 Eq. 258; *Waite* v. *Littlewood*, L. R., 8 Chan. App. 70; *Church* v. *Tyacke*, 12 Ch. Div. 205.

The will of Nancy B. Jose, not sufficiently explicit to effect a bequest to her daughter, Mrs. Peirce, of the amount to be realized from the second policy. *Hathaway* v. *Sherman*, 61 Maine, 466; *Blouin* v. *Phaneuf*, 81 Maine, 176; *Hamilton* v. *McQuillan*, 82 Maine, 204. Beneficiaries named in the policy take a vested interest. *Pingrey* v. *Nat. L. Ins. Co.* 144 Mass. 381, and cases cited; *Hull* v. *Hull*, 62 How. Pr. 100.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

EMERY, J. The complainants as executors of the will of Horatio N. Jose, deceased, have received the amount of two life insurance policies, issued to Mr. Jose, and they now ask how they shall divide the amounts among the beneficiaries named in the policies.

I. In the policy issued by the New England Mutual Life Insurance Company, for $10,000, the insurance was expressed to be payable to his executors, "for the benefit of his widow, if any, and his then surviving children, in equal shares to each." At the date of the policy Mr. Jose had a wife, (Nancy) and two children only, Helen and Jessica. The wife, Nancy, died

and Mr. Jose married the respondent, Harriet, as his second wife. The daughter, Jessica, died before her father, and left one child, the respondent, Gwendolyn. At the death of Mr. Jose, therefore, he left a widow, Harriet, one surviving child, Helen, and one grand-daughter, Gwendolyn, by his prior deceased child, Jessica.

Reading the words of the policy in their ordinary sense, the insurance was for the benefit of his widow, Harriet, who survived him, and his daughter, Helen, the only child of his, surviving him, in equal shares to each. The right of the widow, Harriet, to some share is not seriously contested, but it is vigorously urged, that the grand-daughter, Gwendolyn, is entitled to one third, in the right of her mother, Jessica, the prior deceased daughter of Mr. Jose. It is argued that the word, "children," may be equivalent to "issue," and include grand-children, and still later descendants.

There are cases, where the other words of the instrument, and the circumstances of the party executing it, make it apparent that he meant by the word, "children," to include grand-children. In such cases, where the meaning is thus made clear, the courts have recognized it. Grand-children, however, will not be considered as included in the term children, unless such intention is clearly expressed. *Osgood* v. *Lovering*, 33 Maine, 469. In this case there are no such words or circumstances. On the contrary, the significant words, "then surviving," were placed immediately before the word, "children." If the intent was to include the grand-children by a deceased child, then the prefixed words were superfluous. The words quoted from the policy, plainly refer to the direct offspring and not to grand-children, or later descendants.

As to this policy, the only beneficiaries at Mr. Jose's death were the widow, Harriet, and his only surviving child, Helen.

Each of these is entitled to receive one half of the $10,000, received from the New England Mutual Life Insurance Company.

II. In the policy issued by the Massachusetts Mutual Life Insurance Company, for $400, the insurance was expressed to be payable to Mr. Jose's executors after his death, and was

expressed to be, "for the express benefit of Nancy B., Helen M. and Jessica H., wife and children of the said Horatio N. Jose." At the date of the policy, Mr. Jose had a wife, Nancy B., and two children, Helen M. and Jessica H., the three persons named in the policy. His wife, Nancy B., and his daughter, Jessica H. died before him, so that at the time of his own death the only surviving person named as beneficiary in the policy was Helen M.

The executors make no claim that the death of Nancy B., the wife, and of Jessica, the daughter, before the death of Mr. Jose, operated to turn their shares into his estate, to be disposed of under his will. Helen M., the survivor, now claims, (1st) the whole sum, as the only surviving beneficiary, on the ground of her survivorship; (2d) (if her first claim is overruled,) one third in her own right, and another third, (her mother's share,) as the sole legatee under her mother's will, duly probated. The husband and daughter, (the one as legatee, and the other as heir,) of Jessica, deceased, claim one third as Jessica's share, and also one half of Nancy B., the mother's share, on the ground that her share was not capable of being devised but fell to the shares of the other two beneficiaries upon her death.

The presumption naturally is, that the original beneficiaries were to take equal shares, one third to each. This presumption is not disputed by any of the parties. There is nothing in the language of the policy indicating any intention that the surviving beneficiaries should succeed to the shares of the deceased beneficiaries. The executors make no claim that the shares of those deceased before Mr. Jose lapse to his estate. Where then do they go?

If Mr. Jose had placed $400, or securites for that amount, in the hands of trustees, for the benefit of his wife and two children, to be turned over to them, or to his executors, for them upon his decease, the right of each beneficiary therein would at once become a vested right, capable of transmission, at least, in equity, and so firmly vested that even Mr. Jose could not have taken it from them. *KeKewich* v. *Manning*, 1 De G., M. & G., 179; *Stone* v. *Hackett*, 12 Gray, 227.

What Mr. Jose did do, was to contract with the life insurance company, to pay over that sum to his executors upon his death, for the benefit of his wife and children. He only varied the mode of providing a fund for the beneficiaries. Their right to the fund as vested, will be recognized in equity, as readily in the actual case, as in the supposed case. *National Life Insurance Company* v. *Haley*, 78 Maine, 268.

A few cases will sufficiently illustrate the principle. In *Life Insurance Company* v. *Baldwin*, 15 R. I., 106, one Fifield procured an insurance upon his life, payable to his executors for the benefit of his wife and children. The wife joined in an assignment of the policy, and died before her husband. *Held*, that her right vested on the issuance of the policy, and passed by her assignment to her assignee. In *Harley* v. *Heist*, 86 Ind. 196, (44 Am. Rep. 285,) one Snyder insured his life for the benefit of his wife. She died before her husband, without disposing of her right under the policy. *Held*, that the administrator upon the wife's estate, was entitled to the insurance money. The opinion of the Indiana Court considers at length, with many citations of authorities, the transmissibility of such a right. See also, *Hooker* v. *Sugg*, 11 Am. St. Rep. 717, and notes. Bliss on Life Insurance, § 318.

We think it clear, both upon principle and authority, that the right of each beneficiary in this case became vested and transmissible upon the issuance of the policy.

The counsel for Gwendolyn, the daughter of Jessica, further contends, however, that the share of Nancy B. did not pass by her will to Helen M. because not specifically named therein. The language in the will is "all the estate, real, personal and mixed." The testatrix evidently meant all kinds of rights that were transmissible. The cases in which a special designation has been held necessary to dispose of life insurance money by will are those of wills by the assured himself. In such cases the statute makes special provision for the distribution of such money and if the assured wishes by will to change such disposition, it has been held he should make specific expression of such intention. *Hathaway* v. *Sherman*, 61 Maine, 466. The will we are con-

sidering here, is not that of the assured, Horatio N. Jose, but that of Nancy B. Jose, the beneficiary. No such statute affects her will. Her right under this policy passed by her will to her daughter Helen.

The result is that Helen M. is entitled to two thirds and Gwendolyn is entitled to one third of the four hundred dollars received from the Massachusetts Mutual Life Insurance Company.

No order is made about costs. The executors can charge theirs to the estate of Mr. Jose and be allowed the same in their accounts.

Case remanded for decree in accordance with this opinion.

JOHN J. RYAN *vs.* CITY OF LEWISTON.

Androscoggin. Opinion December 20, 1893.

Office. City Council of Lewiston. Fire Department. Spec. Act, 1891, c. 51.

Membership in the city council of the city of Lewiston is not a statute cause for the removal of a permanent assistant engineer in the Lewiston fire department by the board of fire commissioners.

Such membership is not incompatible with the office of permanent assistant engineer.

ON EXCEPTIONS.

The case is stated in the opinion.

Frank L. Noble, for plaintiff.

F. A. Morey, city solicitor, for defendants.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. This is an action of assumpsit in which the plaintiff seeks to recover his salary as assistant engineer of Lewiston subsequent to June 9, 1892.

The plaintiff was legally appointed permanent assistant engineer in the Lewiston Fire Department by the Board of Fire Commissioners of said city, December 12, 1891. He was elected a member of the City Council of Lewiston at the municipal

election in the spring of 1892. While he was such member of the City Council, the Board of Fire Commissioners undertook to remove him from his office of assistant engineer, June 9, 1892. No cause for such attempted removal is stated, but inferentially it was the supposed incompatibility of the two offices. The question presented is, whether the plaintiff lost his office of permanent assistant engineer, on or before June 9, 1892.

I. The statute under which the Fire Commissioners assumed to act (special acts of 1891, chap. 51) forbade the removal of the permanent assistant engineer "unless for inefficiency or other causes detrimental to the [fire] department." It is not stated in the case how the plaintiff's membership of the City Council made him inefficient as an engineer, nor how it was detrimental to the fire department. There is nothing in the nature of the offices to indicate such a result as probable. We do not see how it would ensue. We must, therefore, hold that the mere fact of the plaintiff's membership in the City Council does not constitute a statute cause for his removal from the office of assistant engineer, and hence that the attempted removal was ineffectual. The power of the court to determine the sufficiency of alleged causes for removal from office is well settled. *Andrews* v. *King*, 77 Maine, 239, and cases there cited.

II. It is urged that by accepting the office of councilman, the plaintiff vacated the office of assistant engineer, the two offices being incompatible. No statute is cited declaring them to be incompatible. The defendant, however, cites the following city ordinance of Lewiston, Chap. 26, § 1.

"No person, while a member of the City Council of Lewiston, shall be eligible to or allowed to hold any salaried office under the City Council, or either board of said Council."

Waiving the question whether the City Council has the power to effectually ordain who shall be eligible, or ineligible to any city office, it is not at all clear that the assistant engineer holds that office under the City Council. The Council did not create the office; nor did it appoint him to the office; nor can it remove him from the office. These powers are vested in the Fire Commissioners. The City Council can fix the salary upon the

recommendation of the Fire Commissioners but can do nothing more. The legislature fixes the salaries of all the State officers, but very few of them hold their office under the legislature.

The presiding justice ruled that the plaintiff had neither vacated, nor been removed from his office of assistant engineer. This ruling was obviously correct.

Exceptions overruled.

LIME ROCK RAILROAD COMPANY *vs.* LUCY C. FARNSWORTH.

Knox. Opinion December 20, 1893.

Railroads. Location. Land. Description. Damages. R. S., c. 1, § 6, cl. X; c. 51, §§ 14, 19.

A railroad company in taking by statute authority a strip of land for the location, construction, repair and convenient use of its road, thereby takes all the marble or limerock upon or under the surface of such strip.

If such marble or limerock is owned separately from the ownership of the rest of the land, the railroad company can maintain a petition for the assessment of the damages that the owner of the marble or limerock has sustained from such taking.

Of the description of the property so taken.

AGREED STATEMENT.

This was an appeal by the defendant from an award of damages made by the County Commissioners upon the petition of the Lime Rock Railroad Company who had taken her property within its location. In the court below the parties stated their case as follows:—

"The petitioners, the Lime Rock Railroad Company, in their petition set forth that said railroad, as located by its several locations, aforesaid, includes within its location the following described real estate situate in said Rockland, viz:—a strip of land four rods wide, being two rods on either side of and parallel with the centre line of the Lime Rock Railroad, on the Engine Quarry Branch, so called, and running from land of the Cobb Lime Co., formerly of Susan Singhi, on the Northeast to land of Cobb Lime Co., formerly of John H. Adams on the Southwest; that said land is necessary for the purposes and uses of said Lime Rock Railroad and said Lime Rock Railroad Company

have taken the same for the location, construction, repair and convenient use of its road as for public uses, and all the materials in and upon it in accordance with the provisions of its charter and the statutes of this State in such cases made and provided; that when said location was filed and approved, the limerock and minerals in the above-described land was owned by Lucy C. Farnsworth of Rockland; that the Lime Rock Railroad Company have settled with the owners of the soil for the damage occasioned by crossing said land as aforesaid, and prays that the county commissioners will estimate and assess the damage to which the above-named Lucy C. Farnsworth is entitled by reason of the taking by your petitioner, of said real estate to be paid to the said Lucy C. Farnsworth by your petitioner."

"It is admitted that the Lime Rock Railroad Company is legally authorized and empowered to take and hold land for the purposes above mentioned; that its lines of railroad are legally located, accepted and recorded.

"It is admitted that Philip Ulmer in 1813 conveyed to Andrew Ulmer, 'all the marble or limerock' which is within the lot of land, over which the road is located, — this conveyance being separate and distinct from that of the soil; that the title of Andrew Ulmer, under this deed, through several mesne conveyances, was, at the time of the taking by the railroad company, in Lucy C. Farnsworth; also that the title to the soil has come down from Philip Ulmer, through various channels, until it reached the owner at the time of the taking by the railroad company, with which owners the railroad company has settled for the damages caused by such taking.

"It is admitted that no marble or limerock, within the location aforesaid, was actually taken or used for the construction of the railroad and that it is not known that there is any marble or limerock within the land taken for such location, — there being none on the surface of the earth, though valuable quarries have been opened in the immediate vicinity of said location.

"At the time of the hearing on said petition, before the county commissioners, Lucy C. Farnsworth filed with them a motion to dismiss the proceedings for the following alleged reasons:—

"1st. Because said petition does not allege or set forth that any land or lands of Lucy C. Farnsworth have been taken or used by said railroad company.

"2nd. Because the petition aforesaid alleges that the land for the right of way described in said petition has been purchased or settled for by said railroad company.

"3d. Because the statute confers no right or authority on railroad corporations to appropriate or take limerock or other minerals separate from lands or soil; nor does it confer upon boards of county commissioners jurisdiction to assess damages therefor.

"4th. Because said petition does not set forth that any of the limerock and minerals therein mentioned has in fact been taken or appropriated by said railroad company."

"If upon the foregoing statement of facts, the petition for assessment of damages aforesaid can be sustained, and damages legally assessed, the petition and appeal is to stand for trial, otherwise the petition is to be dismissed with costs for the appellant."

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

Mortland and Johnson, for defendant.

There is no statute authorizing the taking of minerals alone for public purposes; neither can they be lawfully incumbered except in connection with the taking of land. Mills, Em. Domain, 52; *Blake* v. *Rich*, 34 N. H. 282; *Woodruff* v. *Neal*, 28 Conn. 165; *Barclay* v. *Howell*, 6 Pet. 498. Can be acquired only by purchase. 1 Redf. Rys. 265. Where it is necessary to excavate, the authorities may remove, but not use such materials. *Smith* v. *Rome*, 19 Geo. 89; *Adams* v. *Emerson*, 6 Pick. 56; *Overman* v. *May*, 35 Iowa, 89, and cases *supra*. There has been no taking of limerock — none used in construction. Railroads cannot take as for public uses, limerock, or other minerals, that are owned separately and distinctly from the soil. Statute to be construed strictly. Company has already acquired all the rights possible under the statute. Taking must be in a physical

sense, Sedg. Stat. Law, 454-5, not by separate proceeding. *Eaton* v. *R. R.* 51 N. H. 504.

The location and maintenance of this railroad over a deposit of a valuable vein of limerock would injure the owner exceedingly, and the damages, if any could be awarded, would be great. If on the other hand, no limerock in fact was there, or if any, that of a poor quality, then the damages, if any, would be nominal. But how would the board of county commissioners ascertain the facts necessary to enable them to make a just, or any estimation of the damages, if any? Shall they be required to dig down into the bowels of the earth and ascertain if there be any such deposit there, and ascertain the quantity and quality of such limerock? or will they, in "stating the rights and obligations" of the railroad company, require the company to so ascertain? The damages are remote and depend upon contingencies. They cannot be assessed in this proceeding. Sedg. Stat. Law, 455; *Eaton* v. *R. R. supra.* There is no sufficient description of the marble or limerock. *Hamor* v. *Water Co.* 78 Maine, 134, and cases.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. There is a tract of land in Rockland with a divided ownership. Lucy C. Farnsworth owns "all the marble or lime rock" within the tract. A third party, whose name is not stated, owns all the rest of the tract. The Lime Rock Railroad Company "for the location, construction, repair and convenient use of its road" has assumed to take and hold as for public uses out of this tract, a strip of "land and all materials in and upon it," in accordance with R. S., c. 51, § 14. The railroad company, so far, has not actually taken or used any marble or limerock out of the land, and it is not known that there is any such material within the land.

The railroad company has settled with the third party for all damages caused him by such taking, and now, according to R. S., c. 51, § 19, has filed its petition for the ascertainment of the damages caused Mrs. Farnsworth by the same taking. Mrs.

Farnsworth has moved for the dismissal of the petition. She contends that the court cannot take cognizance of the petition for reasons substantially as follows: 1st, that the railroad company has not assumed to take as for public uses, or in any way to appropriate, her "marble or limerock," nor indeed to take any of her interest in any land. 2d, that the statute does not authorize the taking of marble or limerock for railroad purposes.

The railroad company was by statute authorized to take the particular strip of land it assumed to take, no matter who owned it, nor how minutely its ownership was subdivided. The statute (R. S., c. 51, § 14) does not mention estates, titles or interests in real estate, as subjects for condemnation. It speaks solely of "land and all materials in and upon it." It means not personal interests in lands, but the land itself, the *res*. The process of taking the land in the first instance is not against persons having estates or interests in the land. They are not summoned to show cause against the taking. There is no occasion for the company to consider the ownership, or divisions of ownership, until the beginning of the subsequent proceedings for the estimation and payment of damages. Up to this point the railroad company has to deal with the land only.

The term "land" in this statute evidently has its comprehensive common law signification, including "not only the face of the earth but everything under it or over it," (2 Bl. Com. 18,) at least so far as necessary for the location, construction, repair, and convenient use of the railroad. R. S., c. 1, § 6, cl. X; *State* v. *Railroad Commissioners*, 56 Conn. 308 (15 Atl. Rep. 756); *Jefferson Gas Co.* v. *Davis*, 147 Pa. St. 130 (23 Atl. Rep. 218). It follows that Mrs. Farnsworth's interest in this land, her "marble or lime rock" therein, if any, was lawfully taken by the company as for public uses, when it took the land itself.

The company was bound to make just compensation to all the different owners, as soon as it had taken the land under its statute authority. It did not need to delay this compensation until it had entered upon or made some use of the land, or of

the materials in and upon it. The petition in this case was not prematurely filed. The company has the right to procure an early adjudication of Mrs. Farnsworth's damages, if any, even before entering upon the land.

The uncertainty of the existence of any marble or limerock in the land does not bar the petition. There is a possibility of their existence, and hence a possibility that Mrs. Farnsworth has suffered some damage by the taking the land. This possibility the company is entitled to guard against by making seasonable compensation to her.

It is urged that there can be no just estimate of damages under this petition, for the reason that it is physically impossible to determine the existence, or quantity, or quality of any marble or limerock under the surface of this land. Our remarks upon the elements of the damage, or the mode of assessing them, will be mere *dicta*, as those questions do not arise at present, but we have been shown no reason why the rules and principles applicable in other cases of assessing damages for taking land, are not applicable in this case. If Mrs. Farnsworth's interest in the land had no market value just before the taking, she has not suffered any legal damage. If her interest then had a market value, how much was it reduced by the company's action would seem to be the question. The existence and the depreciation of the market value can be determined in this case by the same kind of evidence as in other cases. This was the mode followed in Pennsylvania in cases similar to this. *Reading Co.* v. *Balthaser*, 119 Pa. St. 472 (13 Atl. Rep. 294); *Penn. Gas Co.* v. *Versailles Fuel Co.* 131 Pa. St. 522 (19 Atl. Rep. 933).

An objection is urged against the form of the petition that it does not state in terms that some "land" of Mrs. Farnsworth had been taken. The petition describes the land taken, and then describes Mrs. Farnsworth's interest in the land. This is sufficient.

Motion to dismiss denied. Petition sustained and case remanded for trial.

HENRY MERRILL, EXECUTOR, in equity,

vs.

MATILDA HAYDEN, and others.

Somerset. Opinion December 20, 1893.

Will. Lapsed Legacy. Life-Estate. Costs. R. S., c. 74, § 9; c. 77, § 6, cl. 7; Spec. Acts, c. 446, 1872; c. 448, 1889.

A child, or its issue, takes no share of the testator's estate when it appears that the omission of a devise in the will was intentional, or was not occasioned by mistake.

A testator by will gave all his property to one of his two daughters, without naming the other, to hold during her life, the income thereof and so much of the principal as she might need to be spent by her; and the residue to the Maine Free Baptist Home Missionary Society which before the testator's death was dissolved by act of the Legislature and all its property transferred to another Association created for different purposes.

Held; 1. That upon the admissible evidence the omission of a devise to one of the daughters was intentional.

2. That by the extinction of the Maine Free Baptist Home Missionary Society in the life-time of the testator, the legacy to that society lapsed; that the other Association created for other purposes took nothing under the will; and that the residue of the estate not having been otherwise disposed of by the will descended to his heirs as undevised estate.

3. That the gift to the daughter did not create a trust fund requiring the appointment of a trustee.

4. It appearing, however, that the daughter is of unsound mind, and that a guardian, or trustee, may be required, the executor is not made such guardian, or trustee, by the provisions of the will.

5. Costs allowed the executor, but none to the claimants, there appearing to be no ambiguity, latent or patent, in the will.

ON REPORT.

Bill in equity, heard on bill, answers and testimony, to determine the construction of a will. The case appears in the opinion.

Walton and Walton, for executor.

Merrill and Gowen, for Matilda Hayden.

H. and W. J. Knowlton, for Maine Free Baptist Association.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. The plaintiff, as executor of the will of Nathaniel P. Merrill, deceased, seeks by this bill in equity for an authoritative interpretation of the will, as against conflicting claimants, according to R. S., c. 7, § 6, par. 7. The will is as follows:

"Be it known that I, Nathaniel P. Merrill of Madison, being of sound mind and memory, do make this my last will and testament.

"First: I give, bequeath and devise to my daughter Maria K., all the property of which I shall die possessed, to hold during her life, the income thereof and so much of the principal as she shall need, to be spent by her, and the residue both of the principal and income that shall be left at the decease of said Maria, I give and devise to the Maine Free Baptist Home Missionary Society.

"Second: I nominate and appoint Henry Merrill, my nephew, to be executor of this will.

"Given the 7th day of June, A. D., 1878.

Nathaniel P. Merrill."

The testator died June 13, 1891.

I. The testator's only heirs are two children, Maria K., named legatee in the will, and Matilda, not named at all in the will. Matilda claims the same share in the estate, which she would have taken if no will had been made, viz: one half, on the ground that she has no devise to her in the will. She invokes R. S., c. 74, § 9. As to this claim of Matilda, the evidence which was legally admissible (*Whittemore* v. *Russell*, 80 Maine, 297,) satisfies us that the omission of any devise to Matilda was not occasioned by any mistake, but was intentional, and for what seemed to the testator to be good reasons. Her claim, therefore, is not sustained. All the parties have assumed that the court may determine that question in this proceeding.

II. At the date of the will, June 7, 1878, there was in legal life the Maine Free Baptist Home Missionary Society, named in the will, and competent to take the devise therein made to it. It

was incorporated with that name by act of the legislature, February 6, 1872 (c. 446 of Special Acts of 1872), solely "for the purpose of aiding Free Baptist Churches in this State in need of assistance." By a later act of the legislature February 26, 1889 (c. 448 of Special Acts of 1889), there was incorporated another and distinct society, with different purposes, viz: the Maine Free Baptist Association, "for religious, missionary and educational purposes." By this latter act also, the former society was authorized to transfer all its property and rights to the new association to be held and used by said new association for the purposes named in its charter, and above quoted. The act also provided that, upon such transfer, the charter of the former society, the Maine Free Baptist Home Missionary Society, should be null and void. This society did make the transfer named in the act of 1889 to the new association, and thereby consented to its own extinction, and was extinguished.

The new association, the Maine Free Baptist Association, thus incorporated in 1889, eleven years after the date of the will, now claims the legacy bequeathed in the will to the former and extinct society.

The case does not present a question of latent ambiguity; nor any question of identity of legatee; nor any question of the testator's intent. He precisely designated, by its correct legal name, a then existing corporation capable of receiving his proposed bounty. He as precisely expressed his intent to bequeath the residue of his estate to that particular corporation. The claimant association was not in the testator's mind, nor within the purview of his bounty, for it did not exist. It is not the same society as that named in the will, with a new name. It is not even a similar society, either in organization or purpose. We cannot find that the testator intended to make any bequest to the claimant association, the Maine Free Baptist Association, or that he had it in his mind to aid in the purposes for which it was incorporated, or to make it the successor to his bounty in case of the extinction of the legatee he selected.

By the extinction of the Maine Free Baptist Home Missionary Society (the legatee named in the will), in the life-time of the

testator, the legacy to that society lapsed to the estate of the testator, and not having been otherwise disposed of by the will, it descended to his heirs as undevised estate. *Elliot* v. *Fessenden*, 83 Maine, 204.

III. The executor further inquires whether he becomes a trustee from the provisions of the will. We think not.

There is nothing in the will creating a trust fund requiring the care of any trustee. All the property was given directly to Maria to hold for life and to be spent by her, income and principal, so much as she should need. Only the excess at her death over her needs during her life, was to go over to any one. The control was given to her. There is no suggestion of any guardian or testamentary trustee. Under the provisions of the will, therefore, the executor after settling the accounts would turn the estate over to her. *Warren* v. *Webb*, 68 Maine, 133; *Starr* v. *McEwan*, 69 Maine, 334; *Copeland* v. *Barron*, 72 Maine, 206; *Fox* v. *Senter*, 83 Maine, 295.

It appears, however, that Maria is in fact of unsound mind, and incapable of managing the estate. This difficulty may require the appointment of a guardian, or a trustee, to manage the estate, and care for the interests of Maria, as well of the interests of Matilda, who will inherit after Maria's death; but the executor is not made such guardian, or trustee, by the provisions of the will.

It is proper that the executor should be reimbursed out of the estate his expenses in this proceeding, but there is no ambiguity in the will, either patent or latent, and we think the unsuccessful claimants should bear their own costs.

Case remanded for a decree in accordance with this opinion.

BENJAMIN F. HAMILTON, and another,

vs.

LIVING L. HILL, and ALBERT W. COLE, Trustee.

York. Opinion December 20, 1893.

Trustee Process. Disclosure. R. S., c. 86, § 30.

The court adheres to the rule that when a trustee disclosure is not contradicted by other evidence and appears to be full and true, it is to be deemed to be true in deciding how far he is chargeable.

ON REPORT.

The case is stated in the opinion.

Hamilton and Cleaves, for plaintiffs.

H. H. Burbank, for trustee.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. The party summoned as trustee of the defendant, has made his disclosure, and has been examined by the plaintiff. The answers and statements of the trustee thus made and sworn to, are to be deemed true, in deciding how far he is chargeable, until the contrary is proved. R. S., c. 86, § 30. In this case the answers and statements assert positively nothing to be due from the trustee to the defendant. An account in detail is stated, showing a small balance in favor of the defendant. This account shows fair upon its face, and is declared in the disclosure to be full and true in every item.

The plaintiffs argue vigorously that the account is improbable, or at least suspicious, and that it is only partially supported by written vouchers. He particularly assails two items of payment to the defendant, which the trustee asserts he made, but for which he produces no book entry nor voucher. The plaintiff, however, adduces no evidence to contradict the trustee's positive assertion of payment in full of all his indebtedness to the defendant. In the absence of such evidence we must take the trustee's answers and statements to be true, they not being impossible, nor intrinsically improbable.

Trustee discharged with costs.

DAVID A. BUNKER *vs.* CHARLES B. PINEO.

Hancock. Opinion December 20, 1893.

Lease. Covenant. Way.

A covenant in a lease of land, "to provide the said lessee with a suitable right of way to get to and from said lot," is not a covenant of warranty, or guaranty; and it is not performed by showing that a right of way by necessity already existed. It is a covenant to do something, and is broken by the covenantor's inaction.

ON MOTION AND EXCEPTIONS.

This was an action for the breach of a covenant in a lease made by the defendant to the plaintiff, and in which the jury returned a verdict of $477.63 for the plaintiff.

Deasy and Higgins, for plaintiff.
J. A. Peters, Jr., for defendant.

SITTING: WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. The defendant in writing leased to the plaintiff a small lot of land in the village of Bar Harbor, bounded on the north side by the sea, and on each of the other three sides by lands of other parties. The only right of way, if any, between the leased lot and any street, was a right by necessity over the land of other parties, to West street, the nearest street. The defendant accordingly covenanted under seal in the lease, in the following words: "And the said lessor hereby agrees to provide the said lessee with a suitable right of way to get to and from said lot."

Soon after the execution and delivery of the lease, and the entry of the plaintiff on the leased lot, the owners of the surrounding and adjoining lands objected to any passing over their lands to or from the leased lot. The plaintiff thereupon called upon the defendant to provide a suitable right of way. The defendant not making any move in the matter, the plaintiff purchased or leased a right of way between the lot and West

street. This action is for the breach of the covenant to provide a right of way.

At the trial, there was much contention whether there was a right of way by necessity appurtenant to the leased lot, and if so, where it was. The presiding justice at the request of the plaintiff admitted evidence tending to show that no such right existed, or if it did, that it was unsuitable for the lot. He also at the request of the plaintiff, instructed the jury that if the right of way by necessity existed, it was not in the place claimed by the defendant. The verdict being for the plaintiff, the defendant excepted to the above rulings.

We think the questions raised by the defendant are not relevant to the real issue. The defendant evidently claims that the covenant is one of warranty,— that by it, the defendant simply guaranteed that a suitable right of way already existed,— that if a suitable right of way by necessity can now be shown to have then existed, the covenant is satisfied. We think the covenant, read in the light of the circumstances, contemplated more than a guaranty to be resorted to only when the plaintiff had been defeated in litigation with the adjoining owners. The situation of the lot was fully known to the parties. Its enclosure by the sea and the lands of others was plainly visible. All the facts were understood. Whether there was a right of way by necessity under those facts, was a question of law, which the parties are presumed to have known and considered. If they agreed that a suitable right of way of that kind already existed, there would be no occasion for any covenant in relation to it. If the defendant asserted such a right to exist, and the plaintiff doubted it, there would have been occasion for covenant of warranty. If they agreed that no suitable right of way already existed, there would have been occasion for a covenant to provide such a right of way.

It is evident from the circumstances and the language of the covenant, that the plaintiff was not content with any existing right of way, nor with the defendant's assertion of the existence of such a right of way,— that he wanted something more than a warranty,— that he wanted a suitable right of way provided,

prepared, created, or at least established. It is equally clear from the same sources, that the defendant undertook to do more than merely warrant existing rights of way,— that he conceded the propriety of the plaintiff's demands, and undertook to satisfy them, and assumed the burden of doing what the plaintiff wanted done. He could have performed his covenant by purchasing such a right of way, — by procuring it to be laid out by the proper authority, or perhaps by causing it to be established as an existing way by judicial decision. He could not perform it, however, by doing nothing, by leaving his lessee and covenantee to assume all the vexation and expense of contention and litigation with adjoining owners. To induce the plaintiff to accept the lease, the defendant conceded that no suitable right of way yet existed, and covenanted to provide one. The lease having been accepted with that covenant, the defendant cannot now be heard to assert that such a right of way already existed in fulfillment of his covenant, at least until he can show an adjudication of the court to that effect. What he then agreed did not exist, he cannot now say did exist.

The plaintiff was not obliged to litigate the question of right of way by necessity. He relied upon the defendant's covenant to provide a suitable right of way. We think the defendant's covenant was broken by his inaction irrespective of any possible right of way by necessity, and hence that he was not prejudiced by any of the rulings excepted to.

There was evidence that to acquire a suitable right of way cost the plaintiff nearly as much as he recovered by the verdict. The defendant though appealed to did nothing to aid the plaintiff. We are not clearly convinced that the damages assessed are excessive.

Exceptions and motion overruled.

INHABITANTS OF CAMBRIDGE, Appellants,
vs.
COUNTY COMMISSIONERS.

Piscataquis. Opinion December 22, 1893.

Way. Appeal. Notice. Stat. 1891, c. 5.

It is not a fatal objection to the validity of an appeal from the action of a joint board of the commissioners of several counties, in refusing the discontinuance of a highway through sections of such counties, that the commissioners of the county where the appeal was filed failed to notify the other commissioners of the fact, although under obligation to do so by chapter five of the laws of 1891; the requirement is directory merely.

AGREED STATEMENT.

Henry Hudson and J. S. Williams, for Cambridge.
J. F. Sprague, for County Commissioners.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

PETERS, C. J. A highway having been laid out through sections of Penobscot, Somerset and Piscataquis counties, a petition for the discontinuance of the same was presented and heard before a joint board of the commissioners of the three counties, and the petition was by them denied. Thereupon, an appeal was taken from their decision to the supreme judicial court, sitting in Piscataquis county, where the proceedings originated, by which court a committee was appointed, which reversed the action of the commissioners.

Acceptance of the report of the committee in favor of reversal is opposed for the alleged reason that the commissioners of Piscataquis county, did not inform the other commissioners of the fact of the appeal before the committee was appointed. All persons and parties had due notice from the committee before any action on their part. And the commissioners of none of the counties have taken any action in regard to the road since the appeal from their action was filed with the commissioners of Piscataquis county.

Chapter five of the laws of 1891, which act governs these proceedings, provides that an appeal of this kind may be filed with the commissioners of the county where the proceedings originated, and adds that, "the commissioners with whom such appeal is filed, shall immediately give notice of such appeal to the commissioners of all the other counties interested." We think this requirement of notice from commissioners to their associate commissioners, need be regarded as directory merely, especially in the circumstances of this case. The omission deprived the other counties of no right whatever, and only possibly prevented their presence in court to be heard on the question as to what persons should be appointed as the committee. No form of notice or manner of serving it is prescribed by the statute. It merely requires the execution of a duty which as certainly existed regardless of the statute. The principle affecting the present case was established in *Newbit* v. *Appleton*, 63 Maine, 491, where it was held that a notice to one overseer was a notice to him and his associates, because it was the duty of the one to communicate the notice to the others. Had the report of the committee in the present case been accepted without opposition, we think the facts would not have been sufficient to disturb the record upon *certiorari*, nor should they be regarded as of importance enough to prevent acceptance. At most, the error or omission is but a harmless irregularity.

Report accepted.

E. WEBSTER FRENCH *vs.* JOHN H. ROBINSON.

Hancock. Opinion December 22, 1893.

Judgment. Foreign Creditor. Attorney. Insolvency. Discharge.

Promissory notes held by a firm residing without this State were assigned to an attorney at law residing within the State for collection in his name for the benefit of the firm, the attorney recovering judgment thereon in his own name.

Held; In an action on the judgment in the attorney's name the defendant's discharge in insolvency is a bar against a recovery against him, although it might

have been otherwise had the judgment been obtained and the action on it instituted in the name of such firm.

ON EXCEPTIONS.

The case is stated in the opinion.

E. S. Clark, for plaintiff.

Counsel cited: *Pullen* v. *Hillman*, 84 Maine, 129, and cases; *Savoye* v. *Marsh*, 10 Met. 594; *Dinsmore* v. *Bradley*, 5 Gray, 487; *Demuth* v. *Cutler*, 50 Maine, p. 300; *Pratt* v. *Dow*, 56 Maine, 81; *Fessenden* v. *Willey*, 2 Allen, 67; *Guernsey* v. *Wood*, 130 Mass. 503; *Illsley* v. *Merriam*, 7 Cush. 242; *Cook* v. *Moffat*, 5 How. 309.

Geo. R. Fuller, for defendant.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. The plaintiff sues upon a judgment, recovered in his own name, against the defendant who since the judgment was recovered against him has been discharged from his debts and liabilities by proceedings in insolvency. The plaintiff claims that he is entitled to recover in this action, notwithstanding the defense of insolvency, because the real ownership of the judgment never was in himself, but was in the firm of Eaton Brothers, who during the period of insolvency proceeding were, and ever since have been, residents and citizens of the Province of New Brunswick. It appears that the original demand which went to judgment was a note of hand given by the defendant to Eaton Brothers and that they assigned the same to the plaintiff for a nominal consideration in order to enable the plaintiff, their attorney, to sue and collect the demand in his name.

Had the judgment been recovered in the name of Eaton Brothers, the defendant's discharge would not be a defense against it or against a suit in their names thereon. But on the facts as before stated we are of opinion that the defense of insolvency is a bar to the present action. The legal creditor is the plaintiff. The equitable owners intrusted the legal title to

him. They were seeking some supposed advantages by that act, and should suffer any disadvantages as well. The insolvency court deals with the legal owners of demands ordinarily. If equitable owners of claims can maintain suits when the legal owners thereof are barred by the defendant's insolvency, difficult questions would be found occurring in the settlement of insolvent estates, which this decision may prevent.

Exceptions overruled.

STATE *vs.* JOHN RILEY.

Androscoggin. Opinion December 23, 1893.

Intox. Liquors. Officer. Arrest. Delay to prosecute. R. S., c. 27, § 39.

An owner of liquors which were seized from him by an officer without a warrant, and kept eight days before a warrant was obtained, without any justification for the delay, cannot be held in criminal proceedings instituted against him personally for having such liquors in his possession for illegal sale; the officer became a trespasser by the delay and the seizure void.

ON EXCEPTIONS.

This was an appeal from the Municipal Court for the City of Lewiston, tried in the court below, where the jury returned a verdict of guilty. The defendant moved an arrest of judgment which was overruled, and he then took exceptions.

Henry W. Oakes, County Attorney, for State.

The statute authorizes officers in such cases, to seize the liquors without a warrant, and keep them in a safe place for a resonable time, until he can procure a warrant. R. S., c. 27, § 39. The courts have said what is ordinarily held to be a reasonable time: "When no sufficient excuse is given for a longer delay, it should not exceed twenty-four hours from the time of seizure." *Weston* v. *Carr*, 71 Maine, 356; *State* v. *Dunphy*, 79 Maine, 104. But it is difficult to see how this provision has anything whatever to do with the trial of this defendant. The statute is evidently intended as a protection to the individual against unnecessary delay by the officer, and unnecessary delay on his part simply subjects him to a suit for damages, and deprives him of the protection which his warrant

would otherwise afford him. *State* v. *McCann*, 61 Maine, 116. "Such direction, as to time is merely directory, and neglect to prosecute speedily, does not exempt the liquors from forfeiture inasmuch as the forfeiture depends upon the breach of the law, and not upon the officer's diligence." *State* v. *Hoxie*, 15 R. I. 251. But this objection comes too late. If open to the defendant, at all, it must be by plea in abatement. It cannot be raised by a motion in arrest of judgment. *State* v. *Carver*, 49 Maine, 588.

Frank L. Noble, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. Liquors were seized by an officer from the possession of the respondent without a warrant, and kept by him eight days without obtaining a warrant therefor, without any pretense of excuse or justification for the delay. The question is whether the respondent can be personally held as an owner of such liquors under proceedings instituted against him at so late a day. We think not. It was decided in *Weston* v. *Carr*, 71 Maine, 356, that an officer who had seized liquors without a warrant, and delayed for more than twenty-four hours to procure a warrant therefor without reasonable excuse for the delay, was liable as a trespasser to the owner of the liquors for their value. The prosecution in the present case contends that the proceedings might be void as against the liquors and valid as against the respondent personally. It would surely be an odd spectacle to see an owner of liquors punished for having such liquors in his possession for an illegal purpose, and the officer also punished for seizing the liquors from him under a pretended form of law. The two things do not seem consistent with each other.

It was early held in *State* v. *Miller*, 48 Maine, 576, that by the procedure of search and seizure prosecutions, two trials are to be had, one against the liquors, and the other against the

person in whose possession the liquors are found. But there is but one process to start with, and that must be a legal process. The foundation for what is first a single and then a duplicate prosecution is that liquors have been legally seized. A seizure proceeding without an actual seizure would be an anomaly. And an illegal seizure is no seizure.

The seizure here had become wrongful before the respondent was arrested, and the officer became a trespasser *ab initio* for making the seizure. There was not at the expiration of the eight days any seizure that authorized an arrest of the respondent. The foundation which had been laid for it was then gone. In this proceeding an owner of liquors cannot be arrested for a past but only for a present offense. The lapse of time might as well have been eight weeks or eight months as eight days.

The prosecution in support of its position, cites *State* v. *Hoxie*, 15 R. I. 251, which maintains that the requirement that the officer shall immediately procure a warrant where he has made a seizure without one is directory merely, and that the owner of the liquors in the proceedings against him obtains no advantage by the officer's neglect of duty. But our policy, as established in *Weston* v. *Carr*, *ante*, is different. That case decides, in effect, that the duty imposed upon the officer in this respect is mandatory. Nothing but the immediate action of the officer relieves the proceeding from the objection of unconstitutionality. The bill of rights in the Constitution of this State declares prohibition against "all unreasonable searches and seizures." Waiting eight days after a seizure is made before process is obtained whereby to justify the seizure is unreasonable.

We do not doubt the principle stated in the Rhode Island case, that a person accused of an offense cannot set up in excuse of his offense that an officer, while arresting him, or holding him under arrest for such offense, did some unjustifiable harm to him or his property. But that principle does not apply in the case before us. The objection here goes to the process itself under which the officer acted in arresting the respondent, and not to his manner of serving any process. The warrant, issued so unseasonably after the seizure that the officer had become a

trespasser *ab initio* for making the seizure, was unauthorized and illegal, if not void.

The other case cited by the prosecution, *State* v. *McCann*, 61 Maine, 116, throws no light upon the question, as the facts are not fully stated by the reporter.

Exceptions sustained.

CLEMENT E. WARD *vs.* JAMES H. BARROWS.

Oxford. Opinion December 23, 1893.

Promissory Notes. Due-Bill. Consideration. Payment.

The defendant gave the plaintiff the following writing, as a minute of the amount of wages due the plaintiff from a company of which the defendant was president: "June 24, 1892, Amount due C. E. Ward to date $28.26. J. H. Barrows." *Held;* that the writing is not a valid due-bill of the defendant, inasmuch as there was no legal consideration for such a promise by the defendant, the plaintiff neither assigning nor acquitting his claim for wages nor taking the paper as a payment thereof.

ON EXCEPTIONS.

The case appears in the opinion.

R. A. Frye, for plaintiff.

Evidence not admissible to show that defendant signed due-bill as agent, or did not intend to bind himself or change his liability. 1 Greenl. Ev. § 275; *Sturdivant* v. *Hull*, 59 Maine, 172; *McClure* v. *Livermore*, 78 Maine, 390; Bigelow on Bills, p. 46; *Bartlett* v. *Hawley*, 120 Mass. 92; *Tucker Mf'g Co.* v. *Fairbanks*, 98 Mass. 101; *Mellen* v. *Moore*, 68 Maine, 390; *Towne* v. *Rice*, 122 Mass. 67; *Davis* v. *England*, 141 Mass. p. 590.

Counsel also cited: *Hussey* v. *Winslow*, 59 Maine, 170; *Carver* v. *Hayes*, 47 Maine, 257; *Fogg* v. *Virgin*, 19 Maine, 352; *Chick* v. *Trevett*, 20 Maine, 462; *Seymour* v. *Prescott*, 69 Maine, 376.

Herrick and Park, for defendant.

Want of consideration may be shown. *Smith* v. *Rowley*, 34 N. Y. 367; *Slade* v. *Halstead*, 7 Cowen, 322; *Bank* v. *Topping*, 9 Wend. 273.

The form and wording of the writing relied upon in this case are so unusual and so far different from those usually employed to express a promise, the court is authorized to inquire into the circumstances attending its origin. There is no expressed promise. The word "due" standing alone might imply one. But when preceded by the word "amount," its force is materially modified, and renders it reasonable to construe the writing as a memorandum of the amount due and subject to explanation as to the person from whom it is due. *DeLavellette* v. *Wendt*, 75 N. Y. 579.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. The plaintiff, having completed his work in the employment of the Bethel Chair Company, went to the office of the president of the company where the amount due him for his wages was computed, and the president, who is the defendant in this action, gave him a voucher to take to the treasurer of the company for payment of the sum due him. The voucher reads as follows:

"June 24, 1892.

"Amount due C. E. Ward to date 28.26.

J. H. Barrows."

The plaintiff took the voucher to the treasurer and was put off without payment for want of funds in the treasurer's hands. He now claims that the paper delivered to him is a due-bill binding the president personally, and that it is not admissible to vary its terms or prove that it was not intended as a promissory instrument by oral testimony. Admitting these positions taken in behalf of the plaintiff to be correct, we think it is open to the defendant to rely on the defense, outside of such positions, that there was no consideration for the note moving from the plaintiff to himself. The structure may be perfect enough in itself, but it must have some foundation to stand upon. In the cases cited in behalf of the plaintiff's contention, where certain curious and irregular instruments have been upheld by the courts as, in

effect, notes of hand or due-bills, there appears to have been some legal consideration for the promise, though of slight importance in some instances.

We cannot, however, find in the present case evidence of any consideration for the defendant's promise, if a promise he made. There was no sale or surrender of any claim for wages, nor any promise to release or acquit the same. The plaintiff made no promise to the defendant and did no act for his benefit or at his request. He did not accept the voucher as a payment, and his claim against the company stands good to this day. There is no kind of legal consideration to support the pretended liability of the defendant.

Exceptions overruled.

STATE *vs.* J. O. S. SKOLFIELD.

Franklin. Opinion December 23, 1893.

Fish and Game. Pleading. Indictment. "Unlawfully." R. S., c. 40, § 49.

The statute (R. S., c. 40, § 49) declares it illegal to "sell trout" during close time. The complaint alleges that the respondent on a certain day named "did sell trout" to a certain person named, the day of the sale being within close time. Both the statute and the complaint describe the offense in general terms. *Held;* that the complaint is good.

The complaint is not defective because it omits to aver that the act complained of does not fall under certain other statutes which make the taking and selling of trout permissible under certain conditions. There is no proviso or exception in the section on which the complaint is founded.

It is not a defect that the complaint does not allege that the act complained of was done "unlawfully." The insertion of the word unlawfully in an indictment or complaint is necessary when the statute uses it in describing the offense. But not necessary when, as here, the statute omits the word, but in its general terms declares the offense. Still, it is wise always to employ the word in charging the elements of an offense, because it negatives all legal cause of excuse for the act committed.

ON EXCEPTIONS.

The defendant was convicted before a trial justice in Franklin County upon the following complaint:

"A. M. Child, of Weld, in the county of Franklin, and State of Maine, in behalf of said State, on oath complains that J. O. S. Skolfield, of said Weld, did sell to Eben Newman, of

said Weld, trout, on the ninth day of April, A. D., 1892, at said Weld, against the peace of the State and contrary to the statute in such case made and provided."

Having appealed to this court where he was tried before a jury and found guilty, the defendant moved an arrest of judgment for the following reasons, viz:

1. Because he says that the said complaint and the matter therein alleged, in the manner and form in which they are therein stated, are not sufficient in law for any judgment to be rendered thereon.

2. No crime or offense is charged in the complaint.

3. Every thing charged in the complaint may be true, and still the respondent may be innocent.

4. The complaint does not allege by any apt words, that the act complained of was unlawful.

5. The complaint does not allege that the trout were illegally caught.

6. The complaint does not set forth whether the trout were blue-backed trout or other kind of trout.

7. It does not appear from the complaint that the respondent was not legally engaged in the artificial culture and maintenance of fishes and did not sell trout from his own enclosed waters for cultivation and propagation.

8. The complaint does not set forth where the trout were taken or caught.

The motion was overruled by the presiding justice and the defendant took exceptions.

Geo. L. Rogers, County Attorney, for the State.

E. W. Whitcomb, for defendant.

It does not appear which section of the statutes the complaint is intended to cover. Hawk. v. 2, c. 25, § 57; *State* v. *Godfrey*, 24 Maine, 232; *State* v. *Benjamin*, 49 Vt. 101; *State* v. *Higgins*, 53 Vt. 191; *Com.* v. *Bean*, 11 Cush. 414; *Com.* v. *Hoye*, 11 Gray, 462; *Com.* v. *Strain*, 10 Met. 521.

If this complaint was intended to be founded upon R. S., c. 40, § 49, it is fatally defective in neither being expressed in the

words of that statute or its equivalent. That section specifically designates certain months of the year only as close time during which the act of selling trout is forbidden, thereby excepting the remaining months during which such act is lawful, but there is no allegation in the complaint that the time of the alleged sale was within the time when such an act was forbidden and unlawful; neither was there any allegation denying that the time of the alleged sale was during the open months when such sale would be lawful. All exceptions to the affirmative allegations of any one section of the statute should be traversed. *State* v. *Dodge*, 81 Maine, 391; *State* v. *Gurney*, 37 Maine, 149.

Nothing criminal is necessarily charged in the complaint. Every thing therein stated may be true and be consistent with the innocence of the respondent.

The law allowed him to sell trout at that time. R. S., c. 40, § 63; Public Laws, 1889, Chap. 204; *State* v. *Godfrey*, 24 Maine, 232; *State* v. *Lane*, 33 Maine, 536; *State* v. *Turnbull*, 78 Maine, 392, 395; *State* v. *Northfield*, 13 Vt. 565; *Moore* v. *Com.* 6 Met. 243; *Allen* v. *Young*, 76 Maine, 80.

The respondent may have sold trout in Weld at the time alleged in the complaint, but he is not charged with having done so unlawfully or illegally.

The expression *contra formam statuti* does not supply the defect, for it is used to show that reference is made to the statute as the foundation of the prosecution, and it does not necessarily charge any crime.

Skolfield may have sold blue-backed trout, trout for cultivation and propagation from his own enclosed waters, or trout legally caught by him in another state, each of which acts, so far as c. 40, § 49, is concerned, would be *contra formam statuti*, but would not be unlawful or illegal.

The complaint must show that the act of selling was unlawful, or else set forth the act of selling in language of equivalent meaning. *State* v, *Learned*, 47 Maine, 426; *State* v. *Turnbull*, 78 Maine, 392; *Com.* v. *Twitchell*, 4 Cush. 74, 76; *Com.* v. *Collins*, 2 Cush. 556; *Com.* v. *Stockbridge*, 11 Mass. 278.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

PETERS, C. J. By R. S., c. 40, § 49, it is provided that no person shall sell "any trout" during close time, with a certain penalty therefor. The complaint in this case avers that the respondent, "did sell trout," to one Eben Newman within the period of close time. Certain objections are urged against the validity of the complaint.

It is contended that the complaint is too general in its description of the quantity of trout sold. But the statute is as general as are the words of the complaint. This objection cannot prevail. *State* v. *Hadlock*, 43 Maine, 282; *Com.* v. *Ryan*, 9 Gray, 137.

It is objected that the complaint is defective in that it does not aver that the sale did not come within certain other statutes and sections which permit the taking and selling of trout within close time under certain conditions and restrictions. The answer to this objection is that any justification of this kind would be a matter of defense. It is necessary to aver against any exceptions only when such exceptions are found in the enacting clause of the section upon which the complaint is based. There are no exceptions whatever in the section of the statute which establishes the present offense. *State* v. *Gurney*, 37 Maine, 149; *State* v. *Boyington*, 56 Maine, 512.

It is further contended that the omission of the word unlawfully from the charging portion of the complaint is a fatal defect. This is a more debatable point perhaps than the others, and still we think the complaint must be regarded as good even in this respect. The section gives no intimation of any lawful selling of trout of any kind during close time. The word would not obviate the necessity of negativing any exceptions in the section had there been any in it. *Com.* v. *Byrnes*, 126 Mass. 248. The word unlawfully need not be used when the offense is one at common law. It is essential to insert it in a complaint grounded on a statute which itself uses the word as a part of the description of the offense. The allegation that the offense was committed against

the statute is not an equivalent, and does not supply the deficiency, if such exists. *United States* v. *Smith*, 2 Mason, 148; 1 Bish. Cr. Proc. § 264, and cases. Mr. Chitty and Mr. Bishop advise the use of the word in all cases as it excludes all legal cause of excuse for the offense. The weight of authority is, however, that the word is needless where it is manifest that the statute in its general terms declares an unlawful offense. Such is the statute affecting the present case. 1 Chitty Crim. Law, 241. Bish. Cr. Proc. § 503. Bou. Law Dic. word unlawful.

Exceptions overruled.

JOHN W. PEASE *vs.* EDWARD T. BURROWES.

Cumberland. Opinion December 23, 1893.

Witness. Cross-Examination. Unsound mind.

The cross-examination of a witness that shows mental illusion or unbalance concerning the subject matter of the examination in chief is competent for the consideration of the jury in weighing the testimony in chief.

The correct account by a witness of knowledge previously obtained depends upon the capacity of the witness to correctly retain and communicate it.

If, at the time of testifying, the witness' mind shows normal, the testimony must have greater weight, than if it appears abnormal; for, in the one case, the medium of communication is trustworthy, while, in the other, it is to be distrusted according to the degree of unbalance that is made apparent. Such cross-examination must necessarily be admitted in the discretion of the court, *de bene*.

If, when heard, it appears competent for consideration by the jury as bearing upon the credit of the witness it becomes a part of the testimony in the case to be weighed and considered.

If it appears to be incompetent for that purpose, and is harmless, its admission will not be considered error, but, if mischievous, will be cause for a new trial.

While such cross-examination of the witness is competent for the consideration of the jury in weighing the testimony of the witness, it is not evidence of the facts so stated, and the jury will be so instructed.

ON EXCEPTIONS.

This was an action for a libel upon the plaintiff, in which the jury rendered a verdict for the defendant. The plaintiff took exceptions to the testimony elicited from his wife, upon her cross-examination, as appears in the opinion.

Edward M. Rand and Seth L. Larrabee, for plaintiff.

Objection to this line of testimony, rests upon the following grounds, viz: That all these interviews and conversations were subsequent to any act of the defendant, alleged or proved by plaintiff, as a part of this case. That all these interviews were with third persons, and in the presence of neither plaintiff nor defendant, and simply *res inter alios*. That any statements of Mrs. Pease, in these interviews were inadmissible, even for the purpose of contradicting her, which was not attempted. That the evidence of the statements of these persons, at these interviews, was merely hearsay, of the most dangerous description. The effect of the admission of the testimony in regard to these subsequent interviews necessarily resulted in causing the true merits of the controversy to be obscured, the attention of the jury to be wearied and distracted, and in leading them astray by a mass of improper testimony upon points not in issue. That the admission of the evidence objected to must have been prejudicial to the plaintiff, seems quite evident from an examination of the statements made by the several unknown parties, viz: "I wrote those anonymous letters. Mr. Burrowes had nothing to do with them, and I am here to tell you rather than to see an innocent man suffer. I wrote those letters. She told me that Mr. Burrowes didn't write those letters. She said that John had those letters written, that her brother wrote them for him."

Symonds, Snow and Cook, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. This is an action for libel in the writing and publication of two anonymous letters of and concerning the plaintiff, without date. They are both addressed to the plaintiff's wife. They are of the following tenor.

"Mrs. Pease: This cut shows how Pease spends his nights in refreshments when away from home. You will be after something like this in a few days."

"Mrs. Pease: Your husband spends his nights with dammed old hoas when away, let this bring you sweet dreams. Why wont You watch him one night will convince You of my truthfulness. Bad disease is flying through the air."

Mrs. Pease, called by the plaintiff, testified in chief and with detail of circumstance, that she was forty years of age; that she received the first letter May 14, 1891, by mail; that she received the second letter about May 21, in the night, or late in the evening; that it was thrown by a man from a wagon, upon the steps of her house, while she was sitting at a window that commanded a view of the steps; that the night was light, that she had no light in the house, and that the man who threw it, as near as she could tell, was the defendant; "the man over there, right behind his counsel;" that the letter was wound around a penstock.

She testified that the first letter contained a drawing of a man and a woman in the act of sexual intercourse, and also newspaper clippings, advertising medicines for "private diseases;" that she destroyed the drawing and the advertisements, and gave the letter to her husband on his return home, after an absence of two or three days; that she went out and got the second letter, read it, re-wrapped it around the penstock, and gave it to her husband when he returned home; that she saw, on the 21st of May, 1891, in the night, the man who threw the letter on the steps; that her husband was away.

She testified that she next saw him, (the bearer of the letter,) on the 15th of July, 1892, and said, "I heard the door bell ring. I got up and came down stairs and went to my window. I never go to the door when I am alone and open it. I said 'What is it,' and the answer came, 'A message for Mrs. Pease.' I said, 'A telegram?' He said, 'A message for Mrs. Pease.' I said, 'Will you please deliver it at the window.' He made the remark, will I step to the door, and I said, 'Please deliver it at the window." He came to the window and said,—I am telling this as near as I recollect it,—'Are you alone?' I remarked, 'No, sir, I am not.' He said, 'Your little girl is with you, I know, but I wish to speak to you in private.' I said, 'Anything

you may say to me will be strictly confidential.' I partially recognized him. He said, 'I wish to talk with you, Mrs. Pease, in regard to the anonymous letters that Mr. Burrowes was accused of writing in the unpleasantness, in the spring, with the post office department; would you be willing to talk with me about it?' I said, 'Go on, I am listening.' He said, 'Although Mr. Burrowes did not write those letters, everything points to him, and he will have to answer for it in all probability. Do you know whether your husband is going to push this case, or not?' That was the way he expressed it. I said, 'I think it probable he may.' I said at this point, 'Is this Mr. Burrowes,' for I recognized him then by his peculiar way of twisting his moustache, and holding his hand up, and also by his voice, and everything; I recognized him as Mr. Burrowes. He said, 'I wouldn't care to call names, as it may be unpleasant hereafter.' And after that I addressed him as Mr. Burrowes, and he said nothing against my doing so. He spoke of a thoughtless act. He said he thought it was wrong and unjust that a man should suffer all his life for one thoughtless act, and he spoke of the shame and degradation brought on his family, and a life time of pain. I said, 'Mr. Burrowes, you should have thought of this beforehand, you should never have got yourself into this place.' He spoke of my being a member of the same church he was, that is, a member of the Methodist Church, believing in the same creed that he did, and he spoke of his fine position in the community. He spoke of his wife and children. I said, 'Mr. Burrowes, I am human, I have some feeling as well as you and your wife. I have suffered as much as you ever will.' He spoke of a passage in the bible expressly, and said that brother should not go to law against brother, and I remember he said this passage over to me; 'Love your enemies, do good to them that hate you, and pray for them that persecute you.' I said 'Mr. Burrowes, are you truly penitent? If you are, I have always said that when you came to me and said you were sorry instead of going into your closet and asking forgiveness, as I was the one that was injured, I would meet you half way, and I would forgive you every time, and if it was in my power to

get these letters and give them to you, you should have them.' At this point I was crying. He said he was sorry, and I said, 'Then Mr. Burrowes, I forgive you, and I will do everything I can to procure these letters. I have influence over my husband, and I think I can make him stop this suit against you. If I can procure these letters you shall have every one of them; and whether I can or not, I will never injure you, or your family, in any way or shape,—under these conditions you are never to go out into the community again and tell everybody that my husband wrote those letters to me, to get rid of me.' I said that, 'I wouldn't ask you to go before the public and say you were guilty; you shouldn't say anything about it. I would never say anything about it, and would never accuse you of it, even as I expect you never to accuse my husband again.' And the agreement was made then and there, between us that he was forgiven under those conditions. He gave me to understand he did it, and he was truly sorry for writing all those letters. Then we talked about whether I had influence enough over my husband to obtain those letters. We talked on that quite a while, I couldn't tell how long, but some little time. Then he turned deliberately around, and said to me, 'I have committed no sin, really no sin; the contents of these letters are true; the crime is only in my sending the letters, or writing it to you.' I said, 'Mr. Burrowes, our agreement is broken from this minute, you have broken yours,' and I shut the window. I went up stairs. Of course we said other things that I don't remember. I did not see him again that night. He rang the bell two or three times, but I didn't go to the door."

She testified that five days afterwards, July 20, 1892, in the afternoon, she received by mail another letter, of the following tenor:

"Mrs. Pease was justly wrathful, and shut me out with anger and scorn, ere any negotiations were reached. Will Mrs. Pease turn to Matt. 18-21, 22, also Luke, 6-37, also II corinthians, 2-7, also Ephesians, 4-32, and over all others read romans, 12-14, although contrary to my remarks to you. The contents of all letters were false. Let God judge rather than man, why

they ever reached you. Now, do not withdraw your sympathy, but have regard for a fellow being in distress. My faith is sound and strong that this letter will never be exhibited by one I trust, although wronged. If you will allow me a private audience, will you stand on the Post Office steps, at 6 o'clock, P. M., the 20, (to-day,) read I Corinthians, 4 to 8, and then give me a hearing. This must not be spoken of, as I warn you that you do not know what torture is or what power I possess. Should anything happen to your children then indeed would your heart be wrung, but all will be well if you will follow your heart, which will tell you what is best. A friend."

The case was tried upon the general issue, and the evidence is voluminous as to the defendant's connection with the writing and publication of the letters. He denied both. The verdict was for the defendant, and the case comes up on exceptions to the admission, upon the cross-examination of Mrs. Pease, of the following testimony:

"On the night of July 27, 1892, at five minutes of eleven, I heard my doorbell ring. I had been told not to go down to the door anyway, but I hadn't heard from my boys that day and I was afraid that something had happened to them; they were in the country. I went down thinking I might have a telegram. I opened the window, as I did for Mr. Burrowes, and I asked the same question 'What is it?' A gentleman stepped around to the end of the steps, the same as Mr. Burrowes did, close to the window, and said, 'Make no outcry, Mrs. Pease, if you do I shall not stir from these steps. Have me arrested if you choose but it will go hard with your husband. I wrote those anonymous letters. Mr. Burrowes had nothing to do with them and I am here to tell you rather than see an innocent man suffer. I was hired to do so by your husband in order to get rid of you. He has had some one here in the city that he loved better than you for a long while — some one on Lincoln street — and the letters were written in the hope that you would get a divorce and make no fuss about it. That will be my advice for you to do. So far as experts are concerned they are no authority and I will state my reasons to you. Mr. Burrowes has some of your letters.' I

said, 'Yes, I know he has; our letters that we put in the post office department are lost and we have every reason to believe that he has them and I am glad you informed me of that fact.' He has had these letters and some of your husband's writing examined by experts in New York and they have each and all pronounced them the same writing, whereas they are not. I wrote those letters, so you can see how much dependence can be placed in an expert.' Then after he had repeatedly assured me that he wrote them and that Mr. Burrowes had nothing to do with them—O, in the course of the conversation he asked me to give the letters up to him if I had them in my possession, that he would be willing to do most anything for the sake of my giving them up. I said, 'If you wrote those letters for my husband I fail to see why you should come here and make me an offer for them as my husband has every one of those letters in his possession. I can't understand it.' I can't seem to remember what he did say, now.

"The next visitor to our house was a woman, on August 4, 1892. I had been sitting out on my steps with some of my neighbors. I had some rugs on the steps and after they went home, I had my little girl in my lap and she had gone to sleep. I went in and laid her in the bay window; we have a seat in the bay window. I went out after my rugs and shook them and carried one into the dining-room where it belonged, another into the reception hall where it belonged and started after a chair that was out there and a woman pushed herself into the door and met me in the vestibule. She was a horrid looking woman, there was no woman to her. I think she said 'You probably know who I am. I am the woman your husband loves.' I said 'I admire his taste very much if he does.' She threw herself around and says, 'He loves me, he loves me, Me!' and then she went on to say that if she was me, rather than live with a man and cause every hour of his life to be one living death, she would go down on the wharf and jump into the harbor. She also said that she had a hard time to get along and she thought she ought to have a part of my husband's wages. I said I was perfectly willing she should have them all if he loved her so

well. I told her several times to leave the house, that I would not be insulted in my own house. I can hardly recollect anything else that she said. She told me that Mr. Burrowes [the defendant] didn't write those letters. I said, 'He is very anxious to get hold of them if he didn't.' She said that John [meaning the plaintiff] wrote those letters. No, I will take that back. She said that John had those letters written, and that her brother wrote them for him. I have never seen the woman since. I have tried very hard to find her. She said we were both to be pitied, I for being married to a man that cared nothing for me, and she for loving a man that was tied to another.

"The next visitor that I had about these letters was a gentleman on the sixth, Saturday. I had company that evening, Miss Chase and I think Mrs. Hayden. Miss Chase went home first and when Mrs. Hayden went out I went with her. We looked at the flowers in my yard, and as we were standing there, Mr. Rand, my counsel, came along. He said, 'Is everything all right?' I said, 'Yes.' I think those were his words. He went along. Mrs. Hayden went in a few minutes and I went in. My little girl was asleep in the bay window and was when the ladies went away. My doorbell rang and I went as I usually do and said, 'Who is it?' The answer came 'Mr. Larrabee.' I was expecting Mr. Larrabee might call that night about something, and opened the door, of course. There was a large man stood at the door and he pushed me in and caught hold of my hands and pushed me in and locked the door and in through the vestibule and locked the next door. In the corner of the hall was a table with a lamp on it and also a lamp in my dining-room. He blew the lamp out in the hall. I said, 'what are you going to do, kill me?' And he said, 'Now that depends on whether you are a nice little lady or not.' He pushed me into the dining-room and also shut those doors. I won't be certain whether my curtains were drawn or not. If they were not he drew them. I think he drew the curtains. They were partially drawn perhaps but I can't remember exactly. He also stated to me that he wanted me to give up the letters I had. I think I told him I had not the letters with me but he wanted

the letters that had been sent me this spring, not the spring of 1891 but the spring of 1892. He said it was very essential that he should see them before my husband came home the next morning as he claimed he knew he was coming. He tried every way to make me give up the letters. He asked me where they were, and I made answer that I didn't know where they are. He asked if Mr. Larrabee had them and I said I didn't know. 'Has Mr. Rand?' 'I don't know.' 'Are they in the house?' 'No, sir.' He insisted that they were in the house, that it was not at all probable that I would give up these until after my husband had seen them. He inquired several times if they were up-stairs and if they were in the hall and in the part of the house where they were and also in the kitchen. He asked me several times about the different places in the house and continued in that conversation for a long while. He held hold of me. He held my hands, my wrists. I was on my knees a part of the time and a part of the time standing up, when I could. I was very much frightened, he was not very gentle with me. After he had talked to me about that and I think was convinced that they were not in the house, although I don't know as he was, he produced a paper—O, he asked me where the ink and pen was and I told him there was one in the kitchen and also one in the hall in the writing desk. He preferred to get the one in the kitchen. He still held my hand and we went into the kitchen together, he pushed me in and he got the pen and ink. He had this paper, I don't know as I can tell the exact words on it. The substance of it was, 'I sign this of my own free will. I never supposed for a moment that Mr. Burrowes wrote those letters; I have always known my husband wrote them; that he had some one in the city that he loved better than me; that I have seen and talked with the lady.' I think that was about all there was on the paper. He asked me to sign the paper. This paper had reference to anonymous letters received by me in 1891. He pushed me around considerable and shook me around and told me I had got to sign the paper; that he would stay with me until resurrection morning if I did not. I am telling this as near as I can. I

told him they had done everything except kill me and now if he wanted to kill me he could do it; that I never should sign that paper, that I knew my husband did not write the letters and I never should sign the paper, He informed me that he would give me while he was smoking a cigar to sign the paper. He lit the cigar about that time. He had hold of one of my wrists. He forced me on to his knee. I couldn't tell you how long I was there, I couldn't tell you if I was to judge a thousand years. He threatened me with personal violence if I did not sign the paper. I told him if he touched me, I prayed God he would drop dead; and he would. He made me take an oath with the threat that if I didn't take the oath he would carry out his threat. He made me go through the form of taking an oath on my knees. A bible was used. We both got it. I knelt down and kissed the bible, held up my hand like that, and he held on to the other hand. This man pushed his way into the house somewheres near nine o'clock. He stayed there a long while, I don't know as I can tell you exactly, but probably about three or four hours. My little girl was asleep in the bay window all this time; she is seven years old.

"The next one that called at the house was a dude. He called in the morning, Wednesday morning after we had telegraphed for my sister to come. He came famished, and he told me how long it had been since he had anything to eat. I supposed he was very hungry, I have had a good many come that were really hungry. I told him to come in. I was alone and had not a great deal cooked in the house, but I sent to the bakers and got some things and set out quite a good deal for him to eat, expecting he was very hungry. I think he ate half a peach and a little mite of cake and a tiny mite of pie. He informed us he had walked from Old Orchard that morning although his clothes had not a bit of dust on them, and he had on patent leather boots and there was not a speck of dust on them. He informed us he had walked from Milwaukee. He only sat at the table a few minutes. I was very much surprised at the time to think he didn't eat anything, although I didn't connect that with this at the time. A letter connected it, saying it was well I kept a

body guard that night. They came apparently to see if anyone was with me.

"The next visitor, after the dude, who called about these letters, came on Tuesday, September 19th. I was not left alone at all; my husband had been staying with me all the time, or some one else was, so that I should not be alone. This morning he was called away on business at the shop and told me he should return before my son went to school which would be about eight o'clock, he had to start for the high school. I thought I would wash my back window. I put a chair out of my window, out of my back window I think, and stepped out on to Mr. Milliken's shed, a little low shed there is there, and I washed off the outside of the window. This was in the morning, and I wiped the upper part of the window and part way down on the lower sash. When my little boy had started for school he came back and told me there was a gentleman at the shoemaker's shop at the corner of Brackett and Gray streets who said he would watch my front door.

"I was expecting my husband back and this gentleman sent my little boy back to say that my husband couldn't come home just then and he was going to stay there and watch my front door so that if any one came in, he would come, too. The man was Clarence Cummings, employed in the office of the same company of which my husband is superintendent. I got out on the shed again and washed the outside windows and wiped them and took a chamois skin and wiped the upper part of the window and pretty nearly all the lower part. Then my little boy came and told me this and I got into the window to see what he wanted and I shut the window and locked it. Then I remembered that I had not put up my laundry and the laundry man would be along very shortly. So I picked up my laundry and did it up and by that time it was time for me to get my little girl ready for school and so I washed and got her ready for school and I don't know what detained me, one thing and another and I didn't get back to my window right away. When I got around to it I went and wiped the inside of the window as I generally would after I washed it. I had already washed it inside and I wiped

it. Then I took hold of the window and pushed it up and reached out, I was on my knees, as I had been wiping the lower sash and I reached out to wipe the other side instead of getting out and then some one caught hold of my hands. That was the first conversation I had with any one after the writ was served on Mr. Burrowes. It was the same gentleman that came on the steps and saw me July 27th. It was the one that had conversation with me then. He held both of my hands a part of the time and a part of the time he didn't but he held one of them all the time. He told me it was impossible for me to identify anyone, that it was utterly impossible for me to go on to the stand in the court room and say that Mr. Burrowes had been at my window for I could not tell whether it was him or not. He asked me if I had ever seen him before. I said, yes, three times, I think it was. He said, 'When have you seen me before?' I said, 'You came to my window and talked with me in the night and I saw you'—there was a man came to your house that we call 'gold specs'—'I saw you watching to see if gold specs came to my house all right and I also saw you on the train.' It was four times instead of three times. I also saw you on Tyng street the other night. He said it was impossible for me to identify anyone and he asked me to look at him and see if I would know him if I saw him anywhere else in the condition he was then. He turned his eyes into his nose and took out some teeth and dropped his mouth down the same as an old gentleman would and asked me if I should know him. I said, 'No, I don't think your mother would know you.' He took out two or three of his teeth, I don't know how many, but he didn't take them all out. I think if his face was straightened up again I should know him pretty well. As he appeared after that process I should not recognize him, but I should know him the next time I saw him do it. I should have hated to have been his mother. He said he supposed things had gone so far — Oh, he said they intended to have frightened me so that I could not have been a witness, that that was their intention but I got away from them. That if they had got me they would have put me through a course of free masonry that I never dreamed of. He told me

when I was summoned here as a witness to take an oath, that I must add mentally — that I could add mentally whatever I chose afterwards; that I wouldn't be obliged to tell all I knew. He told me I must contradict myself. They were going to do some awful things to me if I did come in here. He told me that they had been paid for doing it and that they should certainly do it if I came here as evidence. They were going to try and break my testimony down as evidence so I wouldn't be capable of being a witness here. He said if they had got me they would have taken me — he informed me they were all from Canada — and they would have taken me to Canada, that he knew a nice, quiet, little cemetery up there where there was a vault and he would have confined me in it and if I had been capable of giving any testimony then, they would have put me in a casket or into a box and nailed me up so I could hear them as they drove the nails in. I said, 'You wouldn't dare to do such a thing as that.' and he said they never stopped at a little thing like that. There were to be skeletons in the vault. He made me take an oath that I wouldn't go on the stand, and I was frightened. I don't remember, but I think likely a bible was used in taking the oath. He didn't come into the room. He stood outside. I should think the window came almost up to my waist; all I had to do was to put my hand out if I had a bible. I don't think my bible is always in the same place. I think the oath was about the same as the other oath. It was not the same man. I remember the oath was very near like the other. One place at the last he said, 'So help me God.' This was between nine and ten in the forenoon. I screamed once, I remember that; it was when he caught my hands. I can't tell why I stopped screaming, I guess I got used to it. This man referred to the fact that I escaped from him on the seventeenth.

"Saturday, the night of the democratic parade, that evening just as I got through with my dishes some one came to my back door and told me that a friend of mine that lived on York street nearly over to State, next house to State, was sick and asked me if I would come down and stay with her all night as her husband was away. I was going out to the democratic parade

but I started to go down there first. I had been watched all summer and I could go nowhere without having a letter about it or something. Every step I took I was watched. I went the same way I had gone all summer; it was a place I had frequently gone to. I went down Brackett, over Danforth and down Tyng as I usually would go, never went any other way in my life, and as I got down to Tyng street, it is a very dark street and I always look to see if I can see anybody. There is a cross dog there that I am afraid of. At least, he barks but I don't know as he hurts. I looked to see if I could see anyone and there was a close carriage down below that I saw. There is a livery stable down there somewhere but I don't know exactly where. I started down street and when I got down, I don't know who lives in the corner house but Father Murphy used to live there, and below that is a yard and as I got nearly down to that I heard some one say 'There she is,' and I recognized the voice of the big man that was in the dining-room with me if you remember. I thought in a minute what I was out for and I turned and ran back and they after me. When I got out on Danforth street I saw some one coming. I didn't dare to trust anybody but if they had followed me still further I should have gone up to this man. I saw they did not and I kept on home. I passed two or three people. I ran up Danforth and thought of Mr. Rand's and I remembered that he was not at home and I ran up Brackett street home.

"One of these was the big, light man that came to my house and staid from eleven o'clock until one. The other was the man who seized my hands out of the back window on the nineteenth of September. One of them reached out and said, I have got my little ,— something, I don't know what. At the time the man was standing at the back window he told me to stand in the window until he got away from the shed, as I was covered. He also told me if I identified anybody in the street as following me, which he had done, there would be some vitriol or something thrown in my face and that I couldn't identify anybody again. There was a man out there in the back lot, another man that I had not seen.

"I have no doubt it was the defendant, Mr. Burrowes, who came to my house July 15. I know it was him as well as I can know anybody. I should say it was a moonlight night but I couldn't tell you certain. I couldn't tell you whether it was a clear or cloudy night, it was clear enough so I could see his face distinctly. I don't think it rained. I don't know whether he had a carriage or not, I didn't see any. Do you wish me to go over the whole of the conversation again? I had gone upstairs with my little girl; as near as I can tell it was the 15th of July. I had read her to sleep and gone to sleep myself as I remember it now. I was awakened by my door-bell ringing. I got up and came down stairs and went to the window, as I always did when I was alone, and I said, 'What is it?' or 'Who is it?' and the answer came, 'A message for Mrs. Pease.' I said, 'A telegram?' and he said 'No, a message.' I said, 'Step to the window and deliver it.' Before that he said would I step to the door. I said, 'Deliver your message at the window.' He came to the window and said, 'Are you alone, Mrs. Pease?' I said, 'No, sir.' He said, 'You have your little girl with you I know but otherwise than that you are alone? I wish to speak to you in private.' I couldn't tell this all in exactly the same language as I used before.

"I said, 'Anything that you may say to me will be strictly confidential.' He made the remark, 'I have come to see you Mrs. Pease in regard to the letters Mr. Burrowes was accused of writing in the unpleasantness that occurred in the spring, the trouble with the post office department; would you be willing to talk with me on the subject?' I said, 'I am listening, go on.' He said, Although Mr. Burrowes did not write those letters everything points to him as being the author and in all probability he will have to answer for them; and he would like to talk with me on the subject. I think it was somewhere near here that I said, 'Is this Mr. Burrowes?' I had thought from his looks that I recognized him and his peculiar way of twisting his moustache that he always has and holding his hand up to his face.

"I thought it was Mr. Burrowes. I said, 'Is this Mr. Bur-

rowes?' He said, 'It wouldn't be well for me to call names. It might be unpleasant hereafter.' He said he thought it was a wrong and unjust thing for a man to suffer through his whole life for one little, thoughtless act. I said, 'Mr. Burrowes, you should have thought of that before.' I called him Mr. Burrowes after that. I said, 'You should have thought of this beforehand and never put yourself into the position you are now in.' He asked me if I knew whether my husband was going to push this case or not. I said, 'I presume he will, he is talking of it now.' He said he would like to settle with me and would do so but he would never settle with J. W. but would fight it to the death. That was his own language. He also asked me if I had those letters. I said if I remember right, that I had not. He said, 'Well, you have access to your husband's private papers while he is away or if not you can have.' He then spoke of our being members of the same church, not of the same church, but of the Methodist church, of our believing in the same creed and in the same Christ. He spoke then about the express command in the bible where it said brother shouldn't go to law against brother. He also quoted the passage, 'Love your enemies, be good to them that hate you, and pray for them that despitefully treat and persecute you.' He spoke of his high position in the community, of his wife and child, and of the shame and degradation that would follow him the rest of his life. I said, 'Mr. Burrowes, I am human; I have some feeling, I have suffered as much as you or your family ever can.' 'But,' I said, 'if you are truly penitent, I have always said that when you would come out to the world and say you were sorry instead of going to your church and in your closet and confessing your sins, if you ever came to me, — I was the one you had really injured the worst, — if you ever came to me I would meet you half way every time,' and that I would. Then I asked him if he was truly sorry and he said he was truly penitent. I said, 'I forgive you for everything you have done and I will never injure you in any way or shape, with one agreement, and that is: I do not ask you to go before the public and say you are guilty but if anything is said don't stand up and say I am inno-

cent and Mr. Pease wrote those letters to rid himself of his wife,' as I had heard he had repeatedly said. I said, 'Under that agreement if anything is ever said I will never accuse you of it,' and the agreement was made between us that he shouldn't do it. Then we talked, as near as I can remember, — I was crying then — we talked about whether I could obtain the letters or not, and whether I had any influence over my husband. I said I knew I had some influence over my husband and if I could procure the letters I would hand them all over to him. He said he had faith enough in me to believe that if I promised to destroy the letters he would know that they were destroyed if they were never handed over to him. After that we talked about my getting the letters and about our not pushing this case, as he expressed it several times to me. I don't know particularly now, but perhaps I have not stated it as I did this morning, and then he turned deliberately around and said, 'Mrs. Pease, I have really not sinned any, the contents of the letters were true; the crime was only in my having written it to you.' That cut me like a stab after I had forgiven him. I said, 'Mr. Burrowes, our agreement is broken; you have broken yours and I break mine.' I closed the window and went up stairs. He had a very low, sweet, musical voice, more like a woman than a man, rather a hesitancy about it, if anything, nothing, perhaps, nobody would notice, a little slow.

"After the letter of July 20, I continued to receive other anonymous letters, I do not think I can tell how many. Mr. Burrowes called the night of the 15th as near as I can place it. I got a letter the 20th. I got a letter the 27th. (This is as near as I can tell you.) I got a letter the 27th preceding the gentleman that talked with me on the steps; he came that night. August 2d, the letter was picked up on my steps, I think August 2d. August 4th the woman called. August 6th the man called at night, the big man Saturday night, August 6th. I sent a telegram for my sister Monday. She came Tuesday and Wednesday the dude called, Wednesday morning, the 10th. The 11th I received two letters threatening me. I think I got no more letters until I went into the country. I think I got no

more letters between August 11th and August 17th when I went into the country and then this man that talked with me on the steps was on the train and I suppose he threw the letter in my lap. I found one in my lap.

"If my counsel wish to produce the letters I received July 20, they may, otherwise I refuse."

The cross-examination of the witness, as to interviews with strangers about the letters claimed to constitute the libel in this case, had some fourteen months after they were written, was objected to as irrelevant and immaterial.

The court overruled the objection and expressly admitted the evidence as a legal right, and not merely in the exercise of discretion in the control of cross-examination.

The competency of the evidence, therefore, must be considered as to whether it has any probative force upon the issues on trial, and might be considered and weighed by the jury in deliberating upon the verdict.

It cannot be treated as immaterial and harmless and allowed to stand in the case on that ground, inasmuch as some parts of it, especially the statements of the witness as to what other persons than the defendant told her about the authorship of the letters, is of so mischievous a character that it would certainly influence the jury in determining that question. The declarations of strangers, purely hearsay, as to a fact on trial, when heard by a jury, cannot fail to leave some impression. A jury may not distinguish between the statements of strangers made out of court and not under the sanction of an oath, and testimony given under oath before them. If allowed to hear both, they are apt to consider both; therefore the admission of such evidence cannot be excused as immaterial and harmless. *Woodroffe* v. *Jones*, 83 Maine, 21; *Royal* v. *Chandler*, 81 Maine, 118.

It is not pretended by the defendant that the evidence in question, standing alone, had any force to prove the facts stated by the witness, and especially to prove the authorship of the letters to be or not to be as stated by the persons interviewed; of course it was not competent for such purpose; and it is presumed that the court so instructed the jury, and properly cau-

tioned them in that regard, as the charge of the presiding justice is not made a part of the case and is not before us, and nothing in the case indicates the contrary.

But, it is stoutly asserted that the evidence shows such a state of mental illusion or unbalanced mind touching the libellous letters as to affect the credibility of the witness in regard to them, and discredit her evidence in chief upon the same matter. If the evidence be competent for this purpose, the verdict must stand, otherwise, be set aside.

Insanity destroys the competency of a witness; and the ancient rule was that the question of competency must be determined when the witness is called, and before he is sworn. *Turner* v. *Pearte*, 1 D. & E. 407; Gilbert, 282; Swift, 109; Peake, 129; Starkie, 123; Phil. Ev. c. 5, § 7.

This rule, however, has become relaxed in cases where the incompetency first appears from the testimony of the witness, himself, and, perhaps, in some cases where the fact is to be shown *aliunde*. *State* v. *Damery*, 48 Maine, 327. The objection should be made as soon as known, 1 Greenl. Ev. § 421. If, therefore, the insanity of Mrs. Pease had been made to appear during her examination upon the stand, it would have been cause for excluding her testimony altogether; and the presiding justice, whose judicial experience covers a period of more than thirty years, would not have failed to discern it.

It was not contended that her aberration of mind was of such a pronounced character as to render her incapable of understanding the nature of an oath and render her incapable of testifying at all; but that these letters, that she attributed to the defendant, had so excited and unbalanced her as to create a fancy and imagination touching the subject that was so unreal and extravagant as to make her feel that fancy was real and that illusions were truth.

The evidence objected to is before the court. It is of a most extraordinary character, and, in the mind of the witness, is directly connected with the defendant as the author of her trouble. It shows extreme intensity of belief that he was the author and publisher of the libels complained of. Her inter-

view with him is given with peculiar detail of circumstance. Her interviews with the other persons are of extravagant conception, and in her mind are interviews with his emissaries. He is imagined by her to be at the bottom of the whole. A mind inflamed with extravagant improbabilities upon one subject, may be truthful in part, and fanciful in part, and where the exact division should be placed between truth and fiction cannot be arbitrarily fixed.

The mind upon a single topic should be considered a unit, and its varied phases must be all taken into account, in order to have accurate judgment of the views it holds. The peculiarities of this case show that the witness believed of the defendant conduct that is both reasonable and unreasonable, credible and incredible; that she believed others, instigated by him, guilty of conduct that a rational person cannot consider real; and would it not be dangerous to say that a jury might hear one part of her account and remain ignorant of the rest? To her it was a unit. To those who are to judge of its truth a unit it should remain.

There is force in the suggestion that the interviews with strangers, related by the witness, occurred more than a year after the libellous letters were written and delivered, one of them, as she says, by the defendant in person; but, on the other hand, the case shows much controversy of a rancorous nature between the defendant and the plaintiff, who is the husband of the witness, calculated to intensify her belief in the identity of the defendant as the bearer of the last libellous letter. This hostility between the parties might, naturally enough, by the lapse of time, confirm the witness in her supposed identification, and, especially so, when the nature of the letters is considered, constantly pricking her mind like a thorn in the flesh, the continued controversy adding new irritation, like caustic upon a sore, until it became so thoroughly upset that imaginations became terribly real. She imagined that Burrowes or his emissaries constantly beset her, both in public and private. Wherever she went, they seemed to pursue her like her own shadow, of which she could not rid herself.

The mind of a witness may be compared to a camera. When properly adjusted, it records a true picture painted by the sun; but when unskilfully used, produces a distorted, extravagant, and untruthful likeness. A photograph, when shown to have been skilfully taken, may be used as evidence of existing objects; but suppose on cross-examination of the artist, it were shown that the camera was so used that it might produce an untrue picture, could it be said that such evidence ought not to be considered by the jury in determining how far the camera had reproduced the truth?

Suppose a phonograph apparently repeats discourse, recorded by it, correctly, and it were shown that its mechanism had become disarranged so as to transpose the discourse, and destroy its coherency or impair its lucidity, would not the truthfulness of the instrument be discredited or impeached? Or suppose the mechanism of a music box be shown to have been injured, so that it omitted some parts of the music, would not its accuracy of expression be impaired? And suppose the omission be noticed, should it not properly be inferred that the mechanism had become disordered? Or if the discourse of the phonograph be recognized as imperfect and incoherent, or the photograph be seen to be out of well-recognized proportions, would it not naturally be inferred that the mechanism of the former had become disarranged, and that the camera had been improperly used?

The human mind may be compared to a machine, and, like it, makes no mistake, when normal. The mind of the witness in this case contains knowledge, impressions, convictions and conclusions, touching the issue on trial. All these had been previously gained from the use of her senses. Her knowledge was material for the jury to know; not what she thought, not what she fancied, not what she imagined, but what she knew. She told what she supposed she knew, but a part of her account is incredible. To her, it is just as real as any part of her story. To us it is pure fiction. Now there is no suggestion of dishonesty. The difficulty cannot be disposed of by saying, "the witness lied;" for she appears to have been sincere and desirous

of telling the truth. She doubtless thinks she has told it. How much truth she has told is difficult to say, and why? Because her discourse discloses a disordered brain, as to the matter on trial. The disorder may have been caused by continued agitation over the facts testified to by her in chief: but our knowledge of them comes through a disordered intellect, a defective machine. This medium must be considered in judging of the picture it shows, or the truth it conveys.

Witnesses laboring under partial mania may be trustworthy; more especially when the subject of inquiry is remote from the subject of delusion. But, when the subject of inquiry is the subject of delusion, care should be taken lest the, "dagger of the mind," be mistaken for the real dagger. Browne on Insanity, § 451.

The adjudged cases upon this subject are few; but the doctrine of them seems to be, that the condition of mind, if capable of appreciating truth, must go to the credibility of the witness, and be submitted to the jury. In *Regina* v. *Hill*, 5 Cox, C. C. 259, (1851,) Donnelly, a patient in a lunatic asylum, was called as a witness for the crown, to testify on the trial of the defendant, an attendant in the asylum, for the homicide of a patient. He testified that he was possessed of spirits; that they spoke to him constantly by day and by night; said he, "They are now speaking to me; they are not separate from me; they are round me speaking to me now; but I can't be a spirit, for I am flesh and blood; they can go in and out through walls and places where I cannot. I go to the grave; they live hereafter, etc. When I swear I appeal to the Almighty; it is perjury, the breaking of a lawful oath, or taking an unlawful one. He that does it will go to hell for eternity." On cross-examination he said: "These creatures insist upon it, it was Tuesday night, and I think it was Monday. The spirits assist me in speaking of the date. I thought it was Monday, and they told me it was Christmas eve, Tuesday; but I was an eye witness, an ocular witness, to the fall to the ground."

On appeal a conviction was upheld. Lord Campbell, in delivering the judgment, said: "It is for the judge to say,

whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath, and then the jury are to decide the credibility and weight of his evidence. . . . The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still if he can stand the test proposed, the jury must determine all the rest."

This doctrine was commended by the Supreme Court, in a case where a plaintiff testified in his own behalf concerning his injury, received by falling upon a street, producing partial paralysis and impairment of mind. "His statement was not always as direct and clear as would be expected from a man in the full vigor of his mind; still it was not incoherent nor unintelligible, but evinced a full knowledge of the matters in relation to which he was testifying." Hospital physicians testified to his impairment of memory and derangement, attempted suicide and the like, and his feebleness was apparent while on the stand. The court was requested to exclude his testimony, but declined, and submitted his credibility to the jury. On error for not excluding the witness, the Supreme Court affirmed the judgment below, quoting at length from the English case, and said: "The doctrine of this decision [*Regina* v. *Hill*] has not been overruled that we are aware of, and it entirely disposes of the question raised here." *District of Columbia* v. *Armes*, 107 U. S. 519 (1882).

In the case at bar, the cross-examination of the witness fails to show a weakened intellect and hardly monomania. Monomania is insanity upon a particular subject, and it would seem, when shown, to require the exclusion of all testimony from the witness upon that subject, for the same reason that insanity excludes a witness altogether. It is insanity upon one subject, leaving the mind sane upon all other subjects. The test laid down by the English case could rarely exclude the monomaniac, and perhaps never, unless the monomania related to the subject matter of

giving testimony, and then, it would seem, the test of moral capacity,—the obligation of an oath and a desire to speak truly,—would be the same as in any case of insanity or general weakness of intellect. It would naturally follow that the same quality of mind in each should exclude or admit the witness.

In the case at bar, the witness apparently understands and comprehends the obligation of an oath, and appears desirous of telling the truth. By *post hoc* reasoning, based on the incredibility of her story, it is inferred that her mind imagines fanciful occurrences as real. The court cannot say her illusions render her testimony altogether unreliable as to some occurrences within her ocular vision, as for instance, in the identification of Burrowes as the bearer of the second libellous letter. On the other hand, her illusions in regard to him and his conduct subsequent to her supposed identification of him, in some degree at least, weaken the same. They do not utterly destroy her testimony on the point, but raise doubts as to its accuracy and reliability; and, certainly, the cause of such doubts should be considered somewhere, and if not sufficient to be acted upon by the court in excluding her testimony altogether, must be considered by the jury or not at all.

The plaintiff has no reason to complain of this view, for the only apparent cause for the delusion of the witness is some act of the defendant; naturally the publication of the letters, and if he be wholly guiltless of them, how could her delusion as to them and him have arisen? Is it likely to have been fabricated out of whole cloth? If so, she must have written the letters herself, and this is not suggested in the record, although many experts in handwriting have testified upon the handwriting of the letters.

Whether the case of *Swartz*, tried at Wiscasset in this State, in 1883, and cited at the bar as reported by Dr. Ray in his Medical Jurisprudence, § 528, and also in Browne, § 454, was correctly decided by the jury, in view of the corroborating, almost controlling evidence outside of the testimony of the government witness, whose mind was deranged upon the subject of religion, is questionable. The two authorities cited disagree

upon that question, but both concede the cross-examination of him showing the delusion to have been competent.

With the merits of the case at bar we have no concern. The plaintiff does not ask a revision of it upon that ground. The only question presented is a purely legal one, and of that we think he has no just cause of complaint.

Exceptions overruled.

CHARLES P. MUSTARD, Administrator,

vs.

UNION NATIONAL BANK.

Cumberland. Opinion December 23, 1893.

Banks. Stockholder. Interest. Dividends.

A stockholder in a bank is not entitled to interest from the bank either on ordinary dividends declared on his shares, or on money due him from a reduction by the bank of its capital stock, for a period during which the bank was prevented from paying him the same by attachments of his stock in suits pending in court between him and other parties; although the money thus belonging to him was during such time mingled by the bank with its general assets, the bank being ready and willing to pay over the same but for the attachments and having on hand all the time a balance of money sufficient for the purpose.

ON EXCEPTIONS.

This was an action of assumpsit tried in the Superior Court, for Cumberland County, without the intervention of a jury and submitted for decision upon an agreed statement of facts, the material parts of which appear in the opinion of the court.

The plaintiff took exceptions to the rulings in matters of law by the presiding justice.

Weston Thompson, for plaintiff.

If, instead of attaching shares, McManus had waited till defendant's capital was legally reduced and then held up the money on trustee process, the situation would have been, as to the question of interest, the same as now. In either case, the attachments would have been defendant's only excuse for non-payment of the money. Question is whether its use of the sub-

ject matter pending the attachment, made defendant liable for interest. Method of attachment and form of writ are immaterial. Defendant debtor became a technical trustee.

When the corporation reduced half of its stock to cash it no longer had the consent of the stockholder to use the cash for its own benefit. He was not bound to intrust that fund to the management of the directors.

Counsel cited and commented on: *Farmers, &c., Bank* v. *King*, 57 Pa. St. 202, 98 Am. Dec. 215; *Cotton* v. *Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774; *Chapin* v. *Conn. River R. R. Co.* 16 Gray, 69; *Dalton* v. *Dalton*, 51 Maine, 170; *Chesterfield Mf'g Co.* v. *Dehon*, 7 Pick. 9; *Bank* v. *Ins. Co.* 104 U. S. 693; *Denston* v. *Perkins*, 2 Pick. 86; *Merrill* v. *Bank*, 19 Pick. 32; 1 Sto. Eq. § 465; 2 *Id.* § 1261, 1277; *Stearns* v. *Brown*, 1 Pick. 530; *Freeman* v. *Freeman*, 142 Mass. 98, 105-6; *Fridge* v. *State*, 3 Gill & Johns. 103, 20 Am. Dec. 463; *Docker* v. *Somes*, 2 My. & K. 655; *Palmer* v. *Mitchell*, *Id.* 672, n.; *Heathcote* v. *Hulme*, 1 Jac. & W. 122; *Bobb* v. *Bobb*, 4 West, 381; *Abbott* v. *Stinchfield*, 71 Maine, 213; *Adams* v. *Cordis*, 8 Pick. 260; *Norris* v. *Hall*, 18 Maine, 332; *Smith* v. *Flanders*, 9 Mass. 322, and cases; *Newson* v. *Douglass*, 7 Harr. & J. 417, 16 Am. Dec. 317; *Blodgett* v. *Gardiner*, 45 Maine, 542.

Barrett Potter, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. The agreed statement, with matters not material to the present question eliminated therefrom, exhibits the following facts: The plaintiff's intestate, George F. Mustard, was the owner of stock in the defendant bank amounting, at par value, to two thousand dollars, which stood attached in two suits against him in favor of Patrick McManus. During the pendency of the suits in court the bank reduced its stock, by proceedings which became effectual on July 20, 1882, from $100,000 to $50,000, by which act the intestate would have

been entitled to receive one thousand dollars as his share of his retired capital but for the attachment upon it. Nothing seems to have occurred between the parties after this to alter the situation until January 29, 1891, when a release signed by McManus, dated January 28, 1891, purporting to discharge his attachments so far as covering the one thousand dollars and any dividends due upon the stock, was presented to the bank by the plaintiff and the sums due him from the bank demanded. The bank refused payment at that time, having doubt about doing so because the suits were still in court and also because McManus had died before the release was presented to them. But those questions are not now of any importance more than as an introduction to the later controversy which has arisen between the parties.

The question now is, whether in an action instituted by the plaintiff to recover this money of the bank, on May 20, 1891, interest is recoverable on such sum from July 20, 1882, when the capital was retired, or only from January 29, 1891, when the plaintiff's proportion of the same was demanded. There being $140.00 due as dividends, the judge presiding ruled as a matter of law that the plaintiff was entitled to recover $1140.00 and interest thereon from the date of such demand. The plaintiff, however, claims to recover, in addition to this allowance, interest from July 20, 1882, to January 29, 1891, on $850.00, that portion of the plaintiff's retired capital which, it is admitted, was merged in July, 1882, with the general assets of the bank.

The parties further agree that the bank never made any promise to pay interest on any portion of the funds, and that it has no custom of paying interest on funds in its possession; that it has at all times since the reduction of its capital stock had on hand a balance of money sufficient to pay the $1000.00 and the accrued dividends; and that it has been always willing and ready to pay the same to the plaintiff or his intestate but for the existence of the attachments.

The plaintiff contends that the bank, as to these funds, did not stand in the condition of an ordinary debtor, but became a stake-holder or trustee for the owner of them, and that having

received the profits and benefit of the funds is liable for interest on the same.

We do not feel satisfied to apply the rule invoked by the plaintiff. There was no promise of interest in any way, and no disposition to withhold the funds except for self-protection. There was more money at all times on hand and unemployed than the sum due the plaintiff, in readiness for appropriation on the debt. It would be an unheard of claim to charge a bank with a liability to pay interest on deposits or declared dividends when there is no promise to do so, nor any fault on the part of the bank. And the funds in question were in no more favorable condition for the owner of them than ordinary deposits or dividends. All uncalled for deposits and dividends held by any bank, or at any rate, the bulk of them, become mingled in the moneys and investments of the bank, and that is one source of its legitimate business profits.

If any interest is recoverable by the plaintiff it must be at the legal rate of six per cent, while there is no evidence that the bank earned so much on its stock or assets, but the aspect of the facts could rather indicate the contrary. The plaintiff's claim would seem less just and equitable perhaps, if the detention of his funds had been for nine days or weeks or months even instead of for nine years, but the principle would be the same in either case. The long-continued delay was not caused in any degree by the bank.

The cases in Massachusetts, where this same question has repeatedly arisen, are averse to the plaintiff's claim. *Oriental Bank* v. *Tremont Ins. Co.* 4 Met. 1; *Huntress* v. *Burbank*, 111 Mass. 213; *Smith* v. *Flanders*, 129 Mass. 322. And we do not perceive that our own cases favor the claim. In *Norris* v. *Hall*, 18 Maine, 332, the debt in the trustee's hands was on its face running upon interest. *Blodgett* v. *Gardiner*, 45 Maine, 542, was a similar case. And in *Abbott* v. *Stinchfield*, 71 Maine, 213, the trustee, an attorney at law, had collected funds for his client and deposited them in a savings bank upon interest for his client's benefit.

Exceptions overruled.

CITY OF DEERING *vs.* EDWARD MOORE.

Cumberland. Opinion December 26, 1893.

Bond. Surety. Contribution. Discharge. R. S., c. 82, § 45.

The failure of a collector of taxes to sign his bond delivered to the town with sureties will not invalidate the same, because the liability imposed by law is precisely the same as if the bond had been signed by the principal. The covenants in the bond would not have changed the legal relation of the parties.

When sureties bind themselves severally for the payment of the same debt they are liable to contribution so that all shall fare alike. The release of one by deed would release all; but the discharge of one on part payment of the liability, would not, although the discharge of the debt might do so, under the provisions of R. S., c. 82, § 45.

AGREED STATEMENT.

It appeared from the facts stated by the parties, that this was a suit on two bonds, of a collector of taxes for the town of Deering, one for the year 1884, one for 1885, the last named one not having been signed by the principal. The penal sum was $30,000, and each surety bound himself severally in the sum of $5000.

It was agreed that defendant is liable on the first bond, that of 1884, to the amount of $82.00. And that if this is the only liability in this suit, costs are to be taxed for each party as though an offer to be defaulted for this amount had been filed on the first day of the January term, 1893.

It was further agreed as to the bond of 1885, being the second one in said suit, that in 1885, Grenville M. Stevens, having been chosen and qualified as collector of taxes of Deering, procured the second bond in suit, to be executed; but his name as principal, was not signed on it. The town of Deering became the City of Deering, by chapter 506, Private Laws of 1889, withall rights preserved.

After the execution of the bond by the parties signing it, it was delivered by said Stevens, to the assessors of taxes of said Deering, who made a legal assessment of the taxes of said Deering for that year, and delivered to said Stevens, as collector, a legal commitment and warrant for the collection of said taxes.

Of the taxes so committed to him, said Stevens has failed to pay over to the proper officers the sum of $883.98. Of this deficiency, together with the deficiency on the bond of 1884, plaintiff has received from Messrs. Sawyer and Dunham, two of the sureties, $187.50 each, in full discharge from liability upon each bond, and is willing to assume the collection of $187.50, from Mr. Bell, another surety. The other signers, except defendant, are not good financially, nor is said collector. Plaintiff made same offer of settlement to defendant at the same time. The bonds for 1884 and 1885, are the same except the necessary changes in dates and amounts, and the bond of 1884, was executed by said Grenville M. Stevens. Plaintiff's offer of settlement was to receive $750.00, in full discharge of liability on both bonds, or one quarter of that sum, from each of the good signers.

If said bond of 1885, is obligatory upon said Moore, he is to be defaulted. Hearing in damages to be had at *nisi prius*. If said bond of 1885, is not obligatory upon said Moore, he is to be defaulted for $82.00.

The case was submitted to the law court.

George C. Hopkins, for plaintiff.

Liability: *Clark* v. *Metcalf*, 38 Maine, 126, and cases; *Cleaves* v. *Dockray*, 67 Maine, 123. Damages: *Machiasport* v. *Small*, 77 Maine, 110. No contribution: *Bancroft* v. *Abbott*, 3 Allen, 524; *Fitzpatrick* v. *B. & M. R. R.* 84 Maine, p. 41, and cases.

C. P. Mattocks and L. Barton, for defendant.

Validity: Murfree on Official Bonds, § § 7, 8; *Wildcat Branch* v. *Bail*, 45 Ind. 213. Liability: *Wood* v. *Washburn*, 2 Pick. 24; 1 Am. Law of Administration, p. 552; Brandt, Suretyship, § 121; *Baldwin* v. *Gordon*, 12 Martin, 378; *State* v. *Bugg*, 6 Robinson (La.), 63; *Ferry* v. *Burchard*, 21 Conn. 597; *Bean* v. *Parker*, 17 Mass. 591. Intention of obligor, and negligence of obligee, in accepting imperfect bond: *Wildcat Branch* v. *Bail*, *supra*; *Maguire* v. *Park*, 140 Mass. p. 21; *Bracken County* v. *Daum*, 80 Ky. 388; *Blakey*

v. *Johnson*, 13 Bush, 197, and cases; *Goodyear Co.* v. *Bacon*, 148 Mass. 543; *Fay* v. *Richardson*, 7 Pick. 91; *Steele* v. *Miller*, 40 Iowa, 402; *Stiles* v. *Probst*, 69 Ind. 382; *Dair* v. *U. S.* 16 Wall. 1, 6; *Pawling* v. *U. S.* 4 Cranch, 219; *State* v. *Peck*, 53 Maine, 584; *U. S.* v. *Hammond*, 4 Biss. C. C. 283, 285.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. Debt by an obligee against a surety upon two bonds, given by a collecter of taxes for the years, 1884 and 1885, respectively. The last bond was not signed by the principal. Each surety bound himself severally, and not jointly, in the sum of $5000. The obligee received from two sureties a sum of money, "in full discharge from liability upon each bond." Two questions are presented:

I. Did the failure of the principal to sign the last bond render it void? We think not. The bond was conditioned that the principal should faithfully perform official duty. This he was bound by law to do, just as effectually as if he had covenanted to do it by signing the bond. The engagement of the surety, therefore, rested upon the legal obligation of the principal already incurred. It is not like the cases, often referred to, where no obligation attaches to the principal, outside of the bond itself. In those cases, the principal not being bound, it would be unjust to hold the surety. Nor is it like the case of bail, where the sureties have peculiar rights flowing from the stipulation agreed to by the principal. The bond must be held good at common law. *Howard* v. *Brown*, 21 Maine, 385; *Scarborough* v. *Parker*, 53 Maine, 252; *Goodyear Co.* v. *Bacon*, 148 Mass. 542.

II. Did the discharge of two sureties release the defendant, another surety? No. The defendant was one of six sureties, who bound themselves severally and not jointly, each in the sum of $5000. Their relations to each other are precisely the same as if each one had executed a separate bond. They are neither necessarily joint debtors, nor joint sureties. Had the

principal executed the bond, he would have bound himself in the sum of $30,000. The sureties, instead of standing in jointly for that amount, divided it equally among them, and each one became severally bound for his aliquot share. They are sureties for the principal, and may or may not be called upon to bear a common burden, as circumstances may require. If they are, (that is, if the whole liability be less than the aggregate amount assumed by all of them, it becomes a common burden, not by reason of any contract or engagement to indemnify each other, but on the principle of equity, that a common burden shall be equally borne by all,) they become co-sureties, and stand in relation to each other as joint debtors, and are bound to contribute to each other, so that they shall all fare alike. In cases of this sort, of course, none can be charged beyond the amount that he has stipulated for. *Warner* v. *Morrison*, 3 Allen, 567. It follows, therefore, that the release of one would work the release of all. That is based upon the presumption of payment, the seal being conclusive evidence of complete and ample consideration. To work the discharge of a debtor, the agreement must be made upon sufficient consideration, and that pays the debt. At common law, the part payment of a debt is not sufficient consideration for its discharge. *Bailey* v. *Day*, 26 Maine, 88; *Potter* v. *Green*, 6 Allen, 442. If the discharge be by a sealed instrument, it is of no consequence what the actual consideration may be, for the seal is conclusive evidence of sufficient consideration. By the statute of this State, passed in 1851, c. 213, R. S., c. 82, § 45, the settlement of a demand upon the receipt of money or other valuable consideration, however small, will bar an action upon it. It should be observed that the demand must be settled, in order to effectuate that result. The discharge of a debtor from liability upon a demand that is to remain outstanding will not so operate. This distinction applies where one or two joint debtors is discharged upon the consideration of part payment, leaving the demand outstanding against the other. Such discharge will not bar an action against both; nor can it be pleaded by the other in an action against him, if the liability be several. *Bank* v. *Mar-*

shall, 73 Maine, 79; *Drinkwater* v. *Jordan*, 46 Maine, 432; *McAllester* v. *Sprague*, 34 Maine, 296.

In the case at bar, the attempted discharge of some of the sureties is not pretended to have been by a sealed instrument. Had it been, it would have worked a discharge of all the sureties, for they stand in the relation to each other of joint debtors, being co-sureties for the payment of the same debt. Nor does it pretend to have discharged the whole debt, as provided for by statute. It simply presumes to discharge some sureties from a liability or debt that was to remain outstanding, and, therefore, not being upon sufficient consideration that would have paid the debt, or so much of it as they had engaged to pay by their covenant, nor evidenced by a sealed instrument, it was ineffectual to discharge any one.

The result is, damages upon the last bond should be assessed in a sum equal to the existing default of the principal, with interest from the time it accrued, leaving the defendant to such claims for contribution as shall prove just.

Defendant defaulted. Damages to be assessed below.

SELECTMEN OF ANDOVER, Appellants,

vs.

COUNTY COMMISSIONERS.

Oxford. Opinion December 26, 1893.

Way. Committee. Disinterested. Description. R. S., c. 1, § 6, rule 22; c.18, § 49.

The ownership of land liable to taxation in a town through which a highway has been laid by the committee appointed on appeal from the County Commissioners, will not disqualify a member of such committee from acting, no part of such land having been taken for the way.

Where the termini of a proposed way are fixed and certain and the general route cannot be mistaken, *Held:* that the description is sufficient.

ON EXCEPTIONS.

From the bill of exceptions it appears that this case began by a petition presented to the county commissioners of Oxford

county, signed by the selectmen of Andover, praying for the location of a highway as therein set forth, commencing at Andover Corner in town of Andover and extending through towns of Andover, Roxbury and Rumford, *via* Swain's Notch, so-called, to Rumford Falls. After due proceedings the said commissioners denied the prayer of the petitioners, whereupon the petitioners duly and seasonably appealed to the Supreme Judicial Court of Oxford County. Thereupon a committee was duly appointed on said appeal. Said committee after due proceedings, viewed the route, heard the parties, and made their report to this court, at the next regular term after their appointment, wholly reversing the adjudication of said commissioners, to which report objections were seasonably made in writing by the appellees to the acceptance of said report. A hearing was had upon said objections before the presiding justice who found the following facts: That A. H. Walker, one of the committee, was the owner of one half in common and undivided of about twelve hundred acres of wild land in the northeasterly portion of said town of Andover, situated in the "Kimball Mile" so-called, and in Y range and northeasterly of Andover Corner; and the southerly line of said lands, by the scale of the county map appears to be about one and one half miles northerly of Andover Corner, and about three and one half miles northerly of Chapman's Mills, so-called, by an air line, but is considerably further than that from either Andover Corner or Chapman's Mills, by any roads leading thereto. The proposed road starts at Andover Corner, as appears by petition to the county commissioners, and runs southeasterly over the present located and travelled highway to Chapman's Mills, about two and one half miles; then it leaves the present located and travelled way running in a southeasterly course, through Swain's Notch, so-called, to Rumford Falls. The proposed road brings Rumford Falls about five miles nearer Andover Corner, than by way of South Andover and Rumford Center road, and about two and one half, or three miles, nearer than by way of Roxbury Notch road. A portion of said proposed road, to be built, is in the town of Andover, but no part of it passes over any land of said Walker, who is not a resident of Oxford County.

Upon the foregoing facts the court ruled as matter of law, that the objections be sustained, and the acceptance of the report be denied.

The appellants, being the original petitioners, took exceptions to this ruling.

James S. Wright, for petitioners.

The burden is upon the appellees to show that these lands were affected, in order to disturb the report of the committee. If any interest existed, it was against the road, on account of taxes, but the decision was the other way.

The court should not presume that Walker was influenced, unless it clearly appears in proof that his property was affected by the decision.

Revised Statutes, c. 1, rule 22, where a person is required to be "disinterested" or "indifferent" in a matter in which others are interested, refers only to relationship.

The effect of the word "disinterested" in c. 18, § 49, R. S., is simply to require that the committee shall be impartial. Timber land the growth of which could only be run out by the brooks and streams to be utilized, would be unaffected by this proposed road.

John P. Swasey, for remonstrants.

Walker being a land owner and tax payer is disqualified. *Pearce* v. *Atwood*, 13 Mass. 324; *Friend, applt.* 53 Maine, 387; *Petition of New Boston*, 49 N. H. 328, and cases.

Description insufficient and invalid. *Phillips* v. *Co. Com.* 83 Maine, 541, and cases; *Hayford* v. *Co. Com.* 78 Maine, 153, and cases.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. Objections to the acceptance of the report of a committee appointed on appeal from county commissioners on the location of a highway. Two objections are made:

I. Because one member of the committee owned land in the town of Andover, into which town the road ran, and was a

taxpayer therein and therefore is not a "disinterested" person as required by statute.

The original petition was signed by the selectmen of Andover, authorized by a vote of the town, and they are the appellants in this case. This member of the committee was not an inhabitant of the town and therefore not disqualified as a party to the suit. Nor would any part of his land be taken by the location of the way. The cases of *State* v. *Delesdernier*, 2 Fairf. 473, and of *Friend, Appellant*, 53 Maine, 387, and of *Pearce* v. *Atwood*, 13 Mass. 324, cited at the bar, are, therefore, not in point. These cases hold that any direct interest, however small, will disqualify a judicial officer, "for no man can lawfully sit as a judge" in his own case. An interest that disqualifies from judicial action may be small, but it must be an interest, direct, definite, and capable of demonstration; not remote, uncertain, contingent or unsubstantial, or merely speculative and theoretic. *Fletcher* v. *Railroad*, 74 Maine, 434; *Jones* v. *Larrabee*, 47 Maine, 474; *Warren* v. *Baxter*, 48 Maine, 193.

The requirement to be disinterested is the equivalent of not interested. Interest therefore disqualifies. In this case, what interest had the committee-man who is objected to? He was liable for taxes on his land in Andover. *Prima facie* his interest would be against building the road laid out by the committee. As a taxpayer in any other town in the county, his apparent interest would be in the same direction, for the county would be liable to pay damages for land taken. If liability to pay taxes that may be applied to the building of any highway be the test of disqualification, no citizen of a county can act as county commissioner, or committee-man, in the location of highways in his county, nor can selectmen of towns act in the laying of town-ways in their towns. The liability of taxation for public works is not such an interest as disqualifies action in their construction. Otherwise, government would be impossible. Committees on appeal exercise the same function, whether considered judicial or administrative, that county commissioners exercise in the first instance, and the same test of qualification applies to both. It has always been held in Massachusetts, and

believed in this State, that liability for taxation in the town or county where the road is laid, does not disqualify. *Wilbraham* v. *County Commissioners*, 11 Pick. 322; *Danvers* v. *Co. Commissioners*, 2 Met. 185.

If it were shown that some non-apparent interest influenced a member of the committee and rendered him impartial, such fact might attack the integrity of the report, but would not show a disqualification of the committee. It might destroy action, but not authority to act. No such facts are shown, neither is the fairness or integrity of the report questioned.

II. Because the way to be laid is not sufficiently described in the original petition.

The description commences at Andover Corner, a well known point, thence through Andover, Roxbury and Rumford *via* Swain's Notch to the county road near the dwelling of Manley Blanchard in Rumford, thence to Rumford Falls. The termini are fixed and certain. The route is *via* Swain's Notch. The locality is almost mountainous, and Swain's Notch is a well known pass between the hills. No one could mistake the general route proposed. The petition is as specific as it well could be, and is sufficient. *Packard* v. *Co. Commissioners*, 80 Maine, 43.

Exceptions sustained. Report accepted.

STATE *vs.* JOSEPH TIBBETTS.

SAME *vs.* FRANK HALEY.

Franklin. Opinion December 26, 1893.

Criminal Law. Appeal. Motion. Judgment. Pleading. "*Unlawfully.*"

Appeal is a proper and effectual remedy for the imposing of sentence by a magistrate in excess of his jurisdiction.

A verdict of guilty upon a complaint or indictment containing several counts is a verdict upon each count. Any injustice from such verdict cannot be relieved by motion in arrest, but may be on motion for new trial.

If one of several counts be good, judgment will not be arrested; but where several substantive offences are charged in separate counts, and a conviction be had upon all, judgment may be arrested upon those that are bad, because judgment may be several, although the conviction be general.

The word unlawfully need not be averred when its equivalent "contrary to the form of the statute" is used; and an act need not be charged to have been maliciously done, when not, by law, made an element of the offense.

ON EXCEPTIONS.

The cases appear in the opinion.

Geo. L. Rogers, County Attorney, for State.

B. Emery Pratt and H. L. Whitcomb, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

HASKELL, J. Complaint before a magistrate for hunting and killing deer in violation of the game laws. The offense is charged in two several counts averring the destruction of one deer in each count at different times. A trial was had upon the plea of not guilty, and the defendant was convicted and fined eighty dollars and costs. From this sentence the defendant appealed and was again tried in the court below and convicted. He now moves in arrest of judgment:

I. Because the magistrate imposed a fine in excess of his jurisdiction. Suppose he did. One remedy was by appeal, and the defendant has availed himself of it.

II. Because a verdict was not taken upon each count separately. It was taken upon each count. A general verdict of guilty on several counts is a verdict on all, and therefore on each; and any injustice from such procedure cannot be remedied by motion in arrest of judgment, but may be on motion that the verdict be set aside as unwarranted by the evidence. *State* v. *Hood*, 51 Maine, 363.

If one count be good, judgment will not be arrested. *State* v. *Hadlock*, 43 Maine, 282.

If, however, several substantive offenses be charged in separate counts, and a conviction be had upon all by a general verdict of guilty, judgment may be arrested upon those that are bad, for it "may be several, though the verdict is general." *State* v. *Burke*, 38 Maine, 574. Motions in arrest of judgment reach the sufficiency of the charge, not the justice of the verdict. *State* v. *Rounds*, 76 Maine, 123-126.

III. Because the first count does not allege the act to have been unlawfully or maliciously done. These specific words need not be averred. The allegation against the peace and contrary to the statute is an equivalent of the former, and the latter is not made an element of the offense by the statute. Both counts being valid, judgment must go on both.

Exceptions overruled. Judgment for the State.

WILLIAM C. WALKER, Administrator.

vs.

REDINGTON LUMBER COMPANY.

Franklin. Opinion December 26, 1893.

Negligence. Voluntary Exposure.

When one receives an injury, through his own negligence, by exposing himself to dangers of which he had ample opportunity to be informed, he cannot maintain an action therefor.

ON REPORT.

This was an action on the case against the defendant for negligently and carelessly maintaining a skid-way or landing so near to the passing trains of the Phillips and Rangeley Railroad as to endanger the lives and limbs of persons having occasion to pass upon the trains and in the management thereof, whereby the plaintiff's intestate, a brakeman on one of such trains, received injuries that resulted in the loss of his life.

The plea was the general issue.

The evidence for the plaintiff being taken out, it was agreed that the case be reported to the Law Court, with the stipulation that, if the court shall be of opinion that the plaintiff has a cause of action against the defendant, the case shall stand for trial; otherwise a nonsuit to be entered.

The facts are stated in the opinion.

B. Emery Pratt, for plaintiff.

F. E. Timberlake, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. A brakeman was last seen alive leaning from the steps of the forward end of a passenger car on the Phillips and Rangeley Railroad, looking backward and under the car, while the train was moving on a down grade. He set his brake, stepped down on the steps, and, holding on by the guard rails, leaned over, looking backward and under the car, evidently to observe whether the wheels were sliding. He returned to the brake, set it up, and then resumed his place of observation. The car passed a skid-way about level with its floor and at least twenty-nine inches distant from it. The skid-way had been used by the defendant previously in loading logs upon platform cars. Presumably some part of the brakeman's body struck the skid-way that brushed him aside, and, hanging on for his life, he was carried a short distance, and then fell under the car and was killed.

Assuming all other facts necessary to charge the defendant to be proved, what excuse can be given for the carelessness of the deceased? He had been passing daily by a lumber landing as far away from the sides of the cars as all ordinary platforms are, although passenger platforms, in these days, are much lower on standard guage roads than the floors of the cars. It was no part of his duty to lean from the car to observe the effect of his brake upon the wheels. He could ordinarily tell from his post at the brake rod when the wheels began to slide. It was the sixth of October. There could not have been snow or ice upon the rail so as to have made it more difficult to tell how well the brake was holding. He carelessly exposed himself to danger, of which he must have previously had notice, and, although his misfortune was great, others cannot be held to share it with him or bear it for him.

Plaintiff nonsuit.

WILLIAM B. NEAL *vs.* WILLIAM B. BERRY.

Kennebec. Opinion December 26, 1893.

Partnership. Minor. Ratification. R. S., c. 111, § 2.

A note was given by a firm, one member of which was then a minor. Upon dissolution of the firm,—by an oral submission to arbitration in which the note was expressly excluded,—the other partner assumed all its liabilities, retaining the assets, and was required to pay the note. He sought to recover one half of the amount so paid from his co-partner. *Held;* that if the note was a firm liability it belonged to the plaintiff to pay the whole of it by the terms of the dissolution; if not such a liability, then it was a joint promise for which the defendant, being a minor, is not holden, he not having ratified his promise in writing according to the statute since he became of age.

ON REPORT.

G. W. Heselton, for plaintiff.

A. M. Spear, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. In June, 1887, plaintiff and defendant became partners. Defendant was a minor. December 17, 1887, the firm gave a note for sixty dollars. December 23d, defendant became of age. The partnership was dissolved June 10, 1888. The partnership affairs were settled by an award of referees, July 17, 1888. The note was excluded from the reference by mutual consent. By the terms of the award, $615.47 was to be paid the defendant, and the plaintiff was to succeed to the firm business and save defendant harmless from all liabilities of the firm. November 5, 1888, plaintiff paid the note and has sued defendant for his half.

If the note is to be treated as a firm liability, then it became plaintiff's duty to pay the whole of it by the terms of the award, and he cannot recover in this suit.

If it is not to be treated as a firm liability, then it is the joint liability of the parties, and the plaintiff may recover one half

of what he paid upon it, unless the defendant is not bound by reason of infancy when the note was given. The infancy is admitted. Has the defendant ratified his promise in writing since he became of age? No such writing is produced. The common law authorities do not apply. R. S., c. 111, § 2; *Bird v. Swain*, 79 Maine, 529.

Judgment for defendant.

STATE *vs.* FREDERICK A. CLARK.

Cumberland. Opinion December 26, 1893.

Pleading. Cruelty to Animals. Charge or Custody. R. S., c. 124, § 29.

A complaint, charging a defendant with having the "custody and control" of a horse without further particulars, is sufficient under a statute which provides a penalty for cruel treatment of a horse by any person "having the charge or custody thereof, as owner or otherwise."

The custody need only be alleged or proved.

The statute excuses averments as to the particulars of custody.

ON EXCEPTIONS.

The case originated in the Municipal Court, for the City of Portland, on the following complaint:

"Eben N. Perry, on the twelfth day of January, in the year of our Lord, on thousand eight hundred and ninety-three, in behalf of said State, on oath complains, that Frederick A. Clark, of Portland, in said county, on the eleventh day of January, A. D. 1893, at said Portland, then and there having the custody and control of a certain horse, did then and there unnecessarily fail to provide such horse with proper shelter and protection from the weather, against the peace of the State, and contrary to the form of the statute in such case made and provided."

The defendant was convicted, and appealed to the Superior Court, where he was tried before a jury, and found guilty. He thereupon moved in arrest of judgment, because the complaint did not follow the language of the statute under which it was

brought. The motion having been overruled he brought the case to this court, by exceptions.

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

John C. and F. H. Cobb, for defendant.

Counsel cited: *State* v. *Learned*, 47 Maine, 426; *State* v. *Haskell*, 76 Maine, 399; *Com.* v. *Phillips*, 16 Pick. 211; *Com.* v. *Blood*, 4 Gray, 31; *Com.* v. *Whitman*, 118 Mass. 458.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

HASKELL, J. The complaint, after proper averments as to time and place, avers that the defendant, "then and there having the custody and control of a certain horse, did unnecessarily fail to provide such horse with proper shelter and protection from the weather, *contra pacem et contra formam statuti*."

The statute, R. S., c. 124, § 29, provides that, "every person who cruelly overdrives . . any horse . . or, having the charge or custody thereof, as owner or otherwise, unnecessarily fails to provide such animal with proper food, drink, shelter and protection from the weather," shall be punished.

The defendant, having been convicted below, contends that judgment should be arrested, because the complaint does not charge him with having the charge and custody of the horse, as owner or otherwise.

The words, "charge," and "custody," are frequently used as synonymous. The lexicographers give them as synonyms. They are placed in the statute, however, disjunctively, and, in such cases, need not be conjunctively averred, and cannot be disjunctively averred. The statute word, "custody," therefore, in the complaint, sufficiently charges the defendant's control of the horse. It is not necessary to define the nature of the defendant's custody, "as owner or otherwise." Those words were inserted for the very purpose of obviating any supposed necessity of that sort. The statute meant to reach persons having either the "charge or custody," if there can be any distinction

made in the meaning of those words, without requiring any further particulars to be averred or proved, as such a requirement might paralyze any attempt to punish apparent cruelty.

It is sufficient to charge and prove, that the defendant, having the custody of the animal, was guilty of the inhuman treatment prohibited by the statute. See the reasoning in *State* v. *Haskell*, 76 Maine, 399; *Commonwealth* v. *Curry*, 150 Mass. 509.

Exceptions overruled.

STATE *vs.* ALEXANDER CAMERON.

Piscataquis. Opinion January 4, 1894.

Indictment. Names of Persons. Initials.

A description of the person to whom intoxicating liquor was sold as "S. A. Willetts," is no ground for demurrer to an indictment.

Letters of the alphabet may be sufficient names to distinguish persons of the same surname.

ON EXCEPTIONS.

The case is stated in the opinion.

M. W. McIntosh, County Attorney, for State.

J. B. Peaks, for defendant.

If the given name of Willetts was not known, it should have been so stated in the indictment, giving the initial letter gives the defendant no knowledge of who Willetts is or which Willetts it is. And gives him no opportunity of showing, in case of another indictment for selling to Stephen A. Willetts that he has been once convicted of selling to S. A. Willetts, because this being upon demurrer there is no evidence and will be none that S. A. Willetts means Stephen A. Willetts any more than it means Susan A. Willetts or Solomon. Heard Crim. Law, p. 32.

Counsel cited: *Com.* v. *Blood*, 4 Gray, 33; *Com.* v. *Thurlow*, 24 Pick. 374; *Com.* v. *Stoddard*, 9 Allen, 280, 282, and cases; *Com.* v. *Intox. Liquors*, 116 Mass. 21, and cases; *Com.* v. *Glover*, 111 Mass. 401; *Com.* v. *Crawford*, 9 Gray, 129, and cases; *Com.* v. *Pope*, 12 Cush. 272; *Com.* v. *Hill*, 11 Cush. 141; *Com.* v. *Finn*, 108 Mass. 467.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WISWELL, JJ.

EMERY, J. The defendant was indicted for an unlawful sale of intoxicating liquor "to one S. A. Willetts." He demurred generally to the indictment, but in his argument only complains that it did not sufficiently allege the name of the person to whom the sale was made. His argument is that, at least, one of the christian names should have been stated in full.

By his demurrer, the defendant admits that he did unlawfully sell a quantity of intoxicating liquor to one "S. A. Willetts;" and hence admits that "S. A. Willetts" is the name of the person to whom the liquor was sold. It, therefore, appears and must be assumed that the name of that person is "S. A. Willetts." It does not appear and cannot be assumed that he has any other, or any more of a name. Letters of the alphabet, consonants as well as vowels, may be names sufficient to distinguish different persons of the same surname. *Breedlove* v. *Nicolet*, 7 Pet. 413; *Tweedy* v. *Jarvis*, 27 Conn. 62; *Reg.* v. *Dale*, 6 Eng. L. & Eq. 360.

Exceptions overruled.

ROSALVIN ROBBINS *vs.* AUGUSTUS H. SWIFT.

Franklin. Opinion January 3, 1894.

Trespass. Officer. Taxes. Arrest. Excessive Fees.

For a collector of taxes to demand excessive fees from one under arrest for non-payment of taxes is an abuse of authority which is remediable by an action of trespass.

ON EXCEPTIONS.

This was an action of trespass for assault and false imprisonment in which the jury returned a verdict for the defendant.

The plaintiff claimed that the defendant, a collector of taxes for the town of Industry, abused his authority and taxed illegal fees which the plaintiff was compelled to pay in order to obtain his release from jail upon being arrested and committed for the non-payment of taxes, after being imprisoned about four hours,

whereby the defendant became a trespasser *ab initio*. The tax was three dollars, and the collector's fees were six dollars and ninety cents.

Enoch W. Whitcomb, for plaintiff.

E. O. Greenleaf, for defendant.

The plaintiff was not liable on account of any excess in costs, and such excess, if any there were, will not enable the plaintiff to maintain an action for false imprisonment. *Meserve* v. *Folsom*, 62 Vt. 504. So, also, where the costs are irregularly taxed, *Small* v. *Banfield* (N. H.), 20 Atl. Rep. 284.

The gist of the action of false imprisonment is unlawful detention, and in this case the process was regular and the detention lawful, and not unlawfully extended.

The jury found that the process had not been abused, there was no indignity or oppression beyond the arrest; that being justifiable, and the detention lawful, plaintiff has no grievance. *Coupal* v. *Ward*, 106 Mass. 289; *Mullen* v. *Brown*, 138 Mass. 114; *Abbott* v. *Kimball*, 19 Vt. 551. (47 Am. Dec. 708.)

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, WHITEHOUSE, JJ.

EMERY, J. The defendant was a town collector of taxes, and as such had a legal warrant to collect a legal tax from the plaintiff. After observing the necessary preliminaries, the defendant arrested the plaintiff on the tax warrant for non-payment of the tax, and committed him to the county jail. In the written certificate of the costs of arresting and committing, given to the jailer as required by statute, the defendant named a sum in gross and in excess of the amount of the legal fees. The plaintiff after the commitment paid the full sum thus certified, and was thereupon released from the imprisonment.

It does not appear in the case, that the plaintiff questioned the legality of the sum certified, or that his imprisonment was at all prolonged by the excess of costs certified, or would have been in the least abridged had they been correctly certified.

The plaintiff has now brought this action of trespass for that

arrest and imprisonment. At the trial the defendant conceded that he had injured the plaintiff by demanding and taking excessive fees as above described, but contended that this action of trespass was not the lawful remedy for such an injury. The presiding justice sustained this contention and thus practically directed a verdict for the defendant. The plaintiff excepted. The question, therefore, is whether trespass is the proper form of action for this injury.

It is the firmly established rule of our law that any abuse by a ministerial officer of an authority given him by law, is remediable by an action of trespass. The reasons for this salutary rule are clearly and correctly stated in *Carter* v. *Allen*, 59 Maine, 296; and lately affirmed in *Railroad Co.* v. *Small*, 85 Maine, 462, and need not be repeated here. In accordance with this rule, the following acts have been held to be abuses of authority and remediable by an action of trespass: the working an estray or a beast distrained. *Bagshawe* v. *Goward*, Cro. Jac. 147 (cited in *Gibbs* v. *Chase*, 10 Mass. 129,); the omission to care for impounded beasts, *Adams* v. *Adams*, 13 Pick. 384; the placing an unfit person in a house as keeper over goods attached, *Malcolm* v. *Spear*, 12 Met. 279; selling attached property when one of the appraisers was interested, *McGough* v. *Wellington*, 6 Allen, 505; a delay for five hours to remove goods from the room in which they had been attached, *Williams* v. *Powell*, 101 Mass. 467; the omission of a collector of taxes, after a sale of property, to "render an account in writing" of the sale and charges, *Blanchard* v. *Dow*, 32 Maine, 557; selling the goods of a firm on an execution against one partner, *Moore* v. *Pennell*, 52 Maine, 162; the deduction of illegal fees by a tax collector from the proceeds of a tax sale. *Carter* v. *Allen*, 59 Maine, 296; the selling by a tax collector of more goods than necessary to pay the tax and expenses of sale, although the surplus proceeds were paid over to the plaintiff, *Seekins* v. *Goodale*, 61 Maine, 400; the omission by the officer attaching hay, to leave enough hay for the debtor's cattle. *Wentworth* v. *Sawyer*, 76 Maine, 434.

The foregoing cases sufficiently illustrate the rule. Was the

defendant's act within the rule? Of this, there can be little, if any doubt. He practically demanded and exacted excessive and illegal fees of a prisoner whom we held in official durance. He presumably knew the law, and what were the legal fees. He thus abused his official power, and under the rule above stated this abuse can be remedied in this action of trespass.

It is urged that the imprisonment does not appear to have been prolonged a single instant by reason of the demand for illegal fees, and that, therefore, the plaintiff's only action is one to recover back the sum wrongfully demanded. The same contention was urged in *Carter* v. *Allen*, *supra*, and overruled. In determining whether an act is an abuse of official power, the nature of the act itself, is to be looked at rather than its mere result. The defendant's act was clearly illegal, and an abuse of official power. That the plaintiff did not resist or question it does not make it any the less illegal or abusive. The sharp stress of imprisonment does not encourage a prisoner to question the propriety of official demands made upon him, as a condition of his liberty. That he hastens to comply with the illegal demand rather than suffer further imprisonment, does not purge the demand of its oppressive character as an abuse of official power.

The amount of damages the plaintiff is entitled to recover is another question, not presented here. That must be determined upon the new trial upon the evidence then adduced.

Exceptions sustained.

JOHN U. HILL, Executor, *vs.* HARRIET H. BEAN, and others.

Hancock. Opinion January 12, 1894.

Will. Money Legacies. Residue. Power of Sale.

General money legacies may become a charge upon real estate when there is not sufficient personal property for that purpose after the payment of the testator's debts.

A testator after giving sundry money legacies, not a charge upon any specific part of his estate, gave his executor power to manage, sell and convey his real estate and to distribute the proceeds and income thereof as he might thereafter in his will provide. He then gave all the residue of his estate

both real and personal and income of the real estate before mentioned to certain residuary legatees. The personal estate after payment of debts, &c., was insufficient to pay all the money legacies.

Held; that all the real estate should be converted into money by the executor, that the debts and legacies should be paid, and the residue remaining should go to the residuary legatees.

ON REPORT.

Bill in equity, heard on bill and answers, to obtain a construction of the will of Josiah Bean, late of Sullivan, Hancock County, deceased.

The case appears in the opinion.

Geo. P. Dutton, for plaintiff.

Wiswell and King, for Harriet H. and Eben J. Bean.

Henry Boynton, for the other defendants.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, WHITEHOUSE, JJ.

LIBBEY, J. This is a bill in equity brought by the executor asking for a construction of the will of Josiah Bean, late of Sullivan, Maine. The will first gives twelve general bequests to be paid in money, amounting in all to six thousand, eight hundred and fifty dollars, with no direction charging them upon any portion of his estate. The plaintiff alleges that on payment of the testator's debts and expenses of administration there will not be sufficient of the personal estate to pay the legacies aforesaid by about $1275. That the value of the real estate left by his testator is about $2550.

The complainant alleges that the clauses of the will about the construction of which a doubt arises, and which the court is asked to construe, are twelve and thirteen which read as follows:

"Twelfth. I hereby direct and empower my executor herein named to take charge of and manage to the best possible advantage any real estate which I may leave at my death, and I also authorize and empower my said executor to sell and convey, for such price as he deems proper, in fee simple any and all real estate which I may so leave at my death and to distribute the proceeds and income thereof as hereinafter provided.

"Thirteenth. I give, devise and bequeath all the residue of my estate both real and personal and all the proceeds and income of the real estate mentioned in the preceding (twelfth) section of this will to the following named persons and in the following shares, to wit: To said Harriet H. Bean, to my nephew, Eben J. Bean of California and to said Eben B. Ford one sixth each; to said Mary A. Glidden, Henry E. Urann, Frank F. Hill, Lottie Hill and Clarissa Hill aforesaid one twelfth each; and to said John U. Hill and Oliver H. Perry together one twelfth in trust for said Geo. E. Urann to be paid to said Geo. E. Urann by said Hill and Perry in such sums or portions and at such times as they shall deem advisable."

The question propounded to be answered by the court is as follows:

"That this Honorable Court will construe said will and particularly as to the following matter in doubt, viz: As to the right, power or duty of the said complainant as executor as aforesaid to use any portion of the proceeds from the sale of real estate for the purpose of paying any balance that there may be due upon said legacies and bequests after exhausting the personal property for that purpose."

In the absence of any specific direction to the contrary, the whole estate is charged with the payment of the debts of the testator and the general money legacies, recourse to be had for that purpose first to the personal estate, and if that is not sufficient then, to the real estate. But the testator, by clause twelve, gives his executor full power to convey for such price as he deems proper all his real estate, and to distribute the proceeds and income thereof as thereinafter provided. The only provision in the will after that disposing of any portion of his estate is in the next clause, thirteen, by which he devises all the residue of his estate, including the proceeds of his real estate, to the persons therein named. The *residue* of an estate is what is left after payment of debts and legacies. We must, therefore, conclude that it was the intention of the testator, taking into consideration all the provisions of his will, that all his real estate should be converted into money by his executor and his

debts and legacies should be paid, and the residue remaining should go to the residuary legatees named.

We answer the question propounded in the affirmative.

The costs of this suit, including counsel fees, not exceeding in all seventy-five dollars, to be paid out of the estate.

Bill sustained.

EMMA SMITH, and another, Appellants

vs.

LUCY A. HOWARD, Administratrix.

Waldo. Opinion Febuary 2, 1894.

Probate. Widow's Allowance. Non-resident Decedents. Stat. 1821, c. 51, §§ 8, 39; R. S., c. 65, §§ 21, 36; Pub. Stat. Mass. c. 135, § 2.

Courts of probate are tribunals of special and limited jurisdiction. They exercise only such powers as are directly conferred upon them by the statutes, and such as may be incidentally necessary to the execution of these powers.

A judge of the probate court in this State has no authority to decree an allowance to the widow of a non-resident decedent from assets in this jurisdiction on which there is ancillary administration. The widow's claim for an allowance is not only controlled by the law of the State where the deceased husband had his home at the time of his death, but the decree therefor must be made by the probate court in the State of the decedent's domicil.

Whether the widow's situation would have been improved, if she had obtained from the court in Massachusetts a decree for an allowance with a representation of insufficient assets there to respond to it, and had then asked to have the claim satisfied from the assets in this State, subject to the claims of creditors residing here, *quære.*

AGREED STATEMENT.

Jos. Williamson, for Emma Smith.

R. F. Dunton, for Lucy A. Howard.

The allowance to the widow is to be determined by the law of the domicile of the husband at the time of his decease; but it does not follow that the allowance must be made, if at all, in the state of his domicile. Personal estate, must in all cases be distributed according to the law of the domicile of the deceased, yet by express provision of statute in this State, such property

of a deceased resident of another State may be distributed here, in accordance with the law of the domicile of the deceased. R. S., c. 65, § 36; Woerner's American Law, of Ad. § § 39, 167; Croswell's Exors. and Admrs. § 577; *Kersey* v. *Bailey*, 52 Maine, 198.

The question as to whether under our laws, the allowance would take precedence of the claims of resident creditors does not arise in this case, first, because no creditor is contesting the allowance; and second, no appeal having been taken from the decree of allowance, it is conclusive, if the probate court in this State has authority in any case, under any circumstances, to make an allowance to the widow of a deceased resident of another State.

The statutes of Massachusetts, as well as the statutes of Maine, make ample provision for the support of the widow pending the settlement of estates; yet if a husband domiciled in Massacusetts, dies leaving all of his personal estate in the State of Maine, (which is practically this case,) there is no power in the courts of Massachusetts or Maine, or of both States combined, to provide for the temporary support of the widow from his estate, unless the probate court in this case had jurisdiction over the petition for allowance. The personal estate cannot lawfully be transmitted to Massachusetts, until the creditors in this State have been ascertained and paid, or until the completion of ancillary administration.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

WHITEHOUSE, J. This is an appeal from the decree of a judge of probate, allowing the account filed by the defendant, as administratrix on the estate of her husband, whose domicil was in Massachusetts, at the time of his death. The appellants are the children and heirs of the decedent, and the only item in the account to which they object is a credit of $700, being the amount granted to the widow, as her allowance, by the judge of probate in this State. The defendant took out the ancillary administration in this State, in May, 1892, on personal property

amounting to $850. In June of the same year, she took out the principal administration in the place of the domicil of the decedent; but the entire estate in that jurisdiction, small in amount, was exhausted in effecting a settlement by compromise with the creditors in that State. No allowance was made to the widow, or applied for by her, in Massachusetts. The allowance in question was made by the judge of probate, in this State in July, 1892.

The only question presented by the agreed statement, accompanying the appeal, is whether the judge of probate in this State, had jurisdiction and authority to decree this allowance to the widow of a non-resident decedent, from assets in this jurisdiction on which there is ancillary administration.

In determining this question, a new one in this State, it is proper to be reminded that courts of probate are tribunals of special and limited jurisdiction only. They are wholly creatures of the legislature. They exercise only such powers as are directly conferred upon them by legislative enactment, and such as may be incidentally necessary to the execution of these powers. Unless authority for the exercise of jurisdiction in a given case can be found in the statutes, given either expressly or by implication, the proceeding is void. Woerner's Am. Law of Ad. § 142; *Fowle* v. *Coe*, 63 Maine, 248.

It is furthermore important to observe that, in order to discover the true scope and purpose of statutes defining the powers of these courts, they are to be examined in the light of the common law, which it may be supposed they were intended to modify, affirm or supersede, or by which their practical operation might be affected. In this case it is proper to consider that the statutes of every State are enacted primarily with reference to the citizens within its own jurisdiction; that it is the right of a State to pass laws for the appropriation of any property of a decedent within its limits to the payment of the just claims of creditors residing there, even if not in entire harmony with the spirit of comity between States; and that letters of administration have no legal force or effect beyond the territorial limits of the State in which they are granted. *Saun-*

ders v. *Weston*, 74 Maine, 92; *Smith* v. *Guild*, 34 Maine, 443; Story Confl. of Laws, § 512. These statutes are also to be construed with due regard to the universal rule which Chancellor Kent declares to be as "settled principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to and distribution of, personal property wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. 2 Kent's Com. 571; *Gilman* v. *Gilman*, 53 Maine, 184; Wharton on Confl. of Laws, § § 604, 627. The principle last stated, as will presently be seen, is expressly recognized and affirmed in our statutes. (R. S., c. 65, § 36.)

In the subdivision of chap. 65, R. S., entitled, "Allowances to widows and others," is the following in section 21: "In the settlement of any intestate estate, or of any testate estate, which is insolvent, or in which no provision is made for the widow in the will of her husband, or when she duly waives the provisions made, the judge may allow the widow so much of the personal estate, besides her ornaments and wearing apparel, as he deems necessary, according to the degree and estate of her husband, and the state of the family under her care." The last subdivision of this chapter is entitled, "Distribution of the estates of deceased non-residents." In the first section of it (§ 36), is the following: "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 . . . if he left any; but if not . . . his personal estate shall be distributed according to the laws of the state or county 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." These are modified forms of

the original enactments of 1821 (§ § 8, & 39, c. 51), which were adopted from Massachusetts. In that State the corresponding statutes were enacted at different periods, that relating to ancillary administration, in the form as adopted, having been enacted in Massachusetts, in 1818. None of the enactments providing for administration on the estates of deceased non-residents in Maine or Massachusetts at any time, contained any express reference to a widow's allowance.

It is manifest from the history of these two sections in our Revised Statutes above quoted, and their present collocation in chapter 65, as well as from a comparison of their respective terms and provisions, that section 21 has reference solely to the estates of deceased residents. It was not designed to embrace the estates of deceased non-residents. With respect to the latter, the jurisdiction of the court of probate is clearly defined and limited in section 36. In case of an intestate, it is simply the duty of the judge to order the residue of the estate, after the payment of debts, to be distributed here, or transmitted to the foreign administrator, to be distributed, in either event, according to the law of the place where the deceased had his domicile. So long as there are creditors within the jurisdiction of the ancillary administration, they have a legal right to insist upon having all the assets found there appropriated to the payment of their debts. The court has no authority to order the assets to be transmitted under this statute, until the creditors here are all paid, and it has no jurisdiction to determine that there are no unpaid creditors here until the expiration of the time fixed by law for presenting their claims. *Newell* v. *Peaslee*, 151 Mass. 601; 1 Woerner's Am. Law of Ad. § 167. For aught that appears all the assets inventoried in this jurisdiction may yet be required to pay the claims of creditors residing here.

No authority to make an allowance to the widow of such non-resident decedent is expressly conferred by this section; nor is it granted by implication as necessary to the discharge of the duties that are expressly imposed. A widow's claim for an allowance is not deemed a matter of legal right either in this

State or Massachusetts. It rests merely in the discretion of the judge of probate. *Kersey* v. *Bailey*, 52 Maine, 198; *Dale* v. *Bank*, 155 Mass. 141. It is not a fixed and absolute interest in the estate *Additon* v. *Smith*, 83 Maine, 554; *Adams* v. *Adams*, 10 Met. 170. It is not a debt due from the estate nor a distributive share of it. It is not included in the "expenses of administration." *Washburn* v. *Hale*, 10 Pick. 429.

The widow's allowance was originally designed to afford a temporary supply for the widow and her family pending the settlement of the estate. It had its origin in a humane and beneficent public policy that seeks to encourage the continuance of the family relations by providing against the exigencies arising from the death of the head of the family. *Bailey* v. *Kersey*, *supra*. When, therefore, a claim for such an allowance from the personal property of her husband is presented by the widow it is held with substantial uniformity, that the question must be determined and the amount regulated by the law of the place where the family resided and had their home at the time of the husband's death. *Gilman* v. *Gilman*, *supra*; *Shannon* v. *White*, 109 Mass. 146; Woerner, *supra*, § 89. It is conceded by the defendant that such is undoubtedly the law; but it is still contended that without express statutory provisions, after the analogy of the distribution of the assets, and as a matter of comity, the allowance in question was properly granted by the court in this State, and should be sustained if made in accordance with the law of Massachusetts. Whatever may reasonably be urged, *ex comitate* in favor of such a practice in the courts of the *situs*, in cases where there are no debts, towards domiciliary jurisdictions where the amount of the allowance is definitely fixed by statute, serious difficulties are encountered in attempting to apply it here.

Section 2 of c. 135 of the Pub. Stat. of Massachusetts, is made a part of the agreed statement, and is as follows:

"Such parts of the personal estate of a deceased person as the probate court, having regard to all the circumstances of the case, may allow as necessary to his widow, for herself and for his family under her care, or, if there is no widow, to his minor

children, not exceeding fifty dollars to any child, and also such provisions and other articles as are necessary for the reasonable sustenance of his family, and the use of his house and the furniture therein for forty days after his death, shall not be taken as assets for the payment of debts, legacies, or charges of administration."

It will be seen that this statute differs in important particulars from the corresponding statute in this State. There, in case of a will, the allowance may be granted to the widow in addition to the provisions for her in the will (*Williams* v. *Williams*, 5 Gray, 24); here, by the terms of the statute it is contingent on her waiver of the provisions in the will. It is also manifest that in other respects the nature and office of the allowance are essentially unlike in the two States. There the statute aptly illustrates the original purpose of the allowance, as stated above, while in this State the practical construction has been much more liberal, and the authority to grant an allowance is not confined to cases of mere temporary relief. *Bailey* v. *Kersey*, 52 Maine, 198. In the recent case of *Dale* v. *Bank*, 155 Mass. 144, the court says upon this point: "As a result of a uniform line of authorities, the rule is established that the court has no right under the statute to attempt to modify the provisions of a will, or to change the course which property of an intestate takes under the statute of distribution, or to take the estate from creditors to provide for the future of an unfortunate widow who is left dependent on her own resources. The purpose of an allowance is to provide for the necessities of the widow and minor children for a short time, until they have an opportunity to adjust themselves to their new situation." This is strikingly at variance with the practical construction of the Maine statute; and if the defendant would avail herself of the rule of comity which she invokes, she should at least be able to make it affirmatively appear that the allowance was in fact made in accordance with the Massachusetts statute as construed by the courts of that State. It is not expressly stated, however, to have been made with any reference whatever to the Massachu-

setts statute. On the contrary it may fairly be inferred, from the statement of the case, and from the comparatively large amount of the allowance, that it was made under the influence of the law and practice of our own State, as in ordinary cases of domiciliary administration here.

But if it be conceded that the judge of probate intended to make the allowance in accordance with the law of Massachusetts, there are still insuperable objections to such a practice under circumstances like those here stated. In the first place, it would be incompatible with the rights of creditors under the provisions of section thirty-six which require all debts to be paid before any of the assets can be remitted to the place of the domicil. In this case, there may be no creditors in Maine; but that question has not yet been determined, as nearly a year yet remains within which the claims of creditors may be enforced.

Again, the domiciliary court is the appropriate one to determine the amount of the allowance. That is not fixed by the statute, in Massachusetts, but is left entirely to the sound discretion of the judge of probate. In performing this duty he is to have "regard to all the circumstances of the case." The social position of the husband at the time of his death, as indicating the demands which might be made on the widow; the style in which she has been accustomed to live, the amount of the estate, and the amount of her separate property, the length of their cohabitation, and the size of the family under her charge, the place of residence, and the treatment of each to the other, and many other like considerations, may all be taken into the account in fixing the amount of the allowance. *Allen* v. *Allen*, 117 Mass. 27; *Hollenbeck* v. *Pixley*, 3 Gray, 521; *Washburn* v. *Washburn*, 10 Pick. 374; *Gilman* v. *Gilman*, 53 Maine, 184; *Walker, Applt.* 83 Maine, 1. All these things can be more fully and correctly ascertained, and all branches of inquiry respecting them more easily prosecuted in the jurisdiction where the family had their home. Their social position and style of living can be better understood and appreciated in the community in which they have lived. "The place of the domicile is where we should look to ascertain the real condition of the decedent's affairs."

(*McNichol* v. *Eaton*, 77 Maine, 249). It appears that the decedent's domicile was in Waltham in the State of Massachusetts at the time of his death. It does not appear that he ever resided in Maine, or that the defendant has ever resided here either before or since the death of her husband. Her domicil was merged in that of her husband.

Another practical difficulty would be met in the application of such a rule of comity. If the defendant is entitled to have an allowance from the assets found in this State, she would have an equal right to it in every other state in which personal property of her husband might be found. Embarrassing questions respecting the numerous claims that might be presented in different jurisdictions would thus inevitably arise.

The conclusion is that the judge of probate in this State had no authority to make the allowance to the widow on the facts stated, and that the item of seven hundred dollars, was improperly allowed in the defendant's account.

Whether the defendant's situation would have been improved if she had obtained a decree for an allowance from the probate court of Massachusetts, with a representation of insufficient assets there to respond to it, and had then by proper application asked to have the claim satisfied from the assets in this State, subject to the claims of creditors residing here, or whether further legislation authorizing such procedure would be necessary or expedient, are questions not before this court. The question before us has seldom arisen, and no decision involving the precise state of facts here presented has been brought to the attention of the court. But eminently respectable authorities involving a similar state of facts strongly support the views above stated. In *Richardson* v. *Lewis*, 21 Mo. App. 531, the domicil of the decedent and his family was in Illinois at the time of his death, and the widow obtained an order from the court there for the payment of an allowance under the laws of that state. There were insufficient assets in Illinois to satisfy the claim, but further assets were found in St. Louis. Thereupon the widow applied to the court in St. Louis for the allowance provided for by the laws of Missouri, and it was held that the

Missouri statutes authorizing such allowance had no application to the widows of non-resident decedents, and the application was denied. In the opinion by Judge Thompson the court says: "We rest our decision upon the universal principle of the common law that the succession of the personal property of a deceased person is governed exclusively by the law of his actual domicile at the time of his death." . . . "The statutes invoked are a temporary provision for the widows of deceased persons analogous to the provisions of statutes exempting certain property of debtors from execution. The very nature of such an allowance precludes the idea that the widow can be entitled to it in any state except that of the husband's domicile; for otherwise she would be entitled to this exemption from the claims of his creditors in every state in which he might have personal property."

In *Medley* v. *Dunlap*, 90 N. C. 527, the decedent had his domicile in Arkansas at the time of his death. His widow soon after removed to North Carolina and there applied for an allowance under the laws of that state. It was held that she was not entitled to it; but in the opinion the court says: "If the laws of Arkansas provide for such an allowance, the plaintiff ought to have applied there and had her claim allowed and paid, or, if there were not sufficient assets to pay it there, then she might have her claim thus allowed, satisfied out of assets in this state, upon proper application to the administrator here. But she cannot reach the assets of her deceased husband here in any other way. See also *Simpson* v. *Cureton*, 97 N. C. 113; *Spier's Appeal*, 26 Pa. St. 233; *Shannon* v. *White*, 109 Mass, 146; Woerner's Am. L. of Ad. § 80. *Appeal sustained.*

ALEXANDER DUNCAN *vs.* JAMES GRANT.

Knox. Opinion December 5, 1893.

Writ. Arrest. Notary. Justice. Revision of Statutes. Exceptions. Waiver. R. S., c. 32, § 3; c. 113, § 2.

Statutes relating to the same subject matter, like the power to administer oaths by notaries and justices of the peace may be left standing independently of each other, in a general revision of the laws.

By R. S., c. 32, § 3, a notary public is authorized to administer oaths in all cases where a justice of the peace can act.

Held; that a creditor desiring to arrest his debtor upon *mesne* process, in an action of assumpsit as provided by R. S., c. 113, may make the oath and have it certified as therein required before a notary public instead of before a justice of the peace.

Irregularities in the premature presentation of exceptions may be waived at the argument by permission of the court.

ON EXCEPTIONS.

This was an action of assumpsit on account annexed begun by a *capias* writ, on which the defendant was arrested. The defendant, on motion day, moved to dismiss the action, because the certificate and oath, upon which the plaintiff relied as a foundation for the arrest, was not made before and certified by a justice of the peace, and because the service was illegal.

The oath on the writ and the certificate of it appeared to be made before a notary public.

The presiding justice overruled the motion and the defendant took exceptions.

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

These exceptions are premature.

Counsel cited: R. S., c. 32, § 3; *Day* v. *Chandler*, 65 Maine, 366.

A. A. Beaton and *R. R. Ulmer*, for defendant.

The justice named in R. S., c. 113, § 2, is required to make a certificate of the oath on the writ. No authority is given to a notary to do so. Statute authority given to justices only. *Winslow* v. *Mosher*, 19 Maine, 151. Legislature did not intend to extend power of notaries so as to increase the liability of debtors to be arrested on *mesne* process. *Hathaway* v. *Johnson*, 55 N. Y. 93; *Bennett* v. *Ward*, 3 Caines, 259; *Newell* v. *Wheeler*, 48 N. Y. 486; *Jones* v. *Jones*, 18 Maine, 308; *State* v. *Perkins*, 4 Zab. 409; *State* v. *Hayes*, 61 N. H. 264; *Staniels* v. *Raymond*, 4 Cush. 316 and cases. *Murray* v. *R. R. Co.* 4 Keyes, 274; *People* v. *Blackwelder*, 21 Ill. App. 254.

Stat. of 1875, giving women power to administer oaths, and stat. of 1883, giving notaries same power have not been consolidated

with R. S., c. 113, § 2, which is the only statute authorizing arrest on *mesne* process.

SITTING: PETERS, C. J., WALTON, LIBBEY, HASKELL, WISWELL, JJ.

PETERS, C. J. A creditor, desiring the arrest of his debtor upon *mense* process in an action of assumpsit, made an affidavit upon the back of the writ in the usual form which authorizes such an arrest, and made oath to the same before a notary public instead of before a justice of the peace. By R. S., c. 113, § 2, such an oath is required to be taken before and be certified by a justice of the peace. By R. S., c. 32, § 3, a notary public is authorized to administer oaths in all cases where a justice of the peace can act.

It is objected against the authority of the notary in the present case that, inasmuch as there has been a revision of the general statutes since the authority above named was conferred upon notaries, and in such revision such authority was not expressly incorporated into the section authorizing arrest upon *mesne* process, the authority does not now in such cases exist. This point cannot be sustained. There was no occasion for any such particularity in revising the statutes. The provision authorizing notaries thus to act is as general and broad as language can make it, and is found in a chapter of the statutes which especially enumerates the powers and duties of notaries. This power of a notary public is as apropos to the present case as it can be in any other, and if it cannot be exercised in this instance it will be because it must be rejected altogether. Such an interpretation would render the act in question entirely nugatory and wholly defeat the clear purpose and intention of the legislature.

No other question is presented by the exceptions. Any irregularity in the presentation of the exceptions prematurely was waived at the argument by the permission of the court.

Exceptions overruled.

CLENHAM J. ACHORN *vs.* SAMUEL W. JACKSON, Executor.

Lincoln. Opinion February 9, 1894.

Deed. Reservation. Life Tenant. Remainder Man. Waste.

In an action in the nature of waste it appeared that the plaintiff held a warranty deed from John Orff which contained the following clause, viz: "Reserving thirty acres of said land on the Medomak river during my natural life with all the privileges and appurtenances thereof to the said John Orff." *Held;* that the legal effect of this reservation was precisely the same as that of a grant from a stranger of an estate for life to Orff with a remainder in fee to the plaintiff.

It enabled Orff to retain possession until his death and postponed the plaintiff's enjoyment of his estate in remainder until that event. It created a fixed right of present enjoyment in Orff and a fixed right of future enjoyment in the plaintiff.

One had the interest of a life tenant and the other of a remainder man, and the same result follows respecting liability for waste as usually follows from that position of the parties under our law.

The life tenant would be liable for waste.

When a grantor reserves to himself a life estate in the granted premises and desires greater privileges in the enjoyment of such reservation than legally pertain to the ordinary life estate, he must have stipulations to that effect inserted in the deed.

Settled rules of law are not permitted to yield in cases of hardship, or misfortune, in special instances; otherwise, there can be no certainty or uniformity in the disposition of landed property, or security in the law.

ON EXCEPTIONS.

A verdict having been rendered for the plaintiff, the defendant took exceptions as to the construction by the presiding justice of the deed upon which the plaintiff relied for a recovery.

The case is stated in the opinion.

Ozro D. Castner, for plaintiff.

Wm. H. Fogler, for defendant.

Orff was not a tenant for life. The entire estate, not the use, income, premises, &c., are reserved to the grantor, who was the absolute owner in fee before he gave the deed. Plaintiff's estate was to commence at the death of the grantor. No seizin passed out of the grantor who reserved until a future day all that the deed undertook to convey.

Plaintiff not a remainder man. 2 Wash. R. P. 3d. Ed. page 500. Orff's interest was not created at the same time and by the same instrument as that of Achorn's.

Achorn was not owner of the reversion. 4 Kent's Com. 393, 395; 2 Wash. R. P. p. 685.

The legal effect of the deed was to grant to Achorn a freehold estate, in lands to commence *in futuro*, which estate can be conveyed by deed of bargain or sale, operating under the statute of uses, though at common law it was otherwise. *Wyman* v. *Brown*, 50 Maine, 139-150 *et seq.* and cases; *Drown* v. *Smith*, 52 Maine, 141; *Abbott* v. *Holway*, 72 Maine, 298.

SITTING: WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. The plaintiff brings this action in the nature of waste against the defendant as executor of the will of his grandfather, John Orff, to recover for wood and timber cut by the testator on land alleged to have been occupied by him as a life tenant.

John Orff being seized in fee of the premises, conveyed to the plaintiff by deed of warranty a tract of land situated in Waldoboro, with this clause of reservation, viz: "Reserving thirty acres of said land on the Medomak river during my natural life, with all the privileges and appurtenances thereof to the said John Orff."

The plaintiff claims that the effect of this clause was to create a life estate in favor of Orff with a vested remainder to himself, in the thirty acres reserved.

The defendant contends, that as to the thirty acres thus reserved, the effect of the deed was not to create any present estate in the plaintiff but only an estate to commence *in futuro*; that Orff remained the owner in fee during his life-time and hence had the right to cut wood and timber on the premises at his pleasure.

The presiding justice instructed the jury upon this point as follows: "I rule for the purposes of this case that the instrument

constituted the grandfather a tenant for life, and the grandson (the plaintiff) the remainder man. One had the interest of a life tenant and the other of a remainder man, the estate coming to him at the death of his grandfather, the grantor, and the same results follow as usually follow from that position of the parties under our law."

This was undoubtedly correct. It is in harmony with the established doctrine touching this branch of the law of real property, and in strict accordance with the special application of it to similar cases in this State. "A remainder," says Kent, Chancellor, "is a remnant of an estate in land depending upon a particular prior estate, created at the same time and by the same instrument and limited to arise immediately on the determination of that estate." 4 Kent's Com. 232. See also, 2 Wash. Real Prop. 222. It is immaterial that, in this case, the grantor was the absolute owner of the land in fee at the time of the execution of the deed in question to the plaintiff. The process of carving from it a life estate for the grantor himself and vesting the remainder in the plaintiff was accomplished by the single instrument in question. The legal effect of it was precisely the same as that of a grant from a stranger of an estate to Orff for life with a remainder in fee to the plaintiff. It enabled Orff to retain possession until his death, and postponed the plaintiff's enjoyment of his estate in remainder until that event. It created a fixed right of present enjoyment in Orff and a fixed right of future enjoyment in the plaintiff. An estate is said to be vested in one in possession when there exists in his favor a right of present enjoyment. It is vested in interest when there is a present fixed right of future enjoyment. A vested remainder is essentially an estate commencing *in præsenti* though to be enjoyed *in futuro*. 2 Wash. R. P. 228. The law favors vested estates. Though it may be uncertain whether a remainder will ever take effect in possession, it will still be a vested remainder if the interest be fixed. The criterion is in the present capacity of taking effect in possession. 4 Kent's Com. 237.

This is aptly illustrated by the case of *Watson* v. *Cressey*, 79 Maine, 382. There the grantor conveyed his estate to his

two sons, but they were "to come into possession of said property after the decease" of the grantor and his wife. The deed was "to take effect and go into operation on the decease" of the grantor and his wife and "not before." In the opinion by Mr. Justice WALTON it is said: "A grantor may lawfully convey his real estate reserving to himself, or to himself and wife, a life estate in the premises. Such a conveyance vests an estate in remainder in the grantee immediately. His estate is not postponed till the termination of the life estate. His right of possession or enjoyment is postponed, but his estate, such as it is, vests immediately. In other words, he takes a vested remainder." *Wyman* v. *Brown*, 50 Maine, 139; *Drown* v. *Smith*, 52 Maine, 141.

The real purpose of reserving woodland during the life of the grantor may sometimes be defeated by a rigid application of the law limiting the rights of a life tenant; but if the grantor would have greater privileges in the enjoyment of such a reservation than legally pertain to the ordinary life estate, he must have stipulations to that effect inserted in his deed. If the authority of settled rules is permitted to yield to the suggestion of hardship or misfortune in special instances, there can be no certainty or uniformity in the disposition of landed property and no stability or security in the law.

Exceptions overruled.

JOHN W. BETTINSON *vs.* ADDISON LOWERY.

York. Opinion February 13, 1894.

Replevin. Abatement, Judgment for Return. Bond. Stat. 1821, c. 80, § 4; R. S., 1841, c. 130, § 11; 1857, c. 96, § 11; 1883, c. 96, §§ 10, 11.

When a replevin suit abates or is nonsuit, a return is always ordered as a matter of course, except when *non cepit* alone is pleaded, and the court has no power to do otherwise. In such case the suit miscarries, and the parties are simply placed in *statu quo*. They are only put in position to enforce their rights anew.

The judgment for return is conclusive, in such cases, nowhere, but in a suit upon the bond, which was given in order to secure a return of the property from whence it was unlawfully taken.

In holding judgments for return conclusive in all cases upon replevin bonds, no injustice results when a distinction is made between judgments on the merits and judgments of abatement or nonsuit.

Greely v. *Currier*, 39 Maine, 516, approved.

ON EXCEPTIONS.

This was an action of replevin in which the writ was quashed at the return term.

The presiding justice ordered a return of the property replevied and left the question of damages to be determined on the bond; and in absence of pleadings in the case, ruled as matter of law that the defendant was entitled to the order for return, without the production of testimony.

To this ruling the plaintiff took exceptions.

M. L. Sanborn, of Boston bar, for plaintiff.

By R. S., c. 96, § 11, the defendant is entitled to judgment for return only when it appears that the defendant is entitled to a return of the property replevied, and in order to ascertain that fact it is necessary to have a hearing. The judgment for return is, by the statute and the law of this State, the final judgment in a replevin suit, and involves all the characteristics of a judgment, and is made up as a result of a hearing of the parties upon the production of legal and competent testimony.

It involves an inquiring into and an adjudication upon the the merits of the question at issue, and will be rendered only as law and equity shall require. It does not, as a matter of course, follow the previous results of the suit. *Tuck* v. *Moses*, 58 Maine, 474; *City of Bath* v. *Miller*, 53 Maine, 315, 316.

Equity requires that the parties shall have a hearing in order to ascertain whether the defendant is then entitled to a judgment for a return. Cases, *supra*.

The action is not disposed of until the question of return is acted upon, and until final judgment in a case both parties are in court and have a right to be heard. *Tuck* v. *Moses*, 58 Maine, 474.

Even when the writ is abated for informality in the bond, the judgment for return is conclusive. In *Tuck* v. *Moses*, the writ was abated for informalities of the bond, and judgment given for a return; and the ruling of the court was that a judgment for

return was conclusive, and until that judgment both parties were in court, with a right to be heard.

John M. Goodwin, for defendant.

Counsel cited: *McArthur* v. *Lane*, 15 Maine, 245; *Collins* v. *Evans*, 15 Pick. 63; *Greely* v. *Currier*, 39 Maine, 517; *Fleet* v. *Lockwood*, 17 Conn. 233; *Low* v. *Brigham*, 3 Allen, 429; *Collamer* v. *Page*, 35 Vt. 387; Cobb on Replevin, § § 1117, and cases in note, 1119, 1199; *Morton* v. *Sweetser*, 12 Allen, 134; *Walbridge* v. *Shaw*, 7 Cush. 560.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

HASKELL, J. Actions of replevin are regulated in this State by statute, and the rules of procedure have been very generally adjudged, so that whatever the methods of procedure may be at common law or elsewhere is of no moment to consider.

I. Before serving a writ of replevin, the officer must take from the plaintiff a bond to the defendant, with sureties, in a penal sum double the value of the property to be replevied, conditioned to prosecute the suit to final judgment and pay such damages and costs as the defendant may recover, and to return and restore the same property in like good order and condition as when taken, in case such shall be the final judgment in the suit; and the officer must return the same with the writ to court. R. S., c. 96, § 10. When this is done, the officer is protected, and, until it is done, he has no protection from his precept. The writ thus returned leaves the parties in condition to implead each other as to the property replevied, and the bond, deposited in court, takes the place of the property already delivered to the plaintiff; so that the court has jurisdiction of the parties and of the *res*; and the suit is not finally determined until judgment disposes of both. When judgment is rendered for the plaintiff it so operates; but when rendered for the defendant, it must determine to whom the property shall be given. It must order a return of the property to the defendant, or deny it. "The action is not disposed of until the question of return be acted upon." *Tuck* v. *Moses*, 58 Maine, 474.

The revision of 1841, c. 130, § 11, condensed from the act of 1821, c. 80, § 4, provided: "If it shall appear upon the nonsuit of the plaintiff, or upon a trial or otherwise, that the defendant is entitled to a return of the goods, he shall have judgment therefor accordingly, with damages for the taking thereof," &c.

This statute was condensed in the revisions of 1857, c. 96, § 11, prepared by Chief Justice SHEPLEY, so as to read: "If it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs." That language is retained in the present revision, 1883, c. 96, § 11.

In *Greely* v. *Currier*, 39 Maine, 516 (1855), a writ of replevin was quashed, and on motion for a return, the court refused to hear evidence as to ownership of the property, and ordered a return of it. Upon mature consideration in *Bath* v. *Miller*, 53 Maine, 315 (1865), a bill in equity to restrain officers, who had attached property that had been replevied from them and ordered returned to them on nonsuit of the replevin writ, from prosecuting suits upon the replevin bond, the court said: "In actions of replevin, judgment may be rendered against the maintenance of the suit, and yet the defendant not be entitled to a return of the property. When *non cepit* alone is pleaded, the defendant cannot have judgment for a return, because the taking only is in issue, and not the title to the property. So, if for any cause, the defendant was entitled to the possession of the property when the action was commenced, but his right to possession has expired, or been extinguished, or lost, at the time judgment is rendered, the defendant is not entitled to judgment for a return. Hence, in actions of replevin, when it is determined that the action cannot be maintained, it is always necessary to inquire and determine, and to have a distinct adjudication, whether or not the property shall be returned to the defendant; and this latter inquiry necessarily involves an inquiry into the title and the right of possession as between the contending parties, of the broadest and most unlimited character. It is a well-established and familiar rule of law, that a return of property replevied will not be ordered 'when in equity it ought not to be

returned, though the defendant has judgment in his favor in the suit.' In determining whether or not there shall be a return, the power of the Court and the extent of inquiry are as unlimited in an action of replevin, as in a suit in equity. A judgment for return, therefore, in an action of replevin, must be regarded as a direct and conclusive adjudication that the defendant's right of possession is superior to the plaintiff's."

Undoubtedly the court was there speaking of causes tried upon the merits, and not of causes disposed of upon irregularities of procedure, as actions abated, or nonsuits for want of prosecution, &c. But again, in *Tuck* v. *Moses*, *supra*, (1870,) a suit upon a replevin bond, where the writ had been abated for irregularity and a return had been ordered, the court held the judgment of return conclusive upon the parties as to the title to the property, although *Greely* v. *Currier*, *supra*, was cited as authority that upon abatement of a writ of replevin, a return must be ordered as a matter of course, and evidence as to the justice of it could not be received, the court remarking that if it could not have been received then, it certainly cannot now. That is, if evidence was incompetent on motion for return to control the judgment for return, it certainly is incompetent to contradict it, for the reason that property illegally taken should be restored, and the court not be compelled to lend its aid to illegal procedure.

In *Buck* v. *Collins*, 69 Maine, 445 (1879), the court holds a judgment for return conclusive between the parties as to the right of possession, although Judge BARROWS remarks: "The difficulty of determining where the doctrine of estoppel by former judgment ought to apply arises from the fact that a return is oftentimes ordered in replevin suits where the question of property was not in issue and has not been determined at all." . . . "We see no objection in permitting the defendants in suits of this nature [on replevin bonds] to show anything in mitigation of damages not necessarily inconsistent with the judgment in the replevin suit which could not have been presented therein as a valid reason for denying the order for return." He doubtless had in mind the decision of *Greely* v. *Currier*, *supra*.

In *Jones* v. *Smith*, 79 Maine, 452 (1887), in a suit upon a

replevin bond where the writ had not been entered in court, the plaintiff in replevin, defendant in the suit, was allowed to prove his title to the property replevied. But, there had been no judgment for a return.

The question squarely comes, shall the doctrine of *Greely* v. *Currier*, that the abatement of a replevin suit requires a judgment for return, regardless of the merits, be modified to meet the doctrine of *Bath* v. *Miller*, 53 Maine, 315, that applies to replevin tried upon the merits.

As an original question, decided on principle, it would seem that wherever a suit was abated for informality, or a nonsuit was ordered, except on plea of *non cepit* alone, a return should be ordered as matter of course, inasmuch as property illegally taken under color of process should be restored to the possession from whence it was taken, and that if the plaintiff refuse to return he should be held estopped by the judgment for return in a suit upon the replevin bond, because that is merely security for compliance with the order of return; but it would not follow that such judgment would bar another suit for the same property, inasmuch as the judgment only went to the determination of the suit, and to compel the restoration of the *res*. It would be no judgment between the parties as to their ultimate rights in the property, any more than such judgment would be in any other action. A judgment that a writ abate or that the plaintiff be nonsuit is no bar to another action upon the same claim. *Pendergrass* v. *York Manf. Co.* 76 Maine, 509. And we think this doctrine is settled by the authorities in our own State. It is so held in *Greely* v. *Currier*, *supra*, 39 Maine, 516. In *Bath* v. *Miller*, *supra*, 53 Maine, 508, a bill in equity to restrain attaching officers, to whom a return had been ordered in a replevin suit against them that had been nonsuit, from prosecuting suits on the replevin bonds, the bill was dismissed because the judgment for return was held to be conclusive as a basis for suit upon the bonds; certainly, the bonds secured the fulfillment of the order for return, and the property having been wrongfully taken, that is, illegally taken under color of process, should be restored. *Non constat*, that the return executed settled their title to the property. The same doctrine was held in *Tuck* v. *Moses*,

supra, 58 Maine, 474. That, in suit upon the replevin bond, where the judgment for return, in an action of replevin that had been abated, the judgment was conclusive to compel a return or the value.

In *Buck* v. *Collins*, *supra*, 69 Maine, 445, the judgment for return was held conclusive, but the doctrine of Judge BARROWS indicates that he would favor, in cases of abatement or nonsuit, where the replevin bond is sued, allowing the parties to try their title to the property in mitigation of damages. That is, where a plaintiff illegally took property on color of process that he was required to return and had covenanted so to do, he would excuse him in reduction of damages if he could show title to the same. In other words, he would incorporate into suits upon a replevin bond the issues triable in the main case. Such doctrine has never been authorized in this State, and cannot be sustained upon principle.

In *Jones* v. *Smith*, *supra*, 79 Maine, 452, there had been no judgment of any kind in the replevin suit. It had not been entered in court. Any defense to a suit upon the replevin bond was applicable that could be allowed at common law.

In holding judgments for return conclusive in all cases upon replevin bonds, no injustice results, when a distinction is made between judgments on the merits and judgments of abatement or nonsuit. In the former they are conclusive between the parties everywhere. In the latter they are conclusive nowhere, except in suits upon the replevin bonds. These suits miscarry and the parties are simply placed in *statu quo*. They are only put in position to enforce their rights anew.

The result is, that in all cases of abatement or nonsuit in replevin except where *non cepit* alone is pleaded, the order for return goes as a matter of course, and becomes a part of the judgment to be formulated by the clerk without further order. In other cases of replevin, those tried upon the merits, such order for return may be made as the court considers just.

In this case the writ was abated. The property should be restored. Judgment for return went as a matter of course. The defendant lost nothing from his absence.

Exceptions overruled.

AMANDA F. JORDAN *vs.* AMERICAN EXPRESS COMPANY.

Androscoggin. Opinion February 13, 1894.

Common Carrier. Negligence. Evidence.

No action can be maintained against a common carrier for hire to recover damages for not safely carrying merchandise, when the proof fails to connect the carrier with any fault touching the article intrusted to it for carriage.

ON REPORT.

This was an action on the case in which the plaintiff alleged that she purchased, at two different times, in Boston, alcohol to be used in her business of compounding a certain medicine and delivered it to the defendant in Boston to be carried to New Gloucester, in this State; that while in transit, and in its possession, the defendant drew off about one half and adulterated the remainder with water, so that it became unfit for the use intended by the plaintiff; that the plaintiff not knowing the alcohol has been tampered with and adulterated used it in compounding and preparing her said medicine, whereby said medicine was rendered unfit and the plaintiff thereby greatly injured in her business and put to great expense in replacing her medicine, &c.

The testimony relating to the filling the orders for the alcohol and its delivery to the defendant company is found in the deposition of Erastus C. Gaffield, a member of the firm of D. T. Mills & Co., Boston. The material parts of his deposition are as follows:

"Int. 2. State whether or not on the 19th day of May, 1892, you sold any alcohol to Mrs. A. F. Jordan, the plaintiff in this action? Ans. We did not sell to Mrs. Jordan, but did sell to the India Drug Company, at No. 24, India Square, Boston, four gallons of alcohol.

"Int. 3. What was the quality of this alcohol? Ans. Standard grade and quality, same as we sell to all others, proof one hundred and eighty-eight government standard, same as was formerly known as ninety-five per cent alcohol.

"Int. 4. Is that the best quality of alcohol in the market? Ans. Yes.

"Int. 5. To whom did you ship this four gallons on the 19th day of May, 1892? Ans. On instructions of the India Drug Company it was delivered by us to the American Express Company, marked Mrs. A. F. Jordan, New Gloucester, Maine.

[Same testimony as to the lot of three gallons sold July 14th.]

"Int. 10. On each of the days above stated . . . did the American Express Company call at your place of business and receive the alcohol in question there from your firm? Ans. We have their receipts signed under that date.

"Int. 11. Were those goods delivered to the American Express Company at your place of business? Ans. Yes."

The witness testified on cross-examination:—

"Cross Int. 1. Did you personally put up and pack the two lots of alcohol before mentioned, or either of them? Ans. I don't think I did, as that is the work done by my men generally.

"Cross Int. 2. Did you personally see said lots of alcohol put up and packed, or either of them? Ans. Well! That is a very difficult question to answer. I am generally about and may have seen it and may not have seen it. I don't know about these particular lots.

"Cross Int. 3. Did you personally deliver these lots of alcohol, or either of them, to the American Express Company? Ans. I don't know.

"Cross Int. 4. Do you know whether or not you saw these lots of alcohol, or either of them, delivered to the Express Company? Ans. I cannot say whether I did or not."

Direct examination resumed:

"Int. 12. The alcohol that was shipped by your company to Mrs. Jordan, on the days above stated, was of what proof? Ans. We dump into a large tank alcohol as received by us from the Distilling and Cattle-Feeding Company, in barrels, bearing government inspection one hundred and eighty-eight proof, and from this tank deliver all small orders. The alcohol shipped to the party named, Mrs. Jordan, came from that tank. This is all I can testify to personally. I didn't examine it.

"Int. 13. Do you now, or have you had alcohol in stock other than the one hundred and eighty-eight government proof? Ans. No."

Cross-Examination resumed:—

"Cross Int. 5. What personal knowledge have you that what was delivered to the American Express Company, directed to Mrs. Jordan on the two occasions to which you have testified, came from this tank which you have mentioned? Ans. My personal knowledge is founded on the methods of our house in filling such orders. Beyond this I can say nothing. I have no absolute, personal knowledge relating to these particular lots."

The plaintiff put in evidence the receipts taken by D. T. Mills & Company from the American Express Company, under the two dates above named, from which it is stated "value asked and not given. Accepted only at owner's risk of damage." With the receipt follows the usual and common printed conditions and terms used by the defendant company in its business. The view of the case taken by the court renders a report of them unnecessary.

The plaintiff also put in evidence the following letter of the defendant's general superintendent:—

"American Express Company. General Superintendent's Office.
Eastern New England Division.

Bangor, Me., October 18th, 1892.

"Messrs. McGillicuddy & Morey, Lewiston, Maine.

"Gentlemen: Your letter of the 8th instant, together with all papers relating to claim of Mrs. Jordan, have been referred to this office. The matter has been investigated very carefully on our part, and we are unable to ascertain that the shipment in question met with an accident, or was tampered with while in our hands. We are only liable in any event for actual loss of goods; and the only weak point we have is, that the contents appeared to be leaking when the shipment arrived at Portland.

"We cannot entertain any claim for consequential damages, but will consider one for actual cost of goods lost if you will present a bill showing value of same. Yours truly,

F. W. Carr, Gen'l Supt."

The testimony on the question of damages is omitted.

After the evidence was out, by agreement of the parties the case was reported to the law court to determine, upon so much of the evidence as is admissible, whether the action was maintainable; and if so, the rule of damages. If consequential damages are recoverable, then, the case was to stand for trial; otherwise, the law court to render judgment for such damages as are proved.

McGillicuddy and Morey, for plaintiff.

The defendant admits its liability for the cost of the alcohol.

Damages: *Thomas* v. *Dingley*, 70 Maine, p. 100; *Wyman* v. *Leavitt*, 71 Maine, p. 229. Loss of profits: *City of Antonio* v. *Royal* (Tex.), 16 S. W. Rep. 1101.

Wilson and Woodard, for defendant.

The party who packed the alcohol and who delivered it to defendant company, and who might have known what was packed and what was delivered, was not called as a witness, and the only person who was called confesses that he had no personal knowledge in relation to the matter at all. *McQuesten* v. *Sanford*, 40 Maine, 117. Owner's risk: *Fillebrown* v. *G. T. Ry. Co.* 55 Maine, 462; *Little* v. *B. & M. R. R.* 66 Maine, 239. Burden of proof: *Plantation* v. *Hall*, 61 Maine, 517. Damages: *Grindle* v. *Eastern Express*, 67 Maine, 317-321, and cases.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, WISWELL, JJ.

HASKELL J. Action against an express company for not safely carrying seven gallons of alcohol, contained in tin cans and boxed. The carrier receipted for two boxes, not valued, nor contents specified. The boxes were delivered to the plaintiff, apparently in the condition received, except they were wet, presumably, in the absence of proof, from leakage. There is no proof that the cans were full when delivered to the plaintiff.

The alcohol was ordered from a firm in Boston that purchased the same of another firm there and ordered it shipped *via* express to the plaintiff. The complaint is that the alcohol was reduced

in strength in transit. The plaintiff must prove this. There is no direct proof as to the strength of the alcohol delivered to the carrier. The only witness upon this point is a member of the firm that shipped the alcohol, who says: "I have no absolute personal knowledge relating to these particular lots. My personal knowledge is founded on the methods of our house in filling such orders. Beyond this I can say nothing." Inferior alcohol might have been shipped by mistake or otherwise without his knowledge. The proof fails to connect the defendant carrier with any fault touching the merchandise intrusted to it for carriage. Without such proof this action cannot be maintained.

Judgment for defendant.

JOSEPH O. SMITH, INSURANCE COMMISSIONER, in equity,

vs.

MAINE MUTUAL ACCIDENT ASSOCIATION,
JOHN A. BURRILL, Intervening Claimant.

Cumberland. Opinion February 14, 1894.

Accident Insurance. Creditor. Judgment. Private and Special Laws, 1887, c. 16.

A policy-holder in the Maine Mutual Accident Association, who has recovered judgment against the company upon a claim under his policy, and demanded payment of the same from the state treasurer out of the company's funds in his hands more than thirty days before equitable proceedings of insolvency were instituted against the company by the state insurance commissioner, does not thereby acquire for his claim any preference over the legal claims of the other creditors of the company.

ON EXCEPTIONS.

This was a case in equity, brought by the Insurance Commissioner of the State, against the defendant corporation to wind up its affairs, and came on for hearing upon the acceptance of the master's report, to which exceptions had been taken by John A. Burrill, a judgment creditor, who had intervened and become a party, so far as said report directed that his claim should share *pro rata* with all other claims allowed by the master instead of being ordered to be paid in full from the deposit made by the defendant company in the hands of the State Treasurer, as security for the certificate holders of said company.

It appeared that the claimant, being a certificate holder in said company, recovered judgment against said corporation in this court, on the twenty-ninth day of April, 1892, for the sum of $500.00; execution issued thereon on the second day of May, 1892, and the attorneys for said creditor, on the thirty-first day of May, 1892, more than thirty days after the rendition of said judgment, during which time the same had remained unsatisfied by the defendant company, made demand upon the State Treasurer that his said judgment be satisfied as provided by the charter of said company, viz: Priv. and Spec. Laws, 1887, c. 16, sec. 5, from the deposit of said company then in his hands for such purpose, which he did not then do, nor has since done.

The bill in this case was filed June 4, 1892, within sixty days from the rendition of said judgment; and it was contended on the part of the company that, especially by the terms of Stat. 1889, c. 237, sec. 6, the claimant was not entitled to receive payment of his claim in full, but must share equally with the other creditors of said company. It was further contended that, under the provisions of the charter of said company, the claimant would not be entitled to payment in full upon winding up of the affairs of the corporation, without the aid of the Stat. of 1889.

It was contended on the part of the claimant, Burrill, that the Priv. and Spec. Laws, 1891, c. 178, aided the contention that his claim should be paid in full, and required that the claim should be so paid and not be compelled to share *pro rata* with the other creditors of the company.

The court ruled, as matter of law, that the plaintiff's claim was not preferred and ordered it to be paid *pro rata* with the other creditors of the company.

The claimant thereupon took exceptions to this ruling.

Augustus F. Moulton, for the corporation.

Heath and Tuell, for claimant.

The charter of this company is not enlarged or changed by Stat. 1889. Lien was perfected five days before these proceedings. *Gray* v. *Co. Com.* 83 Maine, 429; *Starbird* v.

Brown, 84 Maine, 238; *State* v. *Cleland*, 68 Maine, 258; *Fales* v. *Whiting*, 7 Pick. 225; *Harnden* v. *Gould*, 126 Mass. 411.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, WHITEHOUSE, JJ.

PETERS, C. J. The Maine Mutual Accident Association, a society established on the principle of assessments, having fallen into a condition of insolvency, and its affairs having been committed by judicial decree into the hands of a receiver for settlement, that official, acting also in the capacity of master, reported to court a list of the claims allowed by him, among which is that of John A. Burrill, who contends that the amount allowed to him is a preferred claim to be paid in full, and that his claim does not stand on a footing with those of the other creditors. The justice sitting for the determination of questions arising upon such report disallowed a preference in favor of the claimant, and exceptions to his ruling were taken.

The claimant relies on a section of the charter of the company, in support of his claim, reading as follows:

"If said corporation shall neglect for thirty days to satisfy any judgment recovered against it in any court in this State, upon any certificate issued by it, the said treasurer shall apply the money, so in his hands, to the satisfaction of said judgment; and said corporation shall not transact any further business until said deposit is restored."

The charter also provides how the funds in the State treasurer's hands shall be disposed of for the benefit of creditors in case of insolvency and receivership. See Ch. 16, Priv. & Spec. Laws of 1887.

The claimant had recovered a judgment against the company for an injury sustained by him while a policy holder, and had demanded payment of the same from the State treasurer who was in possession of the company funds, and more than thirty days had expired after such demand before proceedings were instituted by virtue of which the company was enjoined; and he contends that he thereby acquired a lien for the payment of his judgment in full from such funds.

We are unable to perceive that the claimant became entitled to any such lien upon the funds. There was no attachment or seizure of funds. His judgment was nothing more than a subsisting claim against the company, and not more just and equitable than other claims, as far as is seen in any facts which the case discloses. His claim was in one form while other claims existed in different forms. He had taken more advanced steps than other claimants towards collecting his debt, but those steps fell short of establishing any special title to the funds or lien thereon. This is an equitable proceeding, and equity is equality.

The claimant is opposed in his contention upon another ground. It is urged in opposition to the allowance of his claim, as a preference, that the public act of 1889, (ch. 237,) a general act for the regulation of companies such as this, is applicable here, which allows to the state treasurer sixty days, instead of thirty, within which to respond to a demand made upon him for the payment of judgments against insurance companies having funds in his possession; and in the case before us sixty days had not elapsed after the demand made upon the treasurer before the injunction against the company was granted. But we do not deem it necessary to resort to a decision of this point for the purpose of making more certain or satisfactory our already intimated conclusion.

Exceptions overruled.

LENA T. CLEVELAND *vs.* BANGOR STREET RAILWAY.

Penobscot. Opinion February 14, 1894.

Way. Defect. Street Railway. Poles. Negligence. Statute 1885, § § 1, 8; Private and Spec. Laws, 1887, c. 97; Bangor City Ordinances, chaps. 40, 43.

In an action to recover damages for a personal injury which the plaintiff received, by reason of the negligence of the defendant in erecting and maintaining a pole to sustain its trolley wires, at a point and in such a manner in a public street as to make it dangerous for public travel, the the following instructions were *held correct*:—

That it was incumbent on the plaintiff to prove, first that the defendant company was at fault in the particular thing complained of; that the defendant company fell short of the duty of a prudent, careful man; that

they did not have that regard for the public safety and for the chances of accident that they should have had as prudent men and managers.

Second; she must prove that this particular fault of the defendant which she claims to have shown, caused her the injury of which she complains; and that no fault of hers, or of the person in whose care she was at the time, contributed to the injury or helped cause it.

It is not a defense, in such action, that the street railway located and maintained the pole in question in the public street in accordance with the provisions of its charter and the city ordinances.

ON MOTION AND EXCEPTIONS.

This was an action on the case for injuries which the plaintiff alleges she sustained, September 18, 1892, through the negligence of the defendant in erecting and maintaining a pole for the support of its trolley-wires upon Exchange street in the city of Bangor.

(Declaration.) "In a plea of the case, for that, whereas there now is, and was at said Bangor, on the eighteenth day of September, last past, a public street and highway called Exchange street, in said Bangor, on and over which all citizens are entitled to pass and repass with their horses and carriages, and said plaintiff was in a carriage on the said eighteenth day of September, and was driving through said street and was in the exercise of due care and with a suitable carriage, harness, and horse, in said highway nearly opposite the store of Stockwell, Adams & Co., there was an obstruction in said highway, to-wit: a pole some twenty feet in height standing out in said highway about eighteen inches from the curbstone; said pole being in front of said Stockwell, Adams & Co's store, as aforesaid; said pole having been erected and was then being used by said defendant corporation for the purpose of propelling its electric cars through said street or highway.

"And said plaintiff driving as aforesaid, in a carriage, the horse that was drawing said carriage, though perfectly kind and manageable, was caused to shy, by reason of a car suddenly turning the corner of Washington street, so-called, in said city, and coming out on said Exchange street, said car belonging to said defendant corporation.

"The carriage in which said plaintiff was riding was thrown against said pole situated as aforesaid, and she was thrown out and severely injured by having been dragged under the carriage

and getting a cut on her forehead, a wound on left arm, and receiving a severe wound on right knee, right arm, and right leg below the knee, and she was otherwise severely injured; and the plaintiff avers that said pole was unlawfully and negligently made, erected, and used by said defendant corporation in said highway at said place, and was then and there an unlawful obstruction of said highway, and said tipping of said carriage and said injuries to plaintiff were caused wholly by and solely by said obstruction and defect in said highway, and that she was in the exercise of due care; and the plaintiff avers that by said injury caused as aforesaid, she has suffered great bodily pain, has been put to expense of physicians and attendance, and has lost her ability to work."

Plea, general issue. The jury returned a verdict of $868.00, for the plaintiff, and the defendant moved for a new trial and took exceptions which are stated in the opinion of the court.

The city ordinance of Bangor is a follows: Chapter 40, § 1, "Bangor Street Railway, a corporation duly established by law, . . is hereby authorized and licensed to locate, build, equip and maintain a street railway in the city of Bangor, for the sole purpose of transporting passengers and their baggage, cars to be run by electrical or animal power, and to locate and maintain single or double lines of poles on any street where its tracks may be laid," etc.

"Section 3. But no poles shall be placed or wires strung until the location of such poles and wires shall be approved by the mayor and street engineers."

The material parts of defendant's charter are given in the opinion.

Charles P. Stetson and P. H. Gillin, for plaintiff.

There is nothing in the charter or ordinance which expressly, or by implication, relieves the company from liability for injuries caused by its negligence or want of care, or which makes the location of the railway or poles by city authorities, a protection for its negligent acts and a bar to actions for injuries caused by negligence. *Dickey* v. *Maine Telegraph Co.* 46 Maine, 483.

The defendant's rights in the street as stated in the charge to the jury, in *Head* v. *Auburn*, Androscoggin County, January

Term, 1891, are no greater than that of an abutting proprietor of the street: "He may have a right to enter upon the street and do certain things, but no legal right would exist to make the public street unsafe and inconvenient for travelers, . . and generally the burden is put upon the railroad company [in these charters] to keep the street safe and convenient so far as its road has anything to do with the street, and makes them liable for all damages that may occur by a failure to do so."

Motion: *Aldrich* v. *Gorham*, 77 Maine, 287.

Laughton, Clergue and Mason, for defendant.

In absence of contractual relations between the parties, proof of the mere fact that the accident happened to the plaintiff, without more, will not amount to the *prima facie* proof of negligence on the part of the defendant. Thomp. Neg. 1227.

Plaintiff offered no testimony as to whether defendant was guilty of negligence in locating the pole in question, but relied on the fact that the pole was located in the part of the street used by vehicles and that the accident occurred as constituting proof of negligence. *Cosulich* v. *Standard Oil Co.* 122 N. Y. 118, and cases; *Reiss* v. *N. Y. Steam Heat Co.* 128 N. Y. 107, and cases; *Nason* v. *West*, 78 Maine, 253.

Charter, &c., justifies locating pole. *Com.* v. *Boston*, 97 Mass. 555; *Young* v. *Yarmouth*, 9 Gray, 386; *Roberts* v. *Wis. Tel. Co.* 46 N. W. Rep. 800.

That the pole was located in the part of the street used by vehicles instead of upon the sidewalk does not constitute negligence; nor, if it had been located within the curb of the sidewalk, would negligence be absolutely negatived. Horse was beyond driver's control. *Perkins* v. *Fayette*, 68 Maine, 152, and cases; *Spaulding* v. *Winslow*, 74 Maine, 528. Stat. 1885, if construed as claimed by plaintiff, makes defendant liable as insurer.

SITTING: PETERS, C. J., LIBBEY, FOSTER, WHITEHOUSE, WISWELL, JJ.

LIBBEY, J. Case to recover for a personal injury which the plaintiff alleges she received on Exchange Street, Bangor, by reason of the negligence of the defendant in erecting and main-

taining a pole to sustain its trolley wires, at such a point and in such a manner in said street as to make it dangerous for public travel.

In his charge the court instructed the jury as follows: "The plaintiff must prove first that this defendant company was at fault in the particular thing complained of, that the defendant company fell short of the duty of a prudent, careful man, that they did not have that regard for the public safety and for the chances of accident that they should have had as prudent men and managers."

"Second. She must prove that this particular fault of the defendant's, which she claims to have shown you, caused her the injury of which she complains. Because, of course, if this fault of the company did not cause her the injury, she has no cause of complaint against them."

"She must prove the defendant's fault, that the defendant's fault caused the injury, and also prove besides that no fault of hers, or the person in whose care she was at the time, contributed to the injury, or helped cause it."

"I further instruct you that they were bound in so placing them to have due regard to the rights of the public, and to have had due forethought as to the needs of the public and the danger to the public, and that they were so bound in placing their posts as to not unnecessarily or unreasonably endanger any person travelling in that vicinity."

"I will add this: that the defendant might, perhaps, have been justified in putting the pole there, at the time they placed it there, and not have been justified in maintaining it there, afterwards; and they may have been in fault in the placing as well as in the maintaining. . . . . Assuming the defendants to be thoughtful, careful and watchful men, if it became apparent after the pole was placed there that it was in a dangerous place and was doing harm, they would then be bound to rectify the mistake if it was one."

The defendant, however, contended, that if it located and maintained the pole in question in the public street in accordance with the provisions of its charter and the ordinance of the city of Bangor, it was legally justified; and proof of negligence

in doing so would not subject it to an action by a traveler damaged thereby; and requested the court to instruct the jury as follows: "That if the pole in question was located and maintained in accordance with the provisions of the charter of the company and the ordinance of the city licensing the company to erect and maintain poles, then the pole was not a legal obstruction, and the plaintiff cannot recover." This request was not given, and properly refused as not expressing the law of the case.

A careful examination of defendant's charter and the city ordinance discloses nothing which expressly or by implication relieves the company from liability for injuries caused by its negligence or want of care in erecting and maintaining its poles when licensed by the city council, but rather the contrary. Section four of the charter creates a lien on all property of said railway, to take precedence of any mortgage, in favor of the city of Bangor to secure said city for any sum it may be liable to pay on account of any damages to person or property occasioned by any negligence or fault of said railway during construction or operation.

The case seems to be within the provision of Statute of 1885, Chapter 378. "Section 1. Every company incorporated for the transmission of intelligence, heat, light or power by electricity; and all persons and associations engaged in such business shall be subject to the duties, restrictions and liabilities prescribed in this act.

"Section 8. When an injury is done to person or property by the *posts*, wires, or other apparatus of any company, person or association mentioned in section one, such company, person or association shall be responsible in damages to the person injured. If the same be erected on a highway or town way, the city or town shall not by reason of anything contained in this act, or done thereunder, be discharged from its liability."

The law as stated in the charge, requiring the plaintiff to prove the damage to be from the negligence or fault of the defendant, was sufficiently favorable to it.

A careful examination of the evidence reported satisfies us that it was sufficient to authorize the verdict.

Exceptions and motion overruled.

J. PERCY DUNN *vs.* MARGARET A. WHEELER.

Penobscot. Opinion February 19, 1894.

Deed. Trust. Vested Right. Disseizin.

A husband conveyed, without words of inheritance outside of the *habendum*, a homestead to his wife to be held by her for the benefit of herself and their children until the youngest child should arrive at the age twenty-one; the *habendum* being in these words: "To have and to hold said premises to said Margaret my wife, in trust for said children, and to said children [naming them,] or such of them as arrive at the age of twenty-one years, and to said Margaret in case of their decease, and to their and her heirs and assigns forever." *Held;* That when the youngest child became of age, the father having deceased before that time, the estate in trust became terminated, and an estate in fee vested in the children surviving.

The wife could not acquire any right to the premises by disseizin while in possession under the terms of the trust.

ON REPORT.

This was a petition for partition.

The case is stated in the opinion.

James L. Doherty, for plaintiff.

C. A. Cushman, for defendant.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

PETERS, C. J. The questions arising in this case depend for their solution on the construction to be given to a deed of John Boyle to his wife, Margaret Boyle, dated October 13, 1858, on the eve of his departure from his home in this State for California from which country he never returned, having deceased there in the year 1870.

The substantial portion of the instrument of conveyance, duly signed and executed, is as follows:

"Whereas, I, John Boyle of Oldtown, am seized in fee of lot numbered eight, and lot F on Treat and Webster's Island in Oldtown, Stewart plan, and am about to go to the State of California, leaving my wife Margaret Boyle and three children. Now, therefore, I, said Boyle, for the purpose of securing said

property to my wife and children in case of my death or inability to return, in consideration of one dollar, to me by her paid, of her goods and property, do hereby convey and sell to her, said Margaret, the property aforesaid as follows: First, in trust for the use of my three children, Francis E., Andrew B., and Margaret Ann Boyle, or to such one or more of said children as arrive at the age of twenty-one years, and in case of the decease of said children during their minority, then to said Margaret, my wife, in fee, and I especially prohibit any sale of said property during the minority of said children, and any sale or disposition thereof whatever that shall leave said children out of possession of said property shall be void against them at coming of age, whether made by said Margaret or any guardian of said children, it being my intention to keep and retain said property for a home for said family during the minority of said children, not intending hereby to deprive said Margaret of dower in said premises in case of my decease."

"To have and to hold said premises to said Margaret, my wife, in trust for said children, and to said Francis, Andrew and Margaret, or such of them *as* arrivs at the age of twenty-one years, and to said Margaret in case of their decease, and to their and her heirs and assigns forever."

"Provided, however, if I return to Oldtown at any time after November, 1858, and assert an ownership over said property by making a deed of conveyance thereof, then this deed shall be void and shall not be set up against a conveyance by me made at Oldtown, hereafter aforesaid, nor shall this deed have any force or effect against a conveyance of said property made by me and said Margaret, my wife, jointly, but such joint deed shall convey said estate notwithstanding this deed."

It is not at all difficult to see what the parties meant. The prime purpose was, evidently, to create a deed of trust from husband to wife for the benefit of their three children, the trust to continue until the youngest of the three should attain the age of twenty-one years. That trust has performed its intended purpose and has become terminated. The youngest child was long ago more than twenty-one years old.

And now comes the point of dispute between the widow and the heirs as to the ownership of the estate covered by the deed after the termination of such trust. Did the widow then take the estate in fee by the terms of the deed, or did it go to the three children? It seems plain enough from the *habendum* clause, if not elsewhere disclosed in the deed, that the children and their survivors were to have the estate when the trust terminated. If, however, the children were all deceased at such time then their mother was to have the fee. And, whether the estate should go to the children or to the mother at the termination of the trust, it was to be to them and their heirs and assigns or to her and her heirs and assigns forever.

The other conditions named in the deed upon which it might become void or be terminated are at this date of no consequence whatever, inasmuch as such conditions did not occur and cannot now ever occur.

If it should be regarded as questionable whether the deed contains language competent and sufficient to constitute a technical conveyance to the heirs after the expiration of the trust, it will be enough to vest the estate in them that the deed may operate as an equitable conveyance for their benefit, and that the legal estate would inure to them by the right of inheritance from their father.

The petitioner is the only child and heir of one of the Boyle children, his father and mother being deceased, and claims an undivided third of the premises described in his petition, such premises being a portion of those described in the deed in question, subject to dower therein belonging to his grandmother.

It is not a defense against his claim that at the age of fifteen he, in 1886, joined with his grandmother and her two surviving children in a conveyance of the premises to the respondent. As soon as he became of age he disaffirmed and repudiated his participation in the conveyance and commenced these proceedings for partition. Nor can it be maintained, as attempted to be by the defense that the grantee, Margaret Boyle, was occupying adversely to her children during the continuance of the trust when in the use and occupation of the estate intrusted

to her for her and their benefit. Even if she could have repudiated the trust she never undertook to do so.

Judgment for partition and for costs.

SARAH E. PARKER *vs.* EDMUND E. PRESCOTT.

Waldo. Opinion February 20, 1894.

Deed. Notice. Judgment. Non-Resident Debtor.

A grantee in a deed not recorded does not prove that a person, who attached as the property of the grantor the premises covered by the deed, had at the time actual notice of the existence of such deed, by showing that such person, in a conversation which took place some years before the date of the attachment, and at a time when he had no interest whatever in a knowledge of the fact nor any motive for remembering it, was informed that the grantor had made a conveyance of the premises; but, to constitute actual notice, it should also further appear that such person actually remembered the fact of the conveyance when his attachment was made.

A judgment against a non-resident, over whose person the court has not jurisdiction, but whose property is attached in this State, is not invalid because it is in form general against both property and person, instead of special and limited to the property attached; such a judgment is special in effect.

Knapp v. *Bailey*, 79 Maine, 195, affirmed.

See *Parker* v. *Prescott*, 85 Maine, 435.

ON MOTION.

This was a writ of entry, plea the general issue, and a verdict for the defendant. It was the second trial of the same case reported in 85 Maine, 435.

Jos. Williamson, for plaintiff.

W. H. Fogler, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

PETERS, C. J. This is a real action to recover a small homestead in Palermo, in Waldo county, about the title to which certain undisputed facts appear. Willard H. Chadwick received a deed of the farm from his father in 1872. In May, 1875,

Willard conveyed the same to his brother Edwin, who in April, 1878, conveyed the same to the defendant. The deeds to Edwin and the defendant remained unrecorded until some time in the year 1890. Willard had boarded with the demandant considerably in Worcester (Massachusetts), where she had kept an extensive boarding-house, while he was at work at some trade or business in that city. He was in Palermo when he conveyed the premises to his brother, and, returning to Worcester some months afterwards, he and his wife again took their meals at her house while occupying rooms in the vicinity. Afterwards he became indebted to his landlady for his own and his wife's board, the indebtedness accruing after January 1, 1876, for a balance of which she obtained judgment against him in some court in Worcester county in April, 1878. Not obtaining satisfaction of her claim, and supposing it possible that her debtor possessed some estate in Palermo, where he had many years lived while not at work in Massachusetts, her attorney in Worcester procured an examination to be made of the Waldo county records, and, finding the farm in question to be standing in his name, the same was attached on a writ in her name against him in November, 1884. The action went to judgment and upon an execution issued thereon the premises were sold to the demandant.

The disputed fact of the case is whether the demandant, when she made her attachment, had actual notice that the land had been previously conveyed by her debtor. The Chadwicks, husband and wife, testify that upon their return to Worcester, or soon afterwards, they spoke to her or in her presence of their having during their absence sold their farm in Maine; and the pretended conversations are related in several ways. All this is wholly denied by the demandant who was also a witness. The testimony for the defense does not impress us as being entitled to very great credibility, but whether the jury were justified in their full acceptance of it as true we need not, in our view of the case, now consider.

The true inquiry manifestly is whether the demandant was chargeable, at the very date of her attachment, with a kind and degree of notice which would render such attachment invalid. In

other words, was she possessed of such actual notice at the moment when the attachment was made. It is not enough, in the circumstances of this case, that she had years before in a passing and unimportant conversation casually heard of a conveyance in which she had no interest nor expected to have any. It might be different had the notice been purposely given to her as an interested party, or if for any other reason it had been her duty to recollect the fact. But here no such obligation existed. She had never been in Maine, and knew nothing about Willard's property in Palermo more than that he had something to do with his father's farm there, which was not the farm in controversy. He was not her debtor when he informed her, if he did so, of the sale of his farm, and therefore she had no motive to treasure up the information in her memory. No particulars of the transaction of sale or significant incidents connected with it were communicated to her, and her attachment was not placed upon the property until from nine to ten years after that time. In the meantime there had been no reminder of the fact. We are of the opinion that such information communicated to her in the year 1875 would not be effectual to establish actual notice to her in November, 1884, unless she retained the fact in her mind and memory at the latter date.

Our conclusion is not at all in conflict with the doctrines enunciated in *Knapp* v. *Bailey*, 79 Maine, 195. That case extends a generous protection to grantees whose deeds are not recorded but are known to parties trying to gain priority over them. But the doctrine is not to be extended and should not be misapplied. It is a very grave neglect for a grantee to fail to record his deed.

The counsel for the defendant contends, erroneously however, that the judgment recovered in Waldo county by the demandant, upon which the sale was made to her as a purchaser, is void because issued against the debtor personally instead of against the property attached only, the court acquiring no jurisdiction over the person. It is very common to allow such judgments although not always available against the defendant personally, or collectible beyond the amount of the property attached on the writ. *Eastman* v. *Wadleigh*, 65 Maine, 251.

We think the jury could not have appreciated the distinction between receiving notice and remembering it; and we do not know whether any such distinction was explained to them by court or counsel at the trial.

Motion sustained.

CITY OF AUBURN

vs.

YOUNG MEN'S CHRISTIAN ASSOCIATION OF AUBURN.

Androscoggin. Opinion February 20, 1894.

Taxes. Assessment. Exemption. Y. M. C. A. R. S., c. 6; Stat. 1889, c. 274.

The real estate of the Young Men's Christian Association of Auburn, whether the association be classed, within the meaning of the statute on taxation, as a religious or as a charitable institution, is taxable as other real estate is, so far as it is not used or occupied by the association for its own purposes, but is rented for the sake of obtaining revenue therefrom.

Where one portion of a building which is real estate is taxable and another portion not, it cannot be considered, in a suit for the collection of taxes thereon, objectionable for the assessors to estimate the value of the whole estate, and, after deducting from the amount of such estimate the value of the non-taxable portion of the estate, to assess a tax upon the amount of the estimated value left.

ON REPORT.

This was a statutory action of debt to recover the taxes assessed, for the years of 1891 and 1892, upon the defendant's real estate in the city of Auburn. The presiding justice who heard the case ordered judgment for the plaintiff in the sum of $426.80. The parties agreed that the evidence should be reported to the law court. If the tax in the opinion of the law court was not sustainable, judgment should be for the defendant; otherwise, the judgment was to stand.

The case is stated in the opinion.

James A. Pulsifer, for plaintiff.

Counsel cited: *Camden* v. *Village Corporation*, 77 Maine, 531, and cases; 1 Dill. Mun. Corp. § 86; *Lowell Meeting-House* v. *Lowell*, 1 Met. 538; *Pierce* v. *Cambridge*, 2 Cush. 611; *Trustees*, &c., v. *Wilbraham*, 99 Mass. 599.

Savage and Oakes, for defendant.

The object of the statute of 1889 is apparent. It was that towns in which literary institutions existed should not be burdened especially by the loss of taxation on rentable real estate owned by such institutions, but that that burden should be assumed by the State, on the ground that benefits derived from such institutions were public and confined to no town or section of the State.

It cannot be denied that the work done by this defendant and by associations like it is done for the general public only. The good of society demands that they be supported, and if the general public does not assist at least to the extent of exempting them from public burdens, then pious and generous men must put their hands even deeper into their pockets to carry on the work. And not only that, but if the contention of the city of Auburn in this instance is correct, piety and generosity must be taxed by the public for the privilege of ministering, without fee or reward, to that public which will get all the benefit of the Association's work and which contributes nothing itself.

The defendant is a charitable institution and its property, real and personal, is exempted from taxation.

Charitable institutions within the meaning of the law: *Mass. Soc., &c.*, v. *Boston*, 142 Mass. 24; *Morville* v. *Fowle*, 144 Mass. 109; *Fairbanks* v. *Lampson*, 99 Mass. 533; *Gooch* v. *Association*, 109 Mass. 558; *Dexter* v. *Gardner*, 7 Allen, 243; *Tappan* v. *Deblois*, 45 Maine, 122; *Goodsell* v. *Union Association*, 29 N. J. Eq. 32; *Jackson* v. *Phillips*, 14 Allen, 558; *Bartlett* v. *King*, 12 Mass. 536; *Going* v. *Emery*, 16 Pick. 107; *Sohier* v. *St. Paul's Church*, 12 Met. 250; *Brown* v. *Kelsey*, 2 Cush. 243; *Earle* v. *Wood*, 8 Cush. 430; 3 Am. & Eng. Encyl. 130.

The assessors have not taken the proper steps to make the exemptions.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. The point first discussed on the briefs of counsel in this case is whether the Young Men's Christian Asso-

ciation of Auburn should, for purposes of taxation or immunity from taxation, be classified as a charitable or only as a religious society. That might present a question of some difficulty for decision, but its importance in this case is entirely taken away by the fact that, since the present case was submitted to us, it has been held in another case that the real estate belonging to either kind of such corporations, so far as the same is not occupied by the corporation for its own purposes, is taxable in the municipality where it is situated. *Inhabitants of Foxcroft* v. *Piscataquis Valley Camp Meeting Association*, *ante*, p. 78. That case fully covers and controls the present case.

The last general statute regulating exemptions from taxation was enacted in chapter 274, laws of 1889, by which act, item two of section six of chapter six of the revised statutes is made, in its enumeration of the classes of property exempted, to read as follows:

"All property which by the articles of separation is exempt from taxation; the personal property of all literary and scientific institutions; the real and personal property of all benevolent and charitable institutions incorporated by the State; the real estate of all literary and scientific institutions occupied by them for their own purposes or by any officer thereof as a residence. Corporations whose property or funds in excess of their ordinary expenses are held for the relief of the sick, the poor, or the distressed, or of widows and orphans, or to bury the dead, are benevolent and charitable corporations within the meaning of this specification, without regard to the sources from which such funds are derived, or to limitations in the classes of persons for whose benefit they are applied, except that so much of the real estate of such corporations as is not occupied by them for their own purposes, shall be taxed in the municipality in which it is situated. And any college in this State authorized under its charter to confer the degree of Bachelor of Arts or of Bachelor of Science, and having real estate liable to taxation, shall, on the payment of such tax and proof of the same to the satisfaction of the governor and council be reimbursed from the state treasury to the amount of the tax so paid; provided, however, the

aggregate amount so reimbursed to any college in any one year shall not exceed fifteen hundred dollars; and provided, further, that this claim for such reimbursement shall not apply to real estate hereafter bought by any such college."

The result in the case cited turned on the construction to be given to the clause, in the above statute, limiting the exemption to such real estate as is occupied by certain corporations for their own use. The defendants, in the present case, contend that the excepting clause was intended to apply only to a peculiar class of institutions denominated charitable in the lines immediately preceding such clause; whilst the decision alluded to finds that the excepting clause applies to all charitable and benevolent corporations alike. Even if there may be some question of the meaning of the legislature in this reconstruction of previous sections and amendments, the better interpretation is to infer that, whilst the legislature was willing to increase the kind and number of associations to be regarded as of a charitable character, and thereby enjoying the boon of immunity from taxation, it intended at the same time to lessen and limit the extent of such immunity. It increased numbers and decreased amounts. This construction makes the statute treat all charitable and other associations and institutions alike.

This construction of the statute is required by the strongest presumptions. All doubt and uncertainty as to the meaning of a statute is to be weighed against exemption. Taxation is the rule and exemption the exception. This doctrine runs so strongly in the cases that many of them hold that, when the property "of" an institution is by legislative grant exempted from taxation, the exemption must be held as applying only to such property as is occupied by such institutions for their own purposes. See 18 Am. Law Reg. (N. S.) 366, and numerous citations in note. See, also, Cooley on Taxation, pp. 54, 204, 205. These rules are especially applicable in our own State where there is an absence of express constitutional power to grant exemptions from taxation. The charter accepted by the defendants authorizes them to take and hold real estate for "religious, educational and charitable purposes." The counsel

for the plaintiffs contend, that it would be an invidious discrimination to allow them to hold real estate for purposes of rent and revenue in competition with other holders of commercial property without payment of taxes thereon; that such an exemption to them is an exaction on others.

The defendants' entire real estate, a portion of which was let for a boarding-house and another portion for stores, was valued at the sum of twenty thousand dollars, and an assessment was made upon one half of that sum as the value of the non-exempted portion of the property. This may not have been the most regular mode of assessment, but was regular enough to sustain an action for collecting the taxes, and there is no injustice in it. *Cressey* v. *Parks*, 76 Maine, 532.

Defendants defaulted.

MISSISSIPPI AND DOMINION STEAMSHIP COMPANY, LIMITED,

vs

GUSTAVUS F. SWIFT, and others.

Cumberland. Opinion February 24, 1894.

Contracts. Negotiation. Completion. Signing.

Upon the question whether the signing a written draft of the terms is essential to the completion of a contract, *Held;* If the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract:—if, however, it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed.

The burden of proof is upon the party affirming the completion of the contract before the written draft is signed.

In determining which view is entertained in any particular case, several circumstances may be helpful, as: whether the contract is of that class which are usually found in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.

If a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.

ON REPORT.

This was an action brought in this court, in Cumberland county, for the recovery of $24,690.08, damages for breach of a contract claimed by the plaintiff to have been made with the defendants, by which it chartered to the defendants certain space, at a price designated, on the three steamers, Vancouver, Sarnia and Oregon, owned by the plaintiff company, which space was to be fitted with refrigerators and used by the defendants for the shipping of dressed meat.

The principal part of the evidence consists of letters and telegrams between David Torrance & Co., steamboat agents of the plaintiff company, who had an office both in Montreal and Portland, and these defendants, represented by Mr. Edwin C. Swift, at Boston. The correspondence beginning November 19, 1889, and continuing until the latter part of 1890, is stated in the opinion of the court.

The plaintiff claimed that the minds of the parties were together and that the contract was complete April 5, 1890. Plea, general issue and the statute of frauds. The defendants denied that any contract was made or signed.

Symonds, Snow and Cook, for plaintiff.

Statute of frauds. Contracts to be performed within one year: *Farwell* v. *Tillson*, 76 Maine, 227; *Duffy* v. *Patten*, 74 Maine, 396; *Walker* v. *Johnson*, 96 U. S. 424. Memorandum: *Ryan* v. *U. S.* 136 U. S. 68, p. 83; *Jenness* v. *Iron Co.* 53 Maine, 20; *Williams* v. *Robinson*, 73 Maine, 186; Wood on Fraud, § 345; Browne Stat. Fr. § 371; Chitty Cont. p. 95, n. P; Addison Cont. 8th Ed. App. p. 266; *Atwood* v. *Cobb*, 16 Pick. 227.

The memorandum in this case shows a definite offer and an equally definite acceptance, together with a tender of performence by the plaintiff and a promise of immediate performance by the defendants. The fact that matters of form or detail were still to be arranged does not in any way invalidate the contract thus made by the parties. The contract was made by the acceptance of the offer duly communicated, and this contract shewn by the memorandum is not affected by the mere circumstance that the parties intended to enter into a formal future contract. *Bonnewell* v. *Jenkins*, 8 L. R. Ch. Div. 70; *Gibbins*

v. *The North Eastern Metropolitan Asylum District*, 11 Beavan, 1; *Darlington Iron Co.* v. *Foote*, 16 Fed. Rep. 646: Fry on Specific Performance, § 492.

Defendants' acceptance of April 5th, was absolute and not in any way contingent upon the execution of a future formal contract, and it constituted a final agreement between the parties, which could not be affected by any more formal contract. *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638; Fry on Specific Performance, § 492.

The recognition of the contract may be contained in a letter, and if it admits the contract and refers to the memorandum in such a manner that the court can connect it therewith, and ascertain the terms of the contract without the aid of parol evidence, it is sufficient to bind the defendants, although they did not intend thereby to ratify the contract. Brown on Stat. Frauds, § 346; Wood on Frauds, § 345.

Savage and Oakes, *Freedom Hutchinson*, of Boston bar, and *Clarence Hale*, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. A full exposition of our judgment in this case, requires an extended statement of the evidence and the authorities, notwithstanding constant effort at abridgment.

The plaintiff steamship company owned and operated a line of ocean steamships plying between Liverpool and Montreal in the summer, and between Liverpool and Portland in the winter. The American agents of the company were David Torrance & Co. with offices in Montreal and in Portland. Three of the steamships were named respectively, Sarnia, Oregon and Vancouver.

The defendants, Swift & Co., located at Boston, were large shippers of dressed meats from the United States to Europe. This kind of merchandise, being fresh meat, could not be shipped, stowed and transported across the ocean like ordinary merchandise, upon mere bill of lading. Its suitable transportation required that certain spaces in the steamship should be set

apart for its reception, refrigeration and care during the voyage. This space was necessarily engaged for some time prior to the shipping, that it might be properly fitted up, and it was necessarily to some extent at the disposal of the shipper, and under his control during the term of the contract. There were two modes of refrigeration in use, one by ice, and a new one by the Kilbourn process, so-called.

In this condition of affairs, Torrance & Co., November 19, 1889, opened a correspondence with Swift & Co. relative to space on the company's steamers for the transportation of dressed beef. In the first letter, November 19, Torrance & Co. advised Swift & Co. that they were prepared to negotiate for such space on the Sarnia and Oregon, and were prepared to offer such space at twenty shillings per forty cubic feet on those steamers, retaining liberty to substitute the Vancouver for one of the others later on. There was no reply to this letter, and on January 19, 1890, Torrance & Co. again wrote Swift & Co. naming the sailing dates of the various steamers, and inviting bids. No reply being received, Torrance & Co. on February 6th, again invited the attention of Swift & Co. to the matter. Swift & Co., February 12, wrote Torrance & Co. that one of their men would call upon them with reference to the matter. There seems then to have been some verbal conference, for on March 3d, Torrance & Co. wrote that the Liverpool managers were not inclined to accept the price named by Swift & Co., and "would only agree to fix the ships, provided you are willing to pay twenty shillings and take the space where we think it would be most profitable for the ship," and suggested that if Swift & Co. were inclined to do anything on these terms they might communicate with either the Montreal or Portland house. March 24, Torrance & Co. again wrote (this time from Portland, the other letters having been from Montreal,) that they would not be prepared to enter into a contract for the Vancouver, Sarnia and Oregon unless for one year, from Montreal in summer and Portland in winter, they reserving the right to withdraw the Vancouver in the winter.

The next day, March 25, Swift & Co. wired in answer as

follows: "Answering your letter, 24th, if accepted at once, we will take space in the three ships named, to be mutually agreed on at twenty shillings flat for summer navigation, we agreeing to continue shipments during the winter, if ships go from Portland or Boston, we paying your market price for beef space; as we are negotiating with other parties, would appreciate your answer at once." Torrance & Co. wired same day from Montreal as follow: "We cannot change offer already made by our Portland house under instructions from Liverpool." Their Portland house on the next day, March 26, wrote for an answer to their proposition. On March 27, Swift and Co. wired to the Portland house as follows: "Your favor of 26th just received. We accept your proposition of 24th on three steamers. Please confirm by wire."

In the meantime, between the 24th and 27th of March, Torrance & Co., not hearing from Swift & Co., began negotiations with other parties and so informed Swift & Co. in answer to their telegram of the 27th. March 29th, Swift & Co. wired that they wanted the space, and thought it should be accorded to them. April 1st, Torrance & Co. wired as follows: "The decision has been given in your favor, and the three ships mentioned are at your disposal. Sarnia expected Portland Thursday, will sail following Thursday." On the same day, Torrance & Co. wrote that they had been relieved of their negotiations, and said, "We hasten to advise you that we are willing to contract with you for the three steamers on the terms already mentioned, and conditional on your putting in the cold air blast instead of the ice and we have wired you accordingly in these words, 'The decision has been given in your favor and the three ships mentioned are at your disposal. Sarnia expected Portland Thursday, and will sail the following Thursday.' You can arrange with our Portland house in reference to the contract." . . . To this telegram Swift & Co. wired answer as follows: "Your message received, thanks for same. Shall we refrigerate Sarnia by old process this trip, or wait till first of May and use Kilbourn machine. We have two machines to be delivered early in May." Torrance & Co. replied by wire same day, April 1st,

as follows: "Wait till May. We don't want old process." On April 5th, Swift & Co. wrote as follows: "Your favor of April 1st, received, replying to same will say we will arrange for fitting the three ships by the Kilbourn process as per your request. I notice you say, 'The Toronto, one of our steamers sailing between here and Liverpool all next season is due at Portland on the 10th instant and should sail about the 15th. We are open to negotiation for her if you are so inclined.' I suppose all next season means the coming summer navigation for Montreal. Will you kindly write us saying where this ship will sail from during next winter; if she is to be in the regular service we shall be pleased to negotiate with you."

Here the correspondence ceased for a time. In the meantime, about the last of March, Mr. Foster, agent of Swift & Co., visited the steamers in Portland, took measurements of space in different steerages, and had some conversation with the company's marine superintendent about the location of spaces for refrigerators. He indicated what spaces he should want, but no express stipulation was made that he should have them, or would take them. Swift & Co. did nothing toward refrigerating any space and the steamers carried cargo in all the steerages as usual, leaving no space unoccupied.

July 8, 1890, Swift & Co. wired as follows: "Have no copy of contract, please mail one to-day." On the same day Torrance & Co. replied as follows: "We must apologize for not having earlier sent you copy of the contract for dead meat space. We shall however mail it to you to-morrow without fail." The next day, July 9th, they further wrote as follows: "Owing to this being our English mail day, we have been unable to put your contract in form as promised but we will send it to you to-morrow." July 10th, they wrote again as follows: "We now inclose you copy of our proposed contract which we trust may be found to be in accordance with the understanding arrived at last March. We must apologize for not sending this yesterday but as it was our mail day we were more than busy and this must be our excuse. We trust you may soon be prepared to begin your shipments." The draft of contracts inclosed was quite long.

The only date on the draft was "Montreal, 1890." This draft was never signed.

July 24, Swift & Co. wired that they could not use Kilbourn process and must use ice, and inquired if that would be satisfactory. July 26, Torrance & Co. replied by wire as follows: "Have cable authorizing you using ice but the other preferred. Can you refrigerate Vancouver? Will be here to-morrow. Sails Wednesday week."

Swift & Co. replied on July 28th that they could not refrigerate the Vancouver, and that their Mr. Foster would call on Torrance & Co., Wednesday morning. At this point the draft of contract had not been signed. Swift & Co. had taken no spaces and had made no shipments. The company had set apart no spaces but had filled them as usual with cargo.

This state of affairs continued till September 24th, 1890, when Torrance & Co. wrote to persuade Swift & Co. to hasten matters. Swift & Co. replied September 25th, that they did not feel like assuming the responsibility of shipments in warm weather by either process as at present working. There was other correspondence following this and running up to October, 1891, in which Torrance & Co. insisted that Swift & Co. should carry out the arrangement, and Swift & Co. refused to recognize any arrangement as concluded. The result was that March 19th, 1892, this suit was brought to recover damages for the refusal of Swift & Co. to carry out the contract claimed by the plaintiffs to have been made. The company only claims as damages the profits at twenty shillings per forty cubic feet inasmuch as it filled the spaces, though at a less rate.

The plaintiff now contends that it appears from this correspondence, as explained by the oral testimony, that the terms of a complete contract were mutually agreed upon, April 5th, by Swift & Co.'s letter of that date; and that the parties then had mutually signified an intention to be bound. The defendants contend that the correspondence and the circumstances do not show that the terms of such a contract were then or ever agreed upon; and further, that the correspondence and circumstances do show that the parties contemplated that such terms as should

be agreed upon, should be expressed in some formal instrument, to be written and signed before any contract should be considered as complete. A formal draft of the terms of a contract was prepared by the plaintiff, but was not signed by either party. Was there a complete contract without that signing?

The burden is upon the plaintiff to maintain the affirmative.

Upon this question, the diligent counsel have cited numerous cases where a similar question has arisen and been discussed. A study of these cases has not been profitless. We summarize a few and quote from the opinions of several eminent judges. In *Chinnock* v. *Ely*, 4 De G. J. & S. 638, the defendant's solicitors wrote to the plaintiff naming the price for an estate about which they had been negotiating. The plaintiff wrote a letter in which he agreed to give the price named and then added, "I shall be obliged if you will forward me the usual contract." In reply, the defendant's solicitors wrote, "We have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared and will be forwarded to you for approval in a few days." Lord Chancellor Westbury held that, so far, the parties were in treaty merely, and that without the execution of the draft mentioned, there was no contract concluded. In *Bonnewell* v. *Jenkins*, 8 Ch. Div. 70, the defendant's agents offered certain premises for sale. The plaintiff wrote the agents, making an offer of £800 for the estate. The agents wrote in reply as follows, "We are instructed to accept your offer of £800 for these premises and have asked Mr. Jenkins' solicitor to prepare contract." The Lord Justices of Appeal held that there was a concluded contract. Thesiger, L. J., said, "The mere reference to a preparation of an agreement, by which the terms agreed upon would be put into a more formal shape does not prevent the existence of a binding contract." In *Rossiter* v. *Miller*, 5 Ch. Div. 648, there was much correspondence about a sale of certain lots of land, and the question arose whether the correspondence showed a completed contract, without the formal draft which had been referred to in some of the letters. James, L. J., said, "The reasonable view of the case is, that the parties intended the

signing of the formal contract to be a condition precedent." Coleridge, C. J., said, "If a set of terms be agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here a set of terms was never agreed to." Baggallay, L. J., said, "The letters left the defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement." In the same case upon an appeal to the House of Lords (3 App. Cas. 1124) Lord Hatherly said, "Although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is an agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters be clearly and distinctly stated, though only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because the letter may say, we will have this agreement put in due form by a solicitor." Lord O'Hagan said, "The correspondence gives no color to the suggestion that the contract was not final and was not considered to be final by all the parties to it, because the formal agreement embodying its already settled terms had not been furnished." Lord Blackburn said, "The mere fact that the parties have expressly stipulated that there shall be afterward a formal agreement prepared, embodying the terms, which shall be signed by the parties, does not, by itself, show that they continue merely a negotiation. It is a matter to be taken into account, in construing the evidence, and determining whether the parties have really come to a final agreement or not; but as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the final agreement have not the power to vary the terms already settled, I think the contract is completed." In the same opinion Lord Blackburn further said, "Parties do often enter into negotiation meaning that when they have (or think they have) come to one mind, the results shall be put into formal shape, and then (if on seeing the result in that shape, they find they are agreed) signed and made binding; but that each party is

to reserve to himself the right to retire if on looking at the formal contract, he finds that, though it may represent what he said, it does not represent what he meant to say. Whenever on the true construction of the evidence, this appears to be the intention, I think the parties ought not to be held bound till they have executed the formal agreement." In *Ridgway* v. *Wharton*, 6 H. L. Cases 238, Lord Chancellor Cranworth said, "If parties have entered into an agreement, they are not the less bound by that agreement because they say, we sent it to a solicitor to have it reduced into form; but when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form, affords to my mind generally cogent evidence that they do not intend to bind themselves till it is reduced into form." Lord Wensleydale said, "These cases often occur in courts of law and the question then always is, whether the parties mean to embody the contract made by parol, in writing. If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agreement, nothing will bind them but that written agreement, and that quite independently of the Statute of Frauds applying to all agreements." . . . "If the parties agree finally to be bound by any terms, and then for the sake of preserving a memorial, having agreed to the original terms, they get a document drawn up, there is no doubt they are bound by the original terms." In *Morrill* v. *Tehama M. & M. Co.* 10 Nev. at page 135, the court declared the general rule to be, that where the parties enter into any general agreement, and the understanding is that it is to be reduced to writing, or if it is already in a written form, that it is to be signed before it is to be acted on, or to take effect, it is not binding until it is so written or signed. In *Methudy* v. *Ross*, 10 Mo. App. 106, the court said, "The mere fact that a written contract was to be subsequently prepared, does not show that a final agreement between the parties was not made, but it tends to show it; and in this case we think it clear that there was to be a more explicit agreement which was to be reduced to writing; that this was not done and that

there was no meeting of minds." In *Eads* v. *Carondelet*, 42 Mo. 113, the plaintiff made to the city of Carondelet a written proposition, containing the terms on which he would build gunboats in that city. The city council passed an ordinance reciting the proposition and expressly accepting it as made; but in the second section of the ordinance, directed and empowered the mayor to enter into a written contract with the plaintiff, and employ counsel to draft the contract. The plaintiff carried out his proposition, but the city failed to perform any part. *Held*, that the city was not bound, as further formality was contemplated. In *Water Commissioners* v. *Brown*, 32 N. J. L. 504, Brown made a proposition to the commissioners to do certain work in laying pipe. The commissioners accepted the proposition and directed a written contract to be prepared. This was done, but it was not signed. *Held*, that the commissioners were not bound. In this case, however, the law provided that the contracts of the water commissioners should be in writing. This fact showed conclusively that a written contract must have been contemplated. In *Congdon* v. *Davy*, 42 Vt. 478, the negotiation was for building a dwelling-house by the plaintiff for the defendant. Everything was agreed upon, and it was also agreed that the contract should be put in writing if the defendant desired. The defendant afterward expressed such desire, and a writing was prepared, embodying the agreement, but the defendant refused to sign it. *Held*, there was no completed contract.

From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial,

or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed.

In determining which view is entertained in any particular case, several circumstances may be helpful, as: whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.

Still, with the aid of all rules and suggestions, the solution of the question is often difficult, doubtful and sometimes unsatisfactory. An illustration of this, is the case of *Rossiter* v. *Miller*, above quoted from. In that case, Lord Chief Justice Coleridge and Lord Justices James and Baggallay, three of England's most distinguished judges, were clear that there was no contract for want of a formal draft. Lord Chancellor Cairns, and Lords Hatherly, Blackburn and Gordon, equally able and eminent jurists, were confident in the contrary opinion.

We come now to the consideration of the circumstances and correspondence in this case.

The attempt was to negotiate a contract for the use of space on ocean steamers, of which the shippers were to have control to some extent, and in which they were to set up their appliances, and load and care for their own merchandise. This arrangement is quite different from the ordinary contract of affreightment. It is like a charter-party which is almost universally reduced to formal written draft.

The negotiations contemplated not simply a contract for one area of space on a single steamer for a single trip. The contract was to be for a year, and for different areas of space on three different ships. The interests of the contracting parties in those

spaces were so various and, if not conflicting, yet in such close contact, that a contract would need to contain many stipulations in order to sufficiently define the rights and duties of the parties. The draft prepared by the steamship company would, if printed in this type, occupy over three pages of this volume. It contained some twenty-one distinct stipulations, many of them nowhere alluded to in the correspondence or conversations, and yet seemingly essential to be agreed upon in a contract for chartering space on ocean steamers for the transportation of dressed meats. It had annexed as a part of itself a long printed blank bill of lading. The elder Torrance testified that all the details in the written draft were the well-understood custom of the trade, and understood in every similar contract. He also testified that "the contract was carefully drawn up," and that when he drew it, he had before him several other contracts. So far as the case shows, the draft was entirely in manuscript. No printed blanks seem to have been in existence, as there probably would have been, had the numerous details become crystallized into a well-understood custom. The defendants deny the existence of any such custom, or understanding.

The claim of the plaintiff company that it would have made nearly $25,000.00 profits by such a contract, shows that the negotiations were not about a trifle.

The correspondence seems to indicate that a formal draft of the contract was in the minds of the parties, or at least in the mind of the defendants, as the only authoritative evidence of a contract. In the first letter, that of November 19, Torrance & Co., the plaintiff's agents, write that they are authorized, "To make a contract for dressed beef on our steamers, Sarnia and Oregon, and we hasten to advise you that we are prepared to discuss the matter with you." In the second letter they invite a bid. In the letter of March 3rd, 1890, they name terms and then say, "If you are inclined to do anything on these terms, you might further communicate with us or our Portland house." In the letter of March 24th, from Portland, they say, "We would not be prepared to enter into a contract with you for the Vancouver, Sarnia and Oregon unless for one year, from Mon-

treal during the summer and Portland in winter, we reserving the right to withdraw Vancouver during the winter." In the letter of April 1st, they say, "You can arrange with our Portland house in reference to the contract." July 8th, the defendants wired for a copy of the contract to be sent. On the same day Torrance & Co. write apologizing for neglect to send copy. July 10th, Torrance & Co. send the written draft which has been above described, and write, "We now inclose you copy of our *proposed* contract, which we trust may be found in accordance with the understanding arrived at last March."

Neither party, during all the correspondence, seems to have made any change in his business operations by reason of anything in the correspondence. No dressed meats were shipped by the defendants or offered for shipment. No space was reserved by the plaintiff and there was no delay or hindrance suffered in its regular business.

The case is by no means free from doubt and difficulty, but due reflection and study of the evidence have at the last brought us to the conclusion, that what the plaintiff claims to have become a perfected contract on April 5th, 1890, by the defendant's letter of that date, was at the most only the acceptance of the proposed basis of a contract, which was yet to be perfected as to details, and put in writing; and that the defendants did not have, nor signify, any intention to be bound until the written draft had been made and signed.

Judgment for defendants.

MARCIA E. ROGERS

vs.

THE KENNEBEC STEAMBOAT COMPANY.

Cumberland. Opinion February 24, 1894.

Carrier. Negligence. Free Pass. Passenger. R. S., c. 51, § § 9, 43.

One who accepts and uses a free pass, as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition whether he reads it or not.

Such a contract, exempting a carrier from liability, is not prohibited by any

rule of public policy in this State, and is effectual to exonerate the carrier from liability for the negligence of his servants.

A person may become a passenger before the transportation has actually commenced.

ON MOTION AND EXCEPTIONS.

This was an action on the case brought in the Superior Court, for Cumberland County, to recover damages for personal injuries alleged to have been received by the plaintiff, through the negligence of the defendant's servants, while attempting to pass over the gang-plank, or bridge, from the defendant's wharf in Bath to their steamboat, on the twentieth day of November, 1890.

The plaintiff admitted that she was invited by a friend who had a pass for four ladies, to go from Bath to Boston by boat, but testified that she never saw the pass; and denied that at the time of the injury she was traveling on a pass, or had any knowledge or notice of the conditions it contained.

A material part of the declaration is as follows:

"And the plaintiff avers further that on the day last mentioned, in company with and by invitation of a friend, she came and was lawfully upon said wharf, with intention to go thence to Boston on the last mentioned steamboat, and that when said bridge or slip was fixed by the defendant for use and was open for such use by the defendant, and divers persons then standing on the wharf including the plaintiff and the friend aforesaid, were by the defendant invited to pass upon, across and over said bridge to the steamboat aforesaid, then and on the day last named the plaintiff did enter and go upon said bridge or slip as so invited by the defendant to get access to the steamboat aforesaid, believing that the same bridge was safe and fit for use and not knowing the contrary. And further, the plaintiff alleges that when she entered upon said bridge as aforesaid, she understood that the friend aforesaid had in possession a pass or license issued by the defendant through some authorized agent, but never seen by the plaintiff, whereby the plaintiff was entitled to go upon said steamboat from Bath to Boston without the payment of any fare; and that the plaintiff then and there intended to seasonably ascertain whether such pass or license was in possession of the

friend, and in default of such pass, to pay to the defendant at the office aforesaid, or elsewhere as the defendant might prefer, the regular, usual legal price and fare charged by the defendant for the transportation of one person from Bath to Boston, and had in her possession lawful and sufficient money to make the payment aforesaid."

The jury returned a verdict for the plaintiff, and the defendant moved for a new trial, and also took exceptions which are stated, with the facts of the case, in the opinion of the court.

Weston Thompson, for plaintiff.

At time of receiving injury, plaintiff intended and was able to comply with all proper rules of the carrier. She intended, if required, when facts should be disclosed to defendant's ticket agent, or if she should find the alleged pass unacceptable, to pay her fare. She had not seen or accepted any pass, but supposed that Miss Niles had one that would carry her. She had not reached the place provided by defendant for receiving fares, or the carrier's agent who might decide upon the scope or validity of the pass, and was on the way to that place and agent by the means of access provided by the carrier. She intended no fraud or concealment, but intended to go on pass or ticket, in any event.

To escape liability for negligence, defendant relies on an alleged notice or contract on an alleged pass.

Contract or notice to limit carrier's "common law liability" is one thing; such contract or notice to exclude liability for carrier's negligence or that of its servants, is another thing.

Contracts (*a fortiori* notices) for the latter purposes are generally held void and ineffectual in America, except in New York and New Jersey, where with much dissent and some inconsistency, they have been upheld.

Against their validity: 17 Am. Rep. 719; 17 Wall. 357; 93 U. S. (3 Otto) 174; 95 U. S. (5 Otto) 655; 6 How. 344; 16 How. 469; 62 Maine, 488; 66 Maine, 239; 28 Am. Dec. 653 & n.; 62 Am. Dec. 285; 77 Am. Dec. 183; 92 Am. Dec. 53; 98 Mass. 239; 100 Mass. 505; 55 Am. Dec. 481; 32 Am. Dec. 470 & n.; 45 Am. Dec. 732; 31 Maine, 228; 54 Am. Dec. 513; 43 Am. Dec. 367, n.; 10 Am. Rep. 89; 3 West, 839.

If common carrier's obligation arises from social duty and not from contract (14 How. 468) and is "determined by the policy of the law" (32 Am. Dec. 455), the foregoing cases seem to show the inevitable conclusion; and unless law has more regard for chattels than for human life (2 Am Rep. p. 365) the result must be as they declare it.

Against 53 Conn. 371, we cite 65 Tex. 640, and against 150 Mass. 365, we cite 20 Minn. 125. (S. C. 18 Am. Rep. 360.) We urge that those cases that sustain the contract do not appreciate the principle that the carrier's obligation is not founded on contract (14 How. 468; 32 Am. Dec. 455) or duly consider the question "lying behind" the one which they discuss, referred to in last paragraph in 5 Otto, 655.

A. C. Stilphen, and *Symonds, Snow and Cook*, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. On the evening of November 20, 1890, the defendant's steamer Kennebec arrived at the wharf in Bath about half-past five o'clock on her regular passage from Gardiner to Boston. There was a fresh breeze from the northwest with a flood tide and freezing temperature, and the spray from the wheels caused ice to form on the guards of the steamer. The gang-plank was adjusted so as to form a bridge or passage-way between the steamer and the wharf. The plaintiff had come down from Brunswick by rail and was going on board as a passenger to Boston. She was on the gang-plank and with a single step more would have been on the steamer, when suddenly by reason of the swaying of the boat, the end of the gang-plank resting on the steamer slipped from its place and dropped down over the margin of the guard. The "lip" of the plank was thereby thrown upward and backward, the edge of it striking the plaintiff's leg and inflicting the injury of which she complains.

The plaintiff claims that the defendant's servants were guilty of negligence in the management of the gang-plank, and in this

action to recover damages for the injury thereby sustained, a verdict of $3,950 was rendered in her favor.

The case now comes to this court on exceptions and motion for a new trial. The defendant claims, first, that the evidence fails to show any negligence on the part of the defendant's servants on the occasion in question; and secondly, that the plaintiff became a passenger by virtue of a free pass which had printed on the back of it an express condition that the person accepting it must assume all risk of personal injury while using it.

The plaintiff admits that she was invited by Miss Niles to go to Boston by boat on a pass in company with Miss Niles and her two sisters, Miss Fannie Niles and Mrs. Remick; but says she never saw any pass, and denies that at the time of the accident she was travelling on a pass. She further says that, in any event, she had no knowledge of any condition on the pass in question which exempted the defendant from liability for personal injuries, and was not chargeable with any knowledge of such condition which Miss Niles and her sisters may have had. It is further contended that the terms printed on the back of the pass ought not to be construed as a contract against the defendant's liability for negligence, and finally it is insisted that it was not competent for the defendant as a common carrier of passengers to make such a stipulation against liability for negligence.

I. The plaintiff had undoubtedly consented to avail herself of the benefit of a free pass on the defendant's steamer to Boston. Her own testimony is clear and unequivocal on this point. She was informed by Miss Niles that a pass had been obtained "for four ladies" and accepted her invitation to go in place of one first invited who was obliged to decline. She admits that it was "distinctly understood" that she was to go on the pass, and that "no doubt was expressed by any one" as to her "being allowed to go on it." She "had always wished to go by boat" and accepted with pleasure this proffered courtesy from her friend. She afterwards stated that her employer would not have consented for her to leave at that busy season but for the favorable opportunity presented to her of going on a pass. She went from Brunswick to the wharf at Bath and stepped upon

the gang-plank of the steamer with the full expectation of a gratuitous passage to Boston and with no intention of paying her fare. That such a pass was actually issued by the defendant and was in the possession of Miss Niles on the steamer, as well as at Brunswick, is conclusively shown by the uncontradicted testimony of Miss Niles and Mrs. Remick. It was presented by the latter at the ticket office on the steamer for the purpose of obtaining a stateroom. After obtaining the key the ladies went up stairs to the state-room assigned them, and the plaintiff there ascertained the extent of her injury. The pass was returned to Mrs. Remick when she received the key, but in the excitement and confusion following the accident, it appears to have been lost. Its terms are satisfactorily shown, however, by the testimony of the Niles sisters in connection with a copy of the pass in blank introduced in evidence.

It is equally clear that the plaintiff had become a passenger at the time of the accident. She was at that moment within the protection of the defendant's servants and immediately after the injury was assisted by them to the ladies' cabin. The steamer then left the wharf and proceeded on her course down the river. It was soon discovered, however, that the plaintiff's wound required the attention of a surgeon and the steamer put back to the wharf and the plaintiff returned to Brunswick that night.

It cannot be questioned that a person may become a passenger before the transportation has actually commenced, and before he has entered the carrier's vehicle. In the familiar case of *Brien* v. *Bennett*, 8 C. & P. 724, the defendant's omnibus was passing on its journey and the plaintiff made a signal for the driver to stop and take him up. The omnibus was accordingly stopped for that purpose and the door opened, but just as the plaintiff was putting his foot on the step the omnibus was driven along and the plaintiff thrown upon his face and injured. It was held that the stopping of the omnibus at the plaintiff's request implied a consent to take him as a passenger, and that thereupon in attempting to enter the carriage he had the rights of a passenger.

In *Shannon* v. *B. & A. R. R. Co.* 78 Maine, 52, a person

waiting in the station for a passage on a train soon to depart, was invited by the ticket agent to sit in an empty car standing on the side track while the waiting room was being cleaned; and it was held that she was entitled to the same protection from the company while in this car as if in the regular waiting-room; in either place the person is a passenger in the care of the company. See also *Smith* v. *Railroad*, 32 Minn. 1; *Warren* v. *Railroad*, 8 Allen, 227; *Poucher* v. *Railroad*, 49 N. Y. 263; *Hannibal* v. *Martin*, 111 Ill. 219; *Allen* v. *Railroad*, 37 Iowa, 264; *Caswell* v. *Railroad*, 98 Mass. 194; Hutchinson on Carriers (2nd ed.), § § 556 to 565.

Upon the facts disclosed in the case at bar, it must be conceded that, at the time of the accident, the relation of passenger and carrier between the plaintiff and the defendant had been fully established. She clearly would have been a passenger if she had gone upon the gang-plank intending to procure a ticket at the office and pay her fare, and she was not the less so because travelling on a pass. Hutchinson, *supra*, § 565; *Shannon* v. *Railroad*, *supra*.

II. The plaintiff was travelling on a pass with the following conditions printed on the back of it, viz: "The person who accepts this pass thereby assumes all risks of personal injury and loss or damage of property while using it." The terms of this condition are clear and unmistakable. They are in effect the same as those on the "free ticket" in *Quimby* v. *B. & M. R. R.* 150 Mass. 366, and are sufficiently comprehensive to cover all risks of personal injury "of every name and nature" including those arising from the negligence of the defendant's servants.

But it does not appear that the plaintiff ever saw this pass, and she claims that she had no knowledge of the condition attached to it, and never assented to it. It is in testimony, however, that Miss Niles who procured the pass at Brunswick and Mrs. Remick who presented it at the ticket office on the steamer, had both examined the terms of it and knew that it contained a stipulation exonerating the defendant from liability for injuries. Miss Fannie Niles also learned from her sisters

that there was such a condition on it. Miss Niles and Mrs. Remick both testify that, in a conversation with the plaintiff in going from Brunswick to Bath on the evening of the accident, it was remarked "in a joking way" that they must be very careful as they were travelling on a pass at their own risk and could not recover any damages if they were injured. And on two or three other occasions before they reached the wharf, allusion was made, in the plaintiff's hearing, to the fact that they were "on a pass and at their own risk." The plaintiff says she has no recollection of any such conversation, and never understood, as a matter of fact, that they were travelling at their own risk by reason of express conditions on the pass or otherwise. However that may be, the defendant contends that in procuring the pass Miss Niles may properly be deemed to have acted as agent for those who accepted its benefits, and that the plaintiff is legally chargeable with the knowledge possessed by her agent.

But in the view here taken of the law it is unnecessary to determine whether either of the ladies travelling on the pass, ever read the conditions on the back of it, or had actual knowledge of the terms on which it was granted. It was evidently issued to "Miss Niles and three ladies" or contained some equivalent general description of the beneficiaries intended. The plaintiff consented to become one of them. It is immaterial that she was not the actual custodian of the pass. When she availed herself of the privileges secured by it, it became her pass as fully and effectually as that of Miss Niles. She knew that it was a mere gratuity and she had an opportunity to ascertain if any conditions were attached to the gift. Her omission to inform herself of its terms could give her no additional rights. The acceptance of a conditional gift necessarily involves a compliance with the conditions. A person accepting and travelling upon a free pass with conditions clearly expressed upon it, must be deemed to have accepted it on such conditions whether he reads them or not. This doctrine is elementary in the law of contracts, and is distinctly supported by the authorities respecting agreements for the carriage of passengers, as well as contracts for the transportation of goods and other bailments.

In *Quimby* v. *Railroad*, *supra*, the plaintiff was travelling on a free ticket which he had solicited as a pure gratuity from the general manager of the company. On the back of it was printed an agreement that he should assume all risk of accidents, and on the face of it were these words: "Provided he signs the agreement on the back hereof." In fact, however, this agreement was not signed by the plaintiff, but the court said: "The fact that the plaintiff had not signed it and was not required to sign it, we do not regard as important. Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not." In *Fonseca* v. *Steamship Co.* 153 Mass. 553, it appeared that the plaintiff's attention was not called to the provisions of his passage ticket limiting the defendant's liability, but the court held that the defendant had a right to assume that he assented to its provisions, and that they were equally binding on him as if he had read them.

With respect to this question, the rules of law are applicable alike to contracts for the carriage of passengers and for the transportation of goods. In *Hill* v. *Railroad Co.* 144 Mass. 284, there was a clause in the shipping agreement limiting the liability of the company to certain valuations. The plaintiff offered evidence that his agent never read the shipping agreement which he signed, although he had full opportunity to do so, and did not in fact know that it contained any valuation of the animals. But it was held that the plaintiff was bound by the agreement made in his behalf by his agent. So in *Squire* v. *Railroad*, 98 Mass. 239, it was held that the plaintiff was bound by a similar shipping agreement although his agent signed it without reading it or informing himself of its contents. See also *Grace* v. *Adams*, 100 Mass. 505; *Railroad* v. *Chipman*, 146 Mass. 107; *Hill* v. *Railroad*, 73 N. Y. 351; *Parker* v. *Railway*, 2 C. P. D. 416; *Harris* v. *Railway*, 1 Q. B. D. 515. The same principle is illustrated in contracts other than for transportation. *Reinstein* v. *Watts*, 84 Maine, 139, and authorities cited; *Rice* v. *Mf'g Co.* 2 Cush. 80; *Ins. Co.* v. *Buffum*, 115 Mass. 343.

Upon this branch of the case at bar the following instructions among others, were requested by the defendant, viz:

"A person accepting and traveling upon a free pass with certain conditions upon it must be deemed to have accepted it on such conditions whether he reads and signs them or not."

"If the pass was written to 'Miss Niles and three ladies,' or in any other similar general terms, and the plaintiff accepted it and intended to go upon it as one of the ladies referred to in it, then the plaintiff would be bound by the terms of the pass and cannot recover."

These requests were evidently prepared with direct reference to the authorities above cited and the principles above stated, but the presiding judge refused to give the former request and with respect to the latter said to the jury: "I give you that with this addition, that if she accepted it and knew the conditions that the pass imposed." The judge further instructed the jury upon this point, *inter alia*, as follows: "It is not sufficient that the writing was on the back of the pass which was in the hands of Miss Niles. . . In order to relieve the defendant company from liability under that contract the words written upon the back, placed there by the common carrier, must have been assented to by the person receiving the benefit of the pass. . . If you should find that she expected to travel on a pass simply without knowing that any conditions were attached to it, . . . or if she never assented to the conditions, then the defendant would be liable for the negligence of its servants."

This language of the charge in connection with the refusal to give the requested instructions, necessarily gave the jury to understand that something more was required of the plaintiff than the acceptance and use of the pass to constitute an assent to the conditions imposed. This must be deemed erroneous.

III. The plaintiff finally sets up the more radical contention that the condition on the back of the pass is not a valid and binding one, for the reason that it is not competent for a common carrier of passengers to stipulate against liability for injuries arising from his negligence. It is accordingly insisted that the instruction of the presiding judge that the plaintiff could not

recover if she assented to the terms of the pass imposing non-liability as a condition of granting it, was too favorable to the defendant; and even if there was error in the ruling above considered respecting the evidence of such assent, the defendant is not aggrieved and exceptions ought not to be sustained.

It is an undisputed fact in evidence in this case that there was no valuable consideration whatever for the granting of the pass. It was purely a matter of courtesy and gratuity. This court is thus for the first time brought face to face with the inquiry whether public policy will tolerate the exemption of a carrier from liability for injuries to free passengers resulting from the negligence of his servants. The precise question has not often been decided in other jurisdictions, but it is one with respect to which courts of great respectability and high authority have reached opposite conclusions. It cannot be said that there is any established or prevailing American doctrine upon the question, and this court is free to adopt the view which seems to be most in harmony with the principles of justice and sound reason and such considerations of public welfare as may be involved in the inquiry.

The general doctrine of bailments has always been subject to the watchful care and scrutiny of public policy, and the law of common carriers has undoubtedly been developed and moulded under its controlling influence. But the carriage of passengers is not bailment, properly speaking, and while there are obvious analogies between this service and the transportation of goods, the distinction between them, though practically modified in the progress of society, has never been abrogated by the law. A public carrier may transport both passengers and goods by the same conveyance and at the same time, but the nature of the responsibility incurred with respect to them is legally different. As a common carrier of goods he is an insurer against everything but the act of God and the public enemies; as a carrier of passengers he is liable for the utmost care and vigilance consistent with the character and mode of the conveyance, but is not accountable for failure to take every possible precaution against danger and accident. *Libby* v. *M. C. Railroad*, 85

Maine, 34, and authorities cited. It must be kept in mind, however, that a common carrier is one who undertakes *for hire* to transport the goods of all who choose to employ him, and that no person is in law deemed a common carrier who does not carry for hire. Edwards on Bailment, 426; Schouler's Bailments, § 405; Hutchinson on Carriers, § 57. So when it is declared in *Willis* v. *G. T. Railway*, 62 Maine, 489, to be well-settled law that common carriers cannot stipulate for exemption from responsibility for losses occasioned by the negligence of themselves or their servants, reference is had only to contracts to carry goods for hire. But ever since the "well-ordered exposition of the English law of bailments," in the celebrated case of *Coggs* v. *Bernard*, (Ld. Raym, 909, 1 Smith's Ld. Cas. 354,) those who undertake the gratuitous carriage of goods are deemed private carriers, and held liable only as mandataries; that is, only for losses resulting from gross negligence. And these may by contract protect themselves against liability for all losses except those occasioned by their malfeasance or fraud. Hutchinson on Car. § 14. It is true that in the absence of any agreement to the contrary, when a carrier has admitted a person to the rights of a passenger he owes him the same care and protection when traveling on a free pass as when he has paid the usual fare. Otherwise than this, there seems to be nothing suggested by the analogies between the settled law of common carriers of goods and that of passenger carriers, which militates against the right claimed for the latter to protect themselves by contract against liability for negligence with respect to gratuitous passengers.

It was been the tendency of the English courts from an early period to recognize the power of carriers to limit their liability with respect to both goods and passengers; and under the construction given to the several acts of Parliament in later years, a common carrier in England has practically unlimited power to provide by contract against liability for negligence. In *McCawley* v. *Railway Co.*, L. R. 8 Q. B. 57, (1872,) the plaintiff was traveling on a "drover's pass," which provided that he should travel at his own risk, and it was held that the de-

fendant was not liable even for gross negligence. Cockburn, C. J., said: "It was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable." Quain, J., said: "Negligence, even gross, is the very thing which the contract stipulates that the defendant shall not be liable for." See also *Gallin* v. *Railway*, L. R. 10 Q. B. 212; *Alexander* v. *Railway*, 33 Up. Can. (Q. B.), 474.

The decisions of the New York and New Jersey courts also fully sustain the right of the carrier to contract with free passengers against liability for all degrees of negligence, provided the exemption is in clear and unmistakable terms. *Wells* v. *Railroad*, 24 N. Y. 181; *Poucher* v. *Railroad*, 49 N. Y. 263; *Magnin* v. *Dinsmore*, 56 N. Y. 168; *Dorr* v. *N. J. Nav. Co.* 1 Kernan, 485; *Kinney* v. *Railroad*, 32 N. J. Law, 409. See also *Railroad Co.* v. *Bishop*, 50 Geo. 465. Some courts seek to distinguish the different degrees of negligence and concede the right to make such exemption as to a free passenger, in all cases of ordinary negligence, but decline to extend the doctrine to cases of gross negligence. *Railroad Company* v. *Read*, 37 Ill. 484; *Railroad Co.* v. *Munday*, 21 Ind. 48. And others refuse to give effect to any stipulation absolving the carrier from liability for any degree of negligence. *Railroad Co.* v. *Henderson*, 51 Penn. St. 315; *Railroad Co.* v. *Curran*, 19 Ohio, St. 1; *Jacobus* v. *Railway Co.* 20 Minn. 125, (18 Am. R. 360); *Gulf, &c. R. R.* v. *McGowan*, 65 Texas, 640.

In the great case of *Railroad Co.* v. *Lockwood*, 17 Wall. 357, the Federal Court reached the conclusion that a condition on a "drover's pass," requiring the person using it to travel at his own risk, was not a valid and effectual one and could not exonerate the carrier from liability for negligence. It is important to notice, however, that this decision is put on the ground that a drover's pass was issued as a part of the contract for the carriage of the cattle, and could not be deemed a gratuitous one. At the close of the elaborate opinion in the case is a distinct finding, "that a drover traveling on a pass such

as was given in this case, for the purpose of taking care of his stock on the train is a passenger for hire." The same doctrine was applied in the later case of *Railway Co.* v. *Stevens*, 95 U. S. 655. There the servant of an inventor obtained a pass to see an officer of the road in regard to the use of a new coupling. As in the case of the drover it was held that he was a passenger for hire, and not bound by the condition that he should travel at his own risk. In each of these cases it is explicitly stated that it was not the purpose of the court to express any opinion as to the result which might have been reached if the plaintiff had been a free passenger instead of one for hire. These decisions of the Federal court, therefore, have no application to the precise question here raised. (See an interesting discussion of this question by Mr. Schouler, in Am. Law Rev. for March-Apr. 1892.)

On the other hand, the highest courts of Massachusetts and Connecticut, in able and exhaustive opinions of recent date, have held confidently and without hesitation that such special contracts relieving the carrier from liability to free passengers, are not forbidden by any principle of public policy. *Griswold* v. *Railroad*, 53 Conn. 371; *Quimby* v. *B. & M. Railroad*, 150 Mass. 365. In the former case, (decided in 1885,) the plaintiff's intestate was a youth employed by the keeper of a railroad restaurant, and had a free pass conditioned that he should travel at his own risk. He used it especially in running on the train to sell fruit and sandwiches, but at the time of the accident was traveling on his private account as the pass authorized him to do. The court finding that the railway had no direct interest in the restaurant or the traffic on the cars, decided that the plaintiff was strictly a free passenger; and although he was killed in a collision resulting from the gross negligence of the defendant's servants it was held after a careful examination of the authorities, that he was bound by the terms of his pass, and the defendant was not liable.

But *Quimby* v. *B. & M. Railroad*, *supra*, is an important authority still more directly in point. In this case the plaintiff was unquestionably a free passenger. The pass was given him

"at his own solicitation and as a pure gratuity," with a condition upon it that he should, "assume all risk of accident of every name and nature." In the opinion by Mr. Justice Devens, the court says: "In such instances one who is ordinarily a common carrier does not act as such, but is simply in the position of a gratuitous bailee. . . . The service which he undertakes to render is outside of his regular duties. The plaintiff was in no way constrained to accept the gratuity of the defendant. It had been yielded to him only on his own solicitation. When he did, there is no rule of public policy, we think, that prevented the carrier from prescribing as the condition of it, that it should not be compelled, in addition to carrying the passenger gratuitously to be responsible to him in damages for the negligence of its servants."

This result seems to be clearly in harmony with the principles of justice and common right. The term, "public policy," or "policy of the law," suggests but a vague and uncertain principle and sometimes seems to be invoked as authority for a decision when a more definite reason cannot readily be assigned. In what manner the public welfare or the safety of human life is involved, or any of the cherished interests of the law are invaded by allowing one out of a hundred passengers to travel on a pass at his own risk, does not clearly and satisfactorily appear. In most instances, it is believed, free passes are solicited by the traveler, not proffered by the carrier. The fact that a gratuitous passenger must travel at his own risk will surely operate as an incentive to greater care and caution on his part, and tend to diminish the number of passes issued. The probability that the cases of free transit will be so numerous as to induce any relaxation of the rules of prudence and vigilance on the part of the carrier is too remote to have weight as argument. He is constantly and it would seem sufficiently reminded of his obligations to the public, in the most forcible and effectual manner, by the numerous claims and large verdicts in favor of those injured who travel for hire. Nor is the number of passes likely to be so great as to involve the public interest by an increase in the rates of fare. In this State, furthermore, the

rates of fare on railroads are subject to the control of the legislature or the railroad commissioners. R. S., c. 51, § § 9, 43.

In this case there is no suggestion of defective appliances or incompetent servants. The gang-plank was used continuously after the accident as before. It is claimed that there was negligence on the part of the defendant's servants in the adjustment and management of the gang-plank under the peculiar conditions existing at that time. It is not pretended that there was willful misconduct and it cannot reasonably be claimed that there was gross negligence on the part of the defendant. There is, therefore, no occasion to draw a distinction between the degrees of negligence, if such a distinction is deemed legal and practicable in any case.

The conclusion is that one who accepts and uses a free pass, as a pure gratuity, on condition that he will assume all risk of personal injury, must be deemed to have accepted it on that condition whether he reads it or not; and such a contract is not prohibited by any rule of public policy in this State, but is effectual to exonerate the carrier from liability for the negligence of his servants. *Exceptions sustained.*

HASKELL, J., concurred in the result only.

STATE *vs.* CITY OF AUBURN.

Androscoggin. Opinion February 26, 1894.

Indictment. Pleading. Venue. Time.

An indictment against a municipal corporation in which no addition of place or situation is annexed to the respondent's name, is at least formally defective on account of such omission; but the court may take judicial notice of the fact that the City of Auburn is located within Androscoggin County, when, in an indictment against that city thus defective, it appears that the same was found by a Court held in Auburn in the county of Androscoggin, and that the offense charged is the neglect of the city to open a way within its limits as laid out by the county commissioners of that county.

Where the offense charged against a municipal corporation is its neglect to open a way which the law required such corporation to open within three years from a certain date, it need not be averred in the indictment that the offense was committed on any particular day or days, but it is sufficient if the averment be that the offense was committed by a continuous neglect during the whole period of the three years.

This was an indictment against the city of Auburn for neglecting to open a highway laid out in that city by the county commissioners.

The defendant demurred to the indictment, which demurrer was overruled. They then took exceptions which the presiding justice adjudged were frivolous and intended for delay. The case was thereupon certified under R. S., c. 77, § 51, to the Chief Justice.

The causes of demurrer are stated in the opinion of the court.

Henry W. Oakes, County Attorney, for State.

James A. Pulsifer, City Solicitor, for defendant.

While it is true that the unlawful act need not be proved as having been done on the precise day alleged, yet it is also true that some day must be alleged as well as proved. *Tripp* v. *Lyman*, 37 Maine, 251.

The case of *State* v. *O'Donnell*, 81 Maine, 271, seems to be conclusive on the point. In that case it was held, all the judges concurring, on the authority of *State* v. *Small*, 80 Maine, 452, of *Wells* v. *Commonwealth*, 12 Gray, 326, and of *Shorey* v. *Chandler*, 80 Maine, 409, that "An indictment must allege a particular day on which the offense was committed even if it be set out with a *continuando*," the authorities even going so far as to hold indictments, defective in this respect, bad on general demurrer.

The time when an offense is alleged to have been committed is matter of substance and for that reason if defective cannot be cured by amendment. Am. & Eng. Encyl. of Law, Vol. 10, p. 541, and references. *State* v. *Day*, 74 Maine, 221; *State* v. *Hanson*, 39 Maine, 340; *State* v. *Thurston*, 35 Maine, 205.

The respondent is not alleged to be a municipal corporation. *Nowlin* v. *State*, 49 Ala. 41; 2 Dill. Mun. Corp. p. 1134; *Kane* v. *People*, 8 Wend. 203.

SITTING: PETERS, C. J., WALTON, LIBBEY, EMERY, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. The city of Auburn, having been indicted for its failure to open a highway laid out within its limits by county

commissioners, claims, upon demurrer thereto, that the indictment found against them is insufficient in some respects.

It is contended that it is bad because the city of Auburn, so named in the indictment, is not described as a corporation of any kind, and more especially because there is no averment that the city of Auburn is situated within any county of this State. Such omissions are undoubtedly formal defects, indicating a want of care in the work of the pleader that is not to be commended. The omissions are supplied, however, to some extent by certain indirect allegations contained in the indictment. The way is alleged to have been laid out by the commissioners of Androscoggin county within the city of Auburn. And the indictment avers that it was found at a term of court begun and holden at Auburn within and for the county of Androscoggin. Aided by these implications, we deem it warrantable for us to determine as a matter of judicial knowledge that the city of Auburn described in the indictment is the municipal corporation of that name situated in our county of Androscoggin. The case of *Com.* v. *Desmond*, 103 Mass. 445, supports this view.

The indictment further alleges that the mandate of the commissioners required that the way should be opened and built by the city within three years from March 31, 1890, and that for the period of time between March 31, 1890, and March 31, 1893, as well as ever since, the city had wholly neglected to open and build the same; and it is contended by the defense that such an averment as to the time of the commission of the alleged offense is bad for its generality. In support of this objection the defense invokes the general principle of pleading, recognized in our own cases, that some particular day must be named in the indictment on which the alleged offense was committed and that too even if the offense be set out with a *continuando*.

In our view this criticism does not fairly apply to an indictment like the present. The principle referred to applies mostly to offenses of commission, and not to those of omission; to acts done rather than acts omitted to be done; to offenses accomplished by active and not passive means. Of course the principle contended for would apply as strongly to an act of

non-feasance as to an act of mis-feasance when such act can be logically and correctly described as having been done on some particular day or upon some continuous days. In the present case it would not be true to charge the offense as committed on either the first or the last day of the three years allowed the city within which to construct the contemplated road, or on any intermediate day or days; or as committed upon any time short of the whole period of three years. The offense was growing for three years, culminating at the expiration of that period. The ruling of the court on an analogous question in *Smiley* v. *Merrill Plantation*, 84 Maine, 322, sustains, as far as it goes, our conclusion here. *Exceptions overruled.*

CHARLES F. KINGSLEY

vs.

GOULDSBOROUGH LAND IMPROVEMENT COMPANY.

Hancock. Opinion February 26, 1894.

Way. Easement.

No right of way from necessity exists across the remaining land of the grantor, where the land to which such right of way is claimed is surrounded on three sides by the sea.

ON REPORT.

The case is stated in the opinion.

J. A. Peters, Jr., for plaintiff.

Bedford E. Tracy, for defendant.

The necessity requisite need not be an absolute physical necessity, but one reasonably so. *Pettengill* v. *Porter*, 8 Allen, 6; *Schmidt* v. *Quinn*, 136 Mass. 576, and cases. Cases in So. Carolina were islands.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, JJ.

FOSTER, J. Notwithstanding this is an action of trespass, the real and only question involved is, whether the defendant is entitled to a way from necessity over the plaintiff's premises.

The defendants' land embraces what is popularly known as Grindstone Neck in the town of Gouldsboro', and is surrounded on three sides by the waters of Frenchman's Bay and Winter Harbor. On the north, and adjoining the defendants' land, lies the land of the plaintiff over which the way is claimed.

Admitting that both parcels were originally owned by one William Bingham, through whom, by sundry mesne conveyances, both parties derive their respective titles, we do not think the defendants entitled to the way as one originating from necessity. Such right is founded upon the doctrine of implied grant. And implied grants of this character are looked upon with jealousy, construed with strictness, and are not favored except in cases of strict necessity, and not from mere convenience. The rule is now so well settled in this State that a reference to the decided cases where this question has been fully considered is all that is necessary. *Warren* v. *Blake*, 54 Maine, 276; *Dolliff* v. *Boston & Maine R. R.* 68 Maine, 173; *Stevens* v. *Orr*, 69 Maine, 323; *Stillwell* v. *Foster*, 80 Maine, 333; *Whitehouse* v. *Cummings*, 83 Maine, 91, 98.

It has long been the established rule that if one grants a close surrounded by his own land, or to which he has no access except over his own land, he impliedly grants a right of way over his adjoining lands as incident to the occupation and enjoyment of the grant. *Nichols* v. *Luce*, 24 Pick. 102. And the same rule applies when there has been a severance of the property and one portion of which has been rendered inaccessible except by passing over the other, or by trespassing on the lands of a stranger.

Whether the same rule shall apply in a case like the present, where the property to which the right of way is claimed is partially surrounded by the sea, presents a question somewhat different from any decided case in this State. It has, however, been before the courts in other jurisdictions, and there it was held that the rule did not apply.

Thus, in *Lawton* v. *Rivers*, 2 McCord, 445, (13 Am. Dec. 741) the court in South Carolina decided that the plaintiff, owner of an island separated by a river from another island, and

this island being connected at low tide by a hard marsh with a third island owned by the defendant, did not have a right of way by necessity from the public way over the defendant's plantation connecting with the road or path leading from the second island to the river opposite to the plaintiff's island. After stating the general rule of law governing rights of way from necessity, the court say: "It is apparent, however, that no such necessity existed in this case. The plaintiff has a navigable watercourse from his door to the public road or highway, by which the distance is not greater than by land; and although there may be some inconvenience in being obliged always to go by water, when he visits this plantation, yet it is not greater than necessarily attends every insular situation, and perhaps not so great to him as it would be to his neighbor, to keep up a lane through his plantation for his accommodation."

Turnbull v. *Rivers*, 3 McCord, 131 (15 Am. Dec. 622), is another case in the same state, where the plaintiff claimed a way across the defendant's land, called Stent's Point, to his island, and was decided upon the principles laid down in the preceding case. The court there held that if the land could be reached by water, or by a distant or difficult road, no way from necessity could be said to exist. In the course of the opinion Nott, J., makes use of this language: "In analogy with that case, suppose one person should sell to another the extreme point of a neck or tongue of land surrounded by an open sea or navigable streams, except on one side, would it be understood that the seller should allow him a right of way through the whole neck of land because sometimes it would be more convenient for him to go to his farm by land than by water? I should suppose not."

In the present case the defendants' land has navigable waters upon three sides of it. Over these waters there is a public right of travel. The defendants have the free use of these waters in going to and from their land. They have erected wharves and own a steamboat which during certain portions of the year runs several times each day between there and Bar Harbor, and as occasion requires to Winter Harbor on

the east. To the latter place it is only three quarters of a mile, by the way of the road or by water. It might oftentimes be more convenient to pass over a highway, or across the plaintiff's premises, than be subjected to the inconvenience of using the waters of the sea. But this inconvenience is not such as the law requires to constitute a legal necessity for the way claimed.

Nor can the defendants prevail upon the question of license. There was no such license as would entitle the defendants to enter upon the plaintiff's premises and commit the acts which the evidence shows were done in this case.

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

Judgment for the plaintiff.

GEORGE HATCH, Administrator *de bonis non*, with will annexed, of estate of JOSEPH STORER,

vs.

URIAH A. CAINE, Administrator of estate of OLIVE H. STORER.

YORK. Opinion March 8, 1894.

Will. Life-Estate, with power of disposal. Residuum.

A testator gave by will to his widow the rest and remainder of his estate for her own use and benefit during her life, with full power to sell and convey and to use the principal if, in her judgment, her comfort required it, she to be the sole judge of the amount needed and having the right to spend the whole if she deemed it necessary. Whatever remained not so disposed of at her decease he gave to the Baptist Home Mission Society. *Held*, that the widow took only a life-estate and whatever remained of the estate at her decease went to the beneficiary last named.

A part of the undisposed estate consisted of funds in a savings bank deposited by the widow in her own name without having been commingled with her own money. *Held*, that the deposit belonged to the estate of the testator, and that a bill in equity may be maintained to obtain possession of it.

ON REPORT.

This was a bill in equity, inserted in a trustee writ, by an administrator *de bonis non*, to recover the possession and control of a sum of money in the Kennebunk Savings Bank, and which the plaintiff claimed was a part of the estate of Joseph Storer, the deceased testator, left unadministered by the ex-

ecutrix, his widow, the plaintiff's predecessor in office of whose estate the defendant is administrator.

The case was heard on bill, answers and testimony.

The material portions of the will of said Storer which came up for construction by the court are as follows:

"I give and bequeath and devise to my beloved wife, Olive H. Storer, all the rest and remainder of my estate to have and to hold the same to her own use and benefit during her life, with full power to sell and convey or exchange any or all of it, and to use the principal thereof, if in her judgment her comfort requires it; she to be the sole judge of the amount needed and having the right to spend the whole if she deems it necessary."

"And whatever remains at her decease, of said estate not disposed of by her, it is my will shall be given to the Baptist Home Mission Society, for the education of indigent young men of the African race preparing for the ministry, and members in good standing in Baptist churches." . . .

John M. Goodwin, for plaintiff.

Benj. F. Hamilton and Benj. F. Cleaves, for administrator, Caine, argued:

That the bill of complaint is not brought by the proper party, but should have been brought, if at all, by the legatee under the will, there having been an act of administration which took from the administrator *de bonis non* any rights which he may have had in the property. Woerner's Am. Law Adm. p. 744-5, § 351; *Waterman* v. *Dockray*, 78 Maine, 141.

That it is prematurely brought, defendant having a right, and in law being bound to file and settle Mrs. Storer's account in probate court, and not having had opportunity to do the same. Waterman Prob. Prac. 2d. Ed. p. 186; A. & E. Ency. Vol. 7, p. 423, note; *Curtis* v. *Bailey*, 1 Pick. 199; *Woodbury* v. *Hammond*, 54 Maine, 343.

That upon the decease of Joseph Storer his widow came into absolute ownership of all his property after the payment of his debts and two specific legacies. *Ide* v. *Ide*, 5 Mass. 503; *Hale* v. *Marsh*, 100 Mass. 469; *Gifford* v. *Choate*, *Id.* 346; *War-*

ren v. *Webb*, 68 Maine, 135; *Burbank* v. *Whitney*, 24 Pick. 146; *Ramsdell* v. *Ramsdell*, 21 Maine, 293; *Shaw* v. *Hussey*, 41 Maine, 499.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. This is a suit in equity by an adminstrator, *de bonis non cum testamento annexo*, to obtain possession of money deposited in a savings bank. He claims that the money belongs to the estate which he represents.

The testator's widow was his executrix. By the terms of the will she was given a life-estate in most of his property. She was given the power to use so much of the principal as in her judgment her needs and her comfort required. But the will declared that whatever remained at her decease should go to the Baptist Home Mission Society. The widow died, leaving in the Kennebunk Savings Bank $1800, and some accrued dividends. The money was deposited in her name, but it undoubtedly belonged to her husband's estate. The evidence shows that it had been collected from a debtor of her husband, and immediately deposited in the bank without having been commingled with her money. The right to the possession of this money furnishes the subject matter of this suit. The plaintiff claims that it belongs to the estate which he represents, and the defendant claims that it belongs to the estate which he represents. The plaintiff has possession of the bank book; but, as the money is deposited in the name of the testator's widow, he cannot obtain it without an order from the widow's administrator; and the prayer of the bill is that the latter may be required to give such an order. We think the plaintiff is entitled to the order prayed for.

It is settled law in this State that, under wills similar to the one now before us, the widow takes only a life estate, and that whatever remains of the estate at her decease, goes to the beneficiaries named in the will; and that a bill in equity may be maintained by the administrator *de bonis non cum testamento annexo*, to obtain possession of the remainder. *Hall* v. *Otis*,

71 Maine, 326; *Stuart* v. *Walker*, 72 Maine, 145; *Copeland* v. *Barron*, 72 Maine, 206; *Whittemore* v. *Russell*, 80 Maine, 297. *Decree as prayed for. No costs.*

LEWIS J. TOWNSHEND *vs.* OLIVER O. HOWARD, JUNIOR.

Cumberland. Opinion March 8, 1894.

Will. Revocation. Cancellation. Obliteration. R. S., c. 74, § 3.

A will can be revoked in whole or in part either by cancellation or obliteration. R. S., c. 74, § 3.

If that which is essential to the validity of the whole will, as for instance the signature of the testator, is cancelled or obliterated, *animo revocandi*, the whole will is revoked,

If only a single clause is so cancelled or obliterated, then that clause only is revoked.

Such cancellations or obliterations are as effectual when made with a pencil as when made with a pen.

Held, in this case, that an unconditional revocation of an existing will was not defeated by an intention to execute another will, but not carried into effect.

ON REPORT.

This was an appeal from the Probate Court, for Cumberland County, allowing the will of George H. Townshend, deceased.

The appellant, Lewis J. Townshend, brother of the testator, was granted leave, under R. S., c. 63, § 25, to enter and prosecute the appeal by this court at the October term, 1892, after the decision reported in 85 Maine, 57.

Among the reasons for appeal put in evidence are the following:

"Because the said instrument purporting to be the last will and testament of said George H. Townshend, if ever made and executed by him, was, by him, intentionally destroyed and revoked in his lifetime by being by him intentionally cancelled and obliterated, the said Townshend being at the time of sound mind.

"Because the said George H. Townshend in his lifetime, intentionally revoked said instrument purporting to be his will, by intentionally cancelling and obliterating the clauses numbered second and third therein, and by cancelling and obliterating his signatures thereto."

About the middle of May, 1889, the testator on his journey from California to his home in Portland, arrived in Denver, Colorado, too sick to proceed further. On the eighth day of June following he made his will, the scrivener retaining the custody of it. On the following day the appellant, his brother, arrived in Denver and took charge of him, remaining until his death, June 28th. Three or four days after his arrival at Denver, the testator sent by his brother, who was his sole heir, a note to the scrivener for the will, saying he wanted it and that he was going to destroy it. The will having been obtained and delivered to the testator, he tore open the envelope containing it and took out the papers. He then asked for a pencil and having interlined and worked on it for some time marking out and changing several clauses, at last crossed off his name with the pencil where it had been signed on each page, and then said to his brother, "There, Lewis, it is all yours; how does it suit you?" He then took it and put it in the envelope and put it in his pocket. In subsequent conversations with his brother, the testator said, "I have got $5000 or $7000 now, and if I die it is all yours. You know I would not take anything away from you." He retained possession of the will all the time afterwards until his death when it appears to have been obtained tortiously by one Wilson from whom it was finally procured by the active intervention of the appellant and appellee, who both testify that it appears now the same as when it was surrendered. There was also found in the same envelope another paper appearing to be a partial copy of the will, admitted to be in Wilson's handwriting, but without signature and omitting a legacy of two thousand dollars to the appellee contained in the first writing or will.

Other material facts are also stated in the opinion.

The appellee also filed two motions which are considered and disposed of in the opinion of the court.

Geo. Walker, for Lewis J. Townshend.

Counsel cited: R. S., c. 74, § 3; 1 Jar. Wills, 5th Am. Ed. (Randolph & Talcott) pp. 290, 291 note, 293 note 16, 295, 301; 2 Greenl. Ev. § 681; 1 Red. Wills, 4th Ed. p. 339, citing *Price* v. *Powell*, 3 H. & N. 341 at p. 318; *Dan* v. *Brown*, 4 Cow. 483; *Avery* v. *Pixley*, 4 Mass. 460.

Eben Winthrop Freeman, for Oliver O. Howard, Jr.

Arguments on motions and facts omitted. Counsel cited: (Revocation) *Rich* v. *Gilkey*, 73 Maine, 597; Schoul. Wills, § § 380, 391, 398, 401, n. 2, 408-9, 423, 431, n. 3; 1 Will. Ex. 124, 128-9, 159, 160; 1 Jar. Wills, 135, 291; Pow. Dev. 425; *Benson* v. *Benson*, L. R. 2 P. & D. 174; *Finch* v. *Finch*, L. R. 1 P. & D. 372; *Hitchins* v. *Wood*, 2 Moo. P. C. 355; *Harwood* v. *Goodright*, 1 Cowp. 87; *Bennett* v. *Sherrod*, 3 Ired. Law (N. C.), 303 (40 Am. Dec. 410); *Wikoff's Appeal*, 53 Am. Dec. 600; *Colvin* v. *Fraser*, 2 Hagg. 327, cited in *Collagan* v. *Burns*, 57 Maine, 455; *Winn* v. *Heveningham*, 1 Coll. 638; *Jones* v. *Murphy*, 8 Watts & S. 275. Where a pencil instead of a pen is used for cancelling, the courts regard the act as *prima facie* deliberative. *Hawkes* v. *Hawkes*, 1 Hagg. 321; *Edwards* v. *Astley*, 1 Hagg. 490; *In re Bode*, 5 Notes of Cas. 189; *In re Hall*, L. R. 2 P. & D. 256; *Gardiner* v. *Gardiner*, 65 N. H. 230; Sch. Wills, § 391; 1 Jar. Wills, *291; *Parker* v. *Bainbridge*, 3 Phill. Ecc. R. 321.

When the act of cancelling is not a substantive, independent act, but is connected with and dependent upon another, and both form but one transaction, the entire design and purpose must be considered in order to ascertain whether a revocation has been accomplished. *Onions* v. *Tyrer*, 1 P. Wms. 343 (S. C. 2 Vern. 742,); Case in 3 Eq. Cas. Abr. 776; *Hyde* v. *Mason*, *vid.* 1 Wms. Exors. *130; *Harwood* v. *Goodright*, *supra*; *Short d. Gastrell* v. *Smith*, 4 E. 419; *Perrott* v. *Perrott*, 14 E. 439; *In re Goods of Applebee*, 1 Hagg. 143; *Malone* v. *Hobbs*, 1 Rob. (Va.) 346 (S. C. 39 Am. Dec. 266,); *In re Bode*, *supra*; *Dancer* v. *Crabb & Thompson*, L. R. 3 P. & D. 98; *Hoitt* v. *Hoitt*, 63 N. H. 475; *Gardiner* v. *Gardiner*, *supra*. Counsel also argued that certain declarations of the testator are inadmissible and cited: 1 Woerner Am. Law, 90, n. 5; *Gay* v. *Gay*, 60 Iowa, 415 (46 Am. Rep. 78,); *Pickens* v. *Davis*, 134 Mass. 257; *Coles* v. *Mordaunt*, 4 Ves. 196, n.; *Lovell* v. *Quitman*, 88 N. Y. 377 (42 Am. Rep. 254,); *Jackson* v. *Kniffen*, 2 Johns. 31, (3 Am. Dec. 390); *Boylan* v. *Meeker*, 28 N. J. L. 278; *Clark* v. *Smith*, 34 Barb. 140; *Osgood* v. *Manhattan*

Co. 3 Cow. 612; *Shailer* v. *Bumstead*, 99 Mass. 112; *Cotton* v. *Smithwick*, 66 Maine, 360.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. The question is whether a will made by the late George H. Townshend was afterwards legally revoked. We think it was.

A will can be revoked in whole or in part by cancellation or obliteration. R. S., c. 74, § 3. To cancel is to cross out. To obliterate is to blot out. The former leaves the words legible. The latter leaves the words illegible. By either method a will can be legally revoked in whole or in part. If that which is essential to the validity of the whole will is cancelled or obliterated, *animo revocandi*, the whole will is revoked. If only a single clause is so cancelled or obliterated, then that clause only is revoked. And such cancellations or obliterations are as effectual when made with a pencil as when made with a pen.

In *Succession of Muh*, 48 Am. Rep. 242 (35 La. Ann. 394), the rule is aptly expressed thus: "Erasures of clauses in the body of the will affect only the dispositions erased. Erasure of the signature strikes at the existence of the whole instrument."

In *Bigelow* v. *Gillott*, 133 Mass. 102, lines had been drawn through two clauses of a will, and the court held that the effect was to revoke those clauses, and leave the remainder of the will unimpaired. "The cancellation," said the court, "by the testator of the sixth and thirteenth clauses of his will, by drawing lines through them, with the intention of revoking them, was a legal revocation of those clauses."

In *Woodfill* v. *Patten*, 40 Am. Rep. 269 (76 Ind. 575), the testator had drawn lines through his signature with a pencil, and the court held that the act having been done, *animo revocandi*, the will was legally destroyed. "It is not necessary," said the court, "that there should be a destruction in a literal sense of the fabric upon which the words of the testator are written; it will be sufficient if the legal force of the instrument is extin-

guished." And the court held further that it can make no difference in the result whether a pen, a pencil, or some other implement is used to make the erasures. And to the same effect are *Estate of Tomlinson*, 19 Am. St. Rep. 637 (133 Pa. St. 245), and *Myers* v. *Vanderbelt*, 24 Am. Rep. 227 (84 Pa. St. 510).

In the present case, the signatures of the testator are all erased. The testator had signed the will in three places, at the bottom of the first page, at the bottom of the second page, and at the end of the will on the third page. These signatures are all erased with a lead pencil; and the evidence satisfies us that they were erased by the testator himself, *animo revocandi*. The will was evidently one with which he had become dissatisfied. He was possesed of but a small estate. Its value, according to his own estimate, was not more than from five to seven thousand dollars. He had been induced, when away from his home and away from all his friends and relatives, to sign a will giving to a comparative stranger (Oliver Otis Howard, Jr.), a legacy of two thousand dollars. He had known the legatee less than a month. The legatee was not related to him; and it is evident that upon reflection the testator became dissatisfied with this bequest; for, on obtaining possession of the will, he immediately erased it by drawing lines through it with a lead pencil. What then remained of the will was of little importance. It contained only a small legacy of three hundred dollars conditionally given to Frederick W. Murphey, to assist him in getting an education, and the gift of a few books, and other articles of little value, to Shiler G. Cushing. The residue of his property was given to his brother; and, as his brother was his only heir, this clause in the will was of little importance. Without the will, his brother would inherit the whole. With the will (the legacy to Howard being cancelled) he would receive all but three hundred dollars, and the few books and other articles of little value given to Shiler G. Cushing. Under these circumstances, it is not strange that the testator finally resolved to revoke the whole instrument. And the evidence satisfies us that when he erased his signatures such was his pur-

pose. His brother testifies that he was sitting by his side fanning away the flies; that after George had worked upon the will for some time, he finally crossed off his name in the different places where it had been signed, and then said, "There, Lewis, it is all yours, now." This declaration, made at the very moment of erasing his signatures, confirms what the act itself so clearly indicates, namely, an intention to revoke the whole instrument.

It is urged by the learned counsel for the appellee that other marks upon the paper indicate an intention on the part of the testator to make a new will, and that inasmuch as he died without having accomplished that purpose, the revocation of his then existing will should be regarded as deliberative and not operative, and that the doctrine of "dependent relative revocation," should be applied. In other words, that the revocation should be held to be conditional, and that, the condition not having been performed, the revocation should not be allowed to take effect. We can not accept this interpretation of the testator's acts. It is true that some of the marks upon the revoked will indicate an intention on the part of the testator, at the time when they were made, to make another will. But they also indicate that the new will, if made, was to be essentially different from the old one. They show an unmistakable intention on the part of the testator to abrogate, totally and absolutely, the legacy of two thousand dollars to Oliver Otis Howard. Two lines are drawn through it from top to bottom. The legacy is neither enlarged nor reduced; it is totally expunged. And the paper found in the same envelope with the old will, which the appellee claims is a nearly completed draft of the new will which the testator intended to make, contains nothing to indicate that the legacy to Howard, or any portion of it, was to be renewed. The evidence is plenary that the testator intended to cancel and revoke this ill-advised legacy, totally and absolutely. And if we should now annex to its revocation an implied and unperformed condition, by which the legacy should be revived, our firm belief is that, instead of giving effect to the testator's intentions, we should thwart them,

and produce a result the very opposite of what he intended. Neither reason nor the rules of law will justify such a perversion of the testator's intentions.

The appellee's motions,—one to have the appeal dismissed, because his exceptions to the decision of Mr. Justice VIRGIN, granting the appellant leave to enter and prosecute the appeal, were not allowed, and the other to open the case for the introduction of further evidence—have been considered, and are disallowed. It is the opinion of the court that the decision of Mr. Justice VIRGIN was right, and that the exceptions could not be sustained, if they were now properly before the court; that the further evidence proposed to be introduced is not of sufficient importance to justify the expense and delay that would be caused by opening the case for its introduction. It would not change the result if it was now in the case.

It is the opinion of the court, upon the whole case, that the appeal be sustained; that the decree of the probate court be reversed; that the will offered for probate be disallowed; that neither party recover costs against the other; and that the appellee recover no costs against the estate.

Appeal sustained.

WILLIAM H. MCKOWN *vs.* ASBURY N. POWERS, and another.

Lincoln. Opinion March 9, 1894.

Exceptions. Practice. R. S., c. 77, § 51. Stat. Westminster, 2 (13 Edw. 1 c. 31).

Exceptions to the admission or exclusion of evidence should be noted at the time.

Exceptions to any ruling in the charge should be noted before the jury leave the bar of the court.

Exceptions when properly noted should be presented afterward to the court in a bill of exceptions in a summary manner, showing each ruling distinctly by itself.

Where, instead of each exception being presented separately, the whole record is sent up with the statement that the plaintiff excepts to all the rulings, such exceptions will not be considered.

ON MOTION AND EXCEPTIONS.

This was a real action in which the jury returned a verdict for the defendants. The plaintiff filed a general motion for a new trial and a bill of exceptions.

The view taken by the court renders any further report of the case and the arguments of counsel unnecessary.

Geo. D. Ayers and George B. Sawyer, for plaintiff.

Frank and Larrabee, Geo. B. Kenniston, with them, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, JJ.

EMERY, J. This is a real action coming before the law court on motion and exceptions.

I. Motion. The only issue for the jury under the rulings of the judge, was whether the plaintiff's grantors had occupied the demanded premises openly, notoriously, continuously, exclusively and adversely for at least twenty years. The plaintiff had the affirmative of this issue and we think he failed to maintain it.

II. Exceptions. The bill of exceptions is in the following general terms: "In the course of the trial sundry evidence offered in behalf of the plaintiff was excluded by the court; and other evidence offered in behalf of the defendants was admitted against the plaintiff's objections; as will fully appear by the report of the evidence, which goes forward as a part of the bill of exceptions as well as under the plaintiff's motion for a new trial. Said motion was seasonably filed and made part of the case. Plaintiff's counsel requested certain instructions to be given which were refused, and which, together with the entire charge, make part of this case. The parts of the charge which are specifically excepted to, as well as the rulings on the admission of evidence excepted to, are printed in italics.

"To the several rulings in the exclusion and admission of evidence, and to the several instructions to the jury as indicated above and to the refusals to instruct, the plaintiff excepts, and prays that his exceptions may be allowed."

By such a bill of exceptions the plaintiff does not separately present each issue of law in that clear, distinct, summary manner required by the statute. Instead of separating the various rulings, and presenting each by itself clearly and comprehensively, so that each may be understandingly considered and determined, he presents all or nearly all the rulings indiscriminately and in a confused mass, thus throwing upon the court a great and unnecessary labor of research and analysis.

This court has often expressed its disapproval of this form of bills of exceptions and declared that it was not bound to consider exceptions presented in this manner. *State* v. *Reed*, 62 Maine, 135; *Bradstreet* v. *Bradstreet*, 64 Maine, 204; *Webber* v. *Dunn*, 71 Maine, 331. In other unreported cases the court has refused to consider them at all. We find, however, that the disapproved and erroneous practice is still continued to some extent, and, inasmuch as after examination we are satisfied these exceptions could not be sustained, we think we should take this occasion to authoritatively declare that the court not only need not, but hereafter will not, unless in exceptional cases, consider exceptions presented in this objectionable mode.

A brief review of the origin and nature of bills of exceptions, will fully justify the enunciation of this rule.

Bills of exceptions have their origin in the statute of Westminster, 2 (13 Ed. 1, c. 31). Before that statute, the only remedy for the correction of the errors of justices presiding at *nisi prius* terms, was the writ of error. That writ, however, only reached the errors apparent upon the judgment roll, and hence did not remedy errors made by the justices in their various rulings upon the evidence and in their instructions to the jury. This defect of remedy was sought to be removed in the statute named, by supplementing the record to be sent up on writ of error. The Statute provided that a party dissatisfied with any such ruling during the trial of a cause might "write the exception" thereto, and tender the written statement to the judge to be sealed by him "for a testimony." This written statement thus sealed became known in practice as a bill of exceptions.

This bill of exceptions, however, was not alone sufficient to

procure a review of the rulings excepted to. If the excepting party did not sue out a writ of error, he waived his exceptions. If he did sue out the writ, the bill of exceptions was appended to the judgment roll, and sent along with the writ of error and the record, into the court of review. This was the old English practice (Tidd's Pr. 786), and substantially the same course of proceedings is still pursued in the Federal Courts of this country.

In strictness, the exception was to be written out and sealed during the trial and at the time the point was raised and ruled upon, and this seems to have been the earlier practice under the statute. *Davies* v. *Lowndes*, 1 M. & G. 473, (33 E. C. L. 536) Tidd's Pr. 788. This strictness was later relaxed, and parties were permitted to draw up and present the formal bill of exceptions after the trial as now; but still, according to Tidd, "The substance must be reduced to writing while the thing is transacting, because it is to become a record." According to Archbold, the party excepting should state that he excepts and the point upon which he excepts, and then a memorandum should be made at the time by the parties and the judge. The bill of exceptions could be drawn up in form afterward. In the Federal Courts, the formal bill of exceptions may in practice be prepared after the trial, but in theory each exception is made and stated at the time of the ruling. The later draft is made in a measure *nunc pro tunc*. The bill of exceptions should purport upon its face to be the same as if actually reduced to writing during the trial. It should at least state that the exception was taken at the time of the ruling and before the jury left the bar of the court. *Walton* v. *U. S.* 9 Wheat. 651; *Sheppard* v. *Wilson*, 6 How. 260; *Phelps* v. *Mayer*, 15 How. 160; *Railway Co.* v. *Heck*, 102 U. S. 120.

In the English and American practice, under the Statute of Westminster allowing exceptions, it has been uniformly held that, to obtain the benefit of the statute, and the allowance of the exceptions, the party desiring to except should raise each point distinctly by itself for the consideration of the judge, and should apprise the judge and the opposite party of his claims and positions in presenting it. If he objects to any evidence

offered by the other party, he should at the time state briefly and distinctly upon what grounds he places his objection. If he offers evidence which is objected to, and urges its admission, he should state as briefly and distinctly, upon what rule or principle he relies for its admissibility. In the matter of instructions to the jury, he should clearly ask what rule he desires to be given, and clearly indicate to what rulings he objects, before the jury are sent out with the case. When the points thus relied upon by either party are thus clearly presented to the judge, and made known to the other side, the judge is less likely to err, and may be able to correct errors already made; or the opposite party may waive, some, or all the points, and assent to an adverse ruling upon them. This course greatly lessens the chances of mis-trials, and subserves those most desirable qualities, promptness and accuracy in the administration of justice.

The United States Supreme Court holds counsel fully up to the above standard of practice. It will not consider exceptions unless they are taken and presented in accordance with the strict rule above stated. *Scott* v. *Lloyd*, 9 Pet. 442; *Camden* v. *Doremus*, 3 How. 515; *U. S.* v. *Breitling*, 20 How. 252; *U. S.* v. *McMasters*, 4 Wall. 680; *Columbia Ins. Co.* v. *Lawrence*, 2 Pet. 25; *U. S.* v. *Carey*, 110 U. S. 51; *Pacific Co.* v. *Malin*, 132 U. S. 531; *Dist. of Col.* v. *Woodbury*, 136, U. S. 450.

In Maine, the writ of error is dispensed with. It is not necessary to send up the full record of the case with a bill of exceptions appended, in order to obtain a review of one or more rulings of the presiding justice. A shorter procedure has been devised, R. S., c. 77, § 51 (based on the Massachusetts statute of 1804). The bill of exceptions alone is sent direct to the court of review, and judgment is stayed in the trial court until the exceptions are determined. The statute, however, which authorizes this direct course, evidently contemplates that the exceptions shall be stated separately, pointedly, concisely. It requires that they shall be presented, "in a summary manner," that is, within a narrow compass. There is nothing in the

statute indicating that the exceptions may be more indeterminate in their nature, or more loosely written in form, than under the orignal statute of Westminster. On the other hand, the Maine statute seems to contemplate that the exceptions to each ruling shall be written specifically, though the various exceptions may be combined in one bill. The language is, that "a party aggrieved by *any* opinion may present written exceptions." The spirit of the statute, is that the procedure in trials shall be directed to a speedy, as well as a correct determination of the litigation; that all objections shall be seasonably and clearly made, and all exceptions plainly stated and noted while, "the thing is being transacted;" while steps may be retraced, and errors may be corrected.

The decisions of this court have not authorized any looser practice in the taking and writing exceptions. Objections to offered evidence must be specific. The precise grounds upon which they are made must be stated. The legal issue must be clearly presented. The exceptions of the ruling must be reserved and noted at the time. *Comstock* v. *Smith*, 23 Maine, 202; *Lee* v. *Oppenheimer*, 34 Maine, 181; *White* v. *Chadbourne*, 41 Maine, 149; *Staples* v. *Wellington*, 58 Maine, 453; *State* v. *Bowe*, 61 Maine, 171; *Harriman* v. *Sanger*, 67 Maine, 442; *State* v. *Savage*, 69 Maine, 112; *Hunter* v. *Randall*, *Id.* 183; *Ruggles* v. *Coffin*, 70 Maine, 468. Exceptions to the whole charge are ineffectual. Exceptions can only be made to single propositions of law laid down in the charge. Requests for instructions should be single, and each request confined to a single proposition. Exceptions must be reserved before the cause is finally committed to the jury. The eighteenth rule of court is merely an affirmance, or revival, of a long pre-existing rule of practice. *Bradstreet* v. *Bradstreet*, 64 Maine, 204; *McIntosh* v. *Bartlett*, 67 Maine, 130; *Bacheller* v. *Pinkham*, 68 Maine, 253; *State* v. *Pike*, 65 Maine, 111; *Crosby* v. *M. C. R. R.* 69 Maine, 418; *Brackett* v. *Brewer*, 71 Maine, 478.

There is nothing harsh in these rules. They can be easily conformed to, without embarrassment or annoyance. Counsel should always be willing to state his positions and contentions

so clearly, that the judge, or the opposite counsel, may easily understand them. When the ruling is adverse, a simple request from the counsel that the point be reserved will be sufficient to note the exceptions. Exceptions to instructions given, or instructions refused, can always be quietly noted at the judge's desk in the presence of the opposite counsel, without embarrassing the excepting party's standing with the jury. By this course, inadvertent errors can be easily corrected, or the opposite counsel may waive a ruling in his favor rather than risk exceptions. While this course may sometimes destroy the schemes of artful counsel for a new trial, when he finds the evidence against him, it leads direct to the speedy and just conclusion of the litigation.

Recurring now to the bill of exceptions in this case, it must be evident, that the exceptions were not properly taken or presented under either statute. As to the rulings upon the admissibility of evidence, the stenographer's entire and lengthy report of the trial is presented to us, and we are asked to search through the whole mass for the numerous and various rulings made. The entire charge is also reported, and we are expected to explore that for italicised clauses and sentences. It does not appear in the bill that any exception was seasonably taken, or that the judge or opposing counsel had any notice of a desire to except. So far as the bill shows, the plaintiff acquiesced in each ruling as it was made, and did not bethink himself of exceptions until after the verdict was against him. He should not now be allowed to overturn the trial and its results, for possible errors which might have been avoided by seasonable exceptions. His bill of exceptions should be dismissed.

In this particular case, in order not to take the parties by surprise, we have patiently gone over the whole record and the numerous rulings, and do not find that the plaintiff was prejudiced by any of them, even if he had seasonably and properly excepted. Hereafter, however, exceptions must be seasonably and properly taken, and be presented in the summary manner required by the statute, or they will be dismissed without further consideration.

Motion overruled. Bill of exceptions dismissed.

ENOCH O. GREENLEAF *vs.* GEORGE GROUNDER.

Franklin. Opinion March 15, 1894.

Mortgage, for support. Sale of mortgagor's interest. Possession.

A mortgagor's interest in real estate may be seized and sold on an execution against him. But when the mortgage is given to secure the support of the mortgagee and his wife during life, and the support is to be furnished by the mortgagor on the premises mortgaged, the purchaser's right to the possession is postponed till the condition has been performed or otherwise extinguished.

ON REPORT.

This was an action of forcible entry and detainer tried in the Municipal Court of the town of Farmington, Franklin County. Judgment was rendered for the plaintiff, and the defendant appealed to this court sitting at *nisi prius*.

The facts appear in the opinion.

O. E. Greenleaf and J. C. Holman, for plaintiff.

Only question is one of title. *Abbott* v. *Norton*, 53 Maine, 158. Plaintiff has a right to immediate possession. *Dyer* v. *Chick*, 52 Maine, 350.

It is not necessary that the defendant be a tenant; it is sufficient if he be a disseizor. *Baker* v. *Cooper*, 57 Maine, 388. Forcible entry may be maintained against a disseizor who has not acquired any claim by possession and improvement. R. S., c. 94, § 1. No such claim is here made by the defendant. When real estate is legally levied upon, the creditor may maintain forcible entry and detainer against the debtor if he continue in possession without the creditor's consent. *Baker* v. *Cooper*, *supra*.

Forcible entry and detainer being now chiefly a statutory provision, the plaintiff submits that the provisions of the statutes have been met and fulfilled; and the plaintiff is entitled to judgment against the defendant, as whatever rights or privileges he may have had were purchased by the plaintiff at the sheriff's sale, and conveyed to him by sheriff's deed.

H. L. Whitcomb, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. This is an action of forcible entry and detainer to obtain the possession of a farm. It is defended upon the ground that the character of the plaintiff's title is such that he is not yet entitled to the possession. The facts are these: Benjamin Lowell was formerly the owner of the farm. It was his homestead. In 1887, November 19, he conveyed the farm to the defendant, taking back a mortgage to secure a bond for his and his wife's support during life. The support was to be furnished by the defendant on the farm conveyed to him. In 1891, October 19, the defendant's interest in the farm was sold on an execution against him, and the plaintiff purchased it. Mr. Lowell is dead, but his wife survives and is being supported by the defendant on the farm in question.

The defendant contends that his obligation to support Mrs. Lowell is personal; that it cannot be assigned to another; that it obliges him to support her on the farm conveyed to him by her husband; and that while this obligation is resting upon him, he cannot be ousted or evicted, and Mrs. Lowell's as well as his own home be thus broken up.

We think the defendant's contention is sound. We regard it as settled law that, when one conveys his homestead upon the condition that he and his wife shall continue to have a home upon it, and be there supported by the grantee, and the obligation of the grantee to thus support them is secured by a contemporaneous mortgage upon the premises, the character of the grantee's possession is more like that of a servant than an owner, and he cannot be ousted or evicted by a purchase of his title, without the consent of the persons entitled to such support. The possession is more theirs than his, and without their consent, neither he nor they can be ousted or evicted. *Bryant* v. *Erskine*, 55 Maine, 153, and cases there cited. The mortgagor's interest may be sold, (*Bodwell Granite Co.* v. *Lane*, 83 Maine, 168,) but the purchaser's right of possession must be postponed till the mortgagee's rights are extinguished.

This conclusion is not in conflict with the decision in *Wilson* v. *Wilson*, 38 Maine, 18. In that case, neither the person by whom nor the place at which the support was to be furnished was mentioned in the agreement. In this case, both are mentioned and stipulated for. This latter fact is the foundation on which our decision rests. *Judgment for defendant.*

JAMES F. CONNOR, and others,

vs.

GEORGE N. PUSHOR, and others.

Somerset. Opinion March 17, 1894.

Real Action. Lost Deed. Evidence.

It is competent for the defendant in a real action to disprove the plaintiff's seizin by oral evidence of a lost deed. But when there is no record of such a deed, the oral evidence of its existence, and of its contents, should be full clear, strong and thoroughly convincing. In other words, it should be plenary.

ON MOTION AND EXCEPTIONS.

This was a real action to recover possession of a small piece of land situate in Pittsfield village, in the County of Somerset. Plea, the general issue. During the progress of the trial the defendants introduced evidence tending to prove the loss of an unrecorded deed from Hiram B. Connor to Thomas McCausland of the piece of land in controversy, also a deed of release with a personal covenant of warranty from McCausland to Harriet Chase. It did not appear, however, that Harriet Chase ever had possession of the premises. The plaintiffs claimed title to said land as heirs of said Hiram B. Connor.

The justice presiding instructed the jury among other things as follows:

"When parties seek to supply the place of a lost deed, in view, as I say, of the importance of having a degree of certainty and stability in titles to real estate, the evidence to satisfy you that there has been a deed and that it has been lost should be clear and convincing, and as to the character of the instrument it should be clear and convincing. There should be evidence,

in other words, that should give you a clear preponderance in favor of that proposition that there has been a deed and that it has been lost; and the contents of that deed should be given to that degree of satisfaction that you feel that there *must* have been a conveyance of real estate. I do not mean to say, of course, that there is any different burden of proof on this proposition than in any other class of civil investigations. It is a preponderance of all the evidence in the case. But the evidence I say should be clear and satisfactory within the limits of preponderance of evidence.

"Though he [Thomas McCausland,] undertook to warrant against all persons whatsoever, not only against any one under him, but against all persons whatsoever, yet, as I say, notwithstanding the clause of warranty in that form, it is not necessarily any evidence that Thomas McCausland had received a deed from Hiram B. Connor. . . . If you find that there was such a deed, and it is claimed that if you find the testimony of Franklin McCausland to be true at all in relation to it, you ought to find there was a regular deed and sufficient to pass the title — if you find there was such a deed, which passed the title to this parcel of land to Thomas McCausland, then of course it did pass out of Hiram B. Connor at that time before his decease; and unless he was afterwards reinvested with the title to that quarter of an acre of land, these heirs would not inherit from him, as I have already said; and they would have no title, unless they acquired it under the laws relating to title by possession, and I do not understand that to be insisted upon by counsel for plaintiffs if there was no record title in them. If it did not, if there was no such deed, if you do not find the evidence satisfactory, sufficient, clear and convincing, either that there was a deed and that it has been lost, or not satisfied that it described this property, then, of course, so far as this property is concerned the title remained in Hiram B. Connor."

The jury returned a verdict for the plaintiffs, and the defendants took exceptions.

J. W. Manson, for plaintiffs.

Merrill and Gower, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

WALTON, J. This is a real action to determine the title to a small piece of land (about one fourth of an acre) lying on the easterly bank of the Sebasticook river in the town of Pittsfield. The decision of the cause ultimately turned upon an alleged want of title in the plaintiffs. At first the defendants undertook to set up a title in themselves by adverse possession; but the evidence was too weak, and this ground of defense was abandoned. The defendants then undertook to show a want of title in the plaintiffs. The plaintiffs, as the heirs-at-law of their father (H. B. Connor) had a record title extending back to 1835. But the defendants claimed that sometime during the year 1835, H. B. Connor conveyed the demanded premises to one Thomas McCausland, and that McCausland conveyed them to a Mrs. Chase. No deed from Connor to McCausland was produced, and no such deed had ever been recorded; and, so far as appeared, neither Mrs. Chase, nor any one claiming under her, had ever taken possession of the land or claimed to own it. But the defendants insisted that a deed from Connor to McCausland had once existed and that it had been destroyed in 1871 or 1872, by a fire which burned McCausland's house; and they undertook to prove by oral evidence the existence of the deed, and its loss, and its contents. But the evidence was weak and the jury returned a verdict in favor of the plaintiffs. The defendants move to have the verdict set aside as against evidence. We do not think the motion can be sustained. We have examined the evidence with care, and we are by no means satisfied that the verdict is wrong.

The defendants urge that the jury were misdirected with regard to the amount of evidence necessary to establish the existence and contents of a lost and unrecorded deed. We think not. True, they were instructed that the evidence should be clear, convincing and satisfactory. But we think this instruction was correct. The plaintiffs had an unbroken record title extending back for over half a century; and the presumption in favor of record titles is so strong that it requires strong,

clear and convincing proof to overcome it. This requirement does not militate against the rule that in civil suits a preponderance of evidence is all that is necessary. When an attempt is made to batter down recorded deeds by oral evidence of non-existing and unrecorded deeds, the oral evidence must be clear and strong, satisfactory and convincing, or it will not preponderate. It must be "plenary." So held in *Moses* v. *Morse*, 74 Maine, 472.

The rule is the same when the deed is claimed to be inaccurate. The error must be established by proof that is plenary. *Parlin* v. *Small*, 68 Maine, 289.

In the case last cited the court say that a deed, which can be seen and read, is a wall of evidence against oral assaults; and can not be battered down by such assaults, unless the evidence is clear and strong, satisfactory and convincing. And, surely, duly recorded deeds, which have remained unchallenged for more than half a century, are entitled to an equal degree of protection. We think the ruling was none too strong.

Motion and exceptions overruled.

GEORGE TOLMAN, Assignee, in equity,

vs.

CORA A. WARD.

Cumberland. Opinion March 15, 1894.

Deed. Fraudulent Conveyance. Consideration. Marriage.

It is settled law in this State, as well as elsewhere, that marriage is a good consideration for a conveyance of real estate.

An intended fraud by the grantor upon his creditors will not avoid the deed if the grantee was innocent.

Marriage may be given in evidence as the consideration of a deed expressed to be for a money consideration only.

Goodspeed v. *Fuller*, 46 Maine, 141, affirmed.

ON REPORT.

Bill in equity, brought in this court, for Cumberland County, by an assignee in insolvency, to set aside a conveyance of real estate in Brooklyn, N. Y., made to the debtor's wife, before marriage, and alleged to have been made in fraud of creditors.

It appears from the pleadings in the case that the deed in question given by the debtor, Ward, is dated February 1, 1889, the consideration expressed therein being four hundred and fifty dollars, and was recorded August 22, 1889. The insolvent and the defendant were married May 30, 1889. He began to purchase goods of the plaintiff's firm as early as February 1, 1889, and filed his petition in insolvency June 20, 1890, when he was indebted to said firm to the amount of $3,472.95.

The case was heard on bill, answer and testimony.

H. and W. J. Knowlton, for plaintiff.

Marriage cannot be given in evidence as the consideration of a deed of bargain and sale expressed to be for a money consideration only. *Betts* v. *The Union Bank of Maryland*, 1 Harris & Gill, (Md.) 175, and the cases there cited.

No additional consideration can be proved repugnant to the one mentioned in the deed. *Smith* v. *Davis*, 49 Md. 472.

A voluntary settlement by a man who is indebted, is fraudulent and void, if the debts existing at the time of the conveyance are only paid by contracting other obligations which finally result in insolvency. *Antrim* v. *Kelly*, 4 B. Reg. 189.

A voluntary conveyance made by a person who is indebted is *prima facie*, fraudulent, and the burden is on the grantee to show that the debtor had abundant means, besides the property conveyed to pay all his debts. *Pratt* v. *Curtis*, 6 B. R. 139.

Where the deed is kept from the records, and the debtor appears to be the owner and obtains credit upon the faith of the property, a voluntary conveyance is void as to subsequent creditors. *In re Rainsford*, 5 B. R. 381.

E. W. Whitehouse, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. This is a suit in equity. The plaintiff is assignee of Stephen C. C. Ward, an insolvent debtor. The plaintiff avers that, February 1, 1889, the insolvent conveyed a parcel of real estate to Cora A. Brown, and that the conveyance was

made without consideration, and for the purpose of putting the property beyond the reach of creditors; and he prays that the conveyance may be decreed void, and that the grantee may be ordered to convey her interest in the premises to him, as assignee.

There would be no doubt of the power of the court to make the decree prayed for if these allegations were proved. But we do not think that either of them is proved. The proof is that the conveyance in question was made in consideration of a contemplated marriage between the grantee and the grantor; and marriage has always been held to be one of the highest and one of the most valuable considerations known to the law.

In *Smith* v. *Allen*, 5 Allen (Mass.), 454, the court held that a promise of marriage, made in good faith by a woman, to one who had conveyed to her a parcel of real estate for the purpose of persuading her to marry him, was a sufficient consideration to sustain the conveyance against the grantor's creditors, although the death of the grantor prevented the marriage from being consummated.

And in *Gibson* v. *Bennett*, 79 Maine, 302, where a creditor had levied upon land as the property of the husband, and it was proved that the land had been conveyed to the wife by the husband, before their marriage, and in consideration of her promise to marry him, the court held that the levy could not be sustained. "It is clear," said Mr. Justice EMERY, "that, upon such a state of facts, no creditor of the husband can take the land by a subsequent attachment and levy. Marriage is a valuable consideration for a deed, and if the marriage afterward take place, the deed is valid so far as the consideration is concerned. Any fraud intended by the grantor upon his creditors would not avoid the deed, if the grantee was innocent."

And in *Prewit* v. *Wilson*, 103 U. S. 22, the court held that an antenuptial settlement of lands, though made by the intended husband with the design of defrauding his creditors, will not be set aside except upon the clearest proof that the intended wife participated in the fraud. There is no such proof in the present case.

But the point is made by the learned counsel for the plaintiff that marriage can not be given in evidence as the consideration of a deed expressed to be for a money consideration only; and, in support of the proposition, they cite *Betts* v. *Union Bank*, 1 Harris and Gill, (Md.) 175.

The court did so hold in that case. But the decision does not rest on the consideration of marriage alone. It applies to all considerations in conflict with the one expressed in the deed. And there are other decisions in which the doctrine is maintained that the expressed consideration in a deed can not be varied or contradicted by oral evidence. But in this State, and in most of the states, the law is otherwise.

In *Goodspeed* v. *Fuller*, 46 Maine, 141, this court held that the only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor; and that, for every other purpose, the consideration may be varied or explained by parol proof; and in the opinion of the court, by Mr. Justice APPLETON, a great many authorities are cited showing how extensively the doctrine has been adopted, and the great variety of cases in which it has been applied; and, at the present day, we apprehend that there are but few if any courts that hold to a different doctrine. See note to *McCrea* v. *Purmort*, 30 Am. Dec. 103 (16 Wend. 460), and the authorities there cited.

Our conclusion is that the present suit must fail for want of proof. The proof fails to show that the conveyance to the defendant was made without consideration, or that the grantee knew of or participated in any fraudulent purpose of her then intended husband to place the property beyond the reach of his creditors. In fact, the evidence is very weak of the existence of such a purpose on his part.

Bill dismissed, with costs.

INHABITANTS OF HARRISON *vs.* PORTLAND.
SAME *vs.* LEWISTON.

Cumberland. Opinion March 19, 1894.

Pauper, non compos mentis. R. S., c. 24, § 1, cl. II.

By R. S., c. 24, § 1, cl. II, legitimate children have the settlement of their father if he has any in the state; if he has not, they have the settlement of their mother within it; but they do not have the settlement of either, acquired after they are of age and have capacity to acquire one.

A daughter, *non compos mentis*, not residing with her father, nor supported by him, does not follow a new settlement acquired by him after she becomes of age.

Held, upon the facts in this case, that the daughter when she became of age acquired a settlement through her father in Portland; and that never having resided in any other place for a sufficient length of time to acquire a settlement elsewhere, her settlement remains in Portland, although her father has since acquired a settlement in Lewiston.

ON REPORT.

These were actions of assumpsit to recover supplies, furnished by the plaintiff town to Emma E. Smith, and was tried in the Superior Court, for the County of Cumberland. After the testimony was taken out, the two cases were reported together to this court for decision upon such portions of the evidence as were admissible.

The parties agreed that the pauper had a derivative settlement through her father in Portland, when she became of age; and that she never acquired in her own right a settlement by subsequent residence in any one town for five consecutive years; so that she had only a derivative settlement from her father, whatever that might be.

The facts appear in the opinion.

A. H. Walker, for plaintiff.

F. A. Morey, city solicitor, for Lewiston.

Seth L. Larrabee, city solicitor, for Portland.

If the pauper was not of sound mind or was insane from the time she attained her majority to and at the time in question, her settlement would follow that of her father wherever that

might be. *Strong* v. *Farmington*, 74 Maine, 46; *Islesborough* v. *Lincolnville*, 76 Maine, 572; *Winterport* v. *Newburgh*, 78 Maine, 136; *Upton* v. *Northbridge*, 15 Mass. 237; *Taunton* v. *Middleborough*, 12 Met. 37. She was insane before she became of age. Her mind was enfeebled and weakened by each of seven succeeding attacks of violent mania. Her condition has not improved from the time of her first commitment to the hospital. She has grown gradually and constantly more and more unsound in mind. She has been under the constant care and supervision of her father. Her father has acquired and has a legal settlement in Lewiston. Her settlement follows that of her father and is in Lewiston. She has no legal settlement in Portland.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. Two pauper suits included in one report. The question is whether the settlement of Emma E. Smith, an insane pauper, is in Portland or Lewiston.

We think it is in Portland. Her father's settlement was there when she arrived of age, and the evidence fails to show that she has since acquired one elsewhere. It is true that her father has since acquired a settlement in Lewiston. And it is true that a *non compos mentis* daughter, who continues to reside with her father, and to be supported by him, will follow his settlement, notwithstanding she is more than twenty-one years of age. But Emma has not continued to reside with her father since she arrived of age, nor has she been supported by him. Her mother died before she arrived of age, and her father married again; and Emma, with her father's consent, went to live with her brother in Massachusetts. Her brother kept a store in Natick, and was postmaster; and Emma assisted him some in the store, and acted as delivery clerk in the post-office, and assisted his wife some in the house. She was there when she arrived of age. And never since that time has her father's home been her home. At one time, she and a younger brother established a home for themselves, and her father left his wife

and went and staid with them a short time. But the evidence fails to show that his home has ever been her home since she arrived of age. Nor has he contributed anything toward her support. She at one time borrowed five dollars of him, but she afterwards paid him. She has been subject to attacks of insanity, and has been sent seven times to the Insane Hospital at Augusta. But there is no proof that her father ever contributed a dollar towards her support, either there or elsewhere. These attacks of insanity have not lasted for a very great length of time; and for at least nine of the twelve years following the time when she became of age, she has been a bright, active, and capable woman, and has supported herself by her own labor. During her lucid intervals no one has exercised any control over her. She has selected her own employments and established her own homes. And never having resided in any one place for a sufficient length of time to acquire a settlement there, we think it is plain that her settlement continues to be in Portland, where her father's settlement was when she arrived of age. R. S., c. 24, § 1, cl. II; *Corinth* v. *Bradley*, 51 Maine, 540.

In Harrison v. *Portland*, *Judgment for plaintiff.*
In Harrison v. *Lewiston*, *Judgment for defendant.*

STATE *vs.* MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion March 19, 1894.

Exceptions by State. Evidence. Jury. Negligence.

An indictment against a railroad company for negligently causing the death of a person is essentially a civil suit, and is governed by the same rules of law as other civil suits.

In such case the right to except to erroneous rulings of the presiding justice is open to both parties to the same extent as in other civil suits.

In the trial of such a cause, it is not error for the presiding justice to instruct the jury that, in determining what was the real cause of the accident, they may call to their aid their general knowledge and experience of the characteristics and habits of horses and their liability to become frightened by locomotive engines and moving trains of cars, and that collisions at highway crossings are often caused thereby.

ON EXCEPTIONS.

The case is stated in the opinion.

Henry W. Oakes, County Attorney, and *Frank L. Noble*, for State.

The case is a civil one in procedure, and exceptions are open to the State in behalf of the real plaintiff, the heir of the deceased.

Those portions of the judge's charge excepted to are open to a double construction, which would authorize the jury to act upon evidence not presented upon the witness stand, in determining the material issue.

Counsel cited: *State* v. *G. T. R. R. Co.* 58 Maine, 176; *State* v. *Same*, 60 Maine, 181; *State* v. *M. C. R. R. Co.* 77 Maine, 244; *State* v. *E. & N. A. R. R. Co.* 67 Maine, 479; 3 Bl. Com. 374; *Schmidt* v. *Ins. Co.* 1 Gray, 535-6; 1 Stark. Ev. 449; *Parks* v. *Boston*, 15 Pick. 209; *Patterson* v. *Boston*, 20 Pick. 166; *Murdock* v. *Sumner*, 22 Pick. 156; *Douglass v. Trask*, 77 Maine, 35; *State* v. *Bartlett*, 47 Maine, 395; *Page* v. *Alexander*, 84 Maine, 83; *Ottawa Gas Light Co.* v. *Graham*, 28 Ills. 73 (81 Am. Dec. 263).

Wallace H. White, and Seth M. Carter, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. This is an indictment against the Maine Central Railroad Company for negligently causing the death of a person. It appears that Miss Merrow, — a young woman about twenty-five years old, — was traveling alone with a young horse towards the railroad, and, as she approached the crossing, from some cause, the horse commenced to run; that in spite of her efforts and the efforts of the flagman, the horse ran against a passing train, and Miss Merrow was killed. The case has been tried and a verdict returned in favor of the railroad company; and the case is before the law court on exceptions by the State.

The first question is whether exceptions will lie in behalf of the State in such a case. We think the question must be answered in the affirmative. It is true that in criminal prosecu-

tions, — prosecutions strictly criminal, — exceptions do not lie in behalf of the State. But it has been held that prosecutions like this are criminal in form only, — that they are essentially civil suits, — and must be governed by the rules of law applicable to civil suits. *State* v. *Railroad*, 77 Maine, 244. Such being the settled law in this State, we fail to see any reason why the right to except should not be open to both parties as in other civil suits. We think it should. We will assume, therefore, that the exceptions are properly before us and proceed to examine them upon their merits.

It is claimed that the presiding justice erred in his charge to the jury; that he authorized them to find facts as to the existence of which no evidence was offered. The portions of the charge complained of are as follows:

"Now, applying your memory and judgment to all the evidence in the case, what was the real cause of the accident resulting in the death of Miss Merrow? You have a right to apply your observation, your general knowledge of matters of this kind, in ascertaining what it was. . . . If any omission of duty on the part of the railroad company or its employees frightened the horse, so that he became uncontrollable, that might be a ground of action. It is for you to determine whether it was so. In your common observation, it may be that you have observed sometimes that when you are driving a horse ordinarily kind and manageable, in the vicinity of a railroad, while you hear no noise of an approaching train, the horse does hear it, with its keen instinct, and springs into a faster speed at once, and you may wonder why it is, until in a moment you hear the sound also. And you may have observed that a horse is anxious, approaching a railroad-crossing, to spring into speed and get across as soon as possible. If that is the case, and results from the character of the horse, and is not caused by any means of fright resulting from the wrongful act of the railroad company or its servants, then that does not lay a foundation for an action. It is only when the negligence of the company causes the death, and the party killed was in the exercise of due care, at the immediate time and occasion."

It is claimed that these instructions authorized the jury, in determining whether the fright of the horse was the result of the character of the horse or the negligent act of the railroad company, to inquire into and find facts as to the existence of which not a *scintilla* of evidence was offered; that it permitted them to apply their common observation and personal knowledge in determining the existence of a fact vital to the case, and it is insisted that in these particulars the instructions were erroneous.

The instructions undoubtedly authorized the jury to take notice of one of the characteristics of all horses, — namely, their liability to take fright and run away, — and that, in this particular, they might act upon their common observation and general knowledge of horses. In this assumption, the plaintiff's counsel are undoubtedly right. But, was this erroneous? There are many things of which judges and jurors are allowed to take notice without any other proof than their own observation and experience. Are not the habits and general characteristics of our domestic animals among this number? We think so. "What is notorious needs no proof." (*State* v. *Intoxicating Liquors*, 73 Maine, 279.) It is not always easy to determine whether or not a given fact has become sufficiently notorious to be taken judicial notice of without proof. If it has, then jurors may act upon it without proof. If it has not, then they can not be allowed to act upon it without proof, although the fact may be known to one or more of the panel. The rule of law is plain enough. The lawyers employed in this case do not seem to differ about it. They cite and rely upon the same authorities. The difficulty is in its application. There are many facts in relation to electricity and its uses that to-day are known to almost every school boy, which, a few years ago, were known only to a few. To-day, they may be taken judicial notice of. Then, they could not. Exactly when the transition took place, it might be difficult to say. But it seems to us that, at this day the fact that horses are liable to be frightened by locomotive engines and moving trains of cars, and that collisions at highway crossings are often caused thereby, are facts sufficiently notorious to be taken judicial notice of, and that it can not be

error, in the trial of a cause for an injury so received, to instruct the jury that, in weighing the evidence and determining what was the real cause of the accident, they may call to their aid their observation and general knowledge of such matters. Not, of course, any knowledge they may have of that particular accident. But their general knowledge of the character and habits of horses, and how such accidents are liable to be produced. And as the instructions excepted to went no further than that, we think the entry must be,

Exceptions overruled.

INHABITANTS OF EMBDEN *vs.* SAMUEL BUNKER.

Somerset. Opinion March 19, 1894.

Taxes. Town Officers. Promissory Notes.

A promissory note given to and accepted by a town treasurer in payment of a tax is without consideration and not collectible.

Such a transaction is illegal and void; it does not discharge the tax, and the note has no valid consideration to support it.

ON REPORT.

This was an action upon a promissory note as follows:

"Embden, July 2nd, 1891.

"Thirty days after date, for value received, I promise to pay the town of Embden, or order, one hundred and eighty dollars and 70-100, interest after. Samuel Bunker."

The defendant is a resident of the town of Anson, owning real estate in the town of Embden.

The note in suit was given by the defendant to the treasurer of the town of Embden to pay taxes assessed upon his real estate as a non-resident owner. The taxes, upon the receipt of the note, were receipted for and discharged by the town treasurer.

The questions submitted were whether the town treasurer could lawfully receive such note; whether there was a legal consideration for it; and whether an action could be maintained thereon in the name of the town.

B. S. Collins, Merrill and Gower, for plaintiff.

Walton and Walton, and *S. S. Brown*, for defendant.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, WISWELL, JJ.

WALTON, J. This is an action on a promissory note. The defense is want of consideration. The note was delivered to and accepted by the treasurer of the town of Embden in payment of taxes on the defendant's real estate. It is claimed in defense that the transaction was illegal and void; and, being illegal and void, that it did not have the effect to discharge the taxes; and the taxes not being discharged, that the note is without consideration and not collectible.

Ungracious as this defense may seem to be, we feel compelled to sustain it. Town officers can not be allowed to disregard the statutory modes of doing business and substitute ways of their own. The acceptance of promissory notes is not a lawful mode of collecting taxes. If one man can pay his taxes with a promissory note, all can. And let it once be understood that taxes may be thus paid, and the result could not be otherwise than disastrous to the finances of the town. Sound public policy forbids the introduction of such a practice. We hold that the transaction was illegal and void; and, being so, that it did not discharge the taxes on the defendant's real estate, and the note has no valid consideration to support it. *Packard* v. *Tisdale*, 50 Maine, 376.

Judgment for defendant.

CEPHAS WALKER *vs.* LEONARD H. WALKER.

This also is an action on a promissory note given for taxes. The note differs from the former only in the fact that it was made payable to the treasurer of the town of Embden instead of to the town of Embden, and the action is in the name of the treasurer instead of the name of the town. The differences are immaterial; and, for the reasons stated in the former action, the entry must be, *Judgment for defendant.*

B. S. Collins, Merrill and Gower, for plaintiff.

J. J. Parlin, for defendant.

JAMES PALANGIO *vs.* THE WILD RIVER LUMBER COMPANY.

Oxford. Opinion March 26, 1894.

Railroads. Lumber Company. Laborer's Lien. R. S., c. 48, § 16; c. 51, § 141.

A lumber company organized under R. S., c. 48, § 16, as a manufacturing corporation, having constructed a railroad on its own land to facilitate its lumbering operations, is not a railroad company within the meaning of the statute, R. S., c. 51, § 141, making such companies liable to pay the laborers employed by contractors in their construction.

AGREED STATEMENT OF FACTS.

It appeared from the agreed statement that the defendant corporation, in 1891, constructed a road bed upon its own land extending from Gilead, in Oxford County, to a point in New Hampshire, about four miles beyond the State line, and furnished said road with sleepers and iron rails upon which to run its locomotives and cars, for the transportation of its own lumber from the lands of the said corporation in New Hampshire to said Gilead.

That the said corporation had no other authority to construct and operate a railroad than what is contained in the certificate of its organization, under R. S., c. 48, § 16, relating to manufacturing corporations.

That the defendant contracted for the building of said road with one O. M. Gallup, who employed the men named in the several counts in the writ. That portion of the said road first built is in the State of Maine, and that for all labor performed by said men for said Gallup in Maine, they have been paid in full. The several sums due said men from said Gallup are for labor performed upon said road in New Hampshire. Said laborers assigned their respective claims to the plaintiff as stated in the writ. Said laborers within twenty days after the completion of such labor, in writing, notified the treasurer of said corporation that they had not been paid by said contractor, and this action was brought within six months after said notices were given.

W. H. Looney, for plaintiff.
Herrick and Park, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. A statute of this State (R. S., c. 51, § 141) makes railroad companies liable to pay the laborers employed by contractors under certain specified conditions; and the only question we find it necessary to consider is whether the Wild River Lumber Company can be regarded as a railroad company within the meaning of this statute. We think it can not. Its name does not indicate that it is a railroad company, nor does the certificate of its organization mention the building, construction, or operation of a railroad as one of the purposes for which it was created. Nor was it organized under the railroad law. It was organized under a statute (R. S., c. 48, § 16,) from the operation of which corporations for the construction and operation of railroads are expressly excepted. Surely, it is impossible to regard such a corporation as a railroad company. It does not possess one of the distinguishing characteristics of a railroad company. True, the company has constructed a road bed upon its own land upon which it has placed sleepers and iron rails for the transportation of its own lumber from its own lands. But this no more makes it a railroad company, within the meaning of the law, than the construction of a camp in which to feed and lodge its laborers would make it a hotel company. An individual can lay a railroad track upon his own land for his own use without obtaining a railroad charter, and without thereby making himself a railroad company: and so can a lumbering corporation.

Other objections are urged against the maintenance of this action; but our conclusion being that the agreed statement of facts does not bring the defendant corporation within the operation of the statute relied upon for its maintenance, it is unnecessary to consider them.

Judgment for defendant.

INHABITANTS OF CAPE ELIZABETH *vs.* ALBERT D. BOYD.

Cumberland. Opinion March 26, 1894.

Taxes. Suit. Written Directions. R. S., c. 6, § 175.

Taxes may be collected by an action of debt when the action is duly authorized in writing by the proper municipal officers.

A general direction to commence such actions against any and all tax-payers who refuse or fail to pay their taxes is not sufficient.

Each case should receive a separate consideration.

ON REPORT.

This was an appeal to the Superior Court, for Cumberland County, from the Municipal Court of Portland in a suit to recover taxes assessed upon defendant's poll and personal estate.

The defendant denied that the annual meeting at which the assessors were elected was legally warned, and that the written direction by the selectmen, under which the action was brought, was sufficient. The first objection became immaterial and arguments relating to it are omitted.

The written direction to bring the suit is in the following form:

"Cape Elizabeth, August 3rd, 1890.

"We, the undersigned, Selectmen of the town of Cape Elizabeth, hereby direct Thomas B. Haskell to commence an action of debt in the name of the inhabitants of said town, against any and all tax-payers in said town for the year 1890, who shall refuse or fail to pay their taxes after reasonable demand and notice from him, as collector of taxes for said year.

M. J. Peables,
James H. Harford,
Geo. C. Mountfort,
} Selectmen of Cape Elizabeth."

S. C. Strout, and *W. R. Anthoine*, for plaintiff.

A direction to sue all delinquents, certainly includes a direction to sue each one. The law does not require useless acts. If it was desired to sue several non-payers, no one would question that a written direction to sue the delinquents, calling each by name, in the same paper, would be good. And if, instead of

this recital of names, the direction is to sue all delinquents, that is equivalent to reciting the name of each. It must be remembered the provision requiring this direction is for the protection of the town, against possible bad judgment of the collector in bringing suits. It is in no sense for the benefit of the tax-payer. Suit is less onerous to him than arrest or seizure of property under the collector's warrant. In a suit he can defend against the tax, if illegal, but this would be cut off if the collector distrained.

Actions of this kind should be favored as a convenient mode of collecting taxes, and affording greater protection to the tax-payer than he can possibly have under the distraint or arrest allowed by the collector's warrant. That this is the view of this court appears in *Norridgewock* v. *Walker*, 71 Maine, 181; *Cressey* v. *Parks*, 76 Maine, 534; *Bath* v. *Whitmore*, 79 Maine, 186; *Lord* v. *Parker*, 83 Maine, 530.

C. P. Mattocks and *L. Barton*, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. In addition to the other provisions for the collection of taxes legally assessed, the mayor and treasurer of any city, the selectmen of any town, and the assessors of any plantation, to which a tax is due, may in writing direct an action of debt to be commenced in the name of such city, or of the inhabitants of such town or plantation, against the party liable. R. S., c. 6, § 175.

The question is whether a general direction by the selectmen of a town to a tax-collector to commence actions against "any and all tax-payers" who "refuse or fail" to pay their taxes, is a compliance with this statute. We think not. The power conferred by this statute requires an exercise of judgment and discretion. A refusal to pay a tax is one thing. A failure to pay is another. The former may be the result of wilfulness or a denial of the legality of the tax. The latter may be the result of sickness and poverty and an utter inability to pay. In the former case, an action may be expedient. In the latter, inex-

pedient. It is plain, therefore, that judgment and discretion are to be exercised in determining whether or not an action shall be commenced. And it is a familiar and well settled rule of law that when judgment and discretion are to be exercised, they must be exercised by the persons on whom the law has placed the power and authority to act. Their exercise can not be transferred to another. Such powers are incapable of delegation. 1 Dill. Mun. Corp. § 60, and cases there cited.

The plain meaning of the statute is that no action shall be commenced to collect a tax, unless its commencement is directed by some one of the boards of officers named, in writing. An oral direction will not be sufficient. When, in any case, an authority is required to be conferred in writing, an oral authority will not be sufficient. Such a requirement is calculated to avoid a dispute respecting the fact, and to protect towns against hasty and inconsiderate action by their selectmen. So held in *Morrill* v. *Dixfield*, 30 Maine, 157.

And each suit should receive a separate consideration. A general direction to the tax collector to commence actions against any and all tax-payers who refuse or fail to pay their taxes, is not sufficient. It is not sufficiently specific. It practically transfers to the collector the power to determine whether or not any particular action shall be commenced; and this the law will not allow.

For these reasons, we hold the direction in this case insufficient, and the action improperly commenced.

Judgment for defendant.

EMILY P. MCFADDEN

vs.

HAYNES AND DEWITT ICE COMPANY.

Lincoln. Opinion March 26, 1894.

Waters. Ice. Flats. Colonial Ordinance, 1647.

The right to cut ice upon public rivers and ponds results from the fact that, below the line of low water, the State owns the beds of navigable rivers and great ponds, and holds them in trust for the public. Everyone may cut ice below the line of low water as a public right.

No such right exists above the line of low water. It does not exist upon non-navigable waters, private ponds, or flats.

Ice companies operating upon navigable rivers do not have the right to deposit the snow, scraped from their ice, upon the flats of an adjoining owner without the latter's consent.

ON EXCEPTIONS.

Assumpsit for rent. The following is the material part of the report of the referee, Hon. Enoch Foster, to whom the action was referred, and to which the defendants excepted:

"The plaintiff was the owner of a farm or parcel of land lying on the easterly side of the Kennebec river, in the town of Dresden, about seventy-six rods in width on the river; that there were flats belonging to this land, and which the plaintiff owned, subject to all rights belonging to the public, between high and low water mark, of the following extent, viz: seventy-six rods in length up and down the river, seventeen rods wide at the northerly end, twenty-eight rods wide at the southerly end, and about twenty-three or twenty-four rods wide in the middle. The defendant company had leased of the plaintiff for the term of five years, commencing August 17, 1880, and ending August 17, 1885, a strip of land one rod in width along the shore of the river, above high water mark, together with all rights and privileges of ice fronting thereon, the plaintiff reserving the right to cut the grass on the flats during the time of said lease.

"The defendant company had used the flats for the purpose of dumping the snow which was scraped from the ice which they cut from the river opposite the flats, but beyond low water mark. For no other purposes were the flats used by the defendant company during the continuance of the lease. The defendant company used the flats the two years after the expiration of the lease, being the two years for which suit is brought in plaintiff's writ, just as they had previously done, the whole width of the flats if they wanted to, and since that time they had gone round them. There was evidence in the case of attempted negotiations for a renewal of the lease, or for some agreement upon a reasonable consideration to be paid plaintiff, but no adjustment was ever arrived at, concerning the flats.

"The defendants at the hearing claimed that they were only exercising such rights as belonged to them of right in the use of the flats, between high and low water, during the time sued for in the plaintiff's writ; that they were in the exercise of a public right in cutting ice from the river below low water mark, and as incident to that right they had the right to clean or scrape the ice of snow and deposit the snow on the flats adjacent, and that the plaintiff's ownership of the flats was subject to that right. . . . Upon the facts above found and stated in this report, I decide and determine, as matter of law, that the defendants are liable in this action, the amount not being in controversy, but the right of recovery only for the use of the flats as above stated. And, I, therefore determine and award that the plaintiff recover of the defendant company the sum of one hundred dollars." . . .

Weston Thompson, *F. J. Buker*, with him, for plaintiff.

Baker, *Baker and Cornish*, and *Geo. B. Sawyer*, for defendants.

A title to flats is a qualified title and is subject to the right of the public to use the water covering the flats for any purpose naturally incident to any of the great reserve rights, which the public hold in common, in the general waters of the stream. *Weston* v. *Sampson*, 8 Cush. 354.

But although the riparian proprietor has an interest in the soil, it is not an absolute and unqualified ownership; but so long as the flats so situated are left open, unoccupied by any wharf, dock, or other inclosure, so long as the tide ebbs and flows over them, they so far retain their original character and remain public. This double rule, to which the territory lying between high and low water mark may be subject, is not a novelty in the law, but an old and recognized principle.

The rule, established by usage and judicial decision, has been, that although the ordinance transfers the fee to the riparian owner, yet until it is so used, built upon, or occupied, by the owner, as to exclude boats and vessels, the right of the

public to use it is not taken away; but that whilst open to the natural ebb and flow of the tide, the public may use it, may sail over it, anchor upon it, fish upon it, and by so doing commit no trespass, and do not disseize the owner. *Austin* v. *Carter*, 1 Mass. 231. These rights originally were: 1. Right of navigating the waters over the flats. *Weston* v. *Sampson*, 8 Cush. 355; *Gerrish* v. *Union Wharf*, 26 Maine, 392; *Commonwealth* v. *Alger*, 7 Cush. 74; *Austin* v. *Carter*, 1 Mass. 231. 2. The right of fishing in the waters over the flats. *Weston* v. *Sampson*, *supra*; *Duncan* v. *Sylvester*, 24 Maine, 486; *Moulton* v. *Libby*, 37 Maine, 472; *Bagott* v. *Orr*, 2 B. & P. 472.

Courts have uniformly recognized these public rights to the waters over the flats, though the same were not expressly enumerated in the ordinance as reserved public rights. These are: 1. Bathing. *Fay* v. *Salem Aqua*. 111 Mass. 27; *Reservoir Co.* v. *Fall River*, 147 Mass. 558, 565. 2. Skating. Same cases. 3. The right to use the surface of the water over the flats when frozen the same as when unfrozen for public travel, including winter ice roads, and the driving and stopping of horses and teams. *French* v. *Camp*, 18 Maine, 433; *State* v. *Wilson*, 44 Maine, 25; *Roxbury* v. *Stoddard*, 7 Allen, 167. 4. The right to cut and take ice in common from the main river, which is essentially a modern right and in the amount of capital and men employed, and its importance as an industry, is perhaps the most available public right now existing in the navigable rivers of Maine. Gould on Waters, § 191; *Woodman* v. *Pitman*, 79 Maine, 456.

The court has recognized the right of the boat or vessel to anchor even to the soil of the flats, to let the boat remain resting on the flats themselves while the tide is out, and to use the soil of the flats both for mooring vessels and for lading and unlading them when the flats are bare. Gould on Waters, § 20. The right to moor vessels and discharge and take in cargoes and the use of the soil for these purposes is recognized in *State* v. *Wilson*, 42 Maine, 24. In *Gerrish* v. *Union Wharf*, 26 Maine, 392, it was held, that the right to use the waters covering flats

for navigation purposes was not abridged by the ordinance. That vessels had a right to pass over the flats when covered and to remain on them for commercial purposes when bare from ebb to flow of the tide.

So the right of the public to move and stand upon the flats for the purpose of fishing is recognized as an incidental right. *Packard* v. *Ryder*, 144 Mass. 440. In like manner, we claim that as essential to the public right of taking ice from the main river is involved the right of the public to pass and repass over the ice covering the flats with the same freedom as on the main river, including, wherever it might be necessary, the right even to haul the ice over the flats even when bare.

The ordinance of 1647 made no alteration in the use of places there described "as flats, while they were covered with water," &c. *Com.* v. *Alger*, 7 Cush. 53; *Dyer* v. *Curtis*, 72 Maine, 184, and cases.

The rights claimed by the defendants, in behalf of the public, do not involve any use of the soil itself of the flats, but only the surface of the water in its frozen state. Any use of the ice which would be authorized when the tide was up would also be authorized when the tide was out so long as the ice remains covering the flats.

As the fisherman has the right to plant his boat itself, which is one mode of artificial obstruction, even upon the soil of the flats for the purpose of taking his fish, and even of digging up the soil for the same purpose, could there be any doubt of his right when the water was frozen to plant an ice boat or a fisherman's hut upon the frozen surface in order that the full beneficial enjoyment of the public right of fishing? The temporary obstruction of meltable snow answers exactly to this analogy, and we submit it is a clear right in the public as incident and reasonably necessary to the full beneficial enjoyment of the admitted right of the public to take ice.

It will be further noted that this is a right of vastly greater public importance commercially, than the fisherman's right to build his hut, because if the ice cutter has not this essential right to scrape snow onto the unused flats, when covered, with

frozen water, then he must use the cutable ice of the main river for this purpose, and in that way abridge by many thousands of acres the available ice supply of all our navigable rivers. Now a single acre of cutable ice twelve inches in thickness will yield a thousand tons of ice, and the loss of this available tonnage all up and down the river would be of immense commercial value, and would be just so much property taken from the public and given to the private individuals upon the shores. We submit that policy in law is to increase rather than restrict public rights in all navigable waters whether frozen or unfrozen.

SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. This is an action to recover rent for the use of flats on the easterly shore of the Kennebec river, in the town of Dresden. The action has been referred, a hearing had, a report made, and the report accepted; and the case is before the law court on exceptions to the acceptance of the report. The award was in favor of the plaintiff and the Ice Company excepts.

The only question argued by counsel, and the only one we find it necessary to consider, is whether an ice company, operating upon one of our public rivers, has a right to deposit the snow scraped from its ice upon the flats of an adjoining owner, without the latter's consent.

We think the question must be answered in the negative. No case has been found which sustains such a right, and we do not think it can be maintained upon principle.

The argument urged in its support rests upon a supposed analogy between the rights of fishermen and the rights of ice-cutters. It is claimed that, if a fisherman may enter upon another's flats, and anchor his boat there, and dig up the soil in summer, or, in winter, place an ice boat or a hut upon the frozen surface, an ice-cutter, by analogy, should be allowed temporarily to incumber another's flats with the snow scraped from his ice.

We can not admit the soundness of this argument. Property rights can not be established by analogy alone. The fisherman

has a right to go upon another's flats to take his fish, because the ordinance of 1647, which gave to the adjoining owner the flats in front of his land, expressly reserved the right of fishery. The fisherman has a right to go upon another's flats because it is one of his reserved rights. But no such right was reserved to the ice-cutter. His right to cut ice upon our public rivers and ponds results from the fact that, below the line of low water, the state owns the beds of navigable rivers and great ponds, and holds them in trust for the public. Below the line of low water every one may cut ice. It is a public right. Above the line of low water, no such right exists. Nor does it exist upon non-navigable rivers or private ponds. Nor does it exist upon flats. And we fail to perceive how an ice company, operating upon one of our navigable rivers, can possess the right to deposit the snow scraped from its ice upon the flats of an adjoining owner, without the latter's consent. It is not among the reserved rights mentioned in the ordinance of 1647, nor, so far as we can discover, has the right thus to incumber another's land been recognized or affirmed by judicial decision, either in this country or in England. It is the opinion of the court that such a right does not exist.

Exceptions overruled.

FLAVIUS O. BEAL AND EZRA L. STERNS

vs.

JOSEPH P. BASS, AND EASTERN MAINE STATE FAIR.

Penobscot. Opinion March 31, 1894.

Partnership. Corporations. Estoppel. Lease.

The plaintiffs alleged that they and the defendant, Bass, formed a private business partnership for holding fairs, races, etc., with the view to the pecuniary profits thereof accruing to themselves personally; that as such partnership they had acquired and held a leasehold from the defendant, Bass, of the fair grounds, having made erections, constructions and improvements; and owned them as partnership assets together with a surplus in cash.

The prayer of the bill was for a dissolution of the partnership, a sale of the leasehold estate and a division of the proceeds, with the cash surplus, among the partners.

At the hearing upon the bill in the court below, before a single justice, it appearing to him that the parties had held themselves out, at first, as self-constituted trustees for the purpose of holding public fairs, and later, as trustees under authority of a legislative charter granted to the Eastern Maine State Fair, the plaintiffs were required to make the corporation a party to the suit.

Held; upon the facts found by the court that, whatever may have been the original understanding or design of the parties, they have so plainly and continuously held themselves out as managers, officials, and trustees of a public enterprise, and have thereby obtained so much public support and money, they are now estopped from asserting private ownership in all these public contributions.

Also, that the public having an interest in these proceedings, the corporation was a proper party to the bill.

The plaintiffs contended further that the corporation had ceased to exist and never had a legal board of executive officers.

Held; that they are estopped in these proceedings from denying the existence of the authority they had invoked and under which they assumed to act.

The defendant, Bass, claimed that the lease from him as owner of the fee had been forfeited by non-payment of rent. It appearing that the lease did not provide for a re-entry in case of non-payment of rents, nor for a forfeiture or termination of the lease in that event, *held*; that in the absence of such stipulations, the mere non-payment of rent does not work a forfeiture.

The court states the respective rights of the parties to the bill to be:

(1.) The Eastern Maine State Fair is in possession of the grounds, described in the bill, now under lease to the three personal parties in the suit. The corporation, as trustee for the public, has the title to the buildings and other improvements, subject to the lessees' rights to be re-imbursed for taxes paid by them and a reasonable rent for such time as the corporation, or its predecessors, have occupied their land for holding fairs. This claim for taxes and rent is, in equity, a lien on the property.

(2.) The three personal parties have each an undivided third part of the leasehold estate. If the plaintiffs elect to regard it as subsisting and not surrendered, they are entitled to a division to be effected by a sale.

(3.) The respective rights and duties of the three personal parties under the lease up to July 5, 1889, when defendant Bass claimed it was forfeited, can be determined in an action at law. Those rights and duties accruing after that date will depend upon whether the plaintiffs elect to claim their leasehold interest, or elect to abandon it.

IN EQUITY.

This was a bill in equity, heard by a single justice, in the court below, on bill, answers and testimony. The following decree was there made:

"This cause came on for hearing on the second day of April, A. D., 1892, and was argued by counsel and was thence held for advisement until the sixteenth of June, A. D., 1892, when

the opinion of the presiding justice was filed and the cause was further held for advisement and to enable the defendant corporation, the Eastern Maine State Fair, to accept the benefits provisionally tendered it in the opinion, which have since that day been rejected by said corporation.

"It is therefore ordered, adjudged and decreed at these September Rules, to wit, on the thirteenth day of September, 1892, that the unexpired term of fifty years, to wit, fifty years from July 1, 1883, in Maplewood Park and fair ground in Bangor, including five acres purchased of Stone by Joseph P. Bass as a part of said park and fair ground, at an annual rental of five hundred dollars, and all taxes assessed thereon, the rent being payable semi-annually to said Bass during the remainder of said term, be sold at public auction to the highest bidder, and that the parties to this suit be required to execute a lease of the whole of said premises to such purchasers upon the same terms and conditions (except as to amount of rent) named in the lease from Joseph P. Bass to Messrs. Beal and Sterns of two undivided thirds of said property, stipulating for the payment of rent as aforesaid, to wit, five hundred dollars per annum, payable semi-annually, and taxes assessed thereon for the remainder of said term.

"It is further ordered, adjudged and decreed that any of the parties to this suit may become purchasers at said sale, and that in such case such releases or conveyances be required as will work out the purposes of this decree.

"It is further ordered, adjudged and decreed that Jasper Hutchings, Esquire, be appointed receiver to conduct said sale, first giving bond with sureties to the clerk of the court and his successors in office for the benefit of whom it may concern in the penal sum of $10,000, conditioned for the faithful discharge of his office. That he advertise said sale in some or all of the Bangor papers and otherwise as his judgment may determine for at least thirty days before the day of sale.

"It is further ordered, adjudged and decreed that said receiver apply the proceeds of said sale, first, to the expenses thereof, including his own fees as allowed by the court. Second, to the

costs of this suit. Third, to the payment of the sums due said Bass, Beal and Sterns, respectively, as adjudged in the opinion filed in this cause, *pro rata*, or in full as he may be able to do, and if any balance remains he is to pay the same into the registry of this court to be disposed of as the court may consider.

"It is further ordered, adjudged and decreed that to any sum so paid into the registry of this court as aforesaid, any party who may have an equitable claim thereto may intervene to the end that such fund may be disposed of as equity and right may require, and that this decree may be considered a final decree for all purposes of appeal if any party may so desire."

The cause was heard on appeal by the full court.

The facts are stated in the opinion.

F. A. Wilson and *C. F. Woodard*, *F. H. Appleton and H. R. Chaplin*, for plaintiffs.

J. W. Symonds, for J. P. Bass.

A. L. Simpson, for Eastern Maine State Fair.

SITTING: LIBBEY, EMERY, FOSTER, WHITEHOUSE, WISWELL, JJ.

EMERY, J. This is an equity appeal with a long record in which able and diligent counsel have placed every circumstance they thought might support their various contentions. We have studied the whole record in every detail, but in stating the case, to save space and preserve clearness, we can only recite what seems to us to be important, controlling facts, and where there is a conflict of evidence, state simply our conclusions.

Flavius O. Beal, Ezra L. Sterns and Joseph P. Bass, the personal parties to this suit, were all citizens of Bangor each having large property interests in and about that city, and each having more or less taste for good horses, cattle and farms. Sometime in the latter part of 1882, or early part of 1883, Mr. Beal and Mr. Bass had a conference as to the desirability and feasibility of establishing a driving park and fair grounds in Bangor, and having an annual fair and races held there for the eastern part of the State, the State Fair having been located permanently at Lewiston. With a view to an incorporation

under the general law which required three persons, they asked Mr. Sterns to incorporate with them, which he agreed to do.

These three gentlemen determined to proceed with the enterprise thus suggested, and in order to provide necessary grounds they purchased in June, 1883, a leasehold estate of fifty years from January 1st, 1883, in the land of Mr. Bass which is now known as Maplewood Park in Bangor, at a yearly rental of four hundred and fifty dollars. Mr. Beal and Mr. Sterns stipulated to pay three hundred dollars of this annual rental. Mr. Bass being the owner of the fee furnished the other third. A lease between Mr. Bass and Messrs. Beal and Sterns was executed to effect this arrangement.

The parties to raise the necessary funds, prepared and circulated throughout Bangor subscription papers in aid of the enterprise. These papers were of the following tenor, viz.: "We, the undersigned agree to pay F. O. Beal, J. P. Bass and E. L. Sterns the sums set against our names for the purpose of establishing a park in the city of Bangor to be known as the Eastern Maine Fair Grounds; and to pay the same as assessed for the construction of a race track, and suitable buildings to be constructed on land purchased by J. P. Bass of George A. Stone, William H. Bussey and Lydia A. Jewett in said Bangor; the grounds to be laid out by a competent engineer and contain thirty-five acres more or less. All the money subscribed to be laid out in the construction of a track, fence, buildings and other improvements as the managers may decide."

Mr. Beal, Mr. Sterns and Mr. Bass each subscribed four hundred dollars on these papers. There were obtained from other subscribers over $5000.

The parties also applied to the city council of Bangor for assistance for the enterprise, and obtained $1000 from that source.

In the meantime they raised $3500 upon their own individual note and began the construction of a necessary track and buildings for the fair ground on the leased land. They advertised a fair to be held upon these grounds, September 25 to 28 inclusive, advertising it as the "Eastern Maine Fair, President, Hon. J. P. Bass; General Superintendent, F. O Beal; Secretary, Ezra

L. Sterns; Treasurer, E. B. Nealley; Chief Marshal, Major F. H. Strickland." Mr. Nealley did act to some extent as treasurer. The fair was held as advertised and the surplus proceeds devoted to the payment of loans and bills incurred for construction. The remaining liabilities were met or extended by discounting new notes of the parties or renewing old ones.

In September, 1884, the parties advertised and held another fair, this time as the Eastern Maine *State* Fair but under the same officers and auspices. The surplus proceeds of this fair were also devoted to the payment of the debt for construction. The city also granted them this year the sum of five hundred dollars which was applied in the same way.

In the following winter, 1885, at the first session of the Legisture after the enterprise was started, the parties applied for a special charter for a Fair Association, preferring such a charter to one under the general law by reason of the police powers conferred. They, with twenty-five other prominent men in the eastern part of the State, were incorporated by the name of "Eastern Maine State Fair" with the usual powers and duties of agricultural societies under the general law of the State. No capital stock or stockholders were provided for in the charter.

Pursuant to this charter, Messrs. Beal, Sterns and Bass of the corporators called the first meeting of the corporators to be held at Bangor, April 14, 1885. At that meeting and at an adjourned meeting thereof, all three of the present parties appeared with several other corporators; accepted the charter, and organized the corporation in the usual manner. Under the by-laws adopted, there was to be a board of twenty-five trustees chosen by the corporation, and a board of "executive officers" consisting of a president, vice-president, secretary, treasurer and auditor, to be chosen by the trustees. Each of these executive officers was to hold office until another was chosen in his place, and vacancies could be filled by the board.

Pursuant to these by-laws twenty-five trustees were chosen at the meeting. A meeting of these trustees was called the same day immediately after the adjournment of the corporate meeting, and they elected Mr. Bass, president; Mr. Beal,

vice-president; Mr. Sterns, secretary; Mr. Nealley, treasurer and Mr. Simpson, auditor. The validity of this meeting of these trustees has since been questioned, but that will be discussed hereafter.

In the meantime, subscriptions of twenty dollars each had been procured from some eighty odd persons to constitute them life members of the corporation; and after the organization, Mr. Sterns, as secretary, issued to these subscribers a certificate of membership, stating that the holder was entitled to the privileges of the association.

Fairs were advertised and held in each of the years 1885, 1886, 1887 and 1888, in the name of the Eastern Maine State Fair, J. P. Bass, president; F. O. Beal, vice-president; Ezra L. Sterns, secretary; E. B. Nealley, treasurer; A. L. Simpson, auditor. During these years the managers received over $1600 paid for life membership in the corporation. They also received from this State the stipend voted by the Legislature to the corporation for holding fairs. This stipend amounted to $3000. In the year 1887, a personal injury was received upon the fair grounds for which a suit was brought against the corporation, and defended by counsel assuming to appear for the corporation, and directed to so appear by the managers of the fair.

At the close of the fair of 1888, it was found that the surplus receipts of the various fairs and the various money contributions of citizens, city and State, in aid of the enterprise had paid all the construction account, relieved Messrs. Beal, Sterns and Bass from all the liability incurred by them, except the rental and taxes for the land, and left a balance of $2231.73 to the credit of Eastern Maine State Fair.

So far, there seems to have been reasonable harmony of opinion among these parties, and if any one of them was specially active and persistent, the others seemed to have acquiesced. The rent, however, had not been paid except the first installment. Messrs. Beal and Sterns had several times suggested paying the rent out of the receipts, but Mr. Bass had suggested that it stand until the fair was better established. Now, to-wit: in the spring of 1889, Mr. Beal and Mr. Sterns desired that the surplus of $2231.73 be applied to the rents.

Mr. Bass urged that it should be applied to making what he thought were necessary improvements in the track. No agreement was reached and Mr. Bass, being the president of the fair, soon afterward began to expend the money in making changes in the track. Mr. Beal thereupon served upon him, June 11th, a written notice of dissent and insistence that the money should be applied to the rents. Mr. Bass replied by a written notice, July 5th following, that he had taken possession of the land as owner of the fee for forfeiture of the leasehold estate for non-payment of rent.

About the same time, Mr. Beal sent to Mr. Sterns as secretary of the Eastern Maine State Fair, a written resignation of his office as vice-president, which fact was published in the Bangor newspapers. He withdrew the resignation from the secretary but not before it had been shown to Mr. Bass. The latter after seeing the letter of resignation called a meeting of the executive officers, who assumed to accept the resignation of Mr. Beal and elect Mr. Greely vice-president in his place. They also assumed to ratify Mr. Bass's expenditure of the money. Mr. Sterns does not seem to have formally resigned or been superseded. Neither Mr. Beal nor Mr. Sterns, however, took any part in any fairs or in any proceedings of the association or its officers subsequent to July 5th, 1889. Mr. Bass and the other associates, including Mr. Greely, all assuming to be, and to act as executive officers of the corporation, have held and managed fairs on the same grounds annually up to this time.

These differences of opinion between these three parties, led to a suit at law by Mr. Bass against Messrs. Beal and Sterns for the recovery of the rent up to July 5, 1889, and to this bill in equity by Messrs. Beal and Sterns against Bass.

We have now to review the allegations and proceedings in this suit in equity:

The plaintiffs, Messrs. Beal and Sterns, allege that at the outset the three, Beal, Sterns and Bass, formed a private business partnership to carry on the business of holding fairs, races, etc., with the view to the pecuniary profits thereof,

accruing to themselves personally; that, as such a partnership, they acquired and held the leasehold estate, made the various erections, constructions and improvements; and now own them as partnership assets together with the surplus heretofore stated of $2231.73. Their prayer is that the partnership be dissolved, and that the leasehold estate and the other property be sold; and that the proceeds, with the cash surplus, be divided among them as partners.

The justice hearing this cause in the first instance, was not convinced of the correctness of this claim, but was led by the evidence to believe that the parties had held themselves out, at first, as self-constituted trustees for the public purpose of holding fairs, and later as trustees under authority of the legislative charter. He thereupon required the plaintiffs to make the corporation, the Eastern Maine State Fair, a party to the suit, which the plaintiffs did under protest.

This question of partnership or trusteeship, is the main question in the case, and our view of the evidence does not require us to overrule or reverse the finding of the justice of the first instance in that particular. The subscription papers prepared by the parties at the outset, and which they signed themselves, and upon which they collected several thousand dollars from citizens of Bangor, did not hint that it was a private enterprise. They stipulated that the money should be laid out in construction of track, buildings and other improvements "as the *managers* may decide." In advertising and holding the first two fairs, they did not describe themselves as a firm, nor as owners, but as officers, Mr. Bass as president, Mr. Sterns as secretary, Mr. Beal as general superintendent. An office implies a service, a duty, a trust to be performed. They sought incorporation, as an agricultural society, without stock or chance for dividends. They held up the charter thus obtained, as their lawful oriflamme, and under it, they professed to serve as officers or trustees, Mr. Bass again as president, Mr. Sterns as secretary, and Mr. Beal this time as vice-president. As such officers, they drew from the State treasury stipends never appropriated nor intended for private firms. With this

same banner flying, they gathered some $1600 more from citizens of Bangor as fees for life membership in the association. They have in their official guises, received from popular subscriptions $6600 and from the public treasury, state and city, $4500. In the same guise, they gathered enough additional funds by attendance of the people at the various fairs, to construct buildings and improve the grounds at Maplewood park until they are said by Mr. Beal to be worth $30,000.

Whatever may have been the original understanding or design of the parties, they have so plainly and continuously held themselves out as managers, officials, trustees of a public enterprise, and have thereby obtained so much public support and money, they are now estopped from asserting private ownership in all these public contributions. After coming to this conclusion we might in strictness dismiss the bill, since the main question is determined against the plaintiffs; but to do so will not terminate the litigation, as the respective rights of the parties would remain undetermined. For this reason and because of suggestions at the argument it seems best to retain the bill for such amendments and further proceedings as may determine and enforce these rights. We, therefore, proceed with the consideration of some other questions raised in the arguments.

The plaintiffs contend that the original three parties are the only proper parties in this proceeding; but, assuming the correctness of our conclusion stated just above, it must be apparent that other parties, the public, do have an interest in the proceedings; in the disposition of this property, and that some person representing those interests should be made a party to the bill. The "Eastern Maine State Fair" is clearly such person. The Legislature for the people and at the request of the original parties, created the "Eastern Maine State Fair" to take charge over this enterprise and its assets, as trustees for the public. It was properly made a party to this bill to look after the interests thus intrusted to it.

The plaintiffs further contend that the Eastern Maine State Fair, though authorized to exist, never in fact did exist, or if it ever breathed, it at once ceased to breathe; that it cannot now

be regarded as an existing corporation or party in any proceedings. They claim that no meeting has been held since that for organization, that the trustees never had a legal meeting for want of a quorum, hence there was never a legal board of executive officers, that there never was a legal meeting of even a *de facto* board. The plaintiffs, however, took part in the organization, took part in the meeting of the trustees, took office under the trustees, acted as such officers, drew the stipends appropriated to the corporation. Any irregularities or omissions in the matter of meetings of members, trustees, or officers, the plaintiffs are more or less responsible for. They are clearly estopped now from denying the existence of the authority they invoked, and under which they assumed to act. The State has repeatedly recognized the existence of the corporation by making appropriations for its benefit, and paying them over to persons assuming to be its officers.

However careless the officers and members of the corporation may have been in the matter of meetings and records, it still has an existence and character sufficient for it to be a party to these present proceedings. At least, the plaintiffs cannot be heard to say that it has not.

There remains the original fifty-year leasehold estate, which the three parties acquired, and for the rental of two thirds of which, the plaintiffs became responsible to the owner of the fee. The defendant, Mr. Bass, speaking now as owner of the fee, claims that this estate was extinguished by forfeiture for non-payment of rent July 5, 1889, and hence is no longer a subject for consideration. He assumed at that time, July 5, to make an entry to resume possession as owner of the fee, and to terminate the leasehold estate for non-payment of rent, and he gave written notice thereof to the plaintiffs.

The instrument creating the estate did not provide for any re-entry for non-payment of rent, nor for any forfeiture or termination of the estate in that event. In the absence of any such stipulation, the mere non-payment of rent does not work a forfeiture of the estate. Taylor's Landlord and Tenant, 359.

The defendant further claims that the plaintiffs, by making

no objection to his taking possession, and making no effort to regain possession, have thus voluntarily terminated the estate. The virtual possession however had been in the Eastern Maine State Fair for three years previous to the alleged entry, and continued in the same association afterward. We find no evidence of voluntary surrender of their estate by the plaintiffs. So far as this case shows, the leasehold estate still exists for the remainder of the term and each party owns one third of it.

Mr. Bass afterward assumed to lease the land to the corporation but of course that act of Mr. Bass and the corporation, does not destroy the interests or rights of Messrs. Beal and Sterns in the premises. Nevertheless, the acts of Mr. Bass have been such that he cannot deny the termination of the leasehold estate, in case Messrs. Beal and Sterns elect to consider it terminated. Should they conclude to regard Mr. Bass's entry, in July, 1889, as a resumption by him of his original estate, Mr. Bass could not effectually claim that it was not.

We may now state with more brevity our views of the respective rights of each party to this bill.

I. The Eastern Maine State Fair, the association so named, is in possession of the grounds, the tract of land, described in the bill and in which Messrs. Beal, Sterns and Bass have a leasehold estate. The corporation party as trustee for the public has the title to the buildings and other improvements on those grounds, subject to the rights of the three personal parties to receive the taxes paid by them, and a reasonable rent for such time as the corporation or its predecessors have occupied their land for holding fairs. All advances made by any of the parties, except taxes paid, are admitted to have been re-imbursed; and such taxes and a reasonable rent comprise now the only claim against the property so held by the corporation.

This claim, however, is in equity a lien on that property, it being equitable that the enterprise by whomsoever managed, should pay all the rent and taxes from the beginning. It is well settled that such claims may be enforced by equity proceedings.

II. Messrs. Beal, Sterns and Bass have each an undivided third part of the leasehold estate described in the bill, viz: — a

fifty-year lease of the land from January 1st, 1883. Messrs. Beal and Sterns have not necessarily forfeited their interests, and if they elect to regard the leasehold estate as still subsisting, as not surrendered by them, they are entitled to a division of the estate. This division evidently can only be satisfactorily made by a sale of the estate and a division of the proceeds. This fact confers jurisdiction in equity.

III. The respective rights and duties of Messrs. Beal, Sterns and Bass up to July 5th, 1889, under the instrument signed by them to create the leasehold estate can be determined in the action at law. As to those rights and duties accruing after that date, they will depend upon whether Messrs. Beal and Sterns elect to claim their leasehold interest as still existing after that date, or elect to abandon it to Mr. Bass under his claim of entry and forfeiture of that date.

There remain to be determined the following questions, (1) What is the amount of the taxes paid? (2) What is the reasonable rent for the use of the land, no particular sum having been stipulated? (3) What is the relative or proportional value of the leasehold estate belonging to Messrs. Beal, Sterns and Bass, and the buildings and other improvements belonging to the fair corporation?

We think the further procedure may be substantially as follows: The cause may stand over for thirty days after the filing of this opinion, within which time the plaintiffs may amend or reform their bill to state and enforce their rights as indicated in this opinion; and in the amendment elect whether they retain or abandon their interest in the leasehold estate since July 5, 1889. If they decline to amend then the bill should be dismissed. If the amendment is made, then the case should be sent to a master to ascertain the amounts that are to be paid by the fair corporation for taxes and rents up to such time as the plaintiffs elect to claim an existing leasehold estate; and also to ascertain the proportion of the value between the leasehold estate and the improvements. Upon the coming in of the master's report, a time can be fixed within which the fair corpo-

ration may pay the sum found due. Should it fail to pay within that time, then the leasehold estate, if such be claimed, and the improvements can be sold, and the proceeds divided according to the relative value of each as found by the master, the value of the leasehold going to Messrs. Beal, Sterns and Bass, one third to each, the value of the improvements to be applied to the payment of rent and taxes due to the same parties, one third to each, and the surplus to be paid over to the Eastern Maine State Fair. Of course, out of the proceeds of the sale if made, must first be taken the costs and expenses thereof. The costs of this suit can be hereafter determined and provided for.

The details of the necessary orders and decrees can be settled by a single justice.

The interlocutory decree making the Eastern Maine State Fair a party is affirmed. The final decree is vacated and the case remanded for further proceedings according to this opinion.

JOHN H. MITCHELL

vs.

JOB ABBOTT AND ALBERT F. BRADBURY.

Somerset. Opinion March 31, 1894.

Contract. Offer of Reward. Acceptance. Revocation.

An offer of reward for the detection of an offender or the recovery of property is a proposal merely; if acted upon before revocation, the offer and acceptance by performance become a valid contract for a sufficient consideration. It may be revoked at any time before acceptance.

If such an offer is not accepted within a reasonable time after it is made, the law will conclusively presume that it has been revoked.

A lapse of twelve years between the time that a reward is offered and the time of performance is more than a reasonable time, and in the absence of other facts the offer will be presumed to have been revoked.

ON REPORT.

Assumpsit to recover a reward of one thousand dollars, offered for the detection of the murderers of treasurer Barron, of the Dexter Savings Bank. The offer of reward was as follows:

"$1000, Reward. On the 22d, instant, Dexter Savings Bank was entered, treasurer Barron murdered, and an unsuccessful attempt made to rob the safe, less than one hundred dollars taken. The trustees of the bank do hereby offer a reward of one thousand dollars for the detection of the murderers, or any one of them. A. F. Bradbury, President."

The offer of reward was published at Dexter, February 23, 1878. The writ is dated January 11, 1893.

There were five trustees of the bank at the time when the reward was offered. Two of them have since deceased and another removed from the State. The action is brought against the two remaining members of the board within the State. They appeared at the first term and filed a general demurrer.

It was admitted that David L. Stain and Oliver Cromwell, were indicted and convicted of the murder of Barron, in this court, in Penobscot county, and were sentenced by the court, March 31, 1890, to the state's prison for life. The case is reported in 82 Maine, 472.

Walton and Walton, for plaintiff.

Defendants, and not the bank, liable. *Franklin Co.* v. *Lewiston Inst. for Savings*, 68 Maine, 43; *Gale* v. *South Berwick*, 51 Maine, 174; *Simpson* v. *Garland*, 72 Maine, 40, and cases; *Ross* v. *Brown*, 74 Maine, 352; *Winship* v. *Smith*, 61 Maine, 118; *Rendell* v. *Harriman*, 75 Maine, p. 503, and cases; *Davis* v. *England*, 141 Mass. 587; *Barlow* v. *Society*, 8 Allen, 462, and cases.

Record of conviction admissible and conclusive, except defendants may show it was procured by plaintiff's fraud, &c.

Limitations: Offer unlimited. Not barred. *In matter of Kelley*, 39 Conn. 159; *Ryer* v. *Stockwell*, 14 Cal. 134. (73 Am. Dec. 634, note.)

Crosby and Crosby, for defendants.

The offer was made by the trustees as officials. They are not personally liable. *Ricord* v. *R. R. Co.* 15 Nev. 167; *Am. Exp. Co.* v. *Patterson*, 73 Ind. 430; *Kelsey* v. *Bank*, 69 Pa. 426; 1 Morawetz Corp. § 424; *Simpson* v. *Garland*, 72 Maine,

40; *Purrington* v. *Ins. Co. Id.* 22; *Nobleboro* v. *Clark*, 68 Maine, 87; *Winship* v. *Smith*, 61 Maine, 169; *Mann* v. *Chandler*, 9 Mass. 335.

Offer not accepted within a reasonable time. Question of detection of murderers open to defendants. Bigelow Estop. p. 47, and cases; 1 Greenl. Ev. § § 537, 538; *Butterick* v. *Holden*, 8 Cush. 233.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, WISWELL, JJ.

WISWELL, J. The plaintiff alleges that on the twenty-third day of February, 1878, the defendants published an offer of a reward; that upon the thirty-first day of March, 1890, the plaintiff performed the service which entitled him to the reward in accordance with the terms of the offer.

Various objections to the maintenance of the suit are suggested and argued by the defendants' counsel. It is only necessary to consider one, which, we think, is an insuperable objection to the maintenance of the action unless there are facts other than those set out in the plaintiff's declaration, viz: that the offer of reward was a proposal to continue for a reasonable time only, and that it ceased to be a proposal long before the time when the plaintiff alleges he accepted it by a performance of the service, for which the reward was to be paid.

The legal principles applicable to an offer of reward for the detection of an offender or the recovery of property are well understood. Such an offer is a proposal merely; if acted upon before revocation the offer and acceptance by a performance become a valid contract for a sufficient consideration. It may be revoked at any time before it is acted upon.

The offer in this case was unlimited as to time, and, so far as we know, was never withdrawn by the act of those making it. We think that the proper construction of such a proposal is, as contended by the defendants, that it must be accepted by performance within a reasonable time and that the law will, in the absence of other facts, conclusively presume a revocation after

a reasonable time. Otherwise it would be a perpetually continuing offer for all time. The statute of limitations would furnish no relief nor limit the continuance of the offer, provided only that the action be commenced within the statutory period after performance. Such a construction would be most unreasonable, and one that could neither have been intended by the persons making the offer, nor contemplated by one who twelve years later was instrumental in bringing about the detection of the offender.

Our view is fully sustained by the Massachusetts court in the case of *Loring* v. *Boston*, 7 Met. 409. In that case a lapse of three years and eight months was held to be beyond a reasonable time.

In this case it is not necessary to decide what would be a reasonable time during which the offer would continue. A lapse of more than twelve years between the time of making the offer and the time of performance is certainly much more than a reasonable time. We are forced to presume, therefore, a withdrawal or revocation of the offer before the time of acceptance.

The defendants filed a demurrer, the case was then reported to the law court for the determination of certain questions. Counsel upon both sides expressed a desire that the question considered, although not specially raised in the report, should be decided. This question is raised by the general demurrer and we have considered it alone because, unless the plaintiff can show other facts and circumstances than those alleged, it finally determines the rights of the plaintiff in this or any other action brought to recover this reward.

The plaintiff will have the right to amend the declaration at *nisi prius*, upon terms, if there are any other facts which can avail him.

Declaration adjudged defective. Demurrer sustained.

DAVID BROWN *vs.* NELSON HOWARD.

Androscoggin. Opinion March 31, 1894.

Attachment. Void Writ. Officer. Lien. Waiver.
R. S., c. 23, § 4; c. 83, § 7.

To make and retain a valid attachment of personal property, which can be immediately removed, there must be such a taking and retaining of possession as would render the officer, if not justified by his precept, liable to the owner in an action either of trespass *de bonis* or of trover.

A writ returnable to the municipal court for the city of Lewiston at a term thereof more than sixty days after it was made, contrary to the provisions of R. S., c. 83, § 7, is not voidable merely, but void, and affords no protection to an officer who attaches personal property upon it.

An officer who attaches personal property upon a void writ and who makes his return to that effect, cannot in an action of trover against him justify as a servant of the plaintiff in that writ, claiming that what he did was merely to take possession of the property for the purpose of enforcing a lien of the original plaintiff, when that plaintiff did not attempt to enforce a statutory lien, but sought his remedy in a common law action.

See *Starbird* v. *Brown*, 84 Maine, 238.

ON EXCEPTIONS.

Trover against the defendant, a deputy sheriff, submitted on an agreed statement of facts to the presiding justice, at *nisi prius*, when he gave judgment for the plaintiff, and the defendant excepted. It appears from the agreed statement of facts that the action was brought to recover the value of two heifers attached by the defendant upon a writ in favor of John Starbird, against the plaintiff, and returnable to the municipal court for the city of Lewiston, at its September term, 1892. The writ was not dated, but the defendant's return of his attachment thereon is dated June 26, 1892, and contains a count in trespass, *q. c.*, and a count on account annexed.

It was agreed that the cattle attached upon the writ were the property of the plaintiff, and were two and three years old respectively, and that neither was giving milk at the time. That at the time said cattle were attached, said plaintiff owned other cows, but that this attachment was made without the knowledge of the plaintiff in this suit, and without any opportunity being

afforded him to make any election as to which he would have exempt. The cattle were in possession of the plaintiff in the writ upon which they were attached at the time of the attachment, and he claimed and it was admitted for the purposes of this case only that he could prove, if admissible, that at the time of the attachment there was no pound or pound keeper in the city of Auburn; that the cattle were trespassing on the land of Starbird, and were taken by him while committing said trespass and shut up and detained by him until attached by the officer; and that they entered from the highway and not through any neglect on the part of Starbird, to maintain any partition fence.

That the cattle so taken by Starbird were detained by him until the damages occasioned by their said trespass should be paid by Brown.

Wallace H. White and Seth M. Carter, for plaintiff.

McGillicuddy and Morey, for defendant.

It does not appear that the defendant ever had the possession of the property or ever exercised any dominion over it. Without such proof the plaintiff cannot maintain this action. *Fernald* v. *Chase*, 37 Maine, p. 289.

Starbird had the right to the possession, Brown did not, until he should first pay the lien claim of Starbird. Although the attachment was void and the defendant could not justify as an officer, he might nevertheless defend the detention of the goods as the servant of the party having the lien. *Townsend* v. *Newell*, 14 Pick. 332.

The general statute providing that all writs in municipal and police courts should be made returnable not less than seven or more than sixty days after date, was enacted in 1876, subsequently to the act of 1871, creating municipal court of Lewiston. The general act passed subsequently to the special act does not repeal it. *State* v. *Cleland*, 68 Maine, p. 258; *Allen* v. *Somers*, 68 Maine, p. 247.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, WISWELL, JJ.

WISWELL, J. This is an action of trover to recover for the conversion of two heifers. It is admitted in the agreed statement of facts that the heifers were the property of the plaintiff and that they were attached by the defendant, a deputy sheriff, upon a writ in favor of John Starbird, against the plaintiff in this action.

It is claimed by the defendant's counsel that the case does not show a conversion and that for this reason the action cannot be maintained. To constitute a conversion there must have been either, a wrongful taking, a wrongful detainer, an illegal using, a misusing or an illegal assumption of ownership. *Fifield* v. *Maine Central R. R. Co.* 62 Maine, 77.

The case shows that the property was attached by the defendant; nothing else appearing, it must be inferred that there was a valid and sufficient attachment. It must be presumed, in the absence of facts showing the contrary, that the officer did his duty.

To effect and preserve a valid attachment of personal property, such as this in controversy, the officer must, either by himself or his servant, take and retain possession and control of the property attached or have the power of taking immediate possession. If the possession is abandoned the attachment is dissolved. *Nichols* v. *Patten*, 18 Maine, 238; *Weston* v. *Dorr*, 25 Maine, 176; *Wentworth* v. *Sawyer*, 76 Maine, 434. If such a taking and retaining possession, as is necessary to effect and retain a valid attachment of personal property of this description, is not justified by the precept, it would be wrongful, and sufficient to entitle the owner to maintain either trespass *de bonis* or trover.

The defendant's counsel relies upon the case of *Fernald* v. *Chase*, 37 Maine, 289, as supporting his contention that the mere fact that an attachment has been made by an officer does not necessarily show a conversion; but in that case there was evidence showing just what was done by the officer in making the attachment. He went upon the logs and counted them, he did not remove any of them, he did not leave any person in charge of them and the logs remained where they were for

about ten days when the attachment was discharged. It is said in the opinion in that case: "There does not appear to have been any valid attachment." And in all of the cases cited in that opinion, in which it was held that the action of trover could not be maintained, the evidence disclosed that the officer did not take any possession or control of the property.

The writ upon which the attachment was made affords the defendant no protection. Although bearing no date, it must have been made as early as June 26, 1892, because served upon that date. It was made returnable to the municipal court for the city of Lewiston, on the first Tuesday of September, more than sixty days after the time when it was made, contrary to the provisions of Revised Statutes, Chap. 83, § 7. This court has already held in that case, (*Starbird* v. *Brown*, 84 Maine, 238,) that the action should be dismissed for this reason. The writ upon which the attachment was made was not voidable merely but void. A writ or execution void for want of jurisdiction or otherwise can be no justification to a party thereto for any action under it. *Winchester* v. *Everett*, 80 Maine, 535. This defect was apparent on the face of the writ and disclosed to the officer a want of jurisdiction.

It is further claimed by the defendant's counsel that this action cannot be maintained because the heifers were not in the possession of the plaintiff, at the time that they were attached by the officer, but were in the possession of the plaintiff in the action upon which they were attached, having been taken by him while committing a trespass upon his land. It is admitted that the cattle entered upon the land of the plaintiff, in the original action, from the highway and not by reason of any neglect upon his part to maintain a partition fence. Under these circumstances, Starbird had various remedies. He might have distrained the cattle, *damage feasant*, and detained them in his custody, there being no pound in the city. *Mosher* v. *Jewett*, 63 Maine, 84; or, in an action of trespass against the owner or possessor of the beasts at the time of the damage, he might have preserved his lien by attachment of them. Instead of pursuing these statutory remedies, he elected to enforce his

common law remedy of an action of trespass, *q. c.* He did not attempt to preserve or enforce a lien but waived it.

The officer cannot justify as the servant of the plaintiff in the original writ, claiming that what he did was merely to take possession of the cattle for the purpose of enforcing Starbird's lien, because this is not what he did; he did nothing to enforce a lien, but attached the property upon a void precept.

In the case of *Townsend* v. *Newell*, 14 Pick. 332, relied upon by the defendant's counsel as supporting to some extent his contention upon this point, the court says, "It seems doubtful whether his writ was designed to cover both of his demands against John Townsend; but however this may be, it was clearly his intention to retain his lien, and we are satisfied that he did not discharge it by his attachment and receipt."

In this case it is clear that the plaintiff in the original action did not attempt or intend to preserve his lien but resorted to another remedy.

Exceptions overruled.

ESTELLE FOSTER EATON, in equity,

vs.

JESSIE A. MCCALL.

Kennebec. Opinion March 31, 1894.

Equity. Mortgage. Foreclosure. Land beyond State.

In a bill in equity between residents of this State to foreclose a mortgage upon real estate situated in another jurisdiction, after a breach of conditions, this court may, whenever it is necessary in order to prevent loss or protect the rights of a mortgagee, by proper decrees compel the mortgagor to convey to the mortgagee, by release deed, the equity of redemption, after default in payment of the amount ascertained to be due within the time fixed by the court.

But ordinarily the holder of a mortgage should be required to resort to the remedies or to the courts of the jurisdiction in which the land is situated, and this court will not grant relief in such a case unless unusual or extraordinary circumstances exist and are alleged, showing the necessity of such relief in order to prevent loss or protect the rights of the holder of the mortgage.

ON REPORT.

Bill in equity to foreclose a mortgage. The defendant did not appear and judgment *pro confesso* was taken.

The case is stated in the opinion.

The following is the prayer of the bill:

"Fifth. Wherefore, your complainant prays that the said Jessie A. McCall may be ordered to pay the debt and interest secured by said mortgage and in default thereof to be forever debarred from redemption of the premises therein described.

"Sixth. Your complainant says that said land lies in a district having an office and system for the registry of conveyances of land; wherefore, she prays that there may be a further order to the effect that, in the event of said Jessie A. McCall's failing to pay the debt and interest secured by said mortgage within the time limited therefor by the court, then she shall execute and deliver to your complainant a good and sufficient deed of quitclaim and release, so that the same may be recorded in the district where said land lies."

Harvey D. Eaton, for plaintiff.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, WISWELL, JJ.

WISWELL, J. Bill in equity between parties resident in this State to foreclose a mortgage upon real estate situated in Nova Scotia.

The defendant failing to appear, the bill was taken *pro confesso*. Afterwards on motion for a decree, the justice presiding at *nisi prius*, being doubtful as to the jurisdiction of this court, with the consent of counsel for the complainant, reported the case to the law court to determine whether the bill should be sustained, and what decree if any, should be made.

It is a familiar maxim of equity jurisprudence, that equity acts against the person. Where the subject matter is situated within another State or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which *directly* affects and operates upon the person of the defendant and not upon the subject matter, although the subject matter is

referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly*, affected by the relief granted. Pomeroy's Equity Jurisprudence, § 1318.

Common instances of such an exercise of equity powers, are where courts, having jurisdiction of the person, decree the specific performance of contracts to convey lands, enforce and regulate trusts, or relieve from fraud, actual or constructive, although the subject matter of the contract, trust or fraud, either real or personal property be situated in another State or country. A leading case upon this subject and one often cited in modern cases, is that of *Penn* v. *Lord Baltimore*, 1 Ves. 444, decided in 1750 by Lord Chancellor Hardwicke.

The fact of the *situs* of the land being without the commonwealth does not exempt defendant from jurisdiction, the subject of the suit, being the contract, and a court of equity dealing with persons, and compelling them to execute its decrees and transfer property within their control, whatever may be the *situs*. *Pingree* v. *Coffin*, 12 Gray, 288.

The principle is thus stated by the Federal Supreme Court: "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject matter, such courts consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by a process *in personam*." *Phelps* v. *McDonald*, 99 U. S. 298.

Our court in *Reed* v. *Reed*, 75 Maine, 264, sustained a bill and made the necessary decrees to redeem from a mortgage lands situated in the state of Wisconsin. And the court has in many cases proceeded and granted relief upon the maxim, *equitas agit in personam*.

The English chancery courts, regarding the right to redeem

as a mere personal right, and the decree for a foreclosure, a decree *in personam*, have often decreed the foreclosure of mortgages upon lands beyond the jurisdiction of the court. *Toller* v. *Carteret*, 2 Vern. 495; *Paget* v. *Ede*, L. R. 18 Eq. 118.

In this country the question has frequently arisen as to the power of an equity court to decree the foreclosure of a mortgage upon property situated both within and without the jurisdiction of the court. The doctrine is sustained by the highest authorities that a court having jurisdiction of the person of the mortgagor, or of the owner of the right to redeem, may decree such a foreclosure.

In *Muller* v. *Dows*, 4 Otto, 444, it was held that a U. S. Circuit Court for the District of Iowa, which had jurisdiction of the mortgagor and the trustees of the mortgage, could make a decree foreclosing a mortgage upon a railroad and its franchises and order a sale of the entire property although a portion of the property was in the state of Missouri. Mr. Justice Strong in delivering the opinion of the court said, "Without reference to the English Chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person may decree a conveyance by him of land in another State, and it may enforce the decree by a process against the defendant.

In *Union Trust Co.* v. *Olmstead*, 102 N. Y. 729, the plaintiff sought by foreclosure and sale to enforce a mortgage executed by the defendant corporation upon property, a part of which was situated in another State. The court held that although the decree of foreclosure might not be operative beyond the territorial limits of the jurisdiction, that the court might have required the mortgagor, being within the jurisdiction, to execute a conveyance of the property situated in the other State.

To the same effect are numerous other decisions by courts of the highest authority in this country, both Federal and State. After an examination of these authorities we have no doubt that

this court has the power to make a decree compelling a mortgagor, over whom it has jurisdiction, to make a conveyance of the mortgaged premises, after failure to pay the amount ascertained to be due, within the time fixed by a decree of the court, which time should not be less than the statutory period allowed for redemption in the place where the land is situated.

But as to when and under what circumstances this power should be exercised by the court, is, we think, another and quite different question. It must be remembered that no decree of the court would be operative except one against the mortgagor, or person having the right to redeem, commanding a conveyance. The court could not proceed in the usual and customary method by decreeing either a strict foreclosure or a foreclosure by a judicial sale. Neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court. *Watkins* v. *Holman*, 16 Pet. 25. A court cannot send its process into another State nor can it deliver possession of land in another jurisdiction. *Muller* v. *Dows*, *supra*. It can only accomplish foreclosure of such a mortgage by its decree *in personam*, compelling a conveyance.

We do not think that a chancery court should exercise this power except under unusual or extraordinary circumstances. Wherever it is necessary in order to prevent loss or to protect the rights of a mortgagee it may be done, for instance in the case of a mortgage upon property situated both within and without the State, where, unless a sale of the entire property could be made at one time, great loss might ensue, or in other cases where an equally good reason existed. But ordinarily we think that the holder of a mortgage should be required to resort to the remedies or the courts of the jurisdiction in which the land is situated. This is in accordance with the principle, than which none is better established, that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the same is situated. *Watkins* v. *Holman*, *supra*.

In this case there are no reasons, either alleged or apparent,

why the holder of this mortgage cannot foreclose the same according to the law of the place where the land is situated, without loss or great inconvenience.

We think therefore that the entry should be,

Bill dismissed without prejudice.

BETSEY LORING, in equity,

vs.

JACOB L. HAYES, and others.

Cumberland. Opinion March 31, 1894.

Will. Absolute Gift. Life Estate. "Also."

A testator bequeathed and devised certain specific articles of personal property and a pew in a meeting house to his wife for life, and in the same clause he made a further bequest, using the following language, "I also give and bequeath to my said wife, Betsey Loring, forty-five hundred dollars, to be paid to her in cash or in such personal securities as she may select from my estate." *Held*; That by this language the testator made an absolute gift to his wife, of the sum of forty-five hundred dollars; and that the meaning of the word "also" in this connection was "in addition" rather than "in like manner."

By a subsequent clause in the will, the testator bequeathed and devised to others all of the real and personal property given to his wife, that might remain unexpended at her decease. *Held;* that so far as the devise or bequest over applied to the absolute gift of forty-five hundred dollars, it was void.

ON REPORT.

Bill in equity, heard on bill, the allegations being taken as true by agreement of all the parties, to obtain the construction of the will of Perez Loring, deceased.

The material parts of the will are stated in the opinion of the court.

Nathan and Henry B. Cleaves, Henry W. Swasey, and Stephen C. Perry, for plaintiff.

Franklin M. Drew, and Leonard G. Roberts, for defendants.

The gift of $4500 to the plaintiff is limited like the other property, given to her in the second clause, to "her use during her natural life." Rule of construction. *Cotton* v. *Smithwick*, 66 Maine, p. 367.

Testator intended to provide for the support of his widow during her natural life, and then see to it that all of his property remaining and unexpended by his widow in her life-time, should go to his heirs instead of any portion going to her heirs. He evidently intended that his widow should continue to live in keeping with her style of living while his wife, but when that was accomplished, he felt his duty toward her and her family would be discharged, and he preferred that his heirs should have all the remainder of his estate rather than that any of it should go to his wife's heirs. The testator in no way, in his will, recognizes the heirs of his wife *eo nomine*, but he does remember with gifts his sister and a large number of his nephews and nieces by name. All that he gives his wife is contained in the second article of his will. All the rest of his estate he gives directly to his heirs upon his decease. No recognition of her heirs is made, no provision for them is provided. He gave to his wife for her use during her natural life his home with its furnishings as he should leave it, his horse and carriage, and a pew in the church, and then, that she might have an income to enable her to continue to occupy and use them as she had during their married life, he gave her $4500 for her life. No aid can be derived in the construction of this will from its punctuation as throughout the will the testator disregards the rules of punctuation. Disregarding then the punctuation, let us examine the words of article two, and try to find the true construction to be given to them. Both parties agree that everything enumerated down to and including the pew was given to the widow only during her life. We submit that the remaining gift in this article, namely, $4500, has the same limitation attached to it.

1. Because this is consistent with the purpose we think the testator had that all of his property should in the end go to his heirs and that the heirs of his wife should receive no part of it.

2. The word "also" used at the commencement of this last clause, means here "in like manner," and the commencement of this clause means, "I, in like manner" give and bequeath to my said wife Betsey Loring forty-five hundred dollars," etc., referring back to the limitation "for her use during her natural life."

This interpretation of the word "also" is in harmony with its definition and the rules of construction of wills. See *Caroline Morgan's Executor* v. *John Morgan's Trustee*, Court of Chancery, N. J., reported in Cent. Rep. January 6, 1887, p. 864, a similar case where the court discusses the matter of punctuation and the meaning of the word "also."

3. The construction claimed by the defendants is the only one consistent with the language of the testator used in the fifth article of his will. He says, "Fifth and upon the decease of my said wife I give bequeath and devise all that may remain unexpended of the real and personal or mixed estate given to my said wife in the second clause of this will to Jacob L. Hayes," and the other defendants. This language includes everything given to his wife in the second clause. He says "all."

His language shows that the testator had in mind both clauses of article two and, therefore, he could not have referred alone to the first clause of clause two. He said, "all that may remain unexpended." This word "unexpended" finds no application in the first clause of article two. In the first clause he gave his wife his house, furniture and housekeeping articles, horse, carriage, sleigh, harness, farming tools, watch, jewelry and pew. Not one piece of property which could be expended, and, therefore, the use of the word "unexpended" finds no application in the first clause, no application to the only property which the plaintiff says remains to be disposed of. If we examine the second clause of article two, we find property to which the word "unexpended" could be properly applied, namely, the forty-five hundred dollars. This is a species of property which can be expended.

All the property embraced in the first clause of article two is plainly either real or personal. But when we come to the second clause of article two, we find property which might properly be denominated "mixed," namely, "securities." The testator when he made his will, could not know whether his wife would prefer that the forty-five hundred dollars which he proposed to leave to her, should be paid to her in cash, or made up by selections from his notes and bonds secured by mortgage

on real estate, and that he might cover either contingency he used the word "mixed" estate in his enumeration of the remainder which his wife might leave. And, as a matter of fact, she did select securities for the whole amount of the forty-five hundred dollars except one hundred dollars in gold.

By thus applying the words "unexpended" and "mixed" every part of the will becomes intelligible and every clause and word are taken into consideration; nothing is rejected, and articles two and five mutually aid and give light to each other.

Plaintiff in reply.

The language of John Morgan's will is, "I give, devise and bequeath unto my beloved wife, Caroline Morgan, all of my household goods and furniture, also one third of the income or interest of my estate during her widowhood, in lieu of dower." And the words expressing the quantity of the estate were reserved till the end of the devising clause.

It is said in *Giles* v. *Melsom*, L. R. (6 H. L.) 24, cited in *Morgan* v. *Morgan*, *supra*, "The proviso being at the end of all the devises must have a meaning applicable to all, and not be treated as if placed at the end of one and thus be made applicable to one only."

As said in 8 Viner's Abridgment, 214, it has been decided, "If a man devise blackacre to one in tail, and also whiteacre, the devisee shall have an estate tail in whiteacre too, for this is all one sentence."

Sevinz, J., in 1 Modern Reports, English Courts, 130, has announced this doctrine as follows: "If A. gives blackacre to C. and his heirs, also whiteacre, this gives C. a fee in whiteacre," because the devise is all in one sentence. But the decision goes on to say that if there had been a separate sentence repeating the name of the devisee and the verb of gift — as is the fact in the case at bar — the words of the devise of blackacre in fee would not have enlarged the estate in whiteacre beyond an estate for life in C.

SITTING: PETERS, C. J., WALTON, LIBBEY, EMERY, HASKELL, WISWELL, JJ.

WISWELL, J. Bill in equity asking for the construction of a will. The only two clauses of the bill involved in the question presented, are as follows:

"Second. I give, bequeath and devise to my wife, Betsey, Loring, my house with all the buildings and the land adjoining the buildings, also all the furniture and housekeeping articles contained in my dwelling house in said Yarmouth to have and to hold the same for her use during her natural life, also my horse, carriage, sleigh, harness, farming tools, also my watch and jewelry, Pew No. 9 first Parish Church I also give and bequeath to my said wife, Betsey Loring Forty-five hundred dollars (4500) to be paid to her in cash or in such personal securities as she may select from my estate.

"Fifth And upon the decease of my said wife I give bequeath and devise all that may remain unexpended of the real and personal or mixed estate given to my said wife in the second clause of this will, to Jacob L. Hayes and others [naming them] to be divided equally between them share and share alike, to have and to hold to them, and each of them in severalty, their heirs and assigns forever."

The foregoing is an exact copy of the two clauses of the will (except the names of the devisees in the fifth clause) according to the report, including punctuation.

The only question is whether the last portion of the second clause, taken in connection with the fifth clause, gives to the widow the sum of forty-five hundred dollars absolutely, or only the use of that sum for her life, with or without the right to expend the same. "I also give and bequeath to my said wife, Betsey Loring forty-five hundred dollars (4500) to be paid to her in cash or in such personal securities as she may select from my estate."

This language is not only sufficient and appropriate to make an absolute bequest, but it is difficult to see how the testator could have used other or different words which would more clearly show his intention of making an absolute general bequest. The same language used in a devise of real estate would give the devisee an estate in fee simple.

But the counsel for the respondents urge that the use of the word, "also" in this paragraph, "I also give and bequeath," shows that the intention of the testator was to limit this bequest as he had the other devises and bequests in that clause. He says that the word means, "in like manner," and that the testator's intention was to bequeath this sum of money in like manner with the rest of the devises and bequests in the clause, that is, "for her use during her natural life."

The word "also," is used three times before in the same clause, once shortly before and twice after the words of limitation. Its use and connection in the two first instances after the words of limitation was undoubtedly such as to show an intention upon the part of the testator that the bequest of the specific articles of personal property, the horse, carriage and other things mentioned should be subject to the same limitation. The case of *Morgan* v. *Morgan*, 41 N. J. E. 235, relied upon by respondents' counsel is, we think, much more applicable to the use of the word, "also," in the instances that we have just referred to, than to its use in a separate and distinct paragraph, as this seems to be.

While it is true that one meaning of the word "also" is "in like manner," another and quite as common a meaning is "in addition," "besides," and we think that this is the sense with which it was used by the testator in this last paragraph.

The respondents' counsel further urge that the fifth clause of the will, wherein the testator devises and bequeaths unto Jacob L. Hayes and others "all that may remain unexpended of the real and personal or mixed estate given to my wife in the second clause of this will," at the decease of his wife, should be taken into consideration as showing that the bequest of this sum of forty-five hundred dollars was for life only.

Whether by this clause the testator intended to make a devise and gift over of all the property mentioned in the second clause, or only of that which was given for life can make no difference. It has long been a settled rule in this State, as well as elsewhere, that where by the terms of a devise or bequest an estate in fee simple of real estate, or an absolute gift of personal property is made, a

devise or gift over is void. *Jones* v. *Bacon*, 68 Maine, 34; *Stuart* v. *Walker*, 72 Maine, 146; *Mitchell* v. *Morse*, 77 Maine, 423.

In this case, the bequest of forty-five hundred dollars to the wife in cash or securities to be selected by her is absolute; there are no words of limitation that apply to that portion of the clause and it cannot be presumed that the testator intended a a life estate only, when the language used clearly indicates an intention to make an absolute gift.

Decree accordingly.

ALBERT W. PAINE, Administrator,

vs.

WILLIAM J. FORSAITH, and another, Trustees, and others.

Penobscot. Opinion March 31, 1894.

Trust. Appointment. Disposition. Duration. Termination.

Where property is given, granted or bequeathed to certain individuals to be used, appropriated and applied for their benefit, and in such manner that no other person, or persons, have or can have any interest in it, they thereby become in effect the absolute owners of it, and may exercise all the rights belonging to them in that relation.

The gift of the income of real estate is a gift of the real estate itself. The same rule applies as to personal property.

A grantor conveyed all of his property to his children in trust for certain purposes. The trust deed contained a provision that the sum of $10,000 should be raised from the trust property, to be subject to the appointment and distribution of the grantor "by will or other written instrument." By his will executed several years before his death he fully exercised the power of appointment and distribution reserved, and subsequently by a written instrument, made a few days before his death, he again exercised this power, making a different disposition of the fund. *Held;* that the subsequent exercise of the power of appointment by the written instrument revoked the exercise of that power in the previously executed will.

In the subsequent written instrument the appointor made use of substantially the following language: "I now desire that the following named persons shall receive the benefit of the $10,000. My wife, Amanda S., shall have paid to her annually the income of one third of the $10,000. The income of the remaining two thirds shall be equally divided between the children

of my son, Alfred, and the two daughters, of my daughter, Annie V." Then followed a provision to the effect that in the event of the death of either of the children of his son or of his daughter without issue, the share of the deceased should go to the surviving brother or sister. *Held;* that this was a full and complete disposition of the trust fund and that the rights of the persons named in said instrument are as follows:—

(1.) The widow is entitled to one third of the income of the fund during her life.

(2.) During the continuation of the trust, the remainder of the income shall be paid one half to the children of the son, Alfred, and the other half to the children of the daughter, Annie V.; in the event of the death of either, the share of the deceased to be paid to the children of the deceased, if any, if not, to the surviving brother or sister.

(3.) After the decease of the widow of the appointor, if all the parties who are then or may be interested desire the trust to terminate, this court could decree a termination of the trust and the conveyance or distribution of the trust fund to the persons then entitled, viz, one half to the children of Alfred and one half to the children of Annie V., if living; if any should have deceased at that time, then his or her children would take their deceased parents' share, and if no children, the share of the deceased would go to the surviving brother or sister.

(4.) If all the parties interested should not join in a request for a termination of the trust at that time, it would continue until it should be ascertained if either of the children of the appointor's son, Alfred, or of his daughter, Annie V., died without issue. When that fact becomes ascertained, distribution of the fund can be ordered in accordance with the terms of the written instrument and as indicated in the opinion.

On report.

Bill in equity, heard on bill, answers and facts agreed, to obtain the construction of certain instruments of trust in the estate of John W. Veazie, deceased.

The case is stated in the opinion.

Albert W. Paine, for plaintiff.

F. A. Wilson and C. F. Woodard, for trustees.

Jasper Hutchings, for Amanda S. Veazie.

Sitting: Libbey, Emery, Haskell, Whitehouse, Wiswell, JJ.

Wiswell, J. By a trust deed dated February 22nd, 1879, modified by an instrument dated a few days later, both delivered at the same time, John W. Veazie conveyed all his estate to

his two children, Alfred Veazie and Annie V. Forsaith, in trust for the purposes stated therein.

The trust was duly accepted by the said Alfred Veazie and the said Annie V. Forsaith, and subsequently, both having died, they were succeeded in the trust by the present trustees, William J. Forsaith and Mrs. Etta H. Veazie, in accordance with the provisions of the instrument creating the trust.

The original trust deed contained this provision, "Finally to provide from the income of the trust property or otherwise, within two years of my decease, the sum of ten thousand dollars, which shall be subject to my appointment and distribution, if I so choose, by will or other written instrument." John W. Veazie in his last will executed August 3rd, 1886, fully exercised this power of "appointment and distribution" by a bequest of the fund to Helen M. Lord of Yankton, Dakota, "in trust for the sole use and benefit of my grandson, Alfred Veazie, the only son of said Alfred Veazie, named in the trust deed."

Subsequently, by an instrument dated April 5th, 1891, a few days before his death, he made a different disposition of this ten thousand dollar fund. The language of that instrument, so far as necessary for a proper understanding of the question involved, is as follows, "I now desire that this $10,000 be kept by the present trustees (William J. Forsaith and Etta H. Veazie) of the trust property. . . . . I now desire that the following named persons shall receive the benefit of the $10,000. My wife, Amanda S. Veazie, shall have paid to her annually the income of one third of the $10,000. The income of the remaining two thirds shall be equally divided between the children of my son, Alfred, and the two daughters of my daughter, Annie V. Forsaith. Should Alice V. Towle or Alfred Veazie die and leave no children, then the share of the deceased shall revert to the surviving brother or sister as the case may be. In case of the death of Marion Forsaith or Annie Forsaith leaving no children then the shares of the deceased shall revert to the surviving sister. My wife shall, if she survives me, receive during her widowhood the income of one third of the $10,000,

and at her death the one third which she would have received if living shall be equally divided between Marion Forsaith, Annie Forsaith, Alice V. Towle and Alfred Veazie."

By a bill in equity, in which all of the persons interested are made parties, this court is asked to determine the rights of the parties under these various instruments.

That the exercise by Mr. Veazie of the power of appointment reserved by him in the original trust conveyance, by the written instrument dated April 5th, 1891, revoked the exercise of that power in the previously executed will, either in whole or in part, is too clear to require discussion or citation and is admitted to be the result by the counsel for all parties. If the power is completely and effectually exercised by the subsequent written deed, it entirely revokes the previous exercise of that power in the will.

It becomes necessary then, first to determine whether or not in the instrument dated April 6th, 1891, there is a complete and effectual disposition of this fund. The language is, "I now desire that the following named persons shall receive the benefit of the $10,000," and he then provides that his wife, during her widowhood should receive one third of the income and the children of his son, Alfred, and the two daughters of his daughter, Mrs. Forsaith, should receive the other two thirds.

The question as to what Mr. Veazie's intention was is not entirely free from doubt, but we are inclined to the opinion that he intended to make a full and complete distribution of this fund. We think that, by the use of the words "the benefit of the $10,000," he meant to give more than the income of that sum for a limited time or for life. The word "benefit" unrestricted means the whole benefit, the entire beneficial interest. Where property is given, granted or bequeathed to certain individuals to be used, appropriated and applied for their benefit, and in such a manner that no other person or persons have or can have any interest in it, they thereby become in effect the absolute owners of it, and may exercise all the rights belonging to them in that relation. *Smith* v. *Harrington*, 4 Allen, 566.

The same result is reached by the application of certain rules

of construction to that portion of the instrument which provides for the distribution of the income. It is a well-settled rule of law that a gift of the income of real estate is a gift of the real estate itself. The same rule applies as to personal property. The gift of the income of personal property is in contemplation of law a gift of the property itself. In the case of either real or personal property a gift of the income for life is a gift of the property for life, while a gift of a perpetual income is a gift of the fee of the real estate or of the absolute property in the personal estate. *Sampson* v. *Randall*, 72 Maine, 109.

In this instrument there were no words of limitation in regard to the payment of the income, except as to the widow, and except in the event of the death of either of the beneficiaries without issue, in which event the share of the one so dying is to go to the brother or sister. We think that a fair inference from the language used in regard to the death of either of the beneficiaries without issue, is that, in case of death with issue, such issue is entitled to the benefit of its parent's share of the fund.

It is undoubtedly true that, if the trust was to continue for the payment of the perpetual income, it would be void because of the rule against perpetuities; but we do not think that it is a necessary construction of the instrument that the trust should continue for such a length of time as to create a perpetuity. The instrument contains nothing as to the duration of the trust, except by inference from its purposes. It was undoubtedly the intention of Mr. Veazie that it should continue during the time that his widow may be entitled to one third of the income in accordance with the provisions of the instrument.

At the expiration of that time, if all the parties who are then or may be interested, desire that the trust should terminate, this court would have the power to decree a termination of the trust and the conveyance or distribution of the trust fund to the persons entitled. Perry on Trusts, § 920; *Smith* v. *Harrington*, 4 Allen, 566; *Bowditch* v. *Andrews*, 8 Allen, 339.

If all the parties interested should not join in a request for a termination of the trust at that time, it would have to continue until it was known whether or not either of the children of

Alfred Veazie or of Mrs. Forsaith died without issue, so as to ascertain who became entitled to any portion of the principal fund under that clause which provides that, in case of the death of either of the children of Alfred Veazie or of Mrs. Forsaith without issue, the share of such deceased should go to the brother or sister. But even in this latter event, the trust would terminate and the estate vest within the period allowed by law.

Our conclusions are that, by the instrument dated April 6th, 1891, Mr. Veazie fully and completely executed the power of appointment reserved to him in the original trust deed, thereby entirely revoking the previous exercise of that power in the will; that the present trustees will continue to hold the legal title to the trust property, and during the widowhood of Mrs. Amanda S. Veazie, pay one third of the income of said fund to her, one third to the children of Alfred Veazie and the other third to the children of Annie V. Forsaith; at the expiration of that time, if all of the parties who are or may be interested do not join in a request to have the trust terminated, it will continue for the purposes above indicated; in the latter event distribution of the income should be made as provided in the instrument, viz, one half to the children of Alfred Veazie and one half to the children of Mrs. Forsaith. *Decree accordingly.*

INHABITANTS OF ORONO *vs.* DANIEL EMERY.

Penobscot. Opinion March 31, 1894.

Tax. Suit. Written Directions. Pleading. Proof. R. S., c. 6, § § 141, 175.

The selectmen of a town gave a direction in writing to the tax collector of the town, properly dated, directed to the collector and signed by the selectmen, of the following tenor, "Sir: You are hereby ordered to collect by due process of law, by suit or otherwise, all the taxes remaining unpaid to date." *Held;* that this was not a direction to commence an action of debt in the name of the inhabitants of the town, as required by R. S., c. 6, § 175; and that without such a direction an action for the recovery of taxes in the name of the inhabitants of the town cannot be maintained.

In an action for the recovery of taxes in the name of the inhabitants of a town, the failure to prove such a written direction as is required by the statute, may be taken advantage of in defense under a plea of the general issue.

ON EXCEPTIONS.

Action of debt to recover taxes assessed against the defendant, a resident of the town of Orono.

Declaration: "For that the said Daniel Emery, on the first day of April, A. D., 1887, was an inhabitant of said Orono, and liable to be taxed therein, and the assessors of taxes for the year A. D., 1887, duly elected and legally qualified, assessed upon said Emery the sum of $18.40, on his land and buildings thereon, on the north side of Mill street, his homestead; $13.80, on land and buildings thereon on south side of Mill street, corner of Pleasant street, occupied by him as a shop, and three dollars for his poll tax, in all the sum of $35.20, said sum being his proportion of the town, county and State tax for said year 1887. And the said assessors did on the 20th day of June, A. D., 1887, make a perfect list of said taxes under their hands, and commit the same to the hands of Alanson Kenney, collector of said town for said year, who was duly elected and duly qualified with a warrant in due form of law for said year, under their hands of the date aforesaid. And the plaintiffs aver that the said tax was duly and seasonably demanded of said Emery by said collector prior to the commencement of the suit, whereby and by reason of the statute in such case made and provided, the defendant became liable and an action hath accrued to the plaintiffs, to have and recover of the said defendant the sum of $35.20, of which sum said Emery has paid the amount of $25.20, and no more, and owes the balance, to wit, the sum of ten dollars and interest on same from August 1st, 1887. And the plaintiffs further aver that the selectmen of said town, on the 3d day of September, A. D. 1887, in writing by them signed, directed this action to be commenced; to the damage," &c.

Plea, general issue.

The municipal officers testified that they employed counsel to attend to this case and sanctioned the prosecution; that as selectmen they approved the prosecution of the suit and were directing it; and that the notice was given to bring suits in several cases such as the collector saw fit to bring in the name

of the town. The written direction to the collector is stated in the opinion.

The action, which came into this court upon an appeal by the plaintiffs from a trial justice, was heard before the presiding justice, who ruled that the action could be maintained upon the evidence, for the unpaid balance due, and the defendant took exceptions.

Jasper Hutchings, for plaintiffs.

Pleading the general issue is a waiver of objection that the written directions were not given according to the statute, if they are not good. 1 Chit. Pl. p. 446; *Boynton* v. *Willard*, 10 Pick. 166; *Walpole* v. *Gray*, 11 Allen, p. 149, and cases; *Littlefield* v. *Pinkham*, 72 Maine, 369; *Trustees, &c.* v. *Kendrick*, 12 Maine, 381; *Savage Mfg. Co.* v. *Armstrong*, 17 Maine, 34; *Kellar* v. *Savage*, 20 Maine, 199.

The court will not require technical precision or accuracy of town officers in the wording of this notice. It can be no objection to this order that it is in the alternative.

The selectmen authorized this suit by word of mouth and are here prosecuting it. This serves equally well to guard against abuse of the power to bring suit in the name of the town as a written order, and is a sufficient substitute for a writing.

T. W. Vose, for defendant.

SITTING: PETERS, C. J., EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

WISWELL, J. This is an action brought in the name of the inhabitants of a town to recover a tax aseessed against the defendant in the plaintiff town, for the year 1887, under section 175, chap. 6, of the Revised Statutes. No question is made as to the legality of the assessment, but it is claimed by the defense that the action cannot be maintained because the requirements of this section were not observed.

The section so far as applicable to the question under consideration is as follows: "In addition to the other provisions for the collection of taxes duly assessed, the mayor and treasurer

of any city, the selectmen of any town, and the assessors of any plantation to which a tax is due, may in writing direct an action of debt to be commenced in the name of such city or of the inhabitants of such a town or plantation, against the party liable."

The direction alleged in the writ and relied upon by the plaintiffs is as follows:

"Orono, September 3d, 1887.

"To Alanson Kenney, Collector of Taxes for Town of Orono.

"Sir: You are hereby ordered to collect by due process of law, by suit or otherwise, all the taxes remaining unpaid to date.

A. J. Durgin, } Selectmen
Nath'l Frost, } of Orono."

There are various methods provided by law for a tax collector to enforce the collection of taxes, committed to him. He may distrain the delinquent's property; he may take the body; and by chap. 206 of the laws of 1880, incorporated into section 141, chap. 6, of the Revised Statutes, the Legislature authorized a collector of taxes or his executor or administrator to sue in his own name for any tax in an action of debt.

By the section under which this suit was commenced a still further remedy is provided, whereby the selectmen of a town may in writing direct an action of debt to be commenced in the name of the inhabitants.

We think the intent of the Legislature is obvious. It is the duty of tax collectors to collect, ordinarily at their own expense, the taxes committed to them for the compensation agreed upon. They may proceed by any of the methods provided by statute, and, if they deem it advisable, they may commence actions of debt in their own name. But there may be occasions when for special reasons, such as the denial of liability, a question as to the validity of the assessment and for other reasons, it would be equitable and proper for the city or town to allow a suit to be brought in its name, pay the expenses and be liable for costs in case of defeat. As to the sufficiency of these reasons in any case the selectmen of the town are the sole judges. If they see fit they "may *in writing* direct an action of

debt to be commenced in the name of such city or of the inhabitants of such town or plantation against the party liable."

We do not think that the selectment of Orono did this or attempted to do it in the written direction dated September 3rd, 1887. It was rather a direction to the collector to do his duty in collecting unpaid taxes by suit or otherwise. There was certainly no direction to bring suit in the name of the inhabitants and we cannot think that the selectmen intended to give such a direction. Whether necessary or not, we think that a direction under this section should be as to an action or actions against a particular party or parties.

But the plaintiffs' counsel says in answer to this objection that the defendant cannot raise the question as to the want of a sufficient direction under his plea of the general issue, and that he has waived the objection by not taking advantage of it by proper and seasonable pleading.

The ability of a plaintiff to sue, the existence of a plaintiff corporation, the capacity of a plaintiff as alleged by him are all admitted by a plea of the general issue, and ordinarily any requirements of law intended for the benefit of a defendant may be waived by him by pleading the general issue, for instance, the requirement that the assignment or a copy must be filed with the writ to enable the assignee of a chose in action to maintain a suit in his own name; that the officer before serving a replevin writ shall take from the plaintiff a bond; and the indorsement of every original writ by some sufficient inhabitant of the State when the plaintiff is a non-resident. Other illustrations might be given. See *Littlefield* v. *Pinkham*, 72 Maine, 369, and cases cited.

But we do not think that the principles governing in such cases apply to the objection made by the defendant in this case. He does not question the ability of the plaintiffs to sue nor the existence of the plaintiff corporation. His objection is that a suit in the name of an inhabitant of a town to recover a tax is not authorized by statute, unless the selectmen of the town have in writing directed the same to be brought.

Nor is this requirement of the statute intended for the benefit

of the defendant. It is rather for the benefit of the town, that the town may not be rendered liable for expenses and costs except when the selectmen authorize it. For these reasons we think that the question involved in this case does not come within the rule laid down in the *Littlefield* v. *Pinkham*, *supra*.

The plaintiffs' counsel relies upon the statement of the general rule found in Chitty on Pleadings, page 462, in the following language, "But matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement." The objection raised by the defendant does not merely apply to the present proceeding. It denies the right of the town to sue for the recovery of a tax in its own name until a certain definite direction has been given by the selectmen, and so far as we know this may never be done.

We are confirmed in our opinion that the defendant should be allowed to raise this objection under his plea of the general issue, because the fact of a direction in writing or not, may have been within the exclusive knowledge of the plaintiffs. The plaintiffs allege such a direction and it was incumbent upon them to prove it. The proof disclosed a failure to comply with an important and material requirement of the statute, without which suit cannot be maintained.

Exceptions sustained.

DANIEL CHASE, and others, Appellants,

vs.

CITY OF PORTLAND.

Cumberland. Opinion April 2, 1894.

Way. Damages. Market Value. New Trial.
Stat. 1887, c. 97.

The petitioners represented that they were aggrieved by the refusal of the municipal officers of Portland to award them damages for an injury alleged to have been sustained by reason of the raising of Commercial street on its southerly side, and asked to have the damages determined by this court. The complaint was heard before a jury, who found that the petitioners sustained no damage. *Held;* In such a case, that the diminution in the market value

of the property injured is a correct measure of the damages sustained. The cost of the improvements and changes necessary to restore the premises to a proper condition in relation to the new grade of the street is admissible as evidence affecting the question of the benefit to the property, but not as a substantive cause of damage.

The petitioners were entitled to compensation for the net injury done them; to be made whole as far as money is a measure of compensation. This is the essential meaning of the term, "just compensation," whether reference is had to its use in the constitutional guaranty in favor of those whose property is taken for public uses, or as the recognized basis of all general rules, respecting damages. The special and peculiar benefits resulting to the petitioners from the change of grade, must therefore be offset against the damages sustained.

All such benefits as come from the situation of the premises with reference to the change of grade, such as having a dry and pleasant street in front of their lot and more convenient access to their store, are direct and special and must be set off against the damages, although other estates on the same street, may be benefited in like manner; but the general benefits arising from the improved facilities afforded by the street which affect equally all estates in the neighborhood, cannot be thus offset.

When there is no indication of prejudice or mistake on the part of the jury, and no just cause for disturbing the verdict, a new trial will not be granted.

ON MOTION AND EXCEPTIONS.

This was a case in which the petitioners sought to recover from the city of Portland damages for alleged injury occasioned them as owners of certain land, with buildings thereon, on Commercial street in Portland by the raising of the street by the city in front of petitioners' property during the months of June, July and August, 1891.

Proceedings were commenced by the petitioners, September 7, 1891, under the provisions of § 68 of c. 18 of Revised Statutes as amended by chapter 97 of statute of 1887. Application was seasonably made to the municipal officers of the city to view said street and assess the damages caused by the alleged raising of the street in June, July and August of the same year. View of the premises was had by the municipal officers, October 14, 1891, hearing had and petitioners were given leave to withdraw. Appeal was taken and entered in this court at the January term, 1892.

The case was tried at the October term, 1892, before a juryl and the jury were allowed to view the premises. The jury returned a verdict that the defendant did raise said Commercia,

street in manner and form as the petitioners claimed, but that the petitioners suffered no damages thereby.

The case was then brought to the law court on a general motion for a new trial and upon exceptions.

The case is sufficiently stated in the opinion.

C. F. Libby, Locke and Locke, for plaintiffs.

Seth L. Larrabee, City Solicitor, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. The complainants represent that they are aggrieved by the refusal of the municipal officers of the city of Portland to award them damages for an injury alleged to have been sustained by reason of the raising of Commercial street on its southerly side adjoining their property, located at the head of Long Wharf, and ask to have the damages determined by this court.

The statute under which this complaint is preferred (Stat. 1887, c. 97) provides that, "when a way or street is raised or lowered by a surveyor or person authorized, to the injury of an owner of land adjoining, he may apply in writing to the municipal officers, and they shall view such way or street and assess the damages, if any have been occasioned thereby; and any person aggrieved by said assessment may have them determined on complaint to the supreme judicial court," &c. The complaint has been heard before a jury who found that the street was raised as alleged, but that the, "petitioners sustained no damage thereby." The case now comes to the law court on motion and exceptions.

The street in question appears to have been laid out across tide-water flats in 1853, and to have been constructed with a sea wall along the water front. The complainants' large wooden building (one hundred and fifty feet long and fifty feet wide) was constructed on piles over tide waters facing on Commercial street. At the time it was erected, the ground floor was fifteen

inches above the grade of the street. In 1861, a sidewalk was laid alongside the old platform in front of the store, but no other structural change appears to have been made on the southerly side of the street opposite this store until the change complained of in 1891. But the level of the northerly side of the street seems to have been raised at different points from time to time, and the railroad track in front of the complainants' premises was raised so that the planking between the rails became nearly two feet higher than in 1853. The southerly side of the street thus gradually sloped from the rails to the sidewalk. The result was that a large number of the buildings on that side of the street had been raised from sixteen inches to three feet; but it is in testimony from the complainants that they suffered no inconvenience and sustained no injury from the grade of the street prior to the change in question. In 1891, the street commissioner was duly instructed to raise the retaining wall on the southerly side opposite the building of the complainants, and to fill in the street to grade. This work was executed as directed, leaving the complainants' store seventeen inches below the new grade of the street. It is not in controversy that, in that relative position, the store was practically untenantable, and it is admitted that the sum of $1788.53 was necessarily expended by them in raising it to the level of the street and properly adjusting it to the new conditions. It is also admitted that whatever was done on the street at that time by the street commissioner was duly authorized by the city of Portland. (See *Mitchell* v. *Bridgewater*, 10 Cush. 411.)

I. The exceptions. It was contended in behalf of the complainants that the rentable value of the store was no greater after it was raised than before, and hence that the damage occasioned by the alleged injury to their premises would be fairly measured by the amount claimed to have been judiciously expended in securing it and adjusting it to the new grade. On the part of the city, it was contended that the complainants were benefited rather than injured by the change of grade; that by reason of the low level and depressed condition of the street at that point, before the change in 1891, the water frequently

stood to the depth of eight or ten inches in front of the complainants' store, making the approach to it inconvenient and difficult; and that the special benefits accruing to this property from the improvement in the street exceeded in value the amount expended in raising the building.

The presiding judge instructed the jury, *inter alia*, as follows:

"Now the damage to a piece of property in this class of cases must be substantially this: how much did it reduce its market value? . . . To answer that question intelligently you will consider what condition the land was in. The word land, as used, includes the permanent building upon it. What condition was the property in, as a whole, and what condition was the street in? Then if they went on and raised it in the manner described . . did it increase or depreciate the value of that land as a whole, the market value of it? . . . A great many elements go to make up that question and to make up the answer to that question. . . . If on the whole the increased value of the property by means of raising of the street was equal to the expense thereby incurred, which he was necessarily obliged to incur in order to raise the building and put it in a proper condition, then he would not be damaged within the meaning of the law. But if the expense which he was thereby obliged to incur was more than the increased value of the land, then this fact should be taken into account. This is equivalent to saying he was injured. . . . . There is one benefit . . . which should not be taken into account, that is, this side of Commercial street as a whole was thereby improved, benefited for everybody that had occasion to use it; where there was before a mud-hole on one side it came up and presented a handsome level street throughout. . . Such benefit as the petitioners may have derived in common with all others living on the street, or having occasion to use it, such benefit is not to be taken into account or deducted from the injury to the land. . . . But what direct, special damage was occasioned to this property you may take into account and give them full compensation, if they have suffered.

"Now, in behalf of the city it is said that, although it cost

$1500 or $2000 and even more to raise this building and put it in a safe condition, still, the property being upon a level street instead of being placed in a mud-hole, is worth more than it was before, that it has increased the value of the property more than it has cost him, that he has been benefited rather than injured, even to the extent of $4000 or $5000. . . . . A witness says 'that if they didn't raise that building then of course it diminished its value.' You may as well say that a horse is not worth anything unless a man had a saddle to go with it, or a carriage and harness. . . . A lot without a house on it is not valueless because you can't use it until you do put a house on it."

It is contended by the learned counsel for the complainants that the decrease in the market value of the property injured cannot be a correct measure of the damages sustained, but that the true test to be applied, in a case of this kind, is the cost of restoring the premises to a proper condition in relation to the street, and of obviating the various elements of damage caused by raising the grade, provided such repairs be reasonably and judiciously made; and if he is too poor to repair the injury, or does not see fit to do so, his right to damages still subsists.

Instructions to the jury should be carefully adapted and restricted to the facts before them. It was in evidence here that this building had been elevated to conform to the change of grade, and the complainants had also been allowed to give the jury a full statement of all expenses incurred in making these necessary repairs. Upon these facts, the rule of damages stated and illustrated by the presiding justice was undoubtedly correct. It is the rule which has frequently been invoked in cases of this description, as well as in analagous cases in this and other states. Furthermore, the same rule has been applied in the assessment of damages, in cases of this kind, before the improvements have actually been made to conform to the change of grade and the cost of such improvements considered to be inadmissible as a substantive ground of damage. In *Plimpton* v. *Woburn*, 11 Gray, 415, the center of a town way was raised above the level of the petitioner's land adjoining, and evidence of what it would cost to fill up the intervening space was excluded at the trial. On

exceptions the court say: "The question of the enhanced value to the land of the petitioner was in issue. The evidence offered ought to have been admitted. It is not because the land owner has a right to set up a claim for the expense of filling up the space between the traveled way and his land as a substantive cause of damage, but as affecting the question of the benefit to his property."

So also in *Barker* v. *Taunton*, 119 Mass. 392, damages were claimed for the act of the city in reducing the grade of two streets, and exception was taken because the petitioner was allowed to state what he had expended in improvements upon the premises since the change of grade. The exception was overruled, but the court say the objection would have been well taken, "if the cost of such improvements had been claimed as a substantive ground of damage."

Again, in *Buell* v. *Worcester*, 119 Mass. 372, the necessary changes to conform to the higher grade had not actually been made, but estimates were received in evidence of the expense that must necessarily be incurred in putting the property relatively in a proper condition. The jury were instructed that the damages awarded the petitioner should, "in no event exceed the amount of the diminution in the value of the property," resulting from the change of grade; and in the opinion of the law court it is said: "The petitioner claimed damages occasioned by a change of grade in the street. He was entitled to recover the diminution in value occasioned to his property in the condition it was when the change was made from a low to a higher grade. Upon that question, and as one of the steps in determining it, the jury might consider what expense a prudent man would reasonably incur in putting the property, with reference to the new grade, in as good condition as it was before, being limited in their verdict to compensation for the diminished value of the property."

The same principle has been applied in analogous cases where the court is required to determine what is, "just compensation" for the taking of a portion of a lot of land, "as for public uses," and for the injury to the remainder of the land not taken. *Railroad Co.* v. *McComb*, 60 Maine, 290, is a leading and important

case on that subject. The jury were there instructed that the "damages included the value of the land taken and the direct injury to the land remaining by the taking and use of this portion. . . . If the real value of the land immediately before and after the location of the road could be ascertained, the difference between these two sums would be the damage. . . .

"The market value of the land at the times mentioned is perhaps the nearest approximation to its real value, and they may consider the diminution of its market value by the location of the road over it, excluding, however, any general depreciation of lands by reason of the extension of the road, which affected all lands in the village and neighborhood. It is the direct depreciation of this land in consequence of the location of the road over it, that is to constitute your measure of damages." In the elaborate opinion of the court by KENT, J., all these instructions were expressly approved.

Indeed, the objection to the use of the term "market value" as synonymous with "value" loses its force when the true significance of it is remembered. It is not limited to the price which it might realize at a forced sale by auction. "Market value" means the fair value of the property as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not value obtained from the necessities of another. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy." *Lawrence* v. *Boston*, 119 Mass. 126; *Edmands* v. *Boston*, 108 Mass. 535; 3 Sutherland on Dam. 462; Cooley's Const. Lim. (6th Ed.) 697 and cases cited.

A doubt is also suggested by the learned counsel whether in the absence of express statutory provision therefor any benefits, though special and peculiar to the petitioners resulting from the change of grade, can be set off against the damages sustained; and attention is called to the fact that in Massachusetts the allowance of such benefits is expressly authorized, while in Maine both the statutes and the judicial decisions are silent upon the subject.

But this doctrine seems to be so well founded in reason and justice, and to be so strongly fortified by the decisions in other states, and the uniform practice in this state, that it no longer presents a question for discussion. It is a fundamental inquiry, an indispensable element in determining what is "just compensation" for the injury sustained. A person suffering damage in the manner in question, is entitled to compensation for the net injury done him; he is entitled to an exact equivalent for the injury; he is to be made whole as far as money is a measure of compensation; no more and no less. This is the essential meaning of the term, "just compensation," whether reference is had to its use in the constitutional guaranty in favor of those whose property is taken for public uses, or as the recognized basis of all general rules respecting damages. In his treatment of the subject of eminent domain Mr. Cooley says in regard to compensation for property taken: "It seems clear that in these cases it is proper and just that the injuries suffered and the benefits received by the proprietor, or owner of the remaining portion of the land, should be taken into account in measuring the compensation. This, indeed, is generally conceded; but what injuries shall be allowed for, or what benefits estimated, is not always so apparent. . . . There must be excluded from consideration those benefits which the owner receives only in common with the community at large, . . while allowing those which directly affect the value of the remainder of the land. And if an assessment on these principles makes the benefits equal to the damages, and awards the owner nothing, he is nevertheless considered as having received full compensation, and consequently as not being in position to complain." Cooley's Const. Lim. 698-702, and authorities cited. See also 3 Sutherland Dam. 432.

It is interesting to note also that the statute in Massachusetts, expressly allowing such benefits to be considered, was simply an affirmation of the doctrine long before announced in the early case of *Com.* v. *Norfolk*, 5 Mass. 435. See *Hilbourne* v. *County of Suffolk*, 120 Mass. 393; also *Allen* v. *Charlestown*, 109 Mass. 243; *Upham* v. *Worcester*, 113 Mass. 97.

There is a well-recognized, general distinction between the two kinds of benefit which may accrue to an estate from the alteration of a street. There may be a special and peculiar benefit resulting from its position on the street, as distinguished from other estates not bounding on the same street; and second, the general benefit arising from the facilities and advantages afforded by the street, which affect equally all estates in the neighborhood and which are shared in common with all such estates. This distinction was fully explained to the jury and they were correctly told that the special benefits might be set off against the damages, while the general benefits could not be.

But the learned counsel for the petitioners still insists that it was error to allow the jury to consider the improvement in the access to their store, made by filling up the, "mud-hole," as a special and peculiar benefit to their property.

It has been repeatedly held, however, that the, "advantages which an abutter may receive from his location on a highway laid out, altered or widened, are none the less peculiar and special to him because other estates on the same street receive special and peculiar benefits of a similar kind." *Allen* v. *Charlestown*, 109 Mass. 243; *Hilbourne* v. *Suffolk*, 120 Mass. 393. And *Donovan* v. *Springfield*, 125 Mass. 371, is a case precisely in point. It was a petition for damages occasioned to different lots by reason of the raising of the grade of the street; and it was held that, "all such benefits as come from the situation of the lots with reference to the grade of the street affecting their value, such as having a dryer and pleasanter street in front of the lots, and having more convenient access to the lots, are direct and special and must be set off against the damages, although other lots upon the same street might be benefited in like manner."

The rulings of the presiding justice upon this point were sufficiently favorable to the petitioners.

The remaining exceptions relate to instructions or requested instructions upon matters of minor importance which had in no way been the subject of controversy, and with respect to which it is not conceivable, from the whole tenor of the charge and the character of the evidence admitted, that there should have

been any misapprehension on the part of the jury. "To be enlarging and refining upon points, either of law or fact, about which there is no real dispute, is an evil. It distracts and burdens the memory of the jurors unnecessarily." *Stratton* v. *Staples*, 59 Maine, 99. The vital issue of fact presented by the evidence was clearly stated and aptly illustrated; and we find no reason to question the fullness or correctness of the instructions with which it was submitted to the jury.

II. The motion. The question whether the special and peculiar benefits accruing to the petitioners' property from the improvement in the street, were greater or less than the damage to it as a whole, was not intricate or difficult to be understood. Two tribunals have passed upon it with the same result. The jury were entirely disinterested. They had the advantage afforded by a view of the property and street in question and the improvements made in each. They had before them a plain, business proposition, and they could hardly fail to apprehend the true relation of the facts to the issue. Experienced and competent counsel were also there to see that no feature of the injury was overlooked and no element of damage forgotten. After a thorough examination of all the evidence reported and a careful study of the learned and exhaustive briefs of counsel, it is the opinion of the court that there is no indication of prejudice or mistake on the part of the jury, and no just cause for disturbing the verdict.

Exceptions and motion overruled.

WILLIAM H. GARDINER *vs.* INHABITANTS OF CAMDEN.

Knox. Opinion April 2, 1894.

Way. Culvert. Surface Water. Towns. R. S., c. 18, § 67; Stat. 1889, c. 285.

Where the evidence fails to show that the municipal officers constructed a "public drain," or "common sewer" in the exercise of any authority conferred by the statute of 1889, but satisfactorily proves that the acts complained of were performed by the highway surveyor while making necessary repairs on the highway by cleaning out the old ditch, and one or more of the culverts, in order that they might serve the purpose for which they were designed:

Held; that if the effect of these operations was to cause the surface water to flow upon the plaintiff's land adjacent more freely than it had previously

been accustomed to do, no action will lie against the town for the damage thereby occasioned.

Such proof will not sustain an action upon the statute of 1889, c. 285, relating to public drains and common sewers; and a verdict for the defendants may be properly ordered by the presiding justice.

ON EXCEPTIONS.

The case is stated in the opinion.

J. H. and C. O. Montgomery, for plaintiff.

In matters of drains and sewers under legislature authority, granted and accepted, the town stands in the position of a corporation with special powers granted to it. The officers of the town have the judicial powers, and the town has the ministerial responsibilities. The officers say where the drain shall be laid, &c., but its construction and maintenance are with the town. And for any negligence in its construction or maintenance the town is liable to the party injured thereby. R. S., ch. 16, § 2; *Bulger* v. *Eden*, 82 Maine, 355; *Rowe* v. *Portsmouth*, 56 N. H. 291, 294, 298; Cooley's Con. Lim., page 248; *New York* v. *Bailey*, 2 Den. 433; *Lead Co.* v. *Rochester*, 3 N. Y. 463; *New York* v. *Furze*, 3 Hill, 612; *Gilman* v. *Laconia*, 55 N. H. 130.

In the case of *Lead Co.* v. *Rochester*, cited, the court say: "That an ordinance of a city corporation, directing the construction of a work within the general scope of its powers, is a judicial act, for which the corporation is not responsible; but the prosecution of the work is ministerial in its character, and the corporation must therefore see that it is done in a safe and skillful manner."

Our court approve of the principles laid down by these authorities. *Bulger* v. *Eden*, 82 Maine, 358.

In *R. R.* v. *Norwalk*, 37 Conn. 109, an injunction was granted restraining the town from turning a surface drain on to the road bed of the plaintiff, although the necessities of the town required it, there being a way to avoid damage to the plaintiff though more expensive to the town.

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

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. The plaintiff represents that he is injured in his property by the act of the defendants in constructing a public drain on the west side of Bay View street, in Camden, with outlets so adjusted as to turn the sewage therefrom upon his premises on the east side of the street; and he brings this action to recover damages for the injury. After hearing the plaintiff's evidence, the presiding justice instructed the jury to return a verdict in favor of the defendants. The case comes to this court on exceptions.

It is claimed in the argument of the plaintiff's counsel, that the alleged drain was constructed by direction of the municipal officers of Camden in pursuance of chap. 285 of the statutes of 1889, relating to, "public drains," and "common sewers," that act having been accepted by the defendants in town meeting prior to the injury complained of.

But a careful examination of all the evidence introduced not only fails to disclose any reasonable ground for the contention that the municipal officers constructed a "public drain," or "common sewer," opposite the plaintiff's premises, in the exercise of any authority conferred by the act of 1889, but affirmatively shows beyond a reasonable doubt that the alleged, "public drain," was but the usual ditch on the side of the highway, and the "outlets" were the ordinary culverts long before laid across the street at three different points in that vicinity. They were not designed to carry off the sewage from the dwelling-houses on the west side of the street, but the drain and culverts were intended to perform the well-recognized and customary office of disposing of the surface water accumulating on the highway from rains and melting snows; and the acts complained of were evidently performed by the highway surveyor while making necessary repairs on the highway by cleaning out the old ditch and one or more of the culverts, in order that they might serve the purpose for which they were designed.

If the effect of these operations was to cause the surface water to flow upon the plaintiff's land adjacent, more freely than it had previously been accustomed to do, it is well settled law that no action will lie against the defendants for the damage

thereby occasioned. *Greeley* v. *Me. Cent. R. R. Co.* 53 Maine, 200; *Dickinson* v. *Worcester*, 7 Allen, 19; *Flagg* v. *Same*, 13 Gray, 601; *Parks* v. *Newburyport*, 10 Gray, 28; Angell on Watercourses (6th Ed.), 108 (*l*,) and cases cited. This doctrine is expressly conceded in *Emery* v. *Lowell*, 104 Mass, 13, cited by the plaintiff.

There is no evidence that the owners of the several dwelling-houses on the west side of the street were "permitted," by the selectmen to use the drain and culverts in question to carry off either surface water or sewage from their premises. It does not appear that the selectmen ever took any action whatever under the act of 1889, respecting sewage.

Whether or not the highway surveyor exceeded his official authority and duty and rendered himself personally liable, by excavating a trench outside of the limits of the highway on the land of the plaintiff, or otherwise, is a question not now before the court. It is not claimed that any action therefor would lie against the defendant town. (See *Plummer* v. *Sturtevant*, 32 Maine, 327; Rev. Stat. ch. 18, sect. 67.)

The verdict in favor of the defendants was properly ordered by the presiding justice. *Exceptions overruled.*

HORACE COLE, and others, in equity,

vs.

B. FRANK BRADBURY, and others.

Oxford. Opinion April 2, 1894.

Easement. Adverse Use. Aqueduct. Deed.

An uninterrupted adverse use of the water of an artificial aqueduct for twenty years is sufficient to create a prescriptive right to the enjoyment of it to the extent of such use the same as if the water had flowed in a natural channel. And the term of enjoyment requisite for the prescription is deemed to be uninterrupted when it is continued from ancestor to heirs and from seller to purchaser.

When such an easement, though not originally belonging to an estate, has become appurtenant to it either by grant or prescription, a conveyance of that estate will carry with it such easement whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee.

ON REPORT.

Bill in equity, originally brought by Horace Cole, and afterwards amended to allow his three children to become co-plaintiffs, in which the complainants allege in substance, that they are possessed of the right in common with the respondents, to take and use water from a certain spring in Norway village, by means of a certain aqueduct of which the respondents claim the sole ownership; that the rights of the plaintiffs to use the water are similar, although not the same, nor acquired in the same manner; that the complainants use said water by means of a pipe connecting the premises of said Horace Cole with the main line of said aqueduct at a point on the land of the respondents, Bradbury; that the respondents notified the complainant Horace Cole that they should prevent his further use of said water by cutting off said pipe, November 1st, 1891; thereupon the complainants asked for a temporary, and also a permanent injunction, restraining the respondents, their attorneys, servants and agents, from cutting off or interfering with said pipe, or with the rights of the complainants to take and use water from said spring and said aqueduct.

A temporary injunction was granted as prayed for; the respondents answered the original bill, and answered and also demurred to the amended bill; replications were filed, and the demurrer was joined.

The case was heard on bill, answers, demurrers and testimony.

The facts are stated in the opinion.

Harry R. Virgin, for plaintiffs.

C. E. Holt, Herrick and Park, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. This is a bill in equity brought to restrain the defendants from severing the supply pipe connecting a certain aqueduct and spring of water in the town of Norway with the dwelling-house of the plaintiff, Horace Cole, who claims that the right to take and use water from the spring, in common with the defendants, by means of the aqueduct, was acquired by

prescription by his predecessors in title, and passed to him as appurtenant to the premises by deed of November 1, 1873. In the amended bill his three children become co-plaintiffs, claiming an interest in the aqueduct as residuary legatees of Adeline C. Denison; and a further claim is also set up in favor of Horace Cole as a grantee of other residuary legatees of the same testator.

The defendants claim the exclusive ownership of the aqueduct and deny that either Horace Cole, or his co-plaintiffs, ever acquired any such right by grant, prescription or otherwise. The case comes to this court on report.

I. The claim asserted in favor of the plaintiff, Horace Cole, that a prescriptive right to use the water from this aqueduct was acquired by his predecessor in title and passed to him by deed, will be first considered.

The testimony respecting the arrangement under which the aqueduct was originally constructed is somewhat conflicting. It appears that the aqueduct was laid as early as the year 1852, and that the spring in question was located on land then owned by Adna C. Denison. The defendants claim that Adna C. and his brother, Isaac A. Denison, built the aqueduct primarily for the accommodation of their dwelling-houses at their joint expense; and deny that any other person contributed anything whatever in the construction of it, or acquired any interest in it, or absolute right to use water from it. They concede, however, that there was "an understanding with Moses Bartlett," the predecessor in title of Horace Cole, "that when there was plenty of water he could use some by paying a portion of the expense of keeping it in repair;" but "when the water was short" they "had the right to cut it off at any time." On the other hand, the plaintiffs claim that Bartlett was one of the original builders and proprietors of the aqueduct, and enjoyed the use of it as one of the owners during his occupancy of the premises until the conveyance to Judge Virgin, June 4, 1853; that Judge Virgin in like manner continued to enjoy the right to use the water from that time until August 12, 1872, as a legal appurtenance of his estate; and that Pamelia Cole, his successor in title, thereafter continued to use it as a matter of right until the conveyance to

Horace Cole in 1873. It is, therefore, contended that even if Bartlett's interest was not an easement which had become legally attached to the premises when he conveyed to Judge Virgin in 1853, it unquestionably ripened into a legal right by adverse use on the part of Judge Virgin and Mrs. Cole for more than twenty years prior to November, 1873, and passed by deed of that date to Horace Cole as appurtenant to the estate. Finally, it is said that Horace Cole continued to use the water as of his own right, without interruption or threat of interruption, from 1873 until this controversy arose in 1891; so that there was uninterrupted adverse use of the aqueduct by Cole and his predecessors for a period of thirty-nine years.

It is now settled law that the uninterrupted adverse use of the water of an artificial aqueduct for twenty years is sufficient to create a prescriptive right to the enjoyment of it to the extent of such use in the same manner as would have been the case if the water had flowed in a natural channel. *Tinkham* v. *Arnold*, 3 Maine, 123; *Watkins* v. *Peck*, 13 N. H. 370; Wash. on Eas. 430; *Dority* v. *Dunning*, 78 Maine, 381. And the term of enjoyment requisite for the prescription is deemed to be uninterrupted when it is continued from ancestor to heirs, and from seller to buyer. In other words, the several periods of enjoyment of an easement by successive occupants holding by privity of estate may be counted together to make up the requisite twenty years. All that would be required by the possessor would be evidence that the possession had been legally continued from one owner to the other. Wash. Eas. 176; Gould on Waters, § 335; *Leonard* v. *Leonard*, 7 Allen, 280; *Sargent* v. *Ballard*, 9 Pick. 256. It is also an established rule of conveyancing that the word "appurtenance" in the *habendum* of a deed "will not be construed to convey anything except what was legally appurtenant to the land in the hands of the grantor, and, therefore, will not be extended so as to convey an easement in the land of another, which by reason of not having ripened into a legal right had not become legally attached to the premises conveyed, unless accompanied by proper words describing it and showing the intention of the grantor to pass

it. *Swazey* v. *Brooks*, 34 Vt. 451; *Spaulding* v. *Abbott*, 55 N. H. 423. But when an easement, although not originally belonging to an estate, has become appurtenant to it either by grant or prescription, a conveyance of that estate will carry with it such easement whether mentioned in the deed or not, although it may not be necessary to the enjoyment of the estate by the grantee. Wash. on Eas. 40 and authorities cited; *Dority* v. *Dunning*, 78 Maine, 384.

In the case at bar, it is unnecessary to consider whether Bartlett's interest in 1852 had become legally attached to the estate, or whether it was only an inchoate prescriptive right at that date; for while the question is not entirely free from difficulty, there is on the whole a decided preponderance of evidence in favor of the plaintiffs' contention that, after the deed to Judge Virgin in 1853, there was an uninterrupted adverse enjoyment of the easement for more than twenty years, until the conveyance to Horace Cole in 1873, when, having matured in a legal right and become appurtenant to the estate, it passed by the deed to Cole. It is conceded that the Bartlett house received a supply of water from this aqueduct without interruption for thirty-nine years. It is not in controversy that prior to the purchase of O'Brien in 1876, a period of some twenty-four years, no rent was paid for the water, and it is not established by competent evidence that rent was ever paid for water from this aqueduct by any owner or occupant of the Bartlett premises. Mrs. Bartlett, the wife of Moses Bartlett, testifies that her husband and herself were in the occupation of the premises from 1849 to the time of the conveyance to Judge Virgin in 1853; that in 1851, or 1852, she heard Isaac A. Denison propose to her husband that they should, "take water in logs from the spring on Adna C. Denison's land and bring it to Mr. Bartlett's and his house for the benefit of both of them; that both Mr. Bartlett and Mr. Denison said they would do it, and Mr. Bartlett said he would survey the line and superintend the work; that she understood that they had a right to take all the water they needed from that spring, and that they should share jointly all the expenses arising from it; that no water rent was ever paid by them or demanded of them,

and that she never heard their right to take water from the aqueduct denied or questioned by any one prior to the time of giving her deposition.

The testimony of Judge Virgin, who married a sister of Horace Cole, is unequivocal and conclusive respecting the character of his enjoyment of the easement for a period of nineteen years. He says: "Among the inducements held out to me to purchase that place was the aqueduct which brought the water into the dining-room of the house. . . . . I was frequently out where they were preparing it to be laid and saw Bartlett himself taking an active part in the construction of the aqueduct. . . Bartlett assured me that he helped pay for the original construction of the whole thing. . . . I always claimed to hold the right to that water as a matter of right against all comers, and it was never objected to by the Denisons or anybody else while I was in possession. I never paid any rent for the use of it and never was asked to pay any, and kept my own portion of the aqueduct from my own house to the main line in repair at my own expense."

The plaintiff, Horace Cole, succeeded Judge Virgin in the occupancy of the house from the summer of 1871 to November 1, 1873, as tenant under Judge Virgin and Mrs. Cole successively, and thereafter as owner of the premises. It does not appear that there was any change in the manner of using the water during that period. Cole testifies that, after he bought the premises, he always claimed the right to use the water from this aqueduct as one of the appurtenances of the property; that he contributed his proportional part in labor and money from time to time toward the necessary repairs of the aqueduct, as the same were made known to him; and that his use of the water as a matter of right was not questioned by any one prior to 1891. It also appears that the defendants and all the other parties interested in the aqueduct, lived in such close proximity to the plaintiff's house and had such personal relations with its successive occupants, that they must have had knowledge of the character and extent of the use of the water there.

A patient and critical examination of all the other evidence fails to disclose any facts and circumstances of sufficient weight

to overcome the force of the plaintiffs' evidence on this branch of the case; and the conclusion is irresistible that the easement enjoyed by Moses Bartlett and his wife had ripened into a legal right by adverse and uninterrupted use for twenty years prior to November 1, 1873, and passed to Horace Cole, as appurtenant to the premises by his deed of that date. If further time were required to complete the requisite period of prescription, it is equally well established that Cole used the water continuously as a matter of right for nineteen years after he purchased the premises. But he properly claims it under his deed of November 1, 1873, as a right which had already matured and as an appurtenance to the land; and he is entitled to take and use the water from the aqueduct and spring in question as it was customarily taken and used in connection with his premises from June 4, 1853, to November 1, 1873.

II. This conclusion in regard to the rights of Horace Cole under his deed renders a decision of the question raised by the claim of the co-plaintiffs, and the further claim of Horace Cole under the residuary legatees of Adeline C. Denison of little or no practical importance. This amendment was doubtless introduced *ex majore cautela*, to meet a possible contingency that did not arise.

It appears that, in 1862, Adna C. Denison conveyed to Adeline C. Denison his dwelling-house and land connected therewith, and in 1865, one undivided half of the spring in question and right of way from the same, and that, in 1888, Adeline C. Denison conveyed to the defendant, B. F. Bradbury, the same dwelling-house and also her interest in the aqueduct, "reserving nevertheless the right for Horace Cole and his heirs to draw and use water from said aqueduct as he now uses it, and for the owners of said aqueduct to enter upon the premises hereby conveyed for the purpose of repairing said aqueduct."

Inasmuch as Horace Cole was not a party to this deed, it is not claimed that this "reservation" was effectual, *proprio vigore*, to secure to him the right to draw and use water from this aqueduct, (*Murphy* v. *Lee*, 144 Mass. 374; *Hill* v. *Lord*, 48 Maine, 95); but it is insisted that, in order to effectuate the

intention of the parties upon familiar principles of interpretation (*Engel* v. *Ayer*, 85 Maine, 448; *Stockwell* v. *Couillard*, 129 Mass. 223), it should be construed as an exception of another and distinct right in the aqueduct which thus remained in Adeline C. Denison as a part of her former estate, and passed by will to her residuary legatees. It has been seen, however, that the clause of reservation in question contains an express recognition of some existing right or privilege then enjoyed by Horace Cole. It clearly was not intended to reserve anything for the use of the grantor herself. She did not desire to retain anything in herself as of her former estate. It reserved, or more properly speaking, excepted from the conveyance whatever rights were then possessed by Horace Cole, and thus excluded any interest previously acquired by him from the operation of the covenants in her deed. *Stockwell* v. *Couillard*, and *Hill* v. *Lord*, *supra*. Adeline C. Denison retained no interest in the aqueduct to bequeath to her residuary legatees.

As to the co-plaintiffs, the bill is dismissed. As to Horace Cole the bill is sustained with costs.

Perpetual injunction to issue as prayed for.

MOSES G. HOWARD

vs.

BANGOR AND AROOSTOOK RAILROAD COMPANY.

Piscataquis. Opinion April 9, 1894.

Game. Penalty. Action. Statute amendments. Contradicting clauses. R. S., c. 30, § 18; Stat. 1891, c. 95, § 10.

It is a general (not a universal) rule that, where it is provided by legislative act that a statute shall be amended by inserting certain words therein, so that as amended it shall read in a certain way, and there is a contradiction between the words to be inserted and the words actually inserted, the latter words defeat the former. The last words govern unless there may be some absurdity in such a construction.

Where the amendatory clause provides an action of debt to recover the penalty prescribed for the illegal transportation of moose, caribou or deer, and the section as amended provides an action of case for the offense:

Held, that the latter form of action must be employed in an action to enforce such penalty.

AGREED STATEMENT.

This was an action of debt to recover a penalty under the statute, submitted to the law court upon the following statement of facts:

This was an action of debt brought by the plaintiff, a game warden, against the Bangor and Aroostook Railroad Company, to recover the penal sum for transporting game in close time, under the statute of 1891, chap. 95, sec. 13.

The defendant company received, of one Edwin Lancy, a young calf-moose about three months old, which was hunted and captured in Wilson pond, in the county of Piscataquis, in the month of July, 1892, by said Lancy. Said moose was delivered to said company's agent at Greenville, on the thirteenth day of July, 1892, with knowledge of the above facts.

Said company transported said moose in company with said Lancy to Foxcroft junction, in said county, where it was further shipped by express.

M. W. McIntosh, for plaintiff.

F. H. Appleton and H. R. Chaplin, for defendant.

The plaintiff cannot prevail for two reasons:

I. Because he sues in debt, when he should have sued in case. II. Because the provisions of section 13 of chapter 95, laws of 1891, under which this action is brought, do not apply to a live moose.

Counsel cited: Bishop on Written Laws, § § 80, 102, 152; *Allen* v. *Young*, 76 Maine, 81.

SITTING: PETERS, C. J., LIBBEY, EMERY, HASKELL, WHITEHOUSE, WISWELL, JJ.

PETERS, C. J. The question of this case involves the construction of section 10 of chapter 95 of the laws of 1891, which section runs as follows:

"Sect. 10. Section eighteen of said chapter is hereby amended by striking out all of said section after the figures 'eighteen,' and inserting the following words: 'Officers authorized to enforce the fish and game laws and all other persons, may recover the penalties for the violation thereof in an action

of debt in their own names, or by complaint or indictment in the name of the State, and such prosecution may be commenced in any county in which the offender may be found, or in any neighboring county;' so that said section as amended, shall read as follows:

"Sect. 18. Officers authorized to enforce the fish and game laws and all other persons, may recover the penalties for the violation thereof in an action on the case in their own names, or by complaint or indictment in the name of the State, and such prosecution may be commenced in any county in which the offender may be found, or in any neighboring county."

It will be noticed that, by the words to be inserted as a new section, an action of *debt* may be maintained to recover certain penalties, but by the words actually inserted as the new section an action *on the case* is prescribed as the proper process: and the question is whether an action of debt as first named or an action of case as lastly named shall be regarded as the correct mode of procedure.

It may be said that no rule of universal application prevails as to whether the amendatory or the amended words shall govern the construction where there is a repugnancy between them. One clause may clearly show the legislative intent, and the other not. The consistency of either one may overrule the absurdity of the other. The real intention is to be ascertained if it can be.

But the rule of interpretation which governs in cases generally, where any doubt or uncertainty exists, is that the last words control all preceding words for the purpose of correcting any inconsistency of construction. The authors are agreed on this subject, and a late writer (Endlich on the Interpretation of Statutes, § 183), makes the following statement of the rule:

"Where, in a statute, there are several clauses which present, as compared with each other, an irreconcilable conflict, the one last in order of date or local position must, in accordance with this rule, prevail, and the others be deemed abrogated to the extent of such repugancy; whether the conflicting clauses be sections of the same act, or merely portions of the same section.

But this rule is subject to some modifications. Thus it has been said, that a later clause which is obscure and incoherent will not prevail over an earlier one which is clear and explicit. Nor, as a statute is to be construed with reference to other statutes in *pari materia*, as well as by a general survey of the whole context, and as the various provisions are to be made to stand together if possible, will such be the result, where, upon a comparison of the entire act with others upon the same subject, there appearing no intention to change the general scheme or system of legislation upon the same, the earlier provision harmonizes and the latter conflicts with such statutes. And it has been seen that a reading of the provisions of the whole statute together may give to earlier sections the effect of restricting the meaning of later ones, as well as to the latter the effect of restricting the operation of the former. As to repugnant portions of a code it has been held that the sections last adopted, or portions transcribed from later statutes, must be deemed to repeal sections adopted earlier or transcribed from earlier statutes, or so to modify them as to produce an agreement between them."

It is no doubt logical and natural to regard words last spoken as better considered than words first spoken on the same topic; and this idea runs through the law, with varying influence according to circumstances, in its interpretation of all kinds of written instruments. Courts have quite uniformly held that where statutes have been amended "so as to read," in a particular way, the statute as amended repeals or defeats all previous provisions inconsistent with it, the former provisions becoming merged in the latter.

By R. S., c. 30, § 18, the remedies for illegally hunting and killing deer, caribou and moose are recoverable by actions on the case, and it is reasonable to conclude that the legislature intended to supply the same form of remedy for the illegal transportation of such creatures. Prior to 1891, there were no civil remedies for the transportation of game, although it was a criminal offense. *Plaintiff nonsuit.*

LIBBEY, J., died before the decision of this case.

ISSACHER WEYMOUTH, and others, *vs.* COUNTY COMMISSIONERS.

York. Opinion April 10, 1894.

Way. Petition. Notice. View. Hearing. Adjournment. R. S., c. 18, § 26.

A petition to county commissioners to lay out a way need not aver the fact that such way will cross a railroad track, although the railroad company must receive the statute notice of the pendency of such petition.

It will not be fatal to the proceedings if notice to the railroad company is not given before a view has been commenced, provided a full view and hearing be had after such notice by the commissioners.

County commissioners may adjourn their proceedings from time to time and from place to place, although the day adjourned to may be a regular term day of their court, and all parties originally notified must take notice of such adjournments.

ON REPORT.

The case appears in the opinion.

Fairfield and Moore, for plaintiffs.

Hamilton and Cleaves, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. Certain persons petitioned the county commissioners of York county for an alteration and extension of a way in the town of Old Orchard. The petition does not disclose the fact that the way as prayed for would cross any railroad, while as laid out by the commissioners it runs across the tracks of the Boston & Maine and Old Orchard railroads. In addition to the usual notices by posting and publication, notice on the petition was ordered by the commissioners to be served upon the station agent of the Boston & Maine company at Old Orchard according to the requirement of the statute to that effect. R. S., c. 18, § 26.

On June 23rd, 1891, the day designated in the notices for all parties interested to meet on the premises and take a view of the contemplated way, it was readily seen by those present at the place appointed for the meeting that the way, if extended

as designed by the petitioners must cross the track of the Old Orchard Railroad Company, on which company no notice had been ordered or served. Thereupon the commissioners ordered an adjournment of the hearing to their regular term of court to be held at Biddeford on July 7, 1891, and all further proceedings were suspended until that time; the commissioners deeming it irregular to undertake to order further notice while they were in the open field and away from their records and clerk.

On July 7, 1891, notice was ordered on the Old Orchard Railroad Company to appear, at a place appointed for the purpose, on the 17th day of the same month, and participate in a view of the way and in the hearing to be had afterwards. Neither of the railroad companies has appeared in any state of the proceedings, and there are no indications in the case that they are really interested in the present controversy.

An appeal from the decision of the commissioners was taken to this court by the remonstrants, upon whose motion a committee was appointed, and an acceptance of their report, fully establishing the way as located by the commissioners, is now objected to for certain alleged illegalities in the original proceedings.

It is claimed that the petition to the commissioners is a nullity because it does not itself declare that the way will run across the two railroads. This objection is unfounded. There is no authority requiring any such particularity of description of a proposed way. The tenor of all our decisions touching the subject is the other way. Nor does the general or special statute affecting the proceeding require it. It is enough that the railroads do in fact get the requisite notice and that the records show it to be so.

It is claimed by the remonstrants that the county commissioners had no power to make the adjournments that were ordered by them, and that, if they had such power, the remonstrants were not required to take notice of such adjournments without official information thereof, and furthermore that no adjournment could be made of the business to any regular term of county commissioners' court. We do not think that either of these

propositions should be sustained. There is no good reason why commissioners should not be allowed to adjourn their work from time to time whenever necessity may require such a course, not contravening thereby any positive statute requirement. Nor can we appreciate the objection to a proceeding being heard on an adjournment to the day on which a regular term is held as well as on any other day. And, certainly, where parties are duly notified to appear in a county commissioners' court, such parties are bound to take notice of all adjournments regularly made by that court during the pendency of any business there in which they are interested. That is a principle applicable to the administration of business in all courts.

It is further contended that the Old Orchard Railroad Company should not have been notified to appear at a view to be taken of the way on July 17th, because that part of the work had been previously performed on the 23rd day of June. But the railroad corporations were entitled to an opportunity to participate in an examination of the proposed way, and could not be deprived of the privilege. It was proper that the work partially performed should be again wholly performed after all parties interested had been summoned in. It is not objectionable that there were two examinations instead of one.

Other criticisms are made by the remonstrants of the action of the commissioners, which are not regarded by us as well founded, and which need not be particularly discussed.

Report accepted.

BENJAMIN DODGE *vs.* EBEN DODGE.

EBEN DODGE *vs.* HENRY S. PAGE.

Lincoln. Opinion April 14, 1894.

New trial.

On motion to have a verdict set aside as against evidence and for a new trial on the ground of newly discovered evidence, it appeared that no questions of law were presented; much of the evidence was but remotely relevant; and that portion of it which was more directly relevant was directly contradictory. *Held*, in this case, that its weight depends upon the intelligence, the character, and the credibility of the witnesses; the evidence claimed to be

newly-discovered does not impress the court as of much importance, and it is cumulative in its character and only slightly adds to the numerous contradictions already existing; and a new trial should be denied.

ON MOTION.

The first action was trespass *q. c.* and the second, trespass on the case, with a count in trover for the conversion of a deed.

The actions were tried together and the jury returned a verdict for the plaintiff in the first action and for the defendant in the second action.

W. H. Hilton, for Benj. Dodge and Henry S. Page.
True P. Pierce, for Eben Dodge.

SITTING: WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WALTON, J. These two actions appear to have been tried together, and both are before the law court on motions to have the verdicts set aside as against evidence and for new trials on the ground of newly discovered evidence. No questions of law are presented. Much of the evidence is but remotely relevant; and that portion of it which is more directly relevant is directly contradictory. Its weight depends upon the intelligence, the character, and the credibility of the witnesses. The evidence claimed to be newly-discovered does not impress us as of much importance. It is cumulative in its character and only slightly adds to the numerous contradictions already existing. It is the opinion of the court that the motions must be overruled and the verdicts allowed to stand.

Motions overruled.

JAMES B. HAWKINS, and others *vs.* OSCAR H. HERSEY.

Oxford. Opinion April 24, 1894.

Conditional Sale. Action. Damages. Fixtures. Payment.

When machinery is sold and placed in a building for the purpose of making it available as a manufactory, but under an agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for, it may properly be deemed personal property as against a mortgagee who

with full knowledge consents to the arrangement; and may be removed by the seller retaining title thereto, although it has the character of a fixture and has been permanently annexed.

In such a case, an action of trover may be brought by the vendor against a third person who has purchased of the conditional vendee; and the plaintiff is still entitled to recover the full value of the property at the time of the conversion, although but a single dollar of the purchase money remains unpaid.

Held, that under the terms of the contract between the vendor and the vendee in this case, the sum of $375, admitted to have been applied to the payment of the machinery, may properly be applied to the earliest items delivered after the date of the contract, amounting to the sum of $369.31. As the plaintiffs no longer had title to these articles they cannot recover for them in this action.

ON MOTION.

This was an action of trover to recover the value of certain machinery, specified and enumerated in the schedule annexed to the declaration, and which the plaintiffs alleged had been converted by the defendant. The jury returned a verdict for the plaintiffs, the damages to be assessed by the court according to the agreement of the parties.

The defendant brought the case into the law court upon a general motion for a new trial. At the argument, the parties stipulated that the full court should hear the case as upon report and determine what number of articles, if any, had been converted; the damages to be assessed therefor by G. A. Wilson, Esq., agreed upon as assessor of damages.

The case is stated in the opinion.

John P. Swasey, and Edgar M. Briggs, for plaintiffs.

Geo. D. Bisbee, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, WHITEHOUSE, JJ.

WHITEHOUSE, J. The plaintiffs bring this action of trover to recover the value of certain machinery delivered to Harlow and Son of Buckfield, during the year 1890, under a contract with them by which the machinery was to remain the property of the plaintiffs until paid for, and alleged to have been sold and converted by the defendant.

It appears that Harlow and Son had previously been operating a steam mill in Buckfield for the manufacture of toothpicks, but became embarrassed in business for the want of sufficient capital. Thereupon the defendant united with six others in a praiseworthy effort to encourage the productive industry of the community by aiding the firm with a loan of $1200, secured by a mortgage of the mill property with its machinery and fixtures, signed by J. M. Harlow, a member of the firm of Harlow and Son, and sole owner of the mill, containing the following clause: "Together with all tools, machines and attachments and machinery of every kind hereafter used in connection with said mill." But this business being still unsuccessful, Harlow and Son suspended operations, and made the contract in question with the plaintiffs for the manufacture of wooden cutting-blocks and meat blocks. By the terms of this agreement the plaintiffs were to furnish suitable machinery for the manufacture of these goods, retaining title thereto until wholly paid for, and also to purchase and consign to Harlow and Son lumber for such manufacture to the amount of $1000, the same to remain the property of the plaintiffs. It was also stipulated in the contract that the plaintiffs might deduct thirty-five per cent of the amount due Harlow and Son for the manufacture of the blocks, twenty-five per cent to be used toward the payment of the lumber furnished and ten per cent to be applied towards the payment of the machinery which Harlow and Son had agreed to purchase on the terms stated.

In the report of the case it is expressly admitted that, "the machinery sued for was put into the mill and set up, and that it became fixtures under the ordinary rules relative to machinery."

It is a well-recognized rule that when articles of personal property which are specially adapted and designed to be used in connection with the realty and essential to the convenient and profitable enjoyment of the estate are affixed to it with an intention to make them a permanent accession to the land, they become a part of the realty though not so fastened as to be incapable of removal without serious injury to themselves or

the freehold. *Pope* v. *Jackson*, 65 Maine, 162; *Strickland* v. *Parker*, 54 Maine, 263. So when machinery is sold and placed in a building for the purpose of making it available as a manufactory and permanently increasing its value for occupation, an agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for, will not bind or affect the mortgagee of the realty without notice, and such machinery will pass to the mortgagee as a part of the realty. *Bank* v. *Exeter Works*, 127 Mass. 542; *Thompson* v. *Vinton*, 121 Mass. 139; *Hunt* v. *Iron Co.* 97 Mass. 279. But as against a mortgagee who with full knowledge consents to the arrangement and while in possession under his mortgage treats the machinery as personal property, it may properly be considered as a chattel removable by the seller retaining title thereto, although it has the character of a fixture and has been permanently annexed. *Bartholomew* v. *Hamilton*, 105 Mass. 239. So also articles which are merely incidental to the particular business carried on at the time, and not designed to be permanent adjuncts to the building, and not essential to the profitable occupation of it, will be deemed personal property, although the advantageous use of them may require a fastening by nails or bolts. *McConnell* v. *Blood*, 123 Mass. 47.

In this case it appears, from the testimony of one of the plaintiffs, that before the machinery was delivered to Harlow and Son, he made a special inquiry of the defendant in regard to the mortgage on the mill, and was assured by him that it would, "in no way interfere with any transaction he might have with Mr. Harlow in relation to supplying him with such machinery as was necessary, that would have to go into the building." The defendant admits that he had a conversation with this plaintiff in the presence of Mr. Harlow in regard to the machinery required for the new line of work, and that he agreed, "to take no advantage under the mortgage;" but he claims that only four machines were mentioned as necessary for the manufacture of the blocks and that he heard nothing said about the gearing and other articles named in the writ. A careful examination of all the testimony on this point, viewed

in the light of the situation and circumstances, the obvious interests of the parties and their subsequent conduct, leads irresistibly to the conclusion that the plaintiffs acted upon the belief, and were justified in so doing that the rights of the mortgagees were waived as to all machines put in by them that might be essential to the profitable conduct of the business of manufacturing blocks in that mill; and as to all such gearing and attachments as would be reasonably necessary to make the machines available and operative for the purpose for which they were designed. The mortgagees had a loan of $1200, on a mill then standing idle. Their security would not only not be impaired but its value largely increased by the establishment of a permanent business there. It was manifestly for their interest to have suitable and sufficient machinery placed in the mill to carry on the business in an advantageous and successful manner; for thus the machinery thereafter furnished could soon be wholly paid for by ten per cent of the earnings of Harlow and Son, according to the terms of this contract, and become a part of the realty subject to the mortgage in question. It is reasonable to presume, also, that this understanding extended to all such shafting and gearing as might be required to enable them to set up and operate the machinery thus furnished. If in the course of six or seven months, after the four machines first put in had been tested, it was found from experience that a more profitable business could be done by the aid of a "Daniel's Planer," the plaintiffs were authorized to assume that it could be furnished under the same arrangement as the others. This is confirmed by the subsequent conduct of the parties, for it appears that in the discussions respecting the plaintiff's claim to the machinery, no distinction in this respect was made between the four machines set up in January and February, and those furnished at a later date.

But this enterprise also proved unsuccessful, and in March, 1891, Harlow surrendered possession of the property to the mortgagees, and the defendant soon after removed from the mill and sold all the Hawkins machines with the pulleys, shafting, belting and hangers pertaining to them, and received a check therefor in his own name.

It affirmatively appears, from the testimony on both sides, that by virtue of the provision in the contract for the appropriation of ten per cent of the earnings of Harlow and Son to the payment of the machinery furnished, the sum of $375 had been actually applied by the plaintiffs to that account. But, by the terms of the contract, the entire payment of the purchase money was made a condition precedent to the passing of the title to any of the machinery purchased; and in such a case it is settled law in this State that, in an action of trover brought by the vendor against a third person who has purchased of the conditional vendee for value received, the plaintiff is still entitled to recover the full value of the property at the time of the conversion, although but a single dollar of the purchase money remains unpaid. *Everett* v. *Hall*, 67 Maine, 497; *Brown* v. *Haynes*, 52 Maine, 578.

Under these circumstances, an exact compliance with the provisions of the contract between the plaintiffs and Harlow and Son may properly be insisted upon in behalf of this defendant. The contract bears date January 24, 1890, and expressly refers to all machinery, "which *shall be* consigned" to the Harlows, and provides for an appropriation of the ten per cent in question to "said machinery." It appears from the first two items in the account annexed to the writ that two machines had already been furnished under date of January 21, 1890, of the value of $130 and $80, respectively. The machinery and fixtures consigned under date of January 31, and February 11, and the machinery and articles furnished under date of March 8 (not including the "oak belting,"), amount to the sum of $369.31. Each of these items may have been the result of a special order and the subject of a separate contract. *Bennett* v. *Davis*, 62 Maine, 544. In the absence of any special directions from Harlow and Son with reference to the appropriation of the ten per cent and of any evidence from the plaintiffs showing a different appropriation, in accordance with familiar principles, the sum of $375, admitted to have been applied to the payment of machinery, must be deemed to have been applied to extinguish the earliest items in the account furnished

after the date of the contract. As to all the items above indicated, amounting to $369.31, the purchase money was thus fully paid before the commencement of this action; and as the title to these articles was no longer in the plaintiffs they are not entitled to recover for them in this suit. Neither are they entitled to recover for the nails and glue, nor for the item of $9.20, under date of November 20, for "fitting and filing," saw. For all other items in the account the value of which is, "to be determined by G. A. Wilson, agreed upon as assessor of damages by the parties," there must be,

Judgment for the plaintiffs.

LAURA MUNDLE *vs.* HILL MANUFACTURING COMPANY.

Androscoggin. Opinion May 10, 1894.

Negligence. Master and Servant. Risks voluntarily assumed.

Assuming the risks of an employment by a servant while in the service of the master, is founded upon an essentially different principle from incurring an injury through contributory negligence.

The servant may be debarred from a recovery against the master when he voluntarily assumes the risk, but this is not identical with the principle on which the doctrine of contributory negligence rests.

One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger.

Mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk.

It is the duty of the master to provide suitable instruments with which, and a proper place where, the servant may perform his work, subject only to such risks as are necessarily incident to the business.

But a servant of sufficient age and intelligence to understand the nature of the risk to which he is exposed, may waive this obligation which is due to him from the master, or may dispense with it altogether.

Having full knowledge and appreciation of the dangers to which he is exposed, and consenting to serve in the way and manner in which the business is conducted, he has no legal ground of complaint, even if reasonable precautions have been neglected by the master, and an injury is received.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

F. W. Dana and W. F. Estey, for plaintiff.

The jury have settled the question of the defendant's negligence. They viewed the premises, and heard the evidence in court. *Brown* v. *Moran*, 42 Maine, 44; *Campbell* v. *Eveleth*, 83 Maine, 50; *Beers* v. *Housatonic R. R. Co.* 19 Conn. 566; *O'Brien* v. *McGlinchy*, 68 Maine, 552; *Larrabee* v. *Sewall*, 66 Maine, 376.

If defendant knew or ought to have known the defective condition of the floor, the plaintiff being without fault, it was legally responsible for plaintiff's injury. Thomp. Neg. p. 992, § 12; *Buzzell* v. *Laconia Mfg. Co.* 48 Maine, p. 113.

Plaintiff has a right to presume that all proper attention will be given to her safety, and that she will not be carelessly and needlessly exposed to the risks not necessarily resulting from her occupation, and preventable by ordinary care and precaution on the part of her employer. *Snow* v. *Housatonic Railroad Co.* 8 Allen, 441; *Shanny* v. *Androscoggin Mills*, 66 Maine, 420; *Noyes* v. *Smith*, 28 Vt. 57; Shear. and Redf. Neg. § § 31, 36; Thomp. Neg. pp. 972-3, 975.

The law did not require the plaintiff to keep her eyes constantly and exclusively upon every spot where she placed her feet in walking to and from, especially as she made one hundred and twenty to one hundred and twenty-five trips to the stitcher in a day, or from two hundred and forty to two hundred and fifty trips both ways. Besides her attention would naturally and properly be diverted, at the same time to other branches of her employment.

A party in a dangerous situation not obliged to use extraordinary care. *Fletcher* v. *B. & M. R. R.* 1 Allen, 9.

Whether the plaintiff used due care is a question of fact for the jury, if there are any facts in dispute; or, if there is evidence upon which it is competent for the jury to find that she used ordinary care. *Nugent* v. *B. & M. R. R. Co.* 80 Maine, 70; *Gahagan* v. *B. & L. R. R. Co.* 1 Allen, 186; *Campbell* v. *Eveleth*, 83 Maine, 50; *Larrabee* v. *Sewall*, 66 Maine, 376.

Mere knowledge of danger is not conclusive evidence of negligence, in failing to avoid it. *Coombs* v. *New Bedford*

Cordage Co. 102 Mass. 572; *Reed* v. *Northfield*, 13 Pick. 94; *Whittier* v. *West Boylston*, 97 Mass. 273; *Frost* v. *Waltham*, 12 Allen, 85; *Buzzell* v. *Laconia Manf. Co.* 48 Maine, 113; Shear. & Redf. Neg. 3d Ed. § § 95, 96. It is a circumstance to be taken into consideration.

Plaintiff did not contract to take the risk of unusual or cumulative dangers, arising from defendant's subsequent neglect or want of due care. She had the right to expect that the defects in the floor would be repaired by the defendant and relying upon such expectations, to continue at work, without waiving her right to recover for injuries suffered by her in course of her employment. *Shanny* v. *Androscoggin Mills*, *supra*; Hilliard on Torts, p. 466 (third Ed.); *Railroad Co.* v. *Fort*, 17 Wall. 153; Thomp. on Neg. Vol. II, pp. 975, 976 and 1009; *Seaver* v. *B. & M. Railroad*, 14 Gray, 466; *Cayzer* v. *Taylor*, 10 Gray, 274, 282; *Snow* v. *Housatonic R. R. Co. supra*; *Mayhew* v. *Sullivan Mining Co.* 76 Maine, 100.

Where the plaintiff sees that the defendant has been negligent, he is not bound to anticipate all possible perils, or refrain absolutely from pursuing his usual course, on account of risks to which he is probably exposed by defendant's fault. Some risks are taken by the most prudent men. Shear. & Redf. Neg. § 31.

The supplementary instructions of the presiding justice were correct. *Shanny* v. *Andro. Mills*, and cases *supra*.

Wallace H. White, and Seth M. Carter, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

FOSTER, J. The plaintiff had been in the employ of the defendant as an inspector of cloth for about three months at the time of the accident. In the performance of her work she had occasion to pass from her inspecting table to the stitcher, a distance of about twenty feet, across the room from one hundred to one hundred and twenty-five times a day. While walking across the floor she stuck a splinter from the floor into her foot, for which injury this action was brought and the jury awarded her damages in the sum of five hundred dollars.

The undisputed facts gathered from the plaintiff's own story are that she knew the condition of the floor, had walked on it for three months, and had noticed that it was not what it should be and was always very careful; that she considered it dangerous and was always very careful in walking back and forth; that she had it in mind all the time; that there was no occasion for her to hurry, and that she could go back and forth from the inspecting table to the stitcher carefully and leisurely; that the room was well lighted; that the floor over which she had occasion to pass was not covered up or concealed in any way, and was in about the same condition at the time of the accident as when she began to work there; that the wearing and splintering of it was occasioned by iron trucks heavily loaded with cloth passing over it many times a day; that she never spoke to the overseer or made any complaint to any one about the condition of the floor; and that she was not induced to remain under any promise of a change or repair. It also appeared that the plaintiff at the time of the accident had on a shoe torn across the toe, and that the splinter entered her foot at the point where the shoe was torn.

The defendant contended that the plaintiff having continued to work during all this time with full knowledge of the condition of the floor and the uses to which it was put, without making any complaint or calling the attention of the overseer or any other person representing the defendant to the alleged dangerous condition, and not being induced to continue in her work by any promise that a change would be made, assumed the risks involved, among which would be the liability of her feet being injured by splinters.

The jury, after having been fully instructed, and after deliberating upon the case for some time, returned into court and asked the following question:

"If the plaintiff went on to this floor seeing all the danger there was about it,— if she saw everything there was there and the condition of the floor,— and continued to work upon it, if the floor was faulty, would she be entitled to recover?"

Thereupon, in response to this inquiry, the following instruction was given by the court:

"That is a question which has often been before the courts, and in some of the states it has been held that such knowledge is a bar to a recovery. But we have not gone so far as that in this State. We hold that it is possible for one to continue in the service of another after knowing that the premises or some of the machinery is dangerously and negligently defective, and that such knowledge is not necessarily a bar to a recovery for an injury occasioned by such a defect. Such knowledge is a circumstance to be weighed by the jury in determining whether or not the person injured was guilty of contributory negligence, but is not necessarily, a bar to a recovery. If you think that under all the circumstances the plaintiff was excusable,—that is, that she was not guilty of contributory negligence,—and you also find that the floor was defective and dangerous, you will be justified in finding a verdict in her favor. It is requiring a good deal of a girl (or any one) who is obliged to work for a living, and has a good position, to leave it or continue in it at her own risk, simply because she knows of some defect carelessly or negligently left by her employer. She has a right to assume that in due time he will make the necessary repairs, and upon that assumption, she may work on; and if, in so doing, there is no want of ordinary care on her part, mere knowledge of the defect is not a bar, not a legal bar, to a recovery for an injury occasioned by the defect. But such knowledge is a circumstance to be weighed by the jury in determining whether or not the person injured was guilty of contributory negligence; and upon that question their judgment must control."

To this instruction the defendant excepts and the question is as to its correctness, as applied to the undisputed facts in this case, and those assumed in the question.

In this connection, we feel that the instruction as given must have misled the jury, and their attention should have been called to the distinction between a right of recovery being barred by contributory negligence, and by the voluntary assumption of a known and appreciated risk or danger.

The question presupposed both a defective floor and a full knowledge on the part of the plaintiff of all danger incident to its use, and called for instructions as to whether the plaintiff could recover if she knew and appreciated the danger and voluntarily assumed the risk. The instructions wholly omitted to deal with this aspect of the case, and were limited to the question of contributory negligence, thereby leaving the jury to determine whether such knowledge should preclude the plaintiff from recovering on the ground of contributory negligence alone, and not by reason of her voluntarily assuming a risk or danger fully known and appreciated by her.

Assuming the risks of an employment is one thing, and quite an essentially different thing from incurring an injury through contributory negligence. Generally, it is sufficient, in actions for the recovery of damages, to give instructions as to the effect of contributory negligence on the part of the plaintiff. But when the question arises as to the effect of knowledge and the assumption of risks on the part of the plaintiff, something more is required. As was said in *Miner* v. *Connecticut River Railroad*, 153 Mass. 398, "The principle that one may be debarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may with his eyes open undertake to do a thing which he knows is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circumstances."

The difficulty often arises in determining whether the risk has been voluntarily assumed. One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger. Nor does he on the other hand necessarily fail to appreciate the danger because he hopes and even expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance,

he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture.

It is well settled that a servant by entering the service of the master assumes all known or apparent risks which are incident to it, however dangerous the service may be, even if it might be conducted more safely by the employer. On the other hand, it is a part of the contract which is implied, that the master shall provide suitable instruments with which, and a proper place where, the servant may perform his work with safety, or subject only to such risks as are necessarily incident to the business. But it is in the power of the servant, having sufficient age and intelligence to understand the nature of the risk to which he is exposed, to waive this obligation on the part of the employer, or dispense with it altogether. This doctrine is firmly established by numerous decisions, and is stated with such clearness in the case of *Sullivan* v. *India Manf'g Co.* 113 Mass. 396, that we quote the following language from the opinion of the court, in reference to the servant assuming risks: "When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."

There is a class of cases which recognizes the doctrine, as we have stated, that mere knowledge of a danger will not preclude a plaintiff from recovering unless he appreciates the risk. *Linnehan* v. *Sampson*, 126 Mass. 506; *Williams* v. *Churchill*, 137 Mass. 243; *Taylor* v. *Carew Manf'g Co.* 140 Mass. 150; *Scanlon* v. *Boston & Albany Railroad*, 147 Mass. 484. Also the recent English cases of *Thomas* v. *Quartermaine*, 18 Q. B. Div. 685; *Yarmouth* v. *France*, 19 Q. B. Div. 647, where this doctrine is fully sustained.

But in addition to what we have already stated in reference to the power of the servant to waive or even dispense with the obligation which the employer is under to him, the decisions of our own court, as well as elsewhere, hold that a plaintiff may be precluded from recovering when he voluntarily assumes a risk which he knows and appreciates, whether existing at the time he enters the service or coming into existence afterwards. It is in this class of cases that the principle expressed by the maxim, *volenti non fit injuria*, has the effect to debar the plaintiff from a remedy which might otherwise be open to him.

In *Leary* v. *Boston & Albany Railroad*, 139 Mass. 580, the principle that no one can maintain an action for a wrong where he has consented to the act which has occasioned his loss, is thus expressed: "But the servant assumes the danger of the employment to which he voluntarily and intelligently consents, and, while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

This principle, founded upon the maxim, *volenti non fit injuria*, is recognized in our own State in *Buzzell* v. *Laconia Manf'g Co.* 48 Maine, 113, where the court say: "If the danger is known, and the servant chooses to remain, he assumes, it would seem, the risk and cannot recover." *Nason* v. *West*, 78 Maine, 254, 257; *Coolbroth* v. *Maine Central Railroad*, 77 Maine, 165; *Judkins* v. *Maine Central Railroad*, 80 Maine, 418, 425.

In the case last cited this court say: "Even where a master fails in his duty in respect to inspecting and repairing the machinery or appliances to be used by the employee, and the servant voluntarily assumes the risks of the consequences of the master's negligence, with knowledge or competent means of knowledge of the danger, he cannot recover damages of the master." The English decisions, whenever this question has arisen, have been in accord with this doctrine. *Griffiths* v. *London & St. Katherine Docks Co.* 12 Q. B. Div. 495. After-

wards affirmed in the High Court of Appeal, 13 Q. B. Div. 259; *Thomas* v. *Quartermaine*, 18 Q. B. Div. 685, 697; *Yarmouth* v. *France*, 19 Q. B. Div. 647, 656. Thompson Neg. § 973, and cases. Shear & Red. Neg. § 94. Beach Contrib. Neg. § 139.

It would not be just for one who has voluntarily assumed a known risk, or such as might be discovered by the exercise of ordinary care on his part, and for which another might be culpably responsible, to hold that other responsible in damages for the consequences of his own exposure to those risks which were known and understood by him.

The court in Massachusetts has recently given expression to what we believe to be in accordance with the views herein expressed, in *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155, in the following language: "Certainly it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that the plaintiff is not negligent in voluntarily exposing himself when he understands the danger. It is to be remembered that, in determining whether a defendant is negligent in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he cannot recover, and should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself and find that it was reasonably careful."

But in the case before us, we think the jury must have understood that they were to consider the question of negligence on the part of the defendant by itself, and the plaintiff's conduct by itself, and be allowed to find that she was reasonably careful, and hence entitled to recover, if there was negligence on the part of the defendant and due care on her part, notwithstanding she may have known and appreciated the danger and voluntarily assumed all risk. While the first part of the instruction may have been correct as an abstract proposition, yet followed as it was by this independent statement—"If you think that under all

the circumstances the plaintiff was excusable, that is, that she was not guilty of contributory negligence, and you also find that the floor was defective and dangerous, you will be justified in finding a verdict in her favor"—the jury must have understood that the answer to their question presented but two propositions for their consideration, negligence on the part of the defendant, and freedom from contributory negligence on the part of the plaintiff.

The question asked presupposes, as broadly as language can well state it, full knowledge and appreciation of the risk by the plaintiff. The defense relied upon it. The instruction bore upon the doctrine of contributory negligence, instead of the question of assumption of risk through knowledge of the defective condition of the floor. We think the jury should have been instructed in reference to the latter.

Bowen, L. J., in *Thomas* v. *Quartermaine*, *supra*, makes use of this language, in speaking of the defense in that case, similar to that set up in this: "But the doctrine of *volenti non fit injuria* stands outside the defense of contributory negligence and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all."

As we have before remarked, the question presupposes a defective condition of the floor, and full knowledge and appreciation of the danger by the plaintiff.

Upon these assumed facts as stated in the question, viewed in the light of the undisputed facts in evidence, we think the jury should have been instructed that the plaintiff would not be entitled to recover. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155, 159.

Exceptions sustained.

JOHN L. LEE *vs.* HENRY MCLAUGHLIN.

Penobscot. Opinion May 14, 1894.

Landlord and Tenant. Negligence. Roof. Snow.

The tenant who has full possession and occupancy, and not the landlord, is bound, as between himself and the public, to keep buildings and other structures abutting upon highways and streets in repair so that they may be safe for the use of travelers passing along the same.

The owner of a building with a steep and unguarded roof who lets it to a tenant with the entire right of possession and occupancy, is not liable to a person injured by a fall of snow from the roof while travelling with due care upon the adjoining highway, it not appearing that the tenant might not by the use of reasonable care have prevented the accident.

An ordinance of the city of Bangor requires owners of stores and houses bordering on the streets to put, within thirty days after notice, upon the roofs of such buildings, railings, or other protections, to prevent slides of snow and ice. *Held*, that the ordinance did not affect the parties in this action, it appearing that no notice had been given.

ON REPORT.

The case is stated in the opinion.

H. L. Mitchell, for plaintiff.

Defendant liable because tenants are not responsible for the roof or outside of the building, unless they agreed to take charge and keep the outside of the building in proper condition. Nothing in the case to indicate that tenants had control of the roof. Renting his store to tenants-at-will, without any special agreement as to repairs or care of the property, did not exclude the landlord from the roof of the store or relieve him from the obligation to remove the snow and ice accumulated thereon.

The facts in the case show it to be a nuisance and dangerous to the travellers on the public highway.

Wilson and Woodard, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, WISWELL, JJ.

FOSTER, J. The defendant was the owner of a brick store with a slated roof, situated on the westerly side of Broad street and easterly side of Pickering Square in Bangor.

It appears from the evidence and admitted facts that for several years prior to and at the time of the accident, "the whole store, the real estate and building, were in the occupation of Thurston & Kingsbury under a tenancy at will from the defendant."

A quantity of snow which had fallen upon the roof of the building slid off into the street and upon the sidewalk, thereby causing a horse which was attached to a truck wagon, and belonging to one John C. Mooney, to start and run away, and in its course it came into collision with the horse and sleigh of the plaintiff, who was thrown from the sleigh and received the injuries for which he seeks to recover compensation of the defendant in this suit.

Of the several positions taken in defense of this action, it becomes necessary to consider only one, and that which we think is decisive of this case.

The plaintiff can hold the defendant liable only upon the ground that he was guilty of negligence towards him. Upon no other theory can such an action as this be maintained. The plaintiff seeks to recover of the defendant as owner of the building upon which the snow accumulated producing the injuries of which the plaintiff complains.

Whatever may be the rights of travellers receiving injuries from the fall of snow or ice from a roof which is subject to the use and control of the owner, as in *Shipley* v. *Fifty Associates*, 101 Mass. 251, 106 Mass. 194, and other cases of that nature, it can no longer be regarded as an open question whether or not the owner of a building is liable in such a case as this, when the entire control and occupation belong to the tenants. That question must be regarded as fully settled by the cases of *Kirby* v. *Boylston Market Association*, 14 Gray, 249; *Leonard* v. *Storer*, 115 Mass. 86; *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47; *Lowell* v. *Spaulding*, 4 Cush. 277.

The principle enunciated by these decisions is, that the occupier, and not the landlord, is bound, as between himself and the public, to keep buildings and other structures abutting upon highways and streets in repair so that they may be safe for the use of travellers passing along the same, and that the occupier

is *prima facie* liable to persons injured through any defect in the same or want of care in the use of such buildings.

The case of *Clifford* v. *Atlantic Cotton Mills*, *supra*, was an action for personal injuries occasioned to the plaintiff by the fall of snow from the defendant's house into the highway. The house was three stories high, with a steep slate roof slanting towards the sidewalk, with no protection or railing to keep the snow from falling upon the sidewalk; the court held that the owner of a building with a steep and unguarded roof, who lets it to a tenant, reserving only the right to enter the premises to repair the same, is not liable to a person injured by a fall of snow from the roof while travelling with due care upon the adjoining highway, it not appearing that the tenant might not by the use of reasonable care have prevented the accident. In the course of the opinion the court say: "The defendant's house was not a nuisance in itself. If it was, half the householders in Boston are indictable at the present moment. It was certain to become so at times by the mere working of nature alone, unless the tenant cleared the roof, or took other steps to prevent it. But, so far as appears, the tenant could have done so by using reasonable care. If he could, it was his duty to do so, and the landlord was not liable for the reasons which we have stated."

Very similar to the case last cited was that of *Leonard* v. *Storer*, *supra*, in which the court held the same doctrine afterwards more fully considered in the opinion in *Clifford* v. *Atlantic Cotton Mills*. In that case occupancy by the tenant included the roof as well as the interior, and it did not appear that he might not have cleared the roof of snow by the exercise of due care, or that he might not by proper precautions have prevented the accident. That being the case, there was no neglect of duty or wrongful act on the part of the owner such as to render him liable for the injury.

In the case of *Shipley* v. *Fifty Associates*, 101 Mass. 251, and 106 Mass. 194, where the owners were held responsible for injuries resulting from the fall of ice and snow from the roof upon a traveler, it will be observed that the roof was not in the control of the various occupants of the building, but of the owners,

and for that reason they were held liable. The same is true in the case of *Kirby* v. *Boylston Market Association*, 14 Gray, 249; *Simonton* v. *Loring*, 68 Maine, 164; *Toole* v. *Beckett*, 67 Maine, 544, and many other cases that fall within that class where the owners have been held responsible for injuries resulting from their negligence or wrongful acts. Upon the same principle were the decisions in *McCarthy* v. *York County Savings Bank*, 74 Maine, 315; *Milford* v. *Holbrook*, 9 Allen, 17; *Allen* v. *Smith*, 76 Maine, 335.

In the present case, the tenants had the full control and occupancy of the building. It included the exterior as well as the interior. It is immaterial whether such control and occupancy existed in consequence of a tenancy at will or by virtue of a written lease. The principle is the same. The building was not in itself a nuisance, and could become such only by reason of the action of the elements at certain seasons of the year. If there was any duty to keep the roof clear of snow and ice, it belonged to the tenants. If there was any neglect, it was theirs and not the owners. Nor is there anything in the case to show that the tenants might not, by the exercise of due care, have cleared the roof of snow, or by proper precautions have prevented the accident. The tenants for the time being were in the place of the owner. Nor is it necessary to determine how far the tenant might be warranted in placing suitable guards upon the roof to prevent snow and ice from falling into the street. It has been held that the tenant would have such right, even in cases where the right is reserved to the landlord to enter and make repairs. *Clifford* v. *Atlantic Cotton Mills*, *supra*; *Boston* v. *Worthington*, 10 Gray, 496, 500.

An ordinance of the city was introduced in evidence requiring owners of stores and houses bordering on the streets to put upon the roof of such buildings, railings or other protections to prevent slides of snow and ice, in cases where they have been notified to put on such railings or protections, within thirty days after such notice.

There is no evidence whatever that any such notice, as the ordinance expressly contemplates, was ever given to any body

in relation to this store. This ordinance, therefore, can have no effect in determining the rights and liabilities of these parties. Those rights and liabilities stand unaffected by any ordinance, and must be tested by the principles of the common law.

The entry must therefore be,

Judgment for defendant.

JOSEPH D. CAYFORD *vs.* GREENLEAF A. WILBUR.

Somerset. Opinion May 14, 1894.

Physician. Negligence. New Trial. Damages.

A physician, undertaking the care and treatment of a patient standing in need of his services and employing him, contracts that he possesses ordinary skill, that he will use ordinary care, and exercise his best judgment in the application of his skill to the case which he undertakes.

His liability does not depend upon the skill which he possesses, but rather upon the fact whether he has applied that reasonable skill and diligence which is ordinarily used in his profession.

These are questions of fact to be determined by the jury. And where the evidence is conflicting upon points which are vital to the result, the conclusion reached by the jury will not be reversed, unless the preponderance against the verdict is such as to amount to a moral certainty that the jury erred.

ON MOTION.

The case appears in the opinion.

Merrill and Gower, for plaintiff.

Walton and Walton, for defendant.

SITTING: PETERS, C. J., WALTON, FOSTER, WHITEHOUSE, WISWELL, JJ.

FOSTER, J. Action on the case to recover damages sustained by the plaintiff in consequence of the alleged careless, unskillful and negligent manner in which the defendant as a surgeon treated the plaintiff in reducing a fracture of both bones of the plaintiff's leg. A verdict was rendered for $2075, and the case is now before the court on motion of the defendant to set aside that verdict.

A careful examination of the evidence satisfies us that the motion cannot properly be sustained.

Upon the legal propositions which the case presents, and by which the defendant in the discharge of his duties must be bound, there seems to be little if any controversy. It has become a familiar and well-established principle of law that the physician, undertaking the care and treatment of the patient standing in need of his services and employing him, contracts that he possesses ordinary skill, that he will use ordinary care, and exercise his best judgment in the application of his skill to the case which he undertakes. Nor does the question of his liability depend upon the skill he possesses, but upon the fact whether he has applied that reasonable skill and diligence which is ordinarily used in his profession. Whether he has exercised that skill, or has been guilty of a lack of ordinary care and want of ordinary skill and attention in any given case, is always a question of fact for the jury. And in the present case, with the burden of proof upon the plaintiff to establish a want of ordinary skill and care on the defendant's part, and no contributory negligence on his own, the jury have found in favor of the plaintiff.

It would subserve no general purpose to enter upon a full analysis of the evidence bearing upon the questions at issue in this case. The testimony was more or less conflicting, and the jury must have drawn their own conclusions respecting these questions of fact from having seen and heard the witnesses. No complaint is made to the charge of the presiding judge, and we must assume that the law was correctly given to the jury, and by which they were to be governed in determining the facts. Without proof arising out of the evidence, or otherwise presented, that the jury were influenced by some improper bias, prejudice or influence, we do not feel authorized to assume that such was the case and for that reason cause the verdict to be set aside. With the evidence conflicting, it was the province of the jury to decide those controverted questions, and this they have done. Where the evidence is conflicting upon points which are vital to the result, the conclusion reached by the jury

will not be reversed, unless the preponderance against the verdict is such as to amount to a moral certainty that the jury erred. There is no such preponderance in this case.

Nor are the damages so excessive as to justify the court in disturbing the verdict on that ground. If the plaintiff is entitled to recover, then the damages in a case of this nature, and from all the evidence in the case upon that branch of it, do not seem to us excessive. As a general rule, the parties are entitled to the judgment of the jury and not of the court upon that question. There are cases, to be sure, where the court will intervene; but those cases will be governed by the evidence and circumstances of each particular case. The court will not, however, set verdicts aside on the ground that the damages are excessive or inadequate unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.

Motion overruled.

JOHN O. ELWELL *vs.* EDWARD S. HACKER, and another.

Cumberland. Opinion May 17, 1894.

Master and Servant. Negligence. Practice. Pleading.

To maintain an action against his employer for personal injuries, the servant must establish some neglect of duty on the part of the master arising out of the relation between them, which was the direct cause of the injury, and which the master was bound to guard against.

Ordinarily the question of due care, and of negligence, is one of fact for the jury.

But where the facts are undisputed, and there is no evidence, or the evidence is too slight or trifling to be considered by the jury, then it is the duty of the Court to order a nonsuit.

A case must not necessarily be submitted to the jury because there is a scintilla of evidence. There must be evidence having legal weight.

If evidence is to be offered showing that the injury was received through the negligence of the master in selecting or employing incompetent fellow-servants, the declaration must contain such averment, otherwise the evidence is not admissible.

ON EXCEPTIONS.

The case is stated in the opinion.

J. J. Perry and D. A. Meaher, for plaintiff.
Barrett Potter, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

FOSTER, J. This is an action to recover damages for personal injuries sustained by the plaintiff by the fall of a staging which he was taking down while in the employ of the defendants.

The case comes up on exceptions to the ruling of the judge of the Superior Court in directing a nonsuit at the close of the plaintiff's evidence.

To maintain an action against his employer for an injury such as the plaintiff claims, he must establish some neglect of duty on the part of the defendants, arising out of the relation between them, which was the direct cause of the injury and which as matter of law they were bound to guard against.

In this case there is no evidence upon which a verdict would be sustained showing any negligence on the part of the defendants. In such case, if upon the unquestioned facts, and uncontroverted testimony, it is apparent that the plaintiff's action cannot be maintained, it is not only competent but proper for the presiding judge so to declare by directing a nonsuit. *White* v. *Bradley*, 66 Maine, 254. Ordinarily the question of due care, and of negligence, is for the jury. Especially is this true when the facts bearing upon those questions are in dispute. *Larrabee* v. *Sewall*, 66 Maine, 376; *Aigen* v. *Boston and Maine Railroad*, 132 Mass. 423; or even when the facts are undisputed, and intelligent and fair-minded men may reasonably arrive at different conclusions. *Nugent* v. *Boston, Concord and Montreal R. R.* 80 Maine, 62, 70. But where the facts are undisputed, and there is no evidence, or the evidence is too slight or trifling to be considered by the jury, then it is the duty of the court to order a nonsuit. Where the burden rests upon a party to prove negligence, the evidence in support of it must have some legal weight. A case must not necessarily be submitted to the jury because there is a scintilla of evidence. That

doctrine has long been exploded, inasmuch as it would avail nothing for a jury to find a verdict which the court would set aside for the want of evidence having any legal weight to sustain it. *Connor* v. *Giles*, 76 Maine, 132; *Nason* v. *West*, 78 Maine, 253, 256.

Here, the plaintiff had built the staging himself from materials of his own selection. There is no evidence that these materials were unsuitable. On the contrary, the evidence seems to be conclusive that they were suitable from the fact that the staging had done its work, and held up the brick and mortar of a great mill, and was being levelled to the ground at the time of the accident. There is no evidence that the defendants, or either of them personally superintended the removal of the staging. The plaintiff had built it and worked for months upon it. He knew how it was constructed, and how it was to be taken down, for he had himself taken down more than three fourths of it around the mill, and was removing the balance. It might well be supposed that by that time he knew something about the work he was doing and understood and appreciated the dangers incident to it. The very platform upon which he was standing when he fell had just before been lowered by him from the story above, and was about to be lowered again. He had been instructed by one of the defendants how to remove the staging. They were not obliged to see that no accident happened to the plaintiff. He assumed the ordinary risks incident to the work in which he was engaged, including the negligence of fellow-servants. This principle is too well settled to require the citation of authorities.

But it is claimed there was a defect in the staging; that one of the stays extending through a window and fastened to the floor had been loosened or unfastened from the floor which allowed the stage to spread and precipitate the plaintiff with the plank upon which he was standing to the ground. There is no evidence, however, that the defendants were in any way responsible for the unfastening of the stay. The only evidence bearing upon this, and that is very meager, goes to show that if loosened by any one it was done by one of

the masons at work on the inside of the building, and he was a fellow-servant.

There is no evidence that any fellow-servant of the plaintiff was incompetent, or negligently selected or employed by the defendants. Nor would such evidence be admissible from the fact that the declaration contains no such averment. Such negligence, if relied on in support of the plaintiff's claim, must be averred in the declaration, and established by proof. *Dunham* v. *Rackliff*, 71 Maine, 345, 349; *Blake* v. *Maine Central Railroad*, 70 Maine, 60; *Lawler* v. *Androscoggin Railroad*, 62 Maine, 463.

The case appears to be one where an accident has happened to the plaintiff, but for which no one is responsible in law. See *Kelley* v. *Norcross*, 121 Mass. 508.

Exceptions overruled.

JEROME F. MANNING, and another, *vs.* CHARLES C. PERKINS.

York. Opinion May 17, 1894.

Covenant. Seal. Limitations. Action.

The action for covenant broken can be maintained only for the recovery of damages for the breach of a covenant or contract under seal.

In actions upon contract, the statute of limitations begins to run from the time when the cause of action accrues, and that is at the time of the breach of the contract although no injury may result from the breach until afterwards.

ON REPORT.

The case appears in the opinion.

J. F. Manning, for plaintiffs.

Fairfield and Moore, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

FOSTER, J. This is an action for covenant broken, and is based upon an instrument in writing dated the 26th day of

December, 1876, relative to the prosecution of a claim held by the defendant against the United States for insurance premiums paid for war risks on the ship Addison, and the charters and profits thereof.

The defendant pleads *non est factum* and the statute of limitations.

The instrument offered in evidence, as appears from an inspection of the original as well as copy, was signed by the defendant but not sealed. Following the signature of the defendant is the word "seal," with a brace at each end, printed at the time the blank was printed. This does not constitute a seal within the legal definition of the word, or such as is required by the usage, practice, and common or statute law of this State. *McLaughlin* v. *Randall*, 66 Maine, 226, and cases cited; *Hendee* v. *Pinkerton*, 14 Allen, 381, 387, 388.

The action, therefore, for covenant broken cannot be maintained. Such action can be maintained only for the recovery of damages for the breach of a covenant or contract under seal. It differs materially from the actions of assumpsit and debt. It is a remedy provided for the non-performance of a contract under seal, where the damages are unliquidated and are to be ascertained by the jury, and where neither debt nor assumpsit can be maintained. 1 Chit. Pl. *115. Bouvier, Covenant. 4 Am. & Eng. Encyc. 463.

At the close of the evidence, the plaintiffs moved to so amend their writ that the action for covenant broken should be changed to an action of assumpsit. If legally allowable, it is agreed that this court shall render such judgment as the law and facts require.

From the facts appearing in the report of the evidence it becomes unnecessary to determine whether such amendment could properly be made. For if the amendment were granted and the form of action changed from covenant broken to assumpsit, a barrier is presented to the plaintiffs' right of recovery. The statute of limitations has been pleaded. The cause of action accrued more than six years before the commencement of the action. According to the agreed statement of facts the plaint-

iffs offered and were ready to prosecute the defendant's claim before the Court of Commissioners of Alabama Claims, on July 14, 1882, but the defendant refused to allow them so to do. The plaintiffs did nothing more toward the prosecution of the claim. In their declaration they allege that they "were willing and offered to further prosecute said claim before said Court of Commissioners of Alabama Claims to final judgment and collection thereof, but were prevented and forbidden to do so by the defendant."

This action is brought to recover damages resulting from the defendant's breach of the agreement declared on. It is not for the recovery of compensation for performance by plaintiffs, for it is expressly admitted that the defendant refused to allow them so to do. The gravamen of the action is for damages by reason of being prevented from performance. It is not a rescission but a breach of the contract. There is no evidence of rescission in the case.

The statute of limitations commenced to run from the time when the cause of action accrued. That was at the time of the breach of agreement by the defendant. That moment the plaintiffs could have brought their action against the defendant. More than nine years intervened before the commencement of this action. "If the action rests on a breach of contract, it accrues as soon as the contract is broken, although no injury results from the breach until afterwards." 3 Par. Con. 92; Addison Con. 406; Angell Lim. § 137; *Howell* v. *Young*, 5 Barn. & Cres. 259; *Battley* v. *Faulkner*, 3 Barn. & Ald. 288.

Nor would the plaintiffs be in any better position were their rights to be determined upon the amount "allowed" by the Court of Commissioners of Alabama Claims, as set forth in the contract. Under that claim the cause of action accrued November 20, 1883, the time when judgment was rendered for the amount due the defendant; and that was more than six years prior to this action.

Judgment for defendant.

CHARLES E. SHERMAN

vs.

MAINE CENTRAL RAILROAD COMPANY.

Waldo. Opinion May 21, 1894.

Fires. Practice. New Trial. Irrelevant and Improper Remarks of Counsel. R. S., c. 51, § 64.

The fact that a building in which goods are kept or stored extends a few feet into the location of a railroad, if placed there, or permitted to remain there, by license of the railroad company or its officers, will not exempt the company from liability for injuries to the goods by fires communicated by its locomotive engines.

Irrelevant and improper remarks of counsel in argument to a jury may be a sufficient cause for granting a new trial; and if, upon objection being made, the Court declines to call the offending counsel to order, or omits to instruct the jury to disregard the irrelevant and improper remarks, a new trial may be obtained on exceptions; but if, upon objection being made, the court promptly calls the offending counsel to order and instructs the jury to disregard the irrelevant and improper remarks, exceptions will not lie, and the only mode of obtaining redress is by a motion addressed to the sound discretion of the court.

Exceptions lie only to errors of the court. For misconduct of counsel a motion is the proper remedy.

ON MOTION AND EXCEPTIONS.

The case is stated in the opinion.

Heath and Tuell, for plaintiff.

Webb, Johnson and Webb, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, JJ.

WALTON, J. This is an action based on that provision of the Revised Statutes which makes railroad corporations responsible for injuries caused by fires communicated by their locomotive engines. R. S., c. 51, § 64. The plaintiff was the lessee of a building near the track of the Maine Central Railroad Company in Burnham. He used the upper part of the building for a dwelling-house and the lower part for a store. October 6, 1892, the building and most of its contents were consumed by fire.

The plaintiff claims that the fire was communicated to the building by one of the defendant's locomotive engines; and he has obtained a verdict against the company for $5180.94. The case is before the law court on motion and exceptions.

Exceptions. It appears that one corner of the building extended on to the location of the defendant's roadway some six or eight feet; and, at the trial in the court below, the defendant's counsel requested the presiding justice to instruct the jury that the erection of that portion of the store which was within the lines of the defendant's roadway was unlawful, unless erected for the convenience of and to facilitate the defendant's business authorized under its charter; that neither the plaintiff nor those under whom he occupied had a lawful right to erect a building within the defendant's roadway for their own convenience or use alone; that such erection would be inconsistent with the purposes for which the charter was granted; that it was the duty of the company to preserve the roadway for the uses for which it was incorporated, and it had no right to permit other parties to erect buildings thereon for the sole use of parties other than the railroad; that the railroad had the exclusive control of the land within its roadway, and it was not at liberty to alienate any part of it to be used by other parties for purposes not contemplated by its charter; that while Mr. Tucker, the general manager and vice-president of the corporation, had the right to license the erection of buildings within the roadway, or the use of those having been previously erected there, provided such erection or use was for the convenience of the railroad or to facilitate its business, he had no authority to license such erection, or the use of it, for the sole use and convenience of others in a business not connected with the defendant's.

The presiding justice did not give the requested instructions in the language employed by counsel; but he instructed the jury that if there was a want of ordinary care on the part of the plaintiff in allowing his goods to remain in a building a part of which was within the located limits of the defendant's roadway, whether there by license or otherwise, and such want

of care caused or contributed to the result, the plaintiff could not recover. Could the railroad company rightfully claim more? Can the proposition be maintained that the mere fact that one corner of a building in which goods are kept or stored extends a few feet over one of the side lines of the roadway (though placed there or permitted to remain there by express license of the railroad company or its officers) will exonerate the company from all liability for injuries to the goods by fires communicated by its locomotive engines? Will that fact alone exonerate the company from all liability under the statute cited? We think not. The statute contains no such exemption in express terms, and we think none is implied. The same question has been presented in Massachusetts and in Vermont, under statutes similar to our own, and answered in the negative, and we can see no reason for doubting the correctness of these decisions. *Ingersoll* v. *Railroad*, 8 Allen, 438; *Grand Trunk Railroad* v. *Richardson*, 91 U. S. 454.

We now come to another question. The defendant's counsel have included in their bill of exceptions an exception to remarks made by the plaintiff's attorney in his closing address to the jury. Do exceptions lie for such an error? We think not. Exceptions lie only to errors of the court. A motion is the proper remedy for the misconduct of counsel. In this case, there was no error on the part of the court. The offending attorney was promptly called to order, and the jury instructed to disregard the improper remarks. If, under these circumstances, the remarks were considered sufficiently objectionable to entitle the defendant to a new trial, the new trial should have been sought by motion, not by exceptions. If, as in *Rolfe* v. *Rumford*, 66 Maine, 564, upon objection being made, the court had declined to call the offending attorney to order, and had omitted to instruct the jury to disregard the improper and irrelevant remarks, then there would have been error on the part of the court, and redress could have been sought by a bill of exceptions. But no such errors occurred in this case. The offending attorney was promptly called to order and the jury emphatically instructed to disregard the irrelevant and improper

remarks. The remarks excepted to related to the amount of taxes paid by the railroad company, and were so obviously irrelevant, and so clearly intended as an offset to similar remarks made by the defendant's counsel in his closing address to the jury, that if they had been passed by in silence, we doubt if they would have had the slightest influence upon the jury. But they were not passed by in silence. The court characterized them as grossly irrelevant and instructed the jury not to be in the slightest degree influenced by them. Clearly, there was no error on the part of the court; and if the misconduct of the plaintiff's counsel could be deemed so gross as to entitle the defendant to a new trial, the only legitimate means of obtaining it was a motion addressed to the sound discretion of the court, and not a bill of exceptions. Motions are more elastic than exceptions; and, as remedies, the two forms must not be indiscriminately employed.

For the reasons given, we think the exceptions must be overruled. And we do not think the verdict can be regarded as so clearly against evidence, or the damages so clearly excessive, as to require us to grant a new trial on either of those grounds. Consequently, the motion must be overruled.

Motion and exceptions overruled.

STATE *vs.* HENRY THERRIEN.

Androscoggin. Opinion May 26, 1894.

Intox. Liquors. Search and Seizure. Process. Variance. Stat. 1891, c. 132, § 4.

The search and seizure process under the statutes relating to intoxicating liquors kept and deposited in a place, do not authorize the search and seizure process against the person.

Where the complaint and process were for unlawfully keeping and depositing intoxicating liquors in his shop and its appurtenances, and the proof is for unlawfully having such liquors upon his person, *held;* that there is a variance.

If an officer would take such liquors from the person and thereupon make an arrest, he must arm himself with process specifically and in terms authorizing such an act.

ON EXCEPTIONS.

This was a search and seizure process against the defendant for illegally keeping and depositing intoxicating liquor in a certain shop and its appurtenances, situated on the east side of Lincoln street in Lewiston, on the twenty-eighth day of November, A. D., 1892.

The evidence on the part of the State tended to show that the intoxicating liquors described in the complaint were found upon the person of the defendant and were taken from his pocket just as he stepped outside of the front door, by one of the officers executing the process.

The defendant thereupon moved for his discharge on the ground of variance, but the presiding justice overruled the defendant's motion. The defendant after a verdict against him, took exceptions to this ruling which were allowed.

H. W. Oakes, County Attorney, for State.

F. L. Noble, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, JJ.

EMERY, J. The complainant, a deputy sheriff, found a bottle of whiskey on the person of the defendant, and took it from his pocket, just as the latter stepped outside of the front door of his shop on Lincoln street in Lewiston. The officer then made this complaint, charging that intoxicating liquors were unlawfully kept and deposited by the defendant "in the shop and its appurtenances occupied by him" on Lincoln street, and alleging that the complainant had previously found a bottle of whiskey "upon the above described premises," and praying for process to seize "the said liquors." The warrant directed the officer to "seize the liquors named in foregoing complaint," and to arrest the defendant and take him before the court to answer to the "said complaint."

There is in the complaint no statement that intoxicating liquors had been found on the person of the defendant; nor that such liquors were concealed about his person; nor that he was suspected of selling from or keeping such liquors in his pocket.

(Public Laws of 1891, ch. 132, § 4.) The allegations were confined to "the shop and its appurtenances." The warrant contained no command to seize any other liquors than those described in the complaint as found in the shop.

The charge and process are for having unlawfully kept and deposited intoxicating liquors in his "shop and its appurtenances." The proof at the most is of unlawfully having such liquors upon his person. The variance is evident. It was held in *State* v. *Grames*, 68 Maine, 418, that a complaint and warrant against intoxicating liquors in a place, will not authorize a prosecution for having such liquors upon the person. If it is sought to prosecute one for unlawfully having intoxicating liquors upon his person, the complaint and warrant should be directed against that offense. If an officer would take such liquors from the person, and thereupon make an arrest, he must arm himself with a process specifically and in terms authorizing such an act. The complaint and warrant in this case contained no allusion to the person.

The request of the defendant for an instruction to the jury that the evidence did not sustain this complaint and process should have been granted. *Exceptions sustained.*

STATE *vs.* FRANK PERLEY AND JAMES H. GOODWIN.

Penobscot. Opinion May 29, 1894.

Indictment. Robbery. Pleading. Value.
R. S., c. 100, § 1; c. 118, § 16, Stat. 1889, c. 250.

In an indictment for robbery a description of the property taken as "certain money and one silver watch and watch chain of the goods and chattels of said J. N. E.," is sufficient without further allegation of value.

The rule that indictments for larceny must allege the value of the article stolen is still maintained because the punishment for larceny is graduated by our statutes with reference to the value of the property taken.

There is nothing in the nature of robbery as defined by the common law from which it appears that the value of the property taken has ever been deemed of the essence of the crime, and there is no statute in this State which makes the punishment of the offense dependent upon the value of the property taken.

ON EXCEPTIONS.

The defendants were convicted of robbery upon the following indictment:

"The jurors for the State aforesaid, upon their oath, present that Frank Perley and James H. Goodwin of Bangor, in the county of Penobscot, on the thirtieth day of August, in the year of our Lord, one thousand eight hundred and ninety-two, at Bangor, in the county of Penobscot, aforesaid, in and upon one John H. Emerson feloniously an assault did make and him, the said John H. Emerson did then feloniously put in fear and with force and violence, did then feloniously steal, take and carry away from the person of him, the said John H. Emerson, certain money of the said John H. Emerson, and one silver watch and one watch chain of the goods and chattels of the said John H. Emerson, against the peace of said State, and contrary to the statute in such case made and provided."

The defendants moved in arrest of judgment as follows:

"And now after a general verdict of guilty, and before judgment in the above entitled cause, the respondents, the said Frank Perley and James H. Goodwin, come and move the court that judgment in said cause be arrested and that they be discharged and allowed to go without day for the following reasons, to wit:

"First. Because said indictment does not, with sufficient certainty, precision and particularity, allege and set forth any crime.

"Second. Because said indictment does not, with sufficient certainty, precision and particularity, set forth and allege the crime intended to be charged by the grand jury, and which the jury who tried the case meant to convict the respondents of, to wit, robbery.

"Third. Because the money and goods and chattels alleged in said indictment to have been stolen, taken and carried away from the person of John H. Emerson are not set forth and described with sufficient certainty, precision and particularity.

"Fourth. Because the money alleged in said indictment to have been stolen from the person of said John H. Emerson is not described at all, and there is no allegation of how much it

amounted to, or that it had any value, and there is no allegation in the aforesaid indictment that the watch and chain, the only other property named in the indictment, was of any value whatever, and no reason is stated in said indictment why the said money is not therein described or its amount given, or why its value is not stated, if it had value; nor is any reason given in said indictment why, if said watch and chain had value that value is not stated therein.

"Fifth. Because said indictment is in other respects informal, insufficient and not valid."

The motion was overruled by the court and an exception was taken thereto.

The defendants also took exceptions as follows:

"The judge presiding did not inform the jury that they could find a verdict against the respondents for any offense less than robbery and no request to that effect was made by counsel and no allusion was made to the point by counsel on either side during the trial. And no contention was set up at the trial that the respondents might be guilty of any less offense, if guilty at all. All that was said by the judge on that subject is embraced in the following extract from the charge: 'The two respondents are accused by the indictment of the crime of robbery. The punishment for the crime may be as high as imprisonment for life, and it may be as low as any term of years, which might be two.' On the subject of value of property taken the judge made the following remarks: 'It is not necessary for the government to prove that all the articles alleged were taken from him in order to constitute robbery. It is sufficient if they were all taken, or any of them were taken, or any part of them were taken, or the least of them were taken. No matter how successful or unsuccessful in amount of property taken if any was taken from the complainant's person by violence, feloniously, the offense is established as having been committed by somebody.'

"To the order of the court overruling the motion and to the above instructions of the judge and to his omission to instruct the jury that they could find the respondents guilty of any

offense less than robbery, the respondents except by their attorneys."

Jasper Hutchings and P. H. Gillin, for defendants.

Indictment must stand or fall at the common law, because we have no statute like 14 and 15 Vict. under which the precedent is taken in this case. 2 Arch. Crim. Pr. and Pl. 521.

Counsel also cited: 2 Russell, Crimes, 1st Am. Ed. pp. *988, *989; 1 Whar. Prec. 6th Ed. p. 411; Davis Crim. Proc. p. 704; 3 Chitty Crim. Law, (Riley Ed.) p. 566; *State* v. *Dawes*, 75 Maine, 51; *State* v. *Gerrish*, 78 Maine, 20; *Com.* v. *Cahill*, 12 Allen, 540.

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

SITTING: WALTON, LIBBEY, EMERY, FOSTER, WHITEHOUSE, WISWELL, JJ.

WHITEHOUSE, J. The defendants were found guilty of the crime of robbery on an indictment under chapter 250 of the statute of 1889, entitled, "An act to define robbery and its punishment," which reads as follows: "Whoever by force and violence or by putting in fear, feloniously steals and takes from the person of another property that is the subject of larceny, is guilty of robbery, and shall be punished by imprisonment for life or for any term of years." This act of 1889, however, did not modify the definition of robbery as found in R. S., c. 118, § 16, but only changed and simplified the provisions of that section respecting the punishment.

It is charged in the indictment that the respondents "feloniously an assault did make and him the said John H. Emerson did then feloniously put in fear and with force and violence did then feloniously steal, take and carry away from the person of him the said John H. Emerson, certain money of the said John H. Emerson, and one silver watch and one watch chain of the goods and chattels of the said John H. Emerson."

After the verdict the defendants filed a motion in arrest of judgment based on four specifications; but the only ground now relied upon is that the indictment contains no allegation that

the money or the watch and chain therein mentioned had any value.

It is a principle of natural justice which was early recognized as a fundamental rule of the common law, now incorporated into our constitution as a guaranty of protection to individual rights, that in all criminal prosecutions the accused is entitled to "demand the nature and cause of the accusation" against him. No person can be held to answer to a criminal charge until it is "fully, plainly, substantially and formally described to him." Every material fact which serves to constitute the offense must be expressed with reasonable fullness, directness and precision. The purpose of this rule is sufficiently obvious. It is to inform the accused of the exact charge against him, and enable the court to determine whether the facts alleged constitute a crime, and on proof of them to render such appropriate judgment as will be a bar to any future prosecution for the same offense. 3 Stark. Ev. 1527; *Com.* v. *Pray*, 13 Pick. 359. "The doctrine of the court," says Mr. Bishop, "is identical with that of reason, viz: that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." 1 Bish. Cr. Prac. § 81. It is plain, however, that much of the useless tautology and wearisome prolixity which characterized indictments in the early period of criminal procedure, can be safely avoided without any infringement of this sacred right of the citizen. It is the policy of our modern courts to encourage a more rational system of pleading, with greater directness and simplicity of statement, with less verbiage and needless repetition, and with greater regard for the construction and idioms of the English than for those of the Latin language. In reason, an indictment is best, says Mr. Bishop, when it is "in the fewest and aptest words with no superfluous matter," and while under ordinary circumstances it would not be judicious to omit anything concerning the necessity of which a question may be raised to embarrass the trial, on the other hand no allegation and ordinarily no word should be introduced which is certainly needless. Bish. D. & F. § § 10, 35.

In the case at bar, if the value of the property named in the

indictment is not a necessary ingredient of the offense sought to be charged and is not "legally essential to the punishment to be inflicted" an allegation of it is "certainly useless" and properly omitted. The precise point has never before been raised in this State, and the court is now at liberty to determine it in accordance with the plain philosophy of the question and the true science of pleading.

The indictment charges the offense in the language of the statute as far as permissible under the rule requiring a specification of the property and other identifying particulars. It does not state generally that the defendants took "property that is the subject of larceny," but specifically that they took "certain money and one silver watch and watch chain," which are declared by R. S., c. 100, § 1, to be subjects of larceny. It must be observed that there is no provision of this statute which makes the amount of property taken an essential element of the offense; and there is no statute in this State which creates degrees in robbery, or in any way makes the punishment of the offense, dependent upon the value of the property taken.

Nor is there anything in the nature of robbery as defined by the common law from which it appears that the value of the property has ever been deemed of the essence of the crime. Blackstone defines it to be "the felonious and forcible taking from the person of another, of goods or money to any value by violence or putting him in fear;" (4 Bl. Com. 242,) and all the authorities agree that the taking may be of money or goods "of any value." The value of the property is therefore quite immaterial. "A penny as well as a pound forcibly extorted makes a robbery, the gist of the offense being the force and terror." 2 Arch. Cr. Pr. & Pl. 1287; 3 Co. Inst. 69; 1 Hale P. C. 532; 1 Hawk. P. C. 212.

True, robbery is charterized by the common law as compound or aggravated larceny. It is "larceny committed by violence from the person of one put in fear." 2 Bish. Cr. Law, § 1156. And it is the well-settled general doctrine that indictments for larceny must allege the value of the article alleged to have been stolen. It is conceded, however, that this rule had its origin in

the practice of distinguishing between grand and petit larceny with reference to the extent of the punishment, that being dependent in some measure upon the value of the article stolen; and it is still maintained because under our statutes the punishment for larceny is also graduated with reference to the value of the property stolen. 2 Arch. Pl. & Pr. 1149 & note; *Hope* v. *Com.* 9 Met. 134; 2 Bish. Cr. Prac. § 713; Rev. Stat. Ch. 120, § 1. But where the value is not essential to the punishment it need not be distinctly alleged or proved. The jury must be satisfied, however, that the goods were of some value, and they may infer it without separate proof, either from the inspection of the articles, or from the description of them by the witnesses. 2 Bish. Cr. Prac. § 751; *Com.* v. *Burke*, 12 Allen, 182; *Com.* v. *Lawless*, 103 Mass. 425; *State* v. *Gerrish*, 78 Maine, 20. Upon this point Mr. Archbold says: "Since the distinction between grand and petty larceny was abolished, it seems to have been no longer necessary to insert the value of the article stolen in indictments, except for stealing to the value of £5 in a dwelling-house. It was said, indeed, by some to be necessary to show that the thing was of some value, but this was sufficiently shown by stating it to be of the goods and chattels of the prosecutor. As it can be of no use, therefore, in any case to insert it where the value or price is not of the essence of the offence, and as the Stat. 14 & 15 Vict. (Sect. 24, c. 100) sanctions its omission in all other cases, I have in practice omitted to insert it except in the simple case above mentioned." 2 Arch. Pr. & Pl. 1153.

It is still urged, however, that upon the theory that robbery is an aggravated larceny, an indictment for robbery should contain the allegation of value to authorize a conviction of larceny, in the event of a failure to prove the aggravation. But this suggestion is sufficiently answered by the statute creating a distinct offense of larceny from the person, the punishment of which does not depend upon the value of the property stolen (R. S., c. 120, § 4). In *Com.* v. *McDonald*, 5 Cush. 365, the court says respecting this offense: "As the punisment for stealing from the person does not depend on the amount stolen

there was no occasion for any allegation of value." This is cited with approval in the note to 2 Arch. Pr. & Pl. 1150. And in *Com.* v. *Burke*, 12 Allen, 182, the precise point was directly raised and determined in accordance with the dictum in *Com.* v. *McDonald*, *supra*. It is clear, therefore, that in an indictment for robbery no allegation of value can be necessary to justify a conviction of the minor offense upon failure to prove the aggravation.

Many other authorities may be cited in support of the proposition, so strongly sustained by reason, that an indictment for robbery is sufficient without an averment of the value of the property taken. In *State* v. *Howerton*, 58 Mo. 581, the court says respecting this crime: "The value of the thing taken is not of the essence of the offense. The putting in fear and taking the property constitute the gist of the crime and there is no necessity for either charging in the indictment or proving at the trial or specifying in the verdict, the value of the property." In *State* v. *Burke*, 73 N. C. 83, it is said to be unnecessary to allege the value of the property, "since force or fear is the main element of the crime." See also Wharton Cr. L. 9 Ed. § 857; *State* v. *McCune*, 5 R. I. 60 & note (70 Am. Dec. 180); *James* v. *State*, 53 Ala. 38; *Williams* v. *State*, 10 Texas App. 8.

The reasoning of the court in *Com.* v. *Cahill*, 12 Allen, 540, is not in harmony with *Com.* v. *McDonald*, and *Com.* v. *Burke*, *supra*, from the same state, and cannot be adopted by this court.

The other objections raised by the defendants' exceptions are not insisted upon and are obviously without merit.

Exceptions overruled.

INEZ B. JEANE

vs.

GRAND LODGE, ANCIENT ORDER UNITED WORKMEN.

Lincoln. Opinion May 29, 1894.

Insurance. Beneficiary. Membership. Expulsion. Appeal.

Members of private societies and associations must exhaust the remedies given them by the rules of the society before appealing to courts of law for relief.

ON REPORT.

This was an action of assumpsit to recover the sum of $2000, by the plaintiff who is the widow of Harry J. Jeane, and the beneficiary named in his application for membership and insurance in Lakeside Lodge No. 43, located at Jefferson, Knox county, a subordinate lodge of the defendant association. The application is dated December 25, 1890, on which day, he was initiated a member of the lodge, and the applicant died October 27, 1891.

The defendant is a corporation under the laws of the Commonwealth of Massachusetts, and is organized, "for the purpose of uniting in social and fraternal association all acceptable men of sound bodily health and good moral character, to promote benevolence, charity, and morality, to aid members disabled by accident or sickness, or the wives, children or other relatives of, or any other person dependent upon such members; and to assist the widows, orphans or other relatives of deceased members, or any persons dependent upon deceased members, and have complied with the provisions of the statutes of this Commonwealth." The defendant corporation is the supreme authority of the order known as Ancient Order of United Workmen.

Lakeside Lodge No. 43, located at Jefferson, Knox county, which admitted Jeane to the order, and of which he was a member, is a subordinate lodge, existing by authority of the defendant corporation, and Jeane was, March 26, 1891, at a stated meeting expelled therefrom, for "having made a false statement or answer in his application for membership; and written notice of the fact, under seal of the lodge, was mailed to him a few days after, and the money paid by him refunded.

The plaintiff contended that the expulsion was irregular and void, and therefore without any effect upon her rights.

No appeal from the action of Lakeside Lodge so expelling him, was ever taken by Jeane, as provided by the laws of the defendant corporation.

Applicants for membership agree to comply with all the laws, regulations and requirements of the order, then or thereafter enacted. The constitutions and laws are made a part of the contract. Under provisions of Law XI, page 76:

"Every member who does not take an appeal, in any case affecting his rights or interests in the Order, within the time allowed, shall be deemed to have thereby agreed to abide by such decision or enforcement of the laws or rules of the Order."

Under the provisions of section 21, law XIX:

"When a member shall be suspended or expelled, for any cause whatever, he forfeits all rights, benefits and privileges, and his beneficiary thereby loses all right to any portion of the beneficiary fund.

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

L. M. Staples and *John Haskell Butler*, of Boston Bar, for defendant.

SITTING: PETERS, C. J., WALTON, LIBBEY, EMERY, FOSTER, HASKELL, JJ.

HASKELL, J. The plaintiff must recover, if at all, upon the ground that her husband died while a member of defendant corporation in good standing. Before his death, he had been expelled from membership. It is said that the proceedings leading to his expulsion were irregular, and did not conform to the rules of the order. Suppose they were; the laws of the order give an appeal to a supreme tribunal constituted for the very purpose of correcting such errors, and they provide that each member failing to take such appeal "shall be deemed to have thereby agreed to abide by such decision or enforcement of the laws or rules of the order."

The deceased failed to take any appeal from his expulsion, and thereby must be held to have acquiesced in the decision. If courts of law should undertake to review the regularity of procedure in all secret or private societies or associations, the burden would become onerous. Moreover, it is just and reasonable to hold, that when a member of such society has a remedy, under the rules of his order, from any supposed erroneous action injurious to himself, that he should first exhaust that remedy before appealing to the courts for relief. *Karcher* v. *Knights of Honor*, 137 Mass. 368; *Chamberlain* v. *Lincoln*, 129 Mass.

70; *Grosvenor* v. *United Soc. Believers*, 118 Mass. 78. This court approved the doctrine of the above cases in *Lowell* v. *The Iron Hall*, an unreported case decided in July, 1892.

Judgment for defendant.

JOHN JONES, in equity, *vs.* ROBERT W. LIGHT.

Knox. Opinion May 29, 1894.

Fraudulent Conveyances. Subsequent Creditors. Notice. Stat. 13, Eliz. c. 5.

Where a conveyance though absolute in form, but for a consideration grossly inadequate, the grantor retaining a valuable interest in the property, is made with the intent to hinder and delay creditors, and this intent is participated in by both parties, such conveyance is void, not only against existing but against subsequent creditors and *bona fide* purchasers, whether they have notice of such conveyance or not.

A mortgagee is a purchaser.

ON REPORT.

The case appears in the opinion.

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

W. H. Fogler, for defendant.

SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, WHITEHOUSE, JJ.

FOSTER, J. This is a bill in equity, the main object of which is for the removal of a cloud upon the plaintiff's title. The prayer is for a decree rendering void a deed given by Lewis McDonald to Robert W. Light, the defendant, dated June 16, 1885, and if not void, that it may be in equity a mortgage only.

The claim of the plaintiff is that this deed, absolute in form, was without consideration, or if for any, for one grossly inadequate, and made with the intent to hinder and delay creditors, and that this intent was participated in by both parties.

If the position of the plaintiff is supported by the facts, the authorities are unquestioned, and the principle firmly established, which hold that such a conveyance is void, not only against existing but subsequent creditors and *bona fide* purchasers. It would

fall within the prohibition of the statute 13 Eliz., c. 5, which has become a part of our common law, and which was passed "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors, and others, of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs."

To intelligently understand the case it is necessary to present the following facts.

Sometime in March, 1885, Lewis McDonald found it impossible to meet his indebtedness to his creditors, and executed a mortgage of all his real estate in North Haven to Wright Bros. & James of Boston, whose claim against him at that time was upwards of $1200. In the course of two or three months it became apparent that the indebtedness of McDonald was very much in excess of what it was supposed to be at the time the mortgage was given. Realizing that the mortgage could not be upheld as against all the other creditors, Wright Brothers & James, on the 19th day of June, joined with the other creditors and filed a petition in insolvency against McDonald.

On June 16th, 1885, three days before the petition in insolvency was filed, and about three months after the mortgage of all his real estate had been given by him to Wright Bros. & James to secure their $1200 claim, McDonald appears to have gone to Boston and executed a quitclaim deed of the same real estate for the nominal sum of one dollar and other valuable considerations, running to the defendant. This deed was either taken by McDonald to North Haven, or sent to him by mail, for the purpose, as the defendants says, of being acknowledged by McDonald and procuring the signature of his wife releasing dower. No mention was made in this deed of the mortgage then existing upon the property to Wright Bros. & James. A list of McDonald's creditors was furnished by him June 5, 1885, and in which the name of the defendant Light did not appear. After being decreed insolvent, McDonald furnished a list of his

real and personal property for the insolvent court, and in this list were included the three parcels of real estate which had been mortgaged to Wright Bros. & James, and which had, after the mortgage was given, been included in the quitclaim deed to the defendant Light. The mortgage to Wright Bros. & James was invalidated by the insolvency proceedings. A list of McDonald's creditors as amended after being first filed, when his composition agreement and settlement thereunder was made, contains no reference to the defendant Light. In the meantime McDonald had acknowledged the deed to the defendant, and sent the same to the registry for record without the signature of his wife.

To carry out the composition agreement with his creditors, it became necessary for McDonald to raise quite a sum of money. The principal security he had to offer for this purpose was the real estate included in the quitclaim deed to the defendant. With these three parcels, and his interest in certain vessels which turned out to be of no value, his attorney, B. K. Kallock, who was then acting for him, made an arrangement through G. M. Hicks, an attorney, and who was acting for the plaintiff in this suit, to hire $3600 of the plaintiff. Mr. Kallock at the time of the loan knew about the quitclaim deed to Light, — had talked it over with McDonald and with Mr. Hicks, counsel for the plaintiff. Mr. Hicks, had talked it over with McDonald who had told him that it was a bogus deed, without consideration, and given for the purpose of heading off the attorney for Wright Bros. & James, and that the defendant Light would never under any circumstances make any move under it.

Under these circumstances a loan was obtained from the plaintiff to McDonald, of $3600, the principal security for which was a mortgage of the same real estate which McDonald had previously included in the quitclaim deed to the defendant. With this money McDonald was enabled to carry out his composition agreement and effect a settlement with his creditors.

McDonald being unable to pay anything to the plaintiff upon his indebtedness to him, the mortgage was foreclosed, and the plaintiff took possession of the premises, and McDonald attorned to him, holding under him as his tenant.

It appears that the plaintiff himself had never personally had any knowledge whatever of the existence of the deed from McDonald to the defendant. That deed had remained in the custody of the register of deeds till sometime in 1891, or more than six years after it was executed, and after the mortgage from McDonald to the plaintiff. In August, 1891, McDonald being desirous of purchasing one of the parcels, went to the plaintiff and made a trade with him for its purchase, taking a bond for a deed to his son, paying a part down and giving his own notes for the remainder. About that time upon an examination of the records, the plaintiff, who at the time of the trial was over ninety years of age, learned for the first time of the deed from McDonald to the defendant. His attorney at once went to Boston, saw the defendant who then insisted on the validity of the deed to himself, and claimed to have expended from $3000 to $4000 in connection with the transaction, but refused to render any account of any advancements that he had made to McDonald. Up to this time the defendant had never asserted any title under his deed, or made any claim in any way to the possession of the property.

While the defendant now claims that a portion of the consideration for this deed, (more than two thirds the value of the property named therein, or certainly more than two thousand dollars), was to be afterwards rendered in professional services, he states that he has never made any memorandum of those services or charge thereof, never has notified McDonald of the amount which he claims for the same, and that McDonald has never called upon him for any statement of the amount. It will be noticed that in his answer filed to this bill, the defendant states that the consideration was all paid before and at the time of the execution of this deed to him.

It is expressly admitted by the defendant that at the time he took this deed, he was informed by McDonald that he was being pressed by his creditors, and one of the principal objects of the conveyance was to secure him for services which he was to perform in bringing about a compromise with McDonald's creditors. The real estate which was included in this deed was all the real

estate owned by McDonald. It appears to have been worth between $3000 and $4000, and the defendant admits that prior to the deed he had paid but $475, and after that enough to bring the amount up to $1000; and while he insists, that he never made any agreement either verbal or otherwise to reconvey to McDonald under any circumstances, or that there was any such understanding, he does admit that the balance of the consideration was to be paid in services to be rendered in the future, none of which had been rendered at that time. He also states that he does not expect to hold two of the parcels, and that he regards them as security only for services, none of which, as we have remarked, had been rendered at the time the deed was given. In his answer which was filed to this bill he denies that the deed was given to secure him for the payment of any sum due him for professional fees, or for the security of any sum or sums whatever.

McDonald testifies that there was an understanding between himself and the defendant that, by advancing money to him, the defendant was to have the homestead and McDonald was to occupy it and live in it and it was to be paid from the proceeds when sold, and that he trusted to the defendant's honesty in making a conveyance of this property to him by an absolute conveyance when the property was worth more than $3000, and he had received less than one third of its value.

In *Sidensparker* v. *Sidensparker*, 52 Maine, 481, 491, this court held that such an arrangement between grantor and grantee is a *continuing* fraud, and has been held void not only as against precedent, but, also, against subsequent creditors. In that case the grantor, as a part of the consideration of the deed, was to receive future support to be furnished by the grantee. The same doctrine is held in *Coolidge* v. *Melvin*, 42 N. H. 510, and cases there cited.

But from a very careful and thorough examination of the evidence in this case, we feel that in addition to any secret trust existing between McDonald and this defendant, the conveyance was made with an intent to hinder and delay creditors, and that this intent was participated in by both parties to the

conveyance. Such being the case, the deed from McDonald to the defendant would be void, not only as against existing creditors at the time the deed was executed, but also against subsequent creditors and *bona fide* purchasers.

This doctrine is distinctly laid down by this court in *Wyman* v. *Brown*, 50 Maine, 139, 148, where Mr. Justice WALTON, correctly stating the principle enunciated by the decided cases, says: "An absolute conveyance on full consideration, if made with intent to hinder and delay creditors, is undoubtedly void against existing creditors; but we do not intend to decide that such a conveyance is void against subsequent creditors or purchasers; we intend to decide only that, where a conveyance is for a consideration grossly inadequate, and is absolute in form only, the grantor retaining a valuable interest in the property, and the conveyance is made with the intent to hinder and delay creditors, and this intent is participated in by both parties, that such a conveyance is void, not only against existing creditors, but against subsequent creditors and *bona fide* purchasers, whether they have notice of such fraudulent conveyance or not." *Ricker* v. *Ham*, 14 Mass. 137; *Clapp* v. *Leatherbee*, 18 Pick. 131; *Beal* v. *Warner*, 2 Gray, 447; *Wadsworth* v. *Havens*, 3 Wend. 411; *Hudnal* v. *Wilder*, 4 McCord, 295; *Hill* v. *Ahern*, 135 Mass. 158.

The case of *Whitmore* v. *Woodward*, 28 Maine, 392, 418, is to the same effect, and the court there say: "The statute 13 Eliz., c. 5, is not confined in its operation to creditors existing at the time of the commission of the fraud, but embraces those who subsequently become such. It is not necessary to prove that the fraud was meditated against those who might become creditors at a subsequent period. If the transaction is actually fraudulent against any creditor, any and all creditors may impeach and resist it, and are entitled to the aid of the law in appropriating the property, fraudulently conveyed, to the payment of their debts. The uniform construction of that statute includes subsequent as well as existing creditors." *Howe* v. *Ward*, 4 Maine, 195; *Clark* v. *French*, 23 Maine, 221, 229; *Bangor* v. *Warren*, 34 Maine, 324; *Smith* v. *Parker*, 41

Maine, 452; *Marston* v. *Marston*, 54 Maine, 476; *Bailey* v. *Bailey*, 61 Maine, 361, 364. See also *Laughton* v. *Harden*, 68 Maine, 208, 211.

True, the plaintiff's agent and attorney at the time he loaned the money and took the mortgage, had notice of the deed from McDonald to the defendant, but he was assured and believed that the deed was invalid and that it would never be set up. And if the plaintiff himself is chargeable with all the knowledge which his agent had, he is not for that reason deprived of his remedy as a subsequent creditor, or purchaser for value in good faith, if that deed was given with an intention to defraud creditors, and the fraud was participated in by both parties to it, within the principle laid down in the foregoing decisions. *Ricker* v. *Ham*, 14 Mass. 137, 141; *Hill* v. *Ahern*, 135 Mass. 158, 159; *Clapp* v. *Leatherbee*, 18 Pick. 131, 138; *Wyman* v. *Brown*, 50 Maine, 139, 148. "A conveyance actually fraudulent is void against subsequent purchasers for valuable consideration, even with notice." American Leading Cases, 47. In *Wyman* v. *Brown*, *supra*, the court say that such a conveyance is void not only against existing creditors, "but against subsequent creditors and *bona fide* purchasers, whether they have notice of such fraudulent conveyance or not." In *Ricker* v. *Ham*, *supra*, Chief Justice Parker said: "We apprehend the term *bona fide*, as used in the law upon this subject, means only that the purchase shall be a real and not a feigned one; otherwise the knowledge would not be held immaterial, as it is in all the books."

A mortgagee is a purchaser. *Chapman* v. *Emery*, 1 Cowper, 278; *Hill* v. *Ahern*, *supra*.

That the plaintiff was a purchaser in good faith, within the meaning of the law relating to fraudulent conveyances, there can be no doubt. He actually paid $3600, receiving a mortgage upon property not worth more than that amount. That the transaction in relation to the conveyance in question was permeated with fraud, and that both parties participated in that fraud, the evidence fully satisfies us. But it will be of no general benefit to detail the facts appearing in evidence

which satisfy us of the fraudulent nature of the conveyance. They are disclosed sufficiently upon the record. Some of them have already been stated, but they are too manifold to be reproduced within the proper limits of an opinion which should determine the legal rights of parties, and the principles of law governing the same, instead of furnishing a summary of evidence which can be of no advantage in the decision of other cases.

The evidence shows that the plaintiff has been in possession of the premises since the foreclosure of his mortgage in 1888, and as the bill is informal in not sufficiently stating the plaintiff's possession (*Robinson* v. *Robinson*, 73 Maine, 170), an amendment may be made alleging such possession in the plaintiff. Thereupon a decree is to be entered sustaining the bill, and adjudging the deed from Lewis McDonald to Robert W. Light null and void, and that the defendant release all interest in the land described in said deed to the plaintiff.

Decree accordingly, with costs for the plaintiff.

MARY P. FRISBEE, and others, in equity,

vs.

CHARLES W. FRISBEE, and another.

York. Opinion May 29, 1894.

Mortgages. Redemption. Assignment. Subrogation. Adverse Possession. Limitations.

Any one who has an interest in mortgaged premises and who would be a loser by foreclosure, is entitled to redeem.

Where there are two mortgages upon the same property to different parties, and the subsequent mortgagee redeems the prior mortgage, but no assignment thereof is made to him, he is entitled by operation of law, to be so far subrogated to the rights of the first mortgagee as to hold the first mortgage security, as *quasi* assignee, for the purpose of being reimbursed for the amount he has been compelled to pay to protect his interests as second mortgagee, in case of redemption of his own mortgage.

There is a recognized distinction between rights acquired by assignment, or contractual relations of the parties, and those acquired by operation of law.

The right to redeem may be barred by exclusive and adverse possession of the land by the mortgagee, or his assignees for twenty years; but such possession must be unequivocally adverse to the mortgagor or those claiming under him.

ON REPORT.

The case appears in the opinion.

Savage and Oakes, for plaintiffs.

The effect of redemption from a mortgage is simply to extinguish the mortgage. Thomas Frisbee did not receive an assignment of the foreclosed mortgage, only a release from the mortgage, in accordance with the decree of the court granting redemption. This was all he was entitled to. *Lamb* v. *Montague*, 112 Mass. 352; *Lamson* v. *Drake*, 105 Mass. 564; *Union Inst. &c.*, v. *Hill*, 139 Mass. 47.

The statute of limitations does not reach this case. The lapse of twenty years furnishes a presumption of foreclosure, but it is only a presumption, and it is open to proof that no foreclosure was ever consummated. *McPherson* v. *Hayward*, 81 Maine, 329; *Knight* v. *McKinney*, 84 Maine, 107; Story Equity, § 1157.

It is admitted that the Lowry mortgage and note are still held by defendants, and have never been paid or foreclosed.

Defendants claim by adverse possession for twenty years. The burden is upon them to establish this title. Am. and Eng. Ency., Vol. 1, p. 303, and cases cited. And the proof must be clear and positive. *Ib.* p. 305. The presumption is that Thomas Frisbee took possession May 9, 1862, legally, and not tortiously; that he entered by virtue of his mortgage, and not as a disseizor. 3 Wash. R. P. 3d Ed. p. 129; *Means* v. *Willes*, 12 Met. 356, and cases; *Rung* v. *Shoneberger*, 2 Watts, 23 (26 Am. Dec. p. 102, and note).

Where a party is in actual possession and has a right to possession under a legal title which is not adverse, but claims possession under another title which is adverse, the possession will not in law be deemed to be adverse. 2 Stark. 657, (5th Ed.) *Nichols* v. *Reynolds*, 1 R. I., 30.

The last case was one in which the parties in possession were mortgagees, and were privy in estate with plaintiffs, and their possession under the mortgage was held not to be adverse. In order to make a possession taken under a legal title adverse, some decisive act or declaration is necessary. *Martin* v. *Jackson*, 27 Penn. St. 504; *McMasters* v. *Bell*, 2 Penn. St. 183;

Bannon v. *Brandon*, 34 Penn. St. 263; *McPherson* v. *Hayward*, 81 Maine, 329; *Silva* v. *Wimpenny*, 136 Mass. 253; *Jackson* v. *Lunn*, 3 Johns. Cas. 109; *Jackson* v. *Parker*, 3 Johns. Cas. 124; *McClasky* v. *Barr*, (Ohio,) 42 Fed. Rep. 609.

Ira T. Drew and Geo. F. Haley, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

FOSTER, J. This is a bill in equity for redemption. The following statement is essential to an understanding of the case.

Joseph Frisbee, father of the complainants, on December 17, 1856, executed a mortgage to Joseph Seaward, to secure the payment of $786.50. April 2, 1857, he made another mortgage to secure the payment of $350 to John E. Lowry.

May 28, 1857, Joseph Seaward assigned his mortgage to Stillman B. Allen, and on the same day the mortgagor, Joseph Frisbee, by quitclaim deed released to Allen his right of redemption, and authorized him to take possession whenever he wished so to do.

June 24, 1857, Allen began a foreclosure of the Seaward mortgage by publication which was duly recorded.

March 28, 1860, Lowry assigned his mortgage to Thomas Frisbee, brother of the mortgagor, and the father of these respondents.

June 20, 1860, Thomas Frisbee, assignee of the second mortgage, brought a bill in equity against Allen, assignee of the first mortgage, for redemption of the same in order to protect his interest as second mortgagee. In that suit judgment was entered that the amount due Allen was $903.83, which sum was paid by Thomas Frisbee, June 5, 1861, but there was no assignment of the mortgage.

June 15, 1861, or ten days after payment of the amount due, Allen conveyed to Lydia Frisbee, mother of the complainants, all his right in equity to redeem the premises; and as heirs of Lydia Frisbee these complainants claim the right to redeem. Joseph Frisbee, the mortgagor, died December 2, 1861, and

May 9, 1862, Thomas Frisbee took possession of the premises; and he and his heirs and assigns have ever since been in possession.

The respondents deny the right of the complainants to redeem upon two grounds: (1.) That by payment of the amount due upon the first mortgage in accordance with the decree of the court, Thomas Frisbee obtained the benefit of Allen's foreclosure by subrogation, and the title in him thereby became absolute. (2.) By adverse possession for more than twenty years.

We shall consider the first position briefly, for we think the facts in relation to adverse possession are decisive in relation to the rights of the parties.

I. The right of redemption exists, not only in the mortgagor himself, but in every other person who has an interest in or a legal or equitable lien upon the premises mortgaged. It may be stated in general terms, that any one who has an interest in the premises, and who would be a loser by foreclosure, is entitled to redeem. Consequently, the complainants as heirs of Lydia Frisbee, to whom the equity of redemption was conveyed by Allen, had such an interest as would entitle them to redeem, if otherwise entitled to that right.

The time for redemption had nearly expired under the foreclosure of the senior mortgage held by Allen when Thomas Frisbee, under whom the respondents claim, brought his bill to redeem. Did the foreclosure continue to run and become perfected in the hands of Thomas Frisbee? We think not. There was no assignment of the mortgage while foreclosure was pending; had there been, the assignment would have carried with it the foreclosure and it would have become available in the hands of the assignee. *Hurd* v. *Coleman*, 42 Maine, 182. The mortgage was redeemed. The rights which the second mortgagee acquired arose by operation of law, and not by operation of any assignment made by the parties. And while those rights of subrogation were such as to entitle him to be reimbursed for the amount he had been compelled to pay to protect his interests as second mortgagee, in case his mortgage was redeemed, yet the

distinction between rights acquired by assignment or contractual relations between the parties, and those acquired by operation of law as in the present case, clearly exists, and is recognized by the courts. *Lamb* v. *Montague*, 112 Mass. 352, 353; *Butler* v. *Taylor*, 5 Gray, 455; *Ellsworth* v. *Lockwood*, 42 N. Y. 89, 97, 98; *Hubbard* v. *Ascutney Co.* 20 Vt. 402, 405; *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534, 549; *Memphis & Little Rock R. R.* v. *Dow*, 120 U. S. 287; *Shinn* v. *Budd*, 14 N. J. Eq. 234. Jones Mort. § 874.

The rights which were here acquired by the second mortgagee, arising by operation of law, entitled him to be subrogated to the rights of the first mortgagee, to hold the mortgage security without any assignment or act of transfer as *quasi* assignee, for the purpose of compelling contribution in case of redemption of his own mortgage. *Lamb* v. *Montague*, *supra*.

Allen did not treat the title which he acquired by quitclaim deed from the mortgagor and that which he held as mortgagee as merged, but conveyed that which he acquired by deed, independently of the mortgage, to the mother of these complainants, after payment to him of the amount due on his mortgage.

II. But notwithstanding the complainants, or their predecessor in title, may have been entitled to redeem upon payment of the amount of both mortgages, we think that right has been lost by adverse possession.

It is undoubtedly a well-settled rule that twenty years' possession by the mortgagee or his assigns, without an acknowledgment of a subsisting mortgage, operates as a bar to the right of redemption, unless he, or those succeeding to his rights can bring themselves within the proviso of the statute of limitations. *Philips* v. *Sinclair*, 20 Maine, 269; *McPherson* v. *Hayward*, 81 Maine, 329. And in equity, it is held that if the mortgagor, and those claiming under him, permit the mortgagee to hold the possession for twenty years without accounting, and without admitting that he holds only as mortgagee, his title becomes absolute. *Roberts* v. *Littlefield*, 48 Maine, 61.

In this case it clearly appears that the party claiming under

the second mortgage, Thomas Frisbee, entered into possession of the premises May 9, 1862, and that he and his assigns, including these respondents, have been in the undisturbed possession thereof for more than twenty-five years. He bought what he was advised was Allen's foreclosed mortgage. He talked with the family of Joseph Frisbee, the mortgagor, after Joseph's death, and tried to sell them a part of the premises in the winter of 1861 and 1862. He then decided not to part with any part of the land, ordered them off, and claimed he owned the place under the claim he had bought of Allen, and that they had no right there other than what he chose to give. He took possession and claimed to own the premises. He made repairs upon the buildings, and sold portions of the farm by warrantee deeds to different parties in 1862 and 1863. He occupied the premises from 1862 to the time of his death in 1882. The respondents continued to occupy as owners under their father from his death until this suit was commenced in 1889. No claim was made that Thomas Frisbee was not the owner when he entered in 1862 until 1887 when Ivory Frisbee, one of the complainants, claimed the right to redeem. He never accounted, nor acknowledged the right to redemption in the mortgagor or any other party.

From all the evidence we are satisfied that such possession was unequivocally adverse to the mortgagor and those claiming under him, and that upon well-settled principles their right of redeeming is legally barred. Jones on Mort. § 1144.

Nor do we think the evidence as to the mental condition of Lydia Frisbee, under whom the complainants claim, during such adverse possession, sufficient to warrant us in holding that this case falls within any proviso of the statute of limitations. There is some evidence, to be sure, indicating a mental weakness, but it is not such as satisfies us that she was insane, and therefore within the provisions of the statute.

Bill dismissed with costs.

EDNA J. BRYANT *vs.* INHABITANTS OF WESTBROOK.

Cumberland. Opinion May 29, 1894.

Towns. Municipal Officers. Way. Cess-Pool. R. S., c. 3, § 14.

The statute provides for the election or appointment of road commissioners, or surveyors of highways, whose duty it is to open and keep in repair public ways legally established within their districts.

Municipal officers are not clothed with general powers nor are they the general agents of the municipality for which they act.

Where municipal officers assume the construction or repair of highways or streets, they act, in the absence of any express statute or direction in behalf of the municipality, as public officers; and not as agents or servants of the town; and for such acts the town is not liable.

Held, in this case, that the municipal officers were not acting as a tribunal in relation to the location or construction of a common sewer, but were repairing the street and making provisions for the disposition of surface water in building the catch-basin and connecting it, by permission with the plaintiff's private drain.

ON MOTION.

The case appears in the opinion.

Frank and Larrabee, for plaintiff.

Wm. Lyons, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

FOSTER, J. This is an action on the case to recover damages for injuries to the plaintiff's dwelling-house, occasioned, as it is alleged, by the negligent construction and maintenance of a catch-basin by the defendant town.

The plaintiff built upon a street which had not, at the time, been accepted by the town, and constructed a private drain from the cellar to the street, and thence down the same to Beaver Pond. The street was afterwards accepted by the town. It was necessary, owing to the condition of the land at that place, that there should be some means provided for draining off the surface water, and after consultation with the husband and agent of the plaintiff, permission was given to the municipal officers

to drain the surface water of the street into this private drain by constructing a catch-basin over the same in the ditch by the side of the street, which was accordingly done.

The plaintiff, assuming that the negligence in the construction and maintenance of the catch-basin was legally attributable to the town, bases her claim upon the assumption that the municipal officers, by whose direction the catch-basin was constructed, sustain to the town the relation of an agent to his principal, and that the rule *respondeat superior* applies, even though they conduct themselves negligently or unskilfully.

It is not claimed that the statute gives a remedy against the town to any one injured by reason of the negligence, inefficiency or want of skill in this matter. Hence this action was brought based upon the common law, and a verdict of $1016.66 was recovered which the defendants ask to have set aside as being against law and evidence.

There is no evidence of any vote of the town in relation to this street, or the actions of the municipal officers, except a vote, "to accept when dedicated by metes and bounds in writing and graded satisfactory to the selectmen."

No question is raised as to the acceptance of the street, or that the catch-basin was constructed by direction of the municipal officers. But it does not appear from the evidence whether the town had chosen road commissioners or highway surveyors, or whether the municipal officers had been appointed surveyors, as provided by R. S., c. 3, § 14, and were acting in that capacity in constructing this catch-basin.

The plaintiff's drain over which this catch-basin was built was not a public drain or common sewer within the meaning of the statute and never became such; consequently the town was not responsible in regard to maintaining and keeping the same in repair. *Bulger* v. *Eden*, 82 Maine, 352. The municipal officers in whatever was done, were not acting as a tribunal in relation to the location or construction of a common sewer, but were repairing the street and making provisions for the disposition of surface water in building this catch-basin and connecting it, by permission, with the plaintiff's private drain.

Notwithstanding this catch-basin may have been improperly and unskilfully constructed, and the plaintiff have suffered special injury thereby, the question presented is, whether the town can be held liable in this action.

The answer to that question will be solved in determining whether the municipal officers, in doing what they did, were acting as servants or agents of the town, and for whose negligence or want of skill in the performance of their acts the town would be liable; or as public officers, for whose acts, in the absence of any express statute, or direction on behalf of the municipality, there is a want of corporate liability.

These two phases of character presented by the decisions, and the pecular liabilities in reference to the different capacities of officers, whether as agents of the town, or public officers, are fully recognized and established in this and other States. As to the first, may be noted, *Anthony* v. *Adams*, 1 Met. 284; *Seele* v. *Deering*, 79 Maine, 347; *Hawks* v. *Charlemont*, 107 Mass. 414; *Deane* v. *Randolph*, 132 Mass. 475; *Waldron* v. *Haverhill*, 143 Mass. 582; *Doherty* v. *Braintree*, 148 Mass. 495. As to the second, *Small* v. *Danville*, 51 Maine, 359; *Mitchell* v. *Rockland*, 52 Maine, 118; *Cobb* v. *Portland*, 55 Maine, 381; *Woodcock* v. *Calais*, 66 Maine, 234; *Farrington* v. *Anson*, 77 Maine, 406; *Bulger* v. *Eden*, 82 Maine, 352; *Goddard* v. *Harpswell*, 84 Maine, 499, and many other cases.

The distinction between the authorities which decide in reference to the liability and non-liability of towns for the unauthorized or wrongful acts of its officers is to be found, on the one hand, where the town has interfered by giving directions, or taken charge of the work by its own agents; and, on the other hand, where there has been no such interference, but the work has been left to be done by public officers in the methods provided by law.

The statute provides for the election or appointment of road commissioners or surveyors of highways whose duty it is to open and keep in repair public ways legally established within their districts. Though chosen and paid by the town and supplied with the necessary funds for the performance of their

duties, yet these officers do not sustain the relation of servants or agents of the municipality by whom they are chosen and paid, rendering their principals liable for their acts. They are a part of the municipal government, chosen by the town in the performance of a public duty imposed by general law, and not for its own private advantage.

Among other public duties imposed by law upon municipalities is that of locating, making and repairing highways. In the performance of these duties the town is acting only as the political agent of the State; and for its own convenience it is authorized to confide this power upon certain officers whose duties are defined by statute. As was said by this court in *Small* v. *Danville*, 51 Maine, 359: "The duties of such officers are defined and imposed by public statutes, and not by their respective constituencies. The duty of the constituency in these political divisions is to elect their officers; that of the officers is to obey the public statutes. The officers thus chosen are *public* officers to all intents and purposes; as clearly so as higher officers of the State in their sphere. In legal contemplation they are not servants, or agents of their respective towns, but public officers. Being public officers of a public corporation, acting in its capacity as a public division, the corporation is not liable for their unauthorized or wrongful acts, though done in the course and within the scope of their employment."

But unquestionably a town may render itself liable even for the unauthorized or unlawful acts of such officers in the performance of corporate duties imposed by law upon the town, provided such acts are done by its direct authority previously conferred or subsequently ratified. *Woodcock* v. *Calais*, 66 Maine, 234, and cases cited.

This, however, is not upon the ground that the officers, as such, were the agents or servants of the town, but that by the town's interference and direction it has made them such, and therefore rendered itself liable for their acts.

Thus, where a town or city undertakes to perform a duty imposed upon it by law, by means of agents whom it may direct or control, it is held responsible for the acts of such agents, as

in the case last cited. And upon this principle it has been decided that where a town, although it had duly chosen surveyors of highways, voted that the selectmen should be its agents to repair the highways and bridges, it was responsible for their negligence and wrong doing. *Hawks* v. *Charlemont*, 107 Mass. 414; *Deane* v. *Randolph*, 132 Mass. 475; *Waldron* v. *Haverhill*, 143 Mass. 582; *Doherty* v. *Braintree*, 148 Mass. 495.

In the present case there is no evidence that the town ever directed, or undertook to perform, the work which is here complained of, unless it is to be held that the acts of the municipal officers in constructing the catch-basin were the acts of the town.

With no corporate action or direction given on the part of the town, and no subsequent ratification, these acts were not those of servants or agents of the town, but rather those of public officers, and for which the town cannot be held liable.

While it is true that municipal officers are chosen and paid by the town, and for many purposes its agents, as in making contracts within the scope of their authority concerning the affairs of the town, and in respect to such matters as are provided by statute to be by them performed, yet they do not sustain this relation in reference to these particular acts in question. Their powers and duties are not very fully defined by statute. Many of their acts in behalf of towns, and which are recognized as appropriately within the sphere of their duty, have their origin in long-continued usage. This is especially true in relation to the management of the prudential affairs of the town, and which necessarily requires the exercise of a large discretion, and in relation to which it would be difficult if not impossible by positive enactment to place definite limits to their powers and duties. But they are not clothed with the general powers nor are they the general agents of the municipality for which they act. They can only exercise the powers which are incident to the limited authority conferred upon them by their office, and are special agents, with power to do such acts as are required to meet the exigencies that may arise in town affairs.

Smith v. *Cheshire*, 13 Gray, 318; *Clark* v. *Russell*, 116 Mass. 455. Thus in *Carlton* v. *Bath*, 22 N. H. 559, it was held that selectmen have not, by their general power to manage the prudential affairs of a town, authority to release, without consideration, a cause of action in favor of a town. Nor, by virtue of their office, without a vote of the town, to borrow money upon the credit of the town. *Rich* v. *Errol*, 51 N. H. 350.

Here was no such temporary emergency as can be claimed or said to require action on their part in the performance of duties that, by general law, devolved on those especially elected or chosen for such purposes. The town might, by express direction, or subsequent ratification, have made them its agents in reference to making or repairing this street, or in making provisions for the disposition of the surface water. But no such direction is shown, and no evidence from which a ratification can be legitimately inferred. If we are to assume that the municipal officers were acting in the capacity of surveyors of highways, then certainly they were public officers, acting in that capacity, and for whose negligence or want of skill in the performance of their duties the town would not be responsible. *Walcott* v. *Swampscott*, 1 Allen, 101; *Small* v. *Danville*, *supra*.

In *Bates* v. *Westborough*, 151 Mass. 174, the court say: "It may be that defects in such a catch-basin are to be regarded as defects in surface drainage within the limits of the highway, and therefore as defects in the repair of the highway, the charge of which is committed by statute to the highway surveyors. Highway surveyors in the performance of their statutory duties are held to be public officers, and not agents of the town, partly because of the town's want of control over them, and partly because the duty to repair the surface of highways is regarded as a public duty, from which the town derives no special advantage in its corporate capacity."

It becomes unnecessary to determine whether or not there was negligence or unskillfulness in the construction of the catch-basin, as we are satisfied that the verdict cannot be sustained for the reasons we have stated.

Motion sustained.

SAMUEL L. HOLT, and another.

vs.

WAYLAND KNOWLTON, and another.

SAME *vs.* WAYLAND KNOWLTON.

Waldo. Opinion May 30, 1894.

Sale. Deed. Agreement. Consideration. Lex Fori. R. S., c. 111, § 5.

Deeds and notes, relating to property located in this State, although dated in another State but delivered here will be governed by the laws of Maine.

By R. S., c. 111, § 5, it is provided that, "No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee until the note is paid, is valid, unless it is made and signed as a part of the note; and no such agreement, although so made and signed is valid, except as between the original parties to said agreement, unless it is recorded like mortgages of personal property." . . .

The plaintiffs bargained and delivered certain machinery to the defendants taking their notes therefor and at the same time their sealed writing, a deed in effect, which contained the condition that the property should remain the plaintiffs' until the notes were paid. This condition was not made a part of the notes and was recorded like mortgages of personal property. *Held*, that the deed is void under R. S., c. 111, § 5; and that, therefore, the property was sold to the defendants upon credit, and the title had passed to them.

ON REPORT.

The first action was upon two promissory notes given by the defendants, November 10, 1891, on which day the plaintiffs bargained and delivered to the defendants a boiler, engine, belting and other fixtures at an agreed price of eleven hundred and thirty dollars, and took their three notes therefor payable in four, eight and twelve months.

On the same day the plaintiffs received from the defendants the following agreement:

"Boston, Mass., Nov. 10th, 1891.

Knowlton & Doe, Borrowed and received of S. L. Holt & Bart,

One 50 H. P. Nagle Portable Boiler, No. 7118 with Stack and fixture complete and No. 6 Messenger Injector attached to same.

One 12″×16″ Detached Centre Crank Engine No. 6198 with Pump, Heater, Governor, and fixtures complete, 92 ft. of 14″

Double Leather Belt which we agree to safely keep, and carefully use, and not remove from the town of Montville, County of Waldo, State of Maine; also to keep insured in the sum of one thousand dollars, for the benefit of said S. L. Holt & Bart; also, to pay all taxes upon the same, and at the expiration of twelve months from the above date, return the same to S. L. Holt & Bart, at Boston, together with any additions, improvements, or attachments which may have been made, free of all charges and unincumbered, and in as good condition as when taken, ordinary wear excepted; it being expressly understood that the title to said Boiler, Engine, &c., shall not pass out of said S. L. Holt & Bart, until the full sum hereinafter mentioned shall be paid as herein specified; that the same shall not become a fixture by being placed in any mill or other building, or by being annexed in any manner to the realty; and that the said S. L. Holt & Bart, may at any time enter upon the premises upon which said property is located (forcibly if necessary), and take possession of the same upon a violation of any one of the agreements herein contained, and that any money already paid thereon shall be considered as having been paid for the use of said property.

Provided always, and it is expressly understood, that if said Knowlton & Doe shall pay to the said S. L. Holt & Bart, the sum of eleven hundred and thirty dollars, as follows, to wit:

Cash in advance, $———. Cash on delivery of Machinery, $———.

Note due Mch. 10/13, 1892 for $376.66 with interest at six per cent.

Note July 10/13, 1892, for $376.66 with interest at six per cent.

Note due Nov. 10/13, 1892, for $376.68 with interest at six per cent with freight and charges from Boston together with any sum or sums which the said S. L. Holt & Bart may have paid for insurance or taxes upon the said property by reason of the neglect or failure of the said Knowlton & Doe to keep the same insured, or to pay the taxes thereon as above provided, or in case the said S. L. Holt & Bart are obliged to take possession and

remove the same, they may collect the expenses for so doing, together with cost of any repairs which said S. L. Holt & Bart may have made on said machinery, of the said Knowlton & Doe. But if all the covenants herein contained are kept by the said Knowlton & Doe then the said S. L. Holt & Bart will execute a bill of sale of said Boiler, Engine, Injector and appurtenances.

Wayland Knowlton, L. S.
W. A. Doe, L. S."

On the 16th day of November, 1891, the defendant, Wayland Knowlton, gave to the plaintiffs a mortgage of real estate to secure payment of said notes. On the 12th day of October, 1892, nothing having been paid on said notes, plaintiffs commenced an action of assumpsit against Knowlton & Doe on the first two notes, the third note not being then due.

The second action was a writ of entry brought on the first day of December, 1892, by the plaintiff against Wayland Knowlton to foreclose said mortgage.

On the 29th day of October, 1892, the plaintiffs took and disposed of the belting, described in the agreement, receiving fifty dollars therefor, and on the fifth day of November, following, they disposed of the engine, boiler and fixture, less some parts that were missing which plaintiffs supplied, for $813.39. The plaintiffs claimed that the property so taken and disposed of was with the consent of the defendants.

The defendants contended that there had been a rescission of the contract and that, therefore, the notes were without consideration.

R. F. Dunton, for plaintiffs.

W. H. McLellan, for defendants.

Counsel cited: *Gross* v. *Jordan*, 83 Maine, 383; *Hine* v. *Roberts*, 48 Conn. 267 (40 Am. Rep. 22).

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WISWELL, JJ.

HASKELL, J. The plaintiffs bargained and delivered to defendants certain machinery for the stipulated price of $1130.

For this sum the defendants gave three notes of equal amount on four, eight and twelve months respectively. Defendant Knowlton gave a mortgage of real estate to secure the notes. At the same time the defendants gave their deed, in effect, that the property purchased should remain the property of the plaintiffs until the notes were paid. It contained other stipulations as to insurance, taxes, good condition, expenses of retaking and the like, and it was recorded in a town clerk's office in Maine, presumably where the property was. The notes and deed are dated, Boston. From the evidence, however, it may be inferred that the writings were delivered in Maine, so that it was a Maine transaction, relating to property located in Maine, and to be governed by the laws of Maine, and under the law of this State would have amounted to a conditional sale. *Gross* v. *Jordan*, 83 Maine, 380; *Morris* v. *Lynde*, 73 Maine, 88.

The deed, under R. S., c. 111, § 5, is void. To make it valid, its provisions should have been embodied in the notes. The property, therefore, was sold upon credit, the title passed to the defendants, and the plaintiffs may have judgment upon the notes given for the purchase money, if anything remains due upon them.

Nothing having been paid upon the notes, the plaintiffs retook most of the property, with consent of the defendants, sold the same, and realized therefrom, net, $813.39.

The defendants say that the plaintiffs took back the property, rescinded the sale, and that the consideration for the notes failed. The evidence does not support this contention. One of the plaintiffs testifies that he took back the property under his deed. One of the defendants testifies, the other does not testify, that he surrendered the property without any agreement whatever. We think the inference to be drawn from the evidence is, that the plaintiffs should retake the property and account for its value. There is no suggestion but that, what the plaintiffs received from the property was its fair value. This sum, therefore, must be applied to the notes in suit. It more than pays them. Judgment must be for defendants for costs in that suit.

The third note is not in suit, but remains outstanding. Upon

this note should be indorsed the balance from the sale of the property above the amount of the first two notes, viz: $41.64 as of November 30, 1892. That note fell due November 13, 1892, before the writ to foreclose the mortgage given to secure it, had been sued out. The condition of the same was, therefore, broken before suit brought, and the plaintiff is entitled to judgment as of mortgage.

Judgment for defendants in the suit upon the notes. Conditional judgment for plaintiffs in the real action.

MINARD ROBERTS, and others, *vs.* ABBIE HARTFORD.

Androscoggin. Opinion May 31, 1894.

Husband and Wife. Agency. Issues of fact.

When a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the erection or repair of buildings upon her land, a jury will be justified in finding that her husband acted as her agent.

In all such cases, the question of agency should be submitted to the jury.

ON EXCEPTIONS.

This was an action of assumpsit to recover the price of certain lumber alleged to have been sold and delivered to the defendant through her husband. A nonsuit was entered on the ground that the husband's agency was not established sufficiently to warrant a verdict for the plaintiffs.

It appeared from the evidence that some twelve days had elapsed between the delivery of the first and last load of lumber which was used to repair the buildings of the defendant's homestead.

The husband of the defendant was called as a witness by the plaintiffs and testified in part as follows:

"Ques. You did it entirely on your own responsibility? Ans. Yes, sir. She perhaps knew I was going to buy; perhaps she did afterwards. . . .

"Ques. You never had said a word that you were going to put an addition on to the barn? Ans. I might have spoken of it.

"Ques. Did you not tell her you were going to buy lumber to do it with? Ans. I might have said I was going to.

"Ques. Did she consent to those additions? Ans. She said nothing about it."

Frank L. Noble, for plaintiffs.

Ratification of an unauthorized act of an agent will be implied if the principal accepts the benefits of the agent's act. *Hastings* v. *Bangor House*, 18 Maine, 436; *Verrill* v. *Parker*, 65 Maine, 578; *James* v. *Bixby*, 11 Mass. 37.

If a principal does not in a reasonable time, after actual or presumed notice of his agent's act, disavow it, a presumption of assent and ratification will arise. Story on Agency, 9th Ed. § § 90, 353, *et seq.* *Thayer* v. *White*, 12 Met. 343; *Wright* v. *Boynton*, 37 N. H. 9; *Johnson* v. *Wingate*, 29 Maine, 404; *Saveland* v. *Green*, 40 Wis. 431.

It was not necessary for the plaintiff to prove an express assent of the defendant in order to enable the jury to find a previous request on her part; they may infer it from her knowledge of the transaction and her silent acquiescence. 2 Greenl. Ev. § 103.

When a husband acts for his wife in the management of her estate and his actions naturally tend to accomplish her known wishes in regard to it, it needs but little evidence to warrant an inference that the action was authorized by her. *Simes* v. *Rockwell*, 156 Mass. 373; *Arnold* v. *Spurr*, 130 Mass. 347; *Wheaton* v. *Trimble*, 145 Mass. 345; *Tuttle* v. *Howe*, 100 Am. Dec. 205.

The repairs made and the additions built were in the improvement of the defendant's property and as such would naturally tend to accomplish her known wishes.

The following facts and circumstances are all competent to be submitted to the jury, and combined they are sufficient to warrant a verdict for the plaintiffs. (1.) The husband assumed to act as manager of the estate. This is of itself some evidence that he was acting in behalf of his wife, the owner of the estate. *Arnold* v. *Spurr*, 130 Mass. 347. (2.) The defendant was living with her husband in the house upon which the lumber was

to be used. *Westgate* v. *Munroe*, 100 Mass. 228. (3.) The lumber went to the defendant's benefit. (4.) She had knowledge that it was thus furnished. (5.) No measures were taken by her to show that, although she was receiving the benefit of the lumber, she was not liable for the cost of it. *Verrill* v. *Parker*, *supra*; *Arnold* v. *Spurr*, *supra*.

The conclusions are inferences of fact to be submitted to the jury. Cases, *supra*; *Phila. etc. R. R. Co.* v. *Crowell*, 70 Am, Dec. 128.

Newell and Judkins, for defendant.

The propriety of grantiug a nonsuit is to be determined by the following rule of law: "If the party having the burden of proof upon an issue necessary to the maintenance of an action introduces no evidence which, if true, giving to it all of its probative force, will authorize the jury to find in his favor, the judge may direct a verdict against him." *Heath* v. *Jaquith*, 68 Maine, 433 and cases cited.

Ferguson v. *Spear*, 65 Maine, 277, is decisive of this case. In that case plaintiffs sold and charged to the husband building materials for the price of which they sued the wife claiming a a lien. Plaintiff there insisted, as they do in this case, that, the building being on the real estate of the wife, "the husband in purchasing materials for their erection must be regarded as her agent."

In *Stevens* v. *Mayberry*, 82 Maine, 65, the court refused to charge a wife for grain purchased by her husband to feed her horses, and cite and approve *Ferguson* v. *Spear*, *supra*.

Verrill v. *Parker*, 65 Maine, 578, is quite different. That was an action to recover for labor expended upon a building belonging to the wife, on verbal contract with the husband, without mention being made as to whom the credit was to be given. The labor was done under the inspection and to the approval of the wife. In such case the wife was justly charged.

The Massachusetts cases do not essentially differ from the Maine decisions.

Arnold v. *Spurr*, 130 Mass. 347, the case leaning most strongly towards plaintiff's contention, does not sustain it. In

that case, the presiding judge directed a verdict for defendant (held error) where it appeared that the husband, "had the management of said property of his wife, the defendant, and gave all necessary directions and orders regarding the same."

The cases of *Dyer* v. *Swift*, 154 Mass. 159; *Wheaton* v. *Trimble*, 145 Mass. 345; *Jefferds* v. *Alvard*, 151 Mass. 94; *Lovell* v. *Williams*, 125 Mass. 439; and *Westgate* v. *Munroe*, 100 Mass. 227, are cases in harmony with *Verrill* v. *Parker*, 65 Maine, 578, and do not necessarily conflict with the law clearly expressed in *Ferguson* v. *Spear*, *supra*.

Counsel also argued: There is no direct evidence of agency on the part of the husband. Agency cannot be inferred simply from the marital relation, ownership of the buildings by the wife, and use of the lumber.

SITTING: PETERS, C. J., WALTON, FOSTER, WHITEHOUSE, JJ.

WALTON, J. When a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the erection or repair of buildings upon her land, a jury will be justified in finding that the husband acted as her agent.

In *Wheaton* v. *Trimble*, 145 Mass. 345, the husband and wife both testified that he was not her agent; but on cross-examination the wife admitted that her husband had managed the property just as he did when it was his; that she had allowed him to go ahead and do just as he pleased with the property; and that ever since it had been in her name he had managed it just as he did before; and the court held that considering the relation which she bore to her husband and to the estate, and that she must have known that the labor which was being performed upon her house would be for her benefit,—a finding that the husband was acting as her authorized agent was not unreasonable. To the same effect is *Arnold* v. *Spurr*, 130 Mass. 347.

The fact that the credit may have been given to the husband is not important. It was early settled in this State that, if an agent purchase goods on his own credit without disclosing his

principal, to whose use the goods are applied, the principal, being afterwards discovered, is liable to the seller for the price of the goods. *Upton* v. *Gray*, 2 Maine, 373.

There is considerable conflict in the authorities as to what shall be considered sufficient evidence of a husband's agency. In some of the cases it is held that the mere fact that the wife allows her husband to take the general control and management of her property carries with it sufficient evidence of an implied authority to keep it in repair and to make such additions to it as may be necessary for its convenient use. Others hold that this is a doctrine dangerous to the rights of the wife. To this it is replied that any other doctrine is dangerous to the rights of creditors. In *Verrill* v. *Parker*, 65 Maine, 578, this court held that where the plaintiff had performed labor in the erection of a building upon the wife's land under a contract with the husband, both husband and wife were liable, the husband, because he admitted his liability; the wife, because the labor was done upon her property, and for her benefit, and "before her eyes." On the whole, it is the opinion of the court that it is best in all such cases to leave the question of agency to the jury; that in most cases, they will be likely to decide truthfully as well as equitably.

In this case, the plaintiff was nonsuited by the presiding justice. We think the case should have been submitted to the jury. *Exceptions sustained.*

EDWIN MOREY, and others,

vs.

CHARLES R. MILLIKEN, and others.

Androscoggin. Opinion May 31, 1894.

Insolvency. Preference. Proof of Debt. Law and Fact. R. S., c. 70, § § 29, 52.

By the Insolvent Law of Maine, R. S., c. 70, § 29, "A person who has accepted any preference, knowing that the debtor was insolvent or in contemplation of insolvency, shall not prove the debt on which the preference was given,

nor receive any dividend thereon until he surrenders to the assignee all the property, money, benefit or advantage received by him under such preference."

The court adheres to its former decisions defining the word "insolvent" or "insolvency" as applied under the statute to persons engaged in mercantile or commercial business, viz: an inability to meet maturing demands in the ordinary course of business.

This use of these words is adopted in all bankrupt and insolvent laws, when so applied, although they have a general and popular meaning, viz: an insufficiency of the entire property or assets of an individual to pay his debts.

Sections 29, and 52, of the Insolvent Law, relating to preferences, should be construed to have the same meaning, and be held to inhibit the proof a debt by a preferred creditor until the preference, invalid under the statute, shall have been surrendered.

The word, "knowing," in § 29, and the words, "having reasonable cause to believe," in § 52 as defined by the court, are almost, if not quite, identical in meaning.

Held; that a preference may be surrendered at any time, before the debt is finally disallowed, and the debt may be proved.

Held; in this case, that the creditors, against whose proof of debt objections have been filed, received security on their debt with express notice of their debtor's insolvency by a letter which brought the security to their hands; that having elected to hold the security coupled with such notice, they should be charged with taking it under those conditions.

When one inference only can be drawn from existing facts, it is a matter of law; *Held;* that a finding that the creditors did not know of their debtor's insolvency would be an erroneous decision of the legal inference to be drawn from existing facts of this case, and is error in law. EMERY, J., dissenting.

An exchange of securities of equal value works no prejudice to the creditors of an insolvent debtor and, therefore, should not be held void as a preference. But there must be an exchange. The replacing of securities already lost, by others to take their place, is not an exchange.

A preference cannot be upheld upon the ground that it was given in pursuance of a prior agreement to secure, even if such agreement be proven.

Where it was claimed that a preference had been purged by an agreement made between the deposing creditor and the assignees, with the approval of the insolvent court, *held;* that their action could not conclude other creditors from contesting the proof of debt, and showing an illegal preference.

See *Milliken* v. *Morey*, 85 Maine, 340.

ON EXCEPTIONS.

This was a case arising upon objections to the proof of debt of Morey & Company, filed in the estate of Denison Paper Manufacturing Company, Insolvent. The petitions to have the proof of debt re-examined were filed by Charles R. Milliken, George C. Wing and others. They alleged that Morey &

Company had received an unlawful preference from the insolvent debtor.

When Morey & Company filed their proof of debt with security, the following agreement was made between them and the assignees:

"This Instrument Witnesseth: Morey & Company claim that on March 2nd, 1887, the Denison Paper Manufacturing Company was indebted to them in the sum of one hundred and eighty-nine thousand three hundred and thirteen 45-100 (189,313.45) dollars, and have proved their claim for that amount. On March 2nd, 1887, said Morey & Company held (as appears by schedule prepared by them), as collateral security for a part of said claim certain notes, open accounts and merchandise which had been transferred or assigned to them by said company. And a large part of said notes, accounts and merchandise is still held by said Morey & Company, and has not yet been realized upon and cannot be for a long time.

"Now, whereas, it being deemed desirable by the assignees and creditors of said company that the estate be wound up as soon as possible, said Morey & Company and the assignees of said company have examined into the value of such collateral now held by said Morey & Company, and the amounts already realized by them since March 2nd, 1887, and have agreed that the fair value of such collateral, including the amounts already realized, is fifty-three thousand eight hundred and sixty 85-100 (53,860.85) dollars, and have also found that a rebate should be made from the amount proved by said Morey & Company, of six hundred and thirty-seven 53-100 (637.53) dollars for interest.

"Now, therefore, it is agreed by and between the assignees of the Denison Manufacturing Company and said Morey & Company that said assignees release to said Morey & Company, and they do hereby release to said Morey & Company, all their right and interest as assignees in the notes, accounts and merchandise so held by said Morey & Company as collateral, and said Morey & Company agree that the amount of their proof and claim against the estate of said Denison Paper Manu-

facturing Company in insolvency shall be reduced, and it is hereby reduced, to one hundred and thirty-four thousand eight hundred and fifteen 07-100 (134,815.07) dollars, and that said Morey & Company shall receive a dividend or dividends on that amount ($134,815.07) and on no more.

"This agreement shall not take effect until it shall have been approved by his Honor, the Judge of the Court of Insolvency for the County of Androscoggin.

"In witness whereof, the said Morey & Company and Clarence Hale, E. Adson Gammon and Stephen G. Train, as they are assignees of the estate of the Denison Paper Manufacturing Company, have hereunto set their hands and seals this twenty-fourth day of June, 1887.

Morey & Co. (Seal.)
Clarence Hale, (Seal.)
E. A. Gammon, (Seal.)
S. G. Train, (Seal.)
Per C. Hale.

The foregoing settlement, appraisal and agreements is hereby approved.

ALBERT R. SAVAGE, Judge."

The claim of Morey & Company was wholly disallowed in the court of insolvency, but sustained on appeal in this court below. The particulars of the preference are set out in the petitions as follows:—

"And your petitioners, on the best of their knowledge, information and belief, further represent and allege that said Morey & Company were not entitled to prove their debts aforesaid, or any of them, against said estate in insolvency, nor entitled to receive the dividend aforesaid, or any other dividend thereon; because said Morey & Company on the first day of February, 1887, and at various times between said first day of February, and said second day of March, accepted preferences from said Denison Paper Manufacturing Company on said debts, knowing at the time when each such preference was accepted, that said Denison Paper Manufacturing Company was insolvent and in contemplation of insolvency, and yet said

Morey & Company have never surrendered to the assignees any part of the property, money, benefit, or advantage received by them under any of such preferences, but have ever since retained and still retain all the same.

"And for particulars thereof, your petitioners, on the best of their knowledge, information, and belief, set out and allege the facts following, to wit:—

"On said first day of February, said Denison Paper Manufacturing Company, was in fact insolvent and had not sufficient assets to pay the liabilities, or any considerable percentage thereof; and on said first day of February, said insolvent corporation concluded to cease operations and distribute its assets through insolvency or on some arrangement with its creditors, and became convinced that it was insolvent as aforesaid; and on the same day said corporation addressed to said Edwin Morey, and to said Morey & Company, two letters, each bearing date that day, copies of which are hereto attached and made a part hereof as though recited herein at length, and among other things, by said letters said corporation informed said Edwin Morey and said Morey & Company, that it, the said corporation, had concluded to cease operations and let its creditors determine the course to be pursued in the future, so that by said letters said Edwin Morey and said Morey & Company, were fully advised that said corporation was in fact insolvent and had concluded to wind up its affairs in the manner aforesaid.

"And said corporation in the letter aforesaid to said Edwin Morey and said Morey & Company, enclosed a bill of sale of all paper on hand, of the value of about eleven thousand six hundred forty-five dollars and eighty-one cents, ($11,645.81,) an invoice of other paper made for the Hartford 'Post,' of the value of about thirteen hundred seventy-one dollars and fifteen cents, ($1371.15,) and also, as stated in said letter, assignments of all the accounts in its power to assign, to wit:—Assignments of accounts of the nominal value of twenty-five thousand three hundred forty-eight dollars and forty-three cents, ($25,348.43,) as particularly shown by said copy of said letter of February one, eighteen hundred eighty-seven, to said Morey & Company, and by list of accounts assigned attached hereto.

"And further, thereafterwards, said corporation did in fact deliver, between said first day of February, and said second day of March, in accordance with the terms of said letters and for the purpose aforesaid, paper invoiced as aforesaid, and other paper amounting in all to two hundred forty-two thousand, two hundred thirty-five (242,235) pounds, and of the value of about twelve thousand ($12,000) dollars, as particularly shown by the schedule thereof attached hereto. And thereafterwards, between said first day of February, and said second day of March, in further pursuance of the terms of said letters and for the purposes aforesaid, said Denison Paper Manufacturing Company did further deliver, assign, and transfer to said Morey & Company one note of Lee & Shepard, of three hundred sixty-five dollars and forty-nine cents, ($365.49,) one note of D. Lothrop & Company, ($1000) one thousand dollars, cash remitted by Conrow Bros., one hundred thirty-eight dollars and five cents, ($138.05,) cash remitted by F. Wood, one hundred and forty-seven dollars ($147), note of Borland & Company, of seven hundred twenty-eight dollars and eighty-two cents ($728.82), and sundry lots of ash and bleach of the value of about thirteen hundred and fifty ($1350) dollars; so that all the assets assigned, conveyed, transferred, and delivered as an unlawful preference as aforesaid by said Denison Paper Manufacturing Company to said Morey & Company, were of the value of about forty thousand ($40,000) dollars; and yet said Morey & Company then, that is, on said first day of February, 1887, and at sundry times between said first day of February, and said second day of March, accepted all the same as a preference, knowing at the various times when they accepted the same, that all the same were unlawful preferences as aforesaid, and that said Denison Paper Manufacturing Company was then insolvent and in contemplation of insolvency; and said Morey & Company has ever since retained all the same and the proceeds thereof, and has never surrendered any thereof to the assignees of said insolvent estate."

Other facts are stated in the opinion.

Symonds, Snow and Cook, for Morey & Company.

Counsel argued that Morey & Company did not have actual knowledge of their debtors' insolvency. *Grant* v. *Bank*, 97 U. S. 80, S. C. 17 N. B. R. 498.

That the question whether, upon all the testimony in the case Morey & Company had knowledge when they received the security alleged as preferential that the Denison Company was insolvent, or in contemplation of insolvency, was properly a question of fact and the finding of the presiding justice that Morey & Company did not have such knowledge is final and conclusive. *Randall* v. *Kehlor*, 60 Maine, 37; *Mosher* v. *Jewett*, 63 Maine, 87; *Merrill* v. *Merrill*, 65 Maine, 81; *Kneeland* v. *Webb*, 68 Maine, 540; *Clement* v. *Foster*, 69 Maine, 319; *Bailey* v. *Church*, 71 Maine, 474; *Manning* v. *Devereux*, 81 Maine, 562; *Pettengill* v. *Shoenbar*, 84 Maine, 105. The statute (chap 70, § 12), provides for exceptions only as to matters of law and not as to the findings of facts by the judge hearing the case of *nisi prius*.

That the findings of fact by the presiding justice relating to the execution of the instrument of settlement and release between the assignees of the Denison Company and Morey & Company, and his ruling as to its construction and effect, were correct and final and effective to conclusively determine the case irrespective of his finding of want of knowledge by Morey & Company of the insolvency of the Denison Company, or of any of his other findings, or rulings in the case. *Taylor* v. *Taylor*, 74 Maine, 558.

The assignees of a fraudulent debtor have power to confirm a sale of property made by him although it was made with the intent of giving a preference and the sale so confirmed cannot afterwards be avoided by them. *International Trust Co.* v. *Boardman*, 149 Mass. 162; *Richards* v. *Merriam*, 11 Cush. 582; *Snow* v. *Lang*, 2 Allen, 18; *Butler* v. *Hildreth*, 5 Met. 50; *Freeland* v. *Freeland*, 102 Mass. 477. Assignees must exercise diligence in disaffirming preferences. *Hazelton* v. *Allen*, 3 Allen, 118.

Seth M. Carter and John A. Morrill, for Milliken, and others, objecting creditors.

Counsel cited: R. S. c. 70, § 52; *Nisbet* v. *Quinn*, 7 Fed. Rep. 760; *State* v. *Patterson*, 68 Maine, 473; *In re Hauck*, 17 N. B. R. 158; *Rison* v. *Knapp*, 4 N. B. R. 349, 359; *Martin* v. *Toof*, *Id.* 488, 492, S. C. 13 Wall. 40; *Dube* v. *Lewiston*, 83 Maine, 211; *Tibbetts* v. *Trafton*, 80 Maine, 264. *Butler* v. *Hildreth*, and last cases cited by opposing counsel relate to controversies over rights to property alleged to have been received as a preference, not to the provability of a debt.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

HASKELL, J. Morey & Company proved their debt in insolvency against their insolvent debtor's estate to the amount of $134,815.07. To this proof objections were filed by other creditors that Morey & Company had received a preference in fraud of the insolvent law.

By an agreement in writing between Morey & Company and the assignees, approved by the judge of insolvency, it was stipulated that a fair value of the amount of security received should be considered $53,860.85, and that the same, together with rebates of interest amounting to $637.53, in all $54,498.38, should be deducted from the whole claim, and that the balance, $134,815.07, might be proved upon which a dividend should be paid.

In the insolvent court the objections were sustained and the proof disallowed. An appeal was taken to the court below where the case was heard and decided, and the decree of the insolvent court reversed, and the proof allowed. The case comes up on exceptions.

The insolvent law, R. S., c. 70, § 29 provides: "A person who has accepted any preference, knowing that the debtor was insolvent or in contemplation of insolvency, shall not prove the debt on which the preference was given, nor receive any dividend thereon, until he surrenders to the assignee all property, money, benefit or advantage received by him under such preference."

Under this statute, knowledge by the creditor of the debtor's insolvency or contemplated insolvency is made a condition precedent to the rejection of his claim upon which he may have received security. The fact of knowledge is made vital and must appear in order to reject a claim. It must be determined, too, like any other question of fact, from the evidence in the case. It may be inferred from a variety of other facts that are proved, after giving to each its proper legal significance. For instance, security taken out of the usual course of business has a strong legal significance, and, unexplained by other facts and circumstances, might be considered sufficient in law to show knowledge, but when explained by other facts, as by proof of solvency, *Dutcher* v. *Wright*, 94 U. S. 557, or facts that completely destroy its meaning in the mind of the recipient, it could not have that effect. The various facts shown in the case must each be considered, giving to each one its proper significance, and then, after properly weighing each element, the resultant fact becomes apparent.

The court below heard this case and filed a decision finding various facts upon which the decision rests. The controlling fact so found relates to the fact of knowledge of the debtor's insolvency or contemplated insolvency, by the creditors, at the time they received security claimed to be a preference. It is as follows:

"I find . . that said Morey & Company, when they accepted said securities [those claimed to work a preference], did not know that said Denison Paper Manufacturing Company [the insolvent] was insolvent or in contemplation of insolvency."

This finding of fact is a resultant fact to be inferred from other facts and circumstances, and must be held conclusive unless shown to be erroneous in law.

Morey & Company's debt was $189,313.47. As security they held certain notes, assets and merchandise. On January 20, they wrote their debtors, as near as can be gathered from the evidence,—the letter was not produced,—calling their attention to the dishonor of certain of their notes, and reminding them that, "unless they attended to the business more

promptly when they became due we would wind up the whole business . . . would stop." Receiving no reply, Morey & Company telegraphed Mr. Denison to come to Boston and received answer that he was unable to go but would write. He did write on the first of February, inclosing the assignment of various accounts and of the merchandise on hand, manufactured paper, and saying, among other things: "The assigned accounts is several thousand dollars short, and it has occurred by shrinkage in the price of paper, and paper rejected and returned, and discounts on lots retained, etc. We turn over all we can to cover the same." This is the preference complained of.

The letter also stated: "Your dispatch was received and in confirmation of reply to same I wrote you to say that we have concluded, after a careful consideration of your letter of January 20, to cease operations and let the creditors of the Denison Paper Manufacturing Company say what course, if any, we shall pursue in the future. I am aware that it will be a very uncomfortable position to place you in, as well as many others, but I cannot stand up under the load I have been carrying any longer and am unable to go to Boston for the present. I enclose you a bill of sale of paper on hand and have covered all of the assigned accounts that lies in my power. . . . We wish we could prevent this calamity but we see no relief amid present combination. We have as yet done nothing to precipitate this matter, and shall be at home during the balance of the week, but the amount we have to pay Friday will settle the matter, if no provision is made to protect same."

These extracts were written on Tuesday. One of the firm of Morey & Company went immediately to Mechanic Falls, the debtor's place of business, examined into its affairs, exercised the right of stoppage *in transitu* and giving no further assistance, the debtor's paper went to protest Friday.

At the trial the defendants claimed that these letters were notice to plaintiffs of their debtor's insolvency, and, in law, worked knowledge of the same. It is plain enough that the letters conveyed information of the debtor's insolvency, and alone, without evidence to control their meaning and import,

would sustain the defendant's contention and make the finding of the court below erroneous in law.

In this connection it is well to consider the meaning of the statute phrase, "knowing that the debtor was insolvent or in contemplation of insolvency."

I. Of the meaning of the word insolvent or insolvency. It is not always used in the same sense. "It is sometimes used to denote the insufficiency of the entire property or assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business." *Toof* v. *Martin*, 13 Wall. 47. The latter is the commercial use. It indicates an inability to continue business in the ordinary way; an inability to meet business obligations as they mature; an inability to keep one's credit good so that his commercial promises bear upon their face an assurance that they will be met as they mature.

It is also the use adopted in all bankrupt and insolvent laws, when applied to persons in commercial pursuits, where provision is intended for the liquidation of business interests, when they can no longer continue in the ordinary course, securing to the existing creditors an equal division of the assets before they shall be wasted and frittered away in a hopeless struggle, under conditions that compel disaster in the end.

In the statute phrase under consideration, the word insolvent or insolvency, when applied to the insolvent, a manufacturing corporation engaged in a mercantile business, has the same meaning and significance as in § 48 of the same chapter relating to fraudulent preferences, where its meaning has already been considered and defined in the case of an insolvent business corporation, viz: an inability to meet maturing demands in the ordinary course of business. *Clay* v. *Towle*, 78 Maine, 89. The same meaning as in the late bankrupt law, viz: inability to pay his debts in the ordinary course of business as men in trade usually do, and such must be the conclusion even though his inability be not so great as to compel him to stop business. *Wager* v. *Hall*, 16 Wall. 599; *Buchanan* v. *Smith*, 16 Wall.

308; *Dutcher* v. *Wright*, 94 U. S. 557. And the same as in the Massachusetts insolvent law, *Vennard* v. *McConnell*, 11 Allen, 562; *Barnard* v. *Crosby*, 6 Allen, 331; *Lee* v. *Kilborn*, 3 Gray, 594; *Holbrook* v. *Jackson*, 7 Cush. 136; *Thompson* v. *Thompson*, 4 Cush. 127.

II. Of the meaning of the word knowing or knowledge. It should be noticed that the word knowing is used in the section 29, now under consideration, instead of the phrase, "having reasonable cause to believe," used in § 52, relating to fraudulent preferences, and in the late bankrupt law and in most of the other State insolvent laws. "Having reasonable cause to believe," is defined by our court in the language of the Supreme Court in *Grant* v. *Nat. Bank*, 97 U. S. 80, to mean: "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for his debt. . . . A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be willing to trust him further; he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting." *King* v. *Storer*, 75 Maine, 63. That definition is, "knowledge of such facts as to induce a reasonable belief" of the resultant fact, insolvency; hardly short of knowing it.

In *Knapp* v. *Bailey*, 79 Maine, 195, the question was whether a grantee had actual notice of an unrecorded deed. Actual notice means knowledge. And the court says: "The decided preponderance of authority supports the position that the statutory 'actual notice' is a conclusion of fact capable of being established by all grades of legitimate evidence." Knowledge must be proved in the same way or in many cases not at all.

The court further says in the same case: "If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He

has no right to shut his eyes against the light before him. He does a wrong not to heed the signs and signals seen by him. It may be well to conclude that he is avoiding notice of that which he really believes or knows. Actual notice of facts which, to the mind of a prudent man, indicate notice is proof of notice. . . . 'I cannot dare to know that which I know.'"

"Having reasonable cause to believe." The criterion made in section 52 for determining the validity of a preference as defined by our court is almost, if not quite, identical in meaning with the word "knowing" made by section 29 a criterion for receiving or rejecting a creditor's proof of a debt upon which he may have received a preference. And there are many reasons why they should be considered identical in meaning. The taking of a preference does not forfeit the right to prove the debt, as under some bankrupt laws. It only inhibits the proof until the preference shall be surrendered. When surrendered, the debt becomes provable. *Est tempus penitentiæ.* Until the preference be surrendered, the debt cannot be proved. We see no reason why a preference may not be surrendered at any time, before the debt be finally disallowed, and the debt be proved.

It seems reasonable that the legislature should have intended only to prohibit the proof of a debt until an invalid preference shall be surrendered. Why make a debt provable for the balance over a preference, and then make the preference recoverable by the assignee leaving the creditor with dividends on the balance of his debt only? Why make it possible for him to lose dividends on the amount supposed to have been paid by the preference after he shall have lost it? The statute prohibits his proof only, until he shall have surrendered the preference.

Both sections should be construed to have the same meaning, and be held to inhibit the proof of a debt, until a preference, invalid under the statute, shall have been surrendered. Such construction would practically be as favorable to the creditor as the other and would diminish litigation, as one trial would be likely to settle the right to the security and of proving the debt.

What then are the facts of this case as bearing upon the legal import of the letters claimed to work knowledge to plaintiffs of

the debtor's insolvency? The plaintiffs were merchants in Boston. The insolvent, a manufacturing corporation in Maine. The Denisons were its managers. In 1882, they, being in financial trouble, applied to the senior plaintiff for "advice and counsel." He aided them in arranging a settlement with their creditors, and also afterwards arranged that his firm should furnish them funds by indorsing their paper at two per cent taking security on their accounts. They had previously been selling their paper through a commission house paying a commission of five per cent with a guaranty of two and one half. Morey says: "They wanted to know if I would not make the advances at a less rate and they would sell the paper. I asked them how they would secure me in that way, and they said they couldn't secure me except in the assignment of the accounts, but I would have to trust to their integrity, but under no circumstances, aiding them as I had done, would they take advantage of the position I had occupied. A. T. Denison came to my office with tears rolling down his cheeks, said that it had saved them, and that I never should lose a dollar under any circumstances. I knew I took a risk, but I could not conceive it possible, when I was pulling a man out of the water to save him from drowning, he would put his hand around and take it out of my pocket."

Advances were continued until shortly before the failure when they aggregated about $189,000. Trial balances were forwarded to plaintiffs until July 1, 1886. That one is not produced. The one prior to it, January 1, 1886, is produced. It shows:

Real estate and new machinery as resources,		$427,025.53
Accounts and material,		142,053.67
Total,		$569,079.20
Debts outstanding,	$411,792.64	
Surplus,	157,286.56	$569,079.20

From this statement it appears that the debts exceeded the quick assets (accounts and material) $269,778.97. The next trial balance produced, which Walter Morey testifies was not more unfavorable than the last one received, taken from the books in June, 1887, shows liabilities in excess of quick assets amount-

ing to $512,323.33. On January 20, 1887, plaintiffs wrote the letter before referred to calling for more prompt attention to the payment of their notes and in answer came the letter of February 1, before recited, inclosing the preference complained of. This preference included all their accounts and merchandise on hand. A transaction that gave expression to their straightened condition. With it was express notice of their inability of themselves to meet their paper maturing three days afterwards. The plaintiffs then held all the available quick assets of their debtors and knew that their liabilities to other creditors amounted to above $200,000. Their own claim was nearly that sum. To be sure, the debtors held valuable real estate, but that could not be considered available to pay commercial paper about to fall due. The plaintiffs must have known that, without their help, the debtor's business would cease, as they were informed it would in the letter to them, inclosing the preference complained of. All the facts in the case tend to confirm the statements in the letter of February 1, unless it be the testimony of plaintiffs themselves, who say that they did not know that their debtors were insolvent. Of course, all members of the firm, some of whom did not take an active part in the management of the firm's business, would not necessarily have the same plenary knowledge that others would be expected to have. Nor is it necessary that they should, in order to charge the firm with knowledge. As one member of a partnership is agent for the others in the firm business, so the knowledge of one partner is knowledge of the partnership.

The senior plaintiff, Edwin Morey, testified relating to the information contained in the letter of February 1: "I took the letter and telegram and put them together and I thought Adna was sick at home and blue and thought I was not going on with the help and that he had sent that dispatch, written that letter — I didn't consider at that time but what he would come through with it all right. I had supposed that they had a large surplus, not valuing the materials at any price it would be likely to bring. I saw this trial balance they would send to me from time to time, and when they were first sent to me they put their

balances there to what it stood on the books, but I objected and insisted that the plant should be cut down to $250,000. My impression was that if the property brought in accordance with their trial balances *they could pay in full*, it is only an impression; when I got that telegram I thought that he didn't know how to move and that he was sick and blue at home."

This indicates that the solvency of which this witness speaks was an ability, on liquidation, to pay in full. And he adds: "It is only an impression." The witness does not distinguish between commercial insolvency, the inability to continue business in the usual course, and actual insolvency on final liquidation. He says: "I thought Adna was sick at home and blue, and thought I was not going on with the help [advances] and that he had sent that dispatch, written that letter.—" In the letter he was told, "We have concluded, after a careful consideration of your letter of January 20 [calling for more prompt payment of commercial paper], to cease operations and let the creditors of the Denison Paper Manufacturing Company say what course, if any, we shall pursue in the future. . . . The amount we have to pay Friday will settle the matter, if no provision is made to protect the same." Edwin Morey received that letter on Tuesday. A member of his firm immediately went to the debtor's place of business, examined its condition, and did not help to prevent the paper maturing on Friday from dishonor, but submitted to the condition of affairs of which he was told by the letter to be inevitable. He knew the debtors were commercially insolvent, unable to continue in business for a single hour without the aid of his firm; that, after further investigation, he withheld. This letter, too, contained assignments to him of all the debtor's quick assets, a transaction out of the usual course of business, and, to a commercial man, strong proof of the tale of woe that the letter apprised him of. The information in the letter and the preference that it brought to plaintiff's hands were contemporaneous. The one plainly said I am insolvent, and the other invested him with all the available security within the debtor's power. There is no evidence in the case that controls this transaction or tends to control it, or explains its legal meaning. It

is not contended that the debtor was not actually insolvent. The creditor knew its business and its commercial credit, had complained of its inattention to maturing paper, was informed of its inability to further continue business and that the creditors must decide what course to pursue. These facts gave a reasonable cause to believe that the debtor was insolvent, carried conviction that it must be so, and under this statute worked knowledge of the fact. There is no evidence in the case tending to show that the statements in the letter were untrue, and time has thoroughly verified their truth.

It is too well settled to contend that findings of fact by a presiding justice can be reviewed in any case where an appeal is not given. The doctrine in such cases is well stated in *Coolidge* v. *Smith*, 129 Mass. 556. "The judge who presided at the trial in the court below was in a position in which he was required to exercise the functions of both judge and jury. His conclusions as to the weight and sufficiency of the evidence, and the credit which he ought to give to the witnesses, are binding upon us and are not open to revision. *Forsythe* v. *Hooper*, 11 Allen, 419. If there was any evidence which could properly have been submitted to a jury, and upon which, if believed by them, they could legally find a verdict for the plaintiffs, the verdict could not be set aside as matter of law. *Heywood* v. *Stiles*, 124 Mass. 275. The finding of the judge in this case stands in the same position as if it had been the verdict of a jury." The same doctrine is laid down in *Pettengill* v. *Shoenbar*, 84 Maine, 104.

In the case at bar, the creditors received security upon an existing debt with express notice from their debtor, by a letter bringing the security to their hands, that their debtor was commercially insolvent. They therefore took the security charged with the notice of the debtor's insolvency. They cannot say they did not know whether the information was true or not. If they received the security coupled with notice that it would give them a preference over other creditors and elected to hold it, they should be charged with taking it under those conditions. It was tendered as a preference under the insolvent law, and when they elected to so receive it, they received it as tendered.

The creditors received security, being charged in law with notice, actual notice, that worked knowledge of their debtor's insolvent condition. There is no evidence in the case that does or can explain away the legal aspect of the transaction. The finding, therefore, of the presiding justice, that they did not know of their debtor's insolvency, is an erroneous decision of the legal inference to be drawn from the facts of the case, and is error in law. When one inference only can be drawn from existing facts, it is a matter of law. Where the inference is doubtful, a matter of fact. *Lasky* v. *C. P. R. Co.* 83 Maine, 461.

It is claimed that the supposed preference was but an exchange of securities. The facts are, certain accounts and, perhaps, some merchandise had previously been assigned to the plaintiffs as security for their advances. They neither took possession of the merchandise, nor notified the debtors of the assignment of the accounts, but left both under the control of the insolvent, and it used or sold the merchandise and utilized the accounts by creating offsets and collecting balances, &c., whereby the plaintiffs' security was lost. But they had no security. They had a potential right to security. The assignments were not a mortgage. They could create a pledge where control of the thing assigned was secured, but until that was done the contract was executory. *Walker* v. *Staples*, 5 Allen, 34; *Thompson* v. *Dolliver*, 132 Mass. 103; *Shaw* v. *Silloway*, 145 Mass. 503; *Copeland* v. *Barnes*, 147 Mass. 388.

An exchange of securities of equal value works no prejudice to the creditors of an insolvent debtor and, therefore, should not be held void as a preference. *Cook* v. *Tullis*, 18 Wall. 332; *Clark* v. *Iselin*, 21 Wall. 360; *Burnhisel* v. *Forman*, 22 Wall. 170; *Sawyer* v. *Turpin*, 91 U. S. 114. If larger security be given in the exchange, the excess can only be attacked as a preference. *Hutchinson* v. *Murchie*, 74 Maine, 187; *Robinson* v. *Tuttle*, 2 Hask. 76.

But there must be an exchange. The replacing of securities already lost is not an exchange. It is the giving of new and further security, thereby diminishing the insolvent's estate to

the extent of the new security, a result exactly the reverse of an exchange.

Nor can the supposed preference be upheld upon the ground that it was given in pursuance of a prior agreement to secure, even if such agreement had been shown. *Copeland* v. *Barnes*, 147 Mass. 388; *Re McKay*, 1 Lowell, 561.

It is claimed that the preference was purged by agreement of the assignees made with approval of the insolvent court. Early in the insolvent proceedings plaintiffs proved their claim for $189,313.45. As security they held sundry notes and accounts and parcels of merchandise. They agreed with the assignees to take the security at a fair valuation, and it was agreed that the fair value was $53,860.85, and that a rebate of interest amounting to $637.53, should also be allowed, in all $54,498.38, and that the proof should be correspondingly reduced and stand for dividends at $134,815.07. Upon this amount a dividend of twenty-five per cent has been paid. The agreement is in writing, and the parties differ as to its legal effect. Equity deals with the substance of a transaction regardless of form, and the substance of the transaction was that the plaintiffs should apply their security to the payment of their claim at a fair valuation, and prove the balance. They did so. The assignees parted with all title to the security, and it was applied in payment of the debt. This was all they could agree to do and all they did do. Their action might conclude them but it could not conclude others. Each creditor is given by statute the right to contest the proofs of other creditors, and some creditors have availed themselves of that right in this case, and their contentions must be heard and considered. They have shown a preference, included in the securities of the plaintiffs, to the amount of $11,355.54. Under the statute, until they surrendered this to the assignees, they are debarred from proving their debt. When they do surrender it, they are entitled to have their proof of debt increased by that amount, and would be entitled to receive upon it a dividend of twenty-five per cent to give them an equality with all the other creditors. After giving them credit for this amount, the preference to be surrendered would be $8,516.64.

The injury, therefore, suffered by the defendants on account of the erroneous ruling of the court below, can be measured and exactly determined from the evidence produced before us, as it has all been reported, and, as this cause is of long standing, we think best to finally determine it if possible. If, therefore, the plaintiffs elect to pay the assignees, within thirty days, the sum of $8,516.64 they may increase their proof of debt in the insolvent court by the amount received as a preference, viz: $11,355.54, so that the same shall stand proved to the amount of $146,170.61, upon which they may share equally with the other creditors in future dividends, if any are paid, and the exceptions are to be overruled, otherwise sustained.

Mandate accordingly.

EMERY, J. I am constrained to dissent. I cannot but think the opinion works a practical usurpation by the law court of a power not intrusted to it.

Bills of exceptions were not devised, and have not been used, for reviewing questions of fact. Hence, the statute authorizing bills of exceptions to be brought into the law court, has always been understood to exclude the consideration of such questions. Where the law has provided no appeal, nor motion for a new trial, it has required a court's findings of facts to be taken as conclusive. *Pettengill* v. *Shoenbar*, 84 Maine, 104.

The proposition that the respondent creditors knew that the debtor was insolvent, or was in contemplation of insolvency, is a proposition of fact, and is alleged as such in the petition. It is to be established, not by principle or authority, but by evidence. Without evidence, the proposition is without support. *Knapp* v. *Bailey*, 79 Maine, 195.

I understand these positions, just stated, to be substantially conceded in the opinion. It is said, however, that when the inference to be drawn from existing facts is doubtful, it is a matter of fact; but when the inference to be drawn is clear, it is a matter of law. Upon this proposition seems to be based this action of the law court in overturning, by means of a bill of exceptions, a court's finding of facts, in a case where the law has not authorized an appeal nor a motion for a new trial.

But is not the inference from one fact to another,—from the fact known to the fact sought,—always an inference of fact? Does the facility or difficulty of the inference change its nature? Is it not in either case, clear or doubtful, to be drawn by the judge of the facts, and not by the judge of the law? Upon appeals and motions for new trials, the members of the law court sit as judges of the facts, and weigh evidence and draw inferences as such.

In every trial of facts by a court, each party may insist, and usually does insist, that the inference to be drawn from the evidence is clear. According to the doctrine of the opinion, a party, by such insistence, raises a question of law which may be taken to the law court upon a bill of exceptions. He may in every case require the law court to entertain his bill of exceptions, and review the evidence, so far as to determine whether the inference to be drawn is clear or doubtful. Upon an appeal or motion for a new trial, the law court does no more,—for if the inference to be drawn is found to be doubtful the findings of fact by the court or jury are accepted; and it does this much, as a trier of the fact, not as a trier of the law.

To thus make a bill of exceptions perform the office of an appeal or a motion for a new trial, is to open a new and wide door for appeals from a court's findings of facts in those cases where the law has intended no appeal. I can see no limit to the use of that door by dissatisfied litigants.

In re MOOERS AND LIBBY, Insolvents.

Cumberland. Opinion June 9, 1894.

Insolvency. Discharge. Books of Account. Practice. Findings of Fact. Conclusive. R. S., c. 70, § 46.

A tradesman who has failed to keep proper books of account is not entitled by the laws of Maine to receive a discharge in insolvency.

No exceptions lie to the findings of fact by a presiding justice of this court. His decisions upon questions of fact are conclusive, and the law court has no power to revise or reverse such decisions.

Whether a tradesman's books give a truthful and complete history of his business is a question of fact.

ON EXCEPTIONS.

This was an appeal from the Court of Insolvency, for the County of Cumberland and was heard in this court by the presiding justice without a jury. From the bill of exceptions it appears that:

William H. Mooers and Benjamin F. Libby, co-partners under firm name of Mooers & Libby, were adjudged insolvent debtors by the Insolvent Court for the County of Cumberland, upon their own petition filed in that court on the 9th day of December, 1891, and thereafterwards on the 26th day of July, 1892, said insolvents filed in said court a petition for a discharge, as provided by R. S., c. 70.

On the return day of the petition for discharge, Harris Gage & Tolman and others, creditors of said insolvent debtors, who had filed proofs of their claims in said court, appeared and filed specifications of objections to the discharge of the firm of Mooers & Libby, and also objections to the discharge of William H. Mooers individually. Said cause was heard by the Insolvent Court, and on the 31st day of December, 1892, the judge of that court entered a decree discharging said Benjamin F. Libby, and denying the discharge of said William H. Mooers, and thereupon said objecting creditors gave notice of their appeal from said decree discharging said Libby, and said Mooers gave notice of his appeal from said decree, denying his discharge.

Both appeals were entered in this court at the January term, 1893, and were continued until the April term, when both of said appeals came on to be heard upon five written specifications of objections to the discharge of Mooers & Libby, and written specifications of objections to the discharge of William H. Mooers; all the objections related to the insolvents' books of account.

The appeals were heard in this court upon the evidence produced upon the part of the objecting creditors, and upon consideration thereof, and of the arguments of the counsel for the respective parties, the court found that said Mooers & Libby as co-partners, were merchants and traders, engaged in the retail grocery business at said Portland, between the first day of February, 1889, and the 15th day of December, 1891, and that

said William H. Mooers between the same dates, was a merchant and trader, engaged in the retail meat business.

And thereupon the court decided that the books and exhibits produced, kept by said firm of Mooers & Libby, were proper books of account, and the books kept by William H. Mooers in his retail meat business, were not proper books of account, and ordered that the decree of the Insolvent Court granting a discharge to Benjamin F. Libby, and denying a discharge to William H. Mooers, be affirmed.

The objecting creditors thereupon took exceptions.

Benj. Thompson, for objecting creditors.

Counsel cited: *In re Tolman*, 83 Maine, 353, 358; *In re Gay*, 1 Hask. 108; *In re George & Proctor*, 1 Lowell. 409; *In re Antisdell*, 18 N. B. R. 289; *In re Williams*, 13 Fed. Rep. 30; *In re Archenbrown*, 12 N. B. R. 17; *In re Patten*, 85 Maine, 154; *In re Garrison*, 7 N. B. R. 287; *In re Hammond, & Coolidge*, 1 Lowell 381-2; *In re Vernia*, 5 Fed. Rep. 724-5; *In re Mackay*, 4 B. R. 66; *In re White*, 2 B. R. 590; *In re Odell*, 17 N. B. R. 73-4; *In re Winsor*, 16 N. B. R. 152; *In re Butler*, 13 Fed. Rep. 30-1.

Wilford G. Chapman, for insolvents.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, WISWELL, JJ.

HASKELL, J. The court below decided that the books of a tradesman were proper books of account and granted the discharge in insolvency of the tradesman. To this decision exceptions are taken by the objecting creditors, and they must be overruled. The decision presents no question of law. Had the presiding justice stated the condition of the books, that is, found the facts upon which he based rulings of law, it would have been otherwise. This he did not do, and did not intend to do. The original exceptions as presented recite: "The court ruled as a matter of law that the books and exhibits produced, kept," &c., were proper books of account. Before the exceptions were allowed, the presiding justice, with his own hand, erased the

words, "ruled as a matter of law," and inserted instead thereof the word "decided," plainly showing that questions of fact, as well as of law, were included in his decision. From such decision, exceptions do not lie. The law court cannot, on a bill of exceptions, investigate the whole record, make itself familiar with a complicated or involved system of book-keeping, and determine the existing facts, in order to see whether the result complained of be sustained by the rules of law. Such considerations can only be reached by appeal, and that relief is not given in cases of this sort. The law, in these cases, makes the court below the final arbiter on questions of fact, and the law court has no power to revise or reverse such decision.

In this case, a large box of books is sent to the law court for it to determine on inspection whether the books contain such entries as give a truthful and complete history of the tradesman's business, purely a question of fact. It is not so material to know what the system of bookkeeping is, as to know the substance of it. That can be known only by a careful examination of the accounts, giving results and conditions of fact, that as matter of law either do or do not establish the statute requirement of proper books of account. Such results and conditions must be determined at *nisi prius*. It is unlike the case of *Morey* v. *Milliken*, *ante*, p. 464, where the vital facts were undisputed and the inference showing the resultant fact became a question of law.

Exceptions overruled.

CHARLES S. HATHORN *vs.* ERNEST F. KELLEY, and others.

Sagadahoc. Opinion June 9, 1894.

Flowage. Owners or Occupants. Non-User. Laches. Damages. Limitations. R. S., c. 92, § 17.

The annual damages for flowing one's land by a mill dam may be recovered in an action against either the owners or the occupants of the dam.

To constitute an abandonment of a mill-dam so as to exonerate its owners from liability to pay the annual damages previously established in favor of land owners in proceedings for flowage, the non-user must have been absolute and complete, and not partial or temporary merely.

The proceedings in a complaint for flowage partake so much of equitable forms and principles as to allow the equitable doctrine of laches to be administered in an action to recover annual damages which were established in 1838, but not sued for nor demanded for twenty years next preceding the date of the writ in 1892; the plaintiff in the peculiar circumstances of the case being limited to a recovery of the damages becoming payable within the last six years with interest thereon.

ON REPORT.

This was an action of assumpsit, under R. S., c. 92, § 17, for the annual compensation for the flowage of the plaintiff's land, as awarded in accordance with the preceding provisions of the same chapter, at the rate of twelve dollars per year, for twenty years next prior to the date of the writ, and interest thereon, amounting to $403.20. The writ is dated August 1, 1892.

The plaintiff's claim arose out of the proceedings in the complaint of Seth Hathorn v. John R. Stinson and others, dated August 1, 1831, and entered in the C. C. P. for Lincoln county, at the August term of that year. After due appearance and answer, the case was tried by a jury at the following December term, resulting in a verdict for the complainant. The respondents then appealed to the Supreme Judicial Court, where the case was entered at the May term, 1832, and a new trial was granted. *Hathorn* v. *Stinson*, 10 Maine, 224. The case was again tried by a jury at the September term, 1834, in the Supreme Judicial Court, again resulting in a verdict for the complainant. This verdict, upon a motion for a new trial, was sustained, *S. C.*, 12 Maine, 183, and thereupon, at the May term, 1836, commissioners were appointed whose report was accepted at the May term, 1838, awarding the complainant the sum of twelve dollars yearly damages for each year.

Geo. B. Sawyer, for plaintiff.

C. W. Larrabee, for defendants.

SITTING: PETERS, C. J., WALTON, LIBBEY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J. This is an action, commenced in 1892, against mill-owners or occupiers for the annual damages caused,

during the last twenty years prior to the date of the writ, to the plaintiff's land from flowage created thereon by the defendants' mill-dam, the action being grounded on a judgment for such damages recovered by the plaintiff's ancestor against the defendants' predecessors in title over fifty years ago. The defense urges several objections against the claim.

It is said by the defense, that all the present owners of the mill are not embraced in the suit. But we find that all the occupiers are sued, and the action may be against owners or occupiers. Really, the occupiers are also the owners, excepting that the wife of one of them may have title to a small undivided share.

It is objected against the validity of the original judgment or decree that there was no finding of damages in gross as well as for annual damages, as now required by the statute. But there was no such requirement when the original judgment was recovered in 1838.

It is contended that the defendants should be exempted from the payment of damages for such portions of the last twenty years covered by the claim in the writ as the mills were shut down and the mill-dam not used. We think a defense of partial abandonment is not maintainable; it must be an actual completed abandonment. At no time has there been an intentional total abandonment.

Lastly, the defendants rely either on the statute of limitations as a legal defense, or on the laches of the plaintiff as an equitable defense, against all the claims of the plantiff which did not accrue within six years prior to the date of the writ. The defense of laches is sufficiently asserted in the defendants' brief statement. There certainly is no justice or equity in the plaintiff's recovery of his full claim. He came into possession of his estate in 1869, since which time until 1888, when the mills and dam were rebuilt by the defendants, it is difficult to see that his premises were seriously affected or injured in the least by flowage. Until 1888, he did not even demand any damages. The old structures were so dilapidated as to be incapable of doing any injury to his land.

Were it not for the remark of the court, in *Knapp* v. *Clark*, 30 Maine, 244, that the ordinary statute of limitations did not apply to an action of this kind, a conclusion apparently adopted without much consideration of the question, we should have regarded the point as at least a debatable one, looking at it strictly upon a legal view. The action is not strictly upon the judgment itself, but is one flowing out of it, and to be evidenced by it;—grounded upon it as the earlier statute on the subject expresses it,—an action of assumpsit implying a promise to pay fixed annual damages. There is much reason for classifying such a promise with all other ordinary promises to pay a fixed sum of money.

But the court of that day were looking at what was then regarded as a merely legal question, while since that day the court has regarded the procedure more as equitable then legal. KENT, J., in *Moor* v. *Shaw*, 47 Maine, 88, after giving reasons for the conclusion, said: "Viewed in this light, the strict rules of pleading applicable to pleading in suits at law commenced by writs cannot apply; but the rules in cases in equity do apply." In cases in Massachusetts, it is several times said that the statute proceeding is peculiar and founded in equity and public policy. SHEPLEY, C. J., in *Lowell* v. *Shaw*, 15 Maine, 242, describes the equity of that case and of this also in the remark that, "whoever becomes the owner must take the estate *cum onere*, and that the owner of the land flowed will be entitled to call upon him to pay whatever may be due the land, unless he has been guilty of laches in collecting them from the former owner or occupant." Had the land owner applied for his damages as they became payable in the present case, his application would probably have resulted in some settlement or new adjustment of damages. He was guilty of laches in not so doing. There have been many mutations of occupancy and ownership since 1838, and not a few since 1869. If equity lends her forms of procedure to effectuate the peculiar provisions of the statute in these cases, she should be accorded the privilege of applying her rules of pleading in order to obtain equitable and just results. As the plaintiff has been guilty of

inexcusable delays in collecting the damages now claimed by him, the penalty will be that he recover none of the damages that were due and payable prior to six years before the date of the writ; but will recover all those becoming due since such date, with interest on each sum payable from time of payment due to the date of judgment thereon.

Defendants defaulted.

HORATIO HIGHT, and another,

vs.

JAMES QUINN, and another.

Cumberland. Opinion July 11, 1894.

Pleading. Negative Averments. Liability of Stockholder. R. S., c. 46, § 47.

In an action by a judgment creditor of a corporation against a stockholder upon R. S., c. 46, § 47, it should be alleged in the declaration that the debt was not a mortgage debt of the corporation. The omission of such allegation leaves the declaration insufficient. if it be demurred to.

ON EXCEPTIONS.

The defendants' demurrer to the plaintiffs' declaration having been overruled in the court below, they brought the case into this court on exceptions.

The opinion states the case.

LeRoy L. Hight, for plaintiffs.

Revised Statutes, c. 46, § 46, defines who may be a plaintiff in a proper suit of this nature; and § 47 prescribes the method which such plaintiff may follow. The clause declaring that a stockholder is not liable, "for any mortgage debt of said corporation," is a subsequent, substantive provision and is to be considered an exception or proviso and need not be alleged in the declaration.

Such an exception coming, as it does, in a separate and distinct clause, which has the effect of taking out of the general trend of the statute something that would otherwise be included in it, need not be noticed in the declaration.

"The difference is when an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead

the exception; but where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso." 1 Ld. Raymond, 120.

"Exemption from a penal law may be given in evidence on not guilty: and the negative need not be pleaded. *Rex* v. *Pemberton*, 1 W. Bl. *230.

Ashhurst, J., says: "Any man who will plead an action for a penalty on an act of parliament must show himself entitled under the enacting clause: it follows if there be a subsequent exception that is a matter of defence, and the other party must show it to exempt himself from the penalty." *Spiers* v. *Parker*, 1 T. R. *145. *Gill* v. *Scrivens*, 7 T. R. 31, follows the cases above cited as does also the Massachusetts case, *Com* v. *Hart*, 11 Cush. 134. See also Gould on Pleading, Ch. 4, § 22. See Espinasse on Penal Statutes, 1 Am. Ed. p. 95. Counsel also cited: *Grindle* v. *Stone*, 78 Maine, 176.

Symonds, *Snow and Cook*, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. This is an action on the case by a judgment creditor of a corporation against a stockholder and is based upon the statute R. S., c. 46, § 47. That statute, near the end of the section, declares that a stockholder is not liable, "for any mortgage debt of said corporation." The declaration does not set forth that the debt of the corporation to the plaintiff was not a mortgage debt. For this omission of allegation, the defendant stockholder demurred to the declaration. It is urged, in support of the declaration, that the existence of a mortgage to secure the debt is a matter to be pleaded and proved in defense, and hence it need not be negatived in the declaration.

"There is some perplexity and contradiction in the books respecting the principles to be applied in the decision of this question. There seems to be much curious learning, and many nice and rather shadowy distinctions, the sound reason and solid

sense of which, are not very easily discoverable." MELLEN, C. J., in *Smith* v. *Moore*, 6 Maine, at page 277. Several artificial criteria, such as the particular locality of the excepting clause in the statute, have been suggested; but it is now generally agreed that, "it is the nature of the exception, and not its location, which decides the point." (Day's Chitty, Vol. 1, p. 229, note.)

If the exception is descriptive of the class of persons who may sue, or is descriptive of the cause of action, or is descriptive of the class of persons who may be sued, such descriptive exceptions should be stated in the declaration, to show affirmatively that the plaintiff, the cause of action, and the defendant are all within the statute. In *Little* v. *Thompson*, 2 Maine, 228, the statute gave a right of action for taking logs, &c., "without the consent of the owner." It was held that the want of the owner's consent should be alleged. In *Smith* v. *Moore*, 6 Maine, 274, the statute gave a right of action against an executor who delayed filing a will, "without just excuse made and accepted by the judge of probate for such delay." It was held that the want of just excuse must be alleged. In *Com.* v. *Maxwell*, 2 Pick. 139, the statute enacted a penalty for entertaining on the Lord's day, "any persons not being travelers, strangers or lodgers." It was held that the indictment must contain the allegation that the persons were not, "travelers, strangers or lodgers." In *Williams* v. *Turnpike Co.* 4 Pick. 341, the statute gave a right of action to, "any person from whom toll is demandable." It was held that in the declaration the plaintiff must be described as one from whom toll was demandable. In *Spiers* v. *Parker*, 1 T. R. 141, the statute gave a right of action to any mariner who should be impressed, unless it appeared that he had previously deserted from an English ship of war. It was held that the declaration should affirmatively show that the plaintiff had not previously deserted.

The right of action in the case before us is created solely by statute in favor of a particular class of persons, against another particular class of persons, and upon a particular class of facts. Not all creditors of the corporation are given the right of action, but only judgment creditors. It is clear, therefore, that in

the declaration, the plaintiff must be described as a judgment creditor. But not all judgment creditors of the corporation are given the action. The class of creditors who may sue is still further limited in the statute, by the confining the right of action to those judgment creditors whose debts are not secured by a mortgage. It is equally clear that the declaration should show that the plaintiff is also within this last limited class, by the allegation that his debt is not a mortgage debt. The declaration should exclude whomsoever the statute excludes.

In this case, it is as if the statute read: "All judgment creditors, whose debts are not secured by a mortgage, shall have a right of action." The pleader under a statute so worded would instinctively allege that the plaintiff's debt was not secured by a mortgage. The statute, as it actually does read, clearly means the same thing. The pleader, therefore, should make substantially the same allegation.

In the statute, the same sentence which limits the class of creditors who can be plaintiffs, also limits the class of stockholders who can be made defendants, to those who were stockholders at the time of the contraction of the debt. The plaintiff admits that he must allege and prove that the defendant was an owner of unpaid stock at the time of contracting the debt, and cannot leave it to the defendant to plead and prove that he was not. If the declaration, in its description of the defendant, must show him to be the person whom the statute subjects to the action, it would seem that in its description of the plaintiff, it ought also to show him to be the person to whom the statute gives the action. For the omission to thus describe the plaintiff,— to show him to be of that class of creditors entitled to the action,— the declaration must be adjudged insufficient.

None of the other objections urged against the declaration need now be considered. The plaintiff in amending his declaration, should be careful to avoid any reasonable objections.

In *Grindle* v. *Stone*, 78 Maine, 176, and in *Libby* v. *Tobey*, 82 Maine, 397, cited by the plaintiff, the point here in question did not arise, and was not considered.

Exceptions sustained.

STATE *vs.* GEORGE H. HAMLIN, Executor, and others.

Penobscot. Opinion July 27, 1894.

Taxes. Collateral Inheritance. Constitutional Law. Exemptions. U. S. Const. 14th Amendt. Maine Const. Art. I, § § 1, 6, 21, Art. IX, § § 7, 8, N. Y. Stat. 1885, c. 483, Maine Stat. 1893, c. 146.

Section 1 of chapter 146 of the Statutes of 1893, imposing a tax on collateral inheritances, is not a tax upon real and personal estate, within the meaning of Article IX, § 8, of the Constitution of Maine, but is an excise, clearly within the constitutional powers of the Legislature to impose.

The act is not in conflict with the 14th amendment to the constitution of the United States.

The five hundred dollar exemption, provided in section 1 of the act, is not one exemption from the *corpus* of the estate but is an exemption of that sum from each and every legacy or share given or descending to persons within the classes subject to the excise.

ON REPORT.

This was an appeal by the State from a decree of Judge of Probate, for Penobscot county, made by the judge in the estate of Edward Mansfield, late of Orono, deceased, testate. The question arose under the statute of 1893, c. 146, entitled, "An act to tax collateral inheritances."

Upon the application of the executor of the will, and after due notice, and hearing, the judge made the following decree :—

(1.) That under sections one and two of said act, there shall be deducted the sum of five hundred dollars, from each legacy and devise in said will, which comes under the operation of said law; and that the tax under said act shall be computed upon the value of what remains of each of said legacy and devise after deducting therefrom five hundred dollars.

The State thereupon appealed and assigned the following reasons of appeal :—

(1.) That said decree relieves said estate from taxation under said act to a greater extent than said law contemplates.

(2.) That the exemption provided for in said act is a single exemption of five hundred dollars from the whole property, which by the terms of said will is subject to the provisions of

said act, and not an exemption of five hundred dollars from each legacy or devise affected by said act, as said decree assumes.

(3.) That by the decree aforesaid a very much larger sum than five hundred dollars will be so exempted.

The executor and legatees under the will also contended that the act was unconstitutional.

The case came up for hearing in the court below, as the Supreme Court of Probate, in Penobscot county; and by agreement of all the parties was reported to the law court for the Middle District to be heard at the May term. All formal objections to the appeal, or to the manner of reporting the case, were expressly waived by the parties.

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

C. J. Dunn, for executor.

The statute violates the provisions of Art. 14 of the Federal Constitution providing; "Nor shall any State deprive any person of life, liberty or property, without due process of law," in that it does not require that any notice shall be given to the persons or bodies corporate upon whom the taxes are to be imposed, as to determining the value of their estates or afford them a reasonable opportunity to be heard. *Davidson* v. *New Orleans*, 96 U. S. 97; Cooley on Con. Lim. 5th Ed. 496, note 2; *Stewart* v. *Palmer*, 74 N. Y. 188.

The statute is unconstitutional in that it confers upon the probate court powers and duties not authorized or contemplated by our Constitution. Con. of Maine; R. S., c. 63; Cooley Con. Limitation, 211.

Statute requires the probate court to construe wills. Uniformity and equality are essential to a valid tax. Cons. of Maine, Art. 9, § 8. *Curry* v. *Spencer*, 61 N. H. 624. Inoperative within terms specified in § 2. The value of the prior estate required by § 2 of the statute to be determined within sixty days after the death of the testator, cannot in all cases be accomplished for the reason that in many estates executors and administrators are not, and cannot be qualified to act within sixty days after the death of the testator.

Nor can the tax be paid by the executor within one year from the death of the testator as required by § 4 of the statute in question, as creditors are allowed two and one half years in which to present their claims.

The value of the estate or of the legacy cannot be determined within one year after the death of the testator.

The statute conflicts with and does not repeal existing probate statutes.

The method provided for by the statute to determine, for the purposes of taxation, the value of future and contingent estates is unjust and unconstitutional. Cooley on Taxation, 2d Ed. 237, 352, 493; Cooley on Cons't. Lim. 612, 613, 622.

It provides no method of determining the value of remainders where a life-estate, with power of disposal, is given.

It must be applied to the legacies only; otherwise it would be applied as a direct tax upon property, and therefore unconstitutional, because it would be unequal and unjust.

F. A. Wilson, for legatees and devisees.

A. W. Paine, submitted a brief.

SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, WHITEHOUSE, STROUT, JJ.

STROUT, J. This appeal from the decree of the judge of probate arises under chapter 146, § 1, of the statute of 1893. That section is as follows:

"Sect. 1. All property within the jurisdiction of this State, and any interest therein, whether belonging to inhabitants of this State or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this State, or by deed, grant, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of the daughter of a decedent, shall be liable to a tax of two and a half per cent of its value, above

the sum of five hundred dollars, for the use of the State, and all administrators, executors, and trustees, and any such grantee under a conveyance made during the grantor's life shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid as hereinafter directed."

It is strenuously claimed by the appellee, that the act is in violation of the constitutional provisions, that all men, "have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property." Art. 1, sec. 1.

"Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." Art. 1, sec. 21.

"All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof." Art. IX, sec. 8. Also of the fourteenth amendment to the Constitution of the United States.

Succession duties or taxes have been in existence in other countries for centuries, and have been regarded with favor, as a convenient and comparatively non-burdensome means of revenue. They were well known in Roman jurisprudence (Gibbon's Rome, Vol. 1, p. 133), and were imposed upon all successions, except those to the nearest relatives and to the poor. The practice has long been resorted to in European countries, and was introduced in England in the last century, and was enlarged from time to time till 1853, when it was extended to all successions to real property, chattels real, and a vast variety of personal property and rights.

In this country, they were imposed by congress, by acts of June 30th, 1864, and July 13th, 1866, which were repealed in 1870. They were held by the Supreme Court of the United States, to impose an excise tax or duty, and, as such, not in violation of the Constitution of the United States. *Scholey* v. *Rew*, 23 Wall. 331.

The policy of taxing collateral inheritances was adopted in Pennsylvania, in 1826, and has been adhered to ever since. In

that State the statute has been constantly recognized as valid by its supreme court. *Strode* v. *Commonwealth*, 52 Pa. Sta. 181; *Orcut's Appeal*, 97 Pa. Sta. 179; *Bittinger's Estate*, 129 Pa. Sta. 338.

In Maryland, Virginia, Delaware, New York and several other States, laws imposing succession taxes have been enacted and are now in force; that of Virginia dating back to 1844, of Delaware to 1869, Maryland to 1864; the others of more recent date. In Maryland the act was attacked as in violation of the declaration of rights, in the constitution of 1864, which declared, "that the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the government, but every other person in the State, or person holding property therein, ought to contribute his proportion of public taxes, for the support of government, according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid, with a political view, for the good government and benefit of the community." But the Court of Appeals held the statute to be constitutional. Robinson, J., in delivering the opinion of the court, said: "We have not the slightest doubt as to the constitutionality of the law. . . . The restrictions imposed by it [the constitution] upon the legislative power, as to the objects of taxation, are explicitly declared. Poll taxes are denounced as grievous and oppressive, paupers are exempted from assessment; and all other persons are required to pay their proportion of public taxes, according to the value of their property. Arbitrary taxes on property without regard to value, are expressly prohibited, and all measures for the collection and imposition of taxes upon *property* are required to conform to this general principle of equality. Whilst thus providing for a *uniform* mode of taxation on property, it was not the purpose of the framers of the constitution to prohibit any *other species of taxation*, but to leave the legislature the power to impose *such other* taxes as the necessities of the government might require." *Tyson* v. *State*, 28 Md. R. 586; *State* v. *Dalrymple*, 70 Md. 294.

In Virginia, the Supreme Court held the same doctrine in *Eyre* v. *Jacob*, 14 Gratt. 430. In that case the court said: "The right to take property by devise or descent is the creature of the law, and secured and protected by its authority. The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent, to a particular class of his kindred, say to his lineal descendants and ascendants, and it might impose terms and conditions upon which collateral relatives may be permitted to take it; or it may tomorrow, if it please, absolutely repeal the statute of wills and that of descents and distributions, and declare that, upon the death of a party, his property shall be applied to the payment of his debts and the residue appropriated to public uses."

The statute of New York, chap. 483, laws of 1885, contains substantially the same provisions, and nearly the same exemptions, as the first section of chap. 146 of the laws of 1893, of our State. It does not differ in principle from ours. The question of the constitutionality of this act came before the New York Court of Appeals, in *Matter of McPherson*, 104 N. Y. 306, and that court said: "We entertain no doubt that such a tax can be constitutionally imposed. The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select objects of taxation. It may impose all the taxes upon land, or all upon personal property, or all upon houses or upon incomes." A like statute in New Hampshire was held, by the Supreme Court of that State, to be in violation of that State's constitution, which empowered the legislature to assess and lay taxes, but expressly limited that grant of power to, "proportional and reasonable assessments, rates and taxes, upon all the inhabitants and residents within the said State, and upon the estates within the same." And by sec. 12 of the bill of rights, that every member of the community, "is bound to contribute his share to the expense" of the State. *Curry* v. *Spencer*, 61 N. H. 624.

We are not aware that the question has been decided in any other State, where similar statutes exist. These decisions of

the courts, being based upon constitutions containing provisions, in some cases unlike, and in others like, but not the same, as our constitution, have a lessened weight as authority here. In Virginia the constitution required taxes to be equal and uniform. In Maryland the constitutional provision required every person holding property to contribute his proportion of public taxes, according to his actual worth in real or personal property. But whatever may be the particular language of the several State constitutions, all the cases assume that the constitution, either in terms or by necessary implication, requires taxation of property to be equal and uniform, and in all of them, except the New Hampshire case, succession taxes are regarded as special taxes or duties, or, more exactly, excises, not falling within the regular and ordinary annual taxation of property, contemplated and provided for and guarded by constitutional provisions and limitations.

The statute under consideration provides a subject and mode of taxation not heretofore resorted to in this State. The act provides sufficient opportunity to parties interested to be heard, and have their rights protected, and cannot be deemed to conflict with Article 1, section 6 of the constitution, which provides that no person shall be deprived of his property or privileges, but by judgment of his peers, or by the law of the land; nor with section 21 of the same Article, which prohibits the taking of private property for public uses without just compensation. Perhaps the latter provision is limited to the exercise of the right of eminent domain, and does not extend to the subject of taxation. The word, "compensation" seems to imply a money or other valuable consideration, as distinguished from the protection of life and property afforded by the State as a return for the tax contributions of its citizens.

Does the act conflict with the constitutional provision which requires all taxes assessed upon real and personal estate to be apportioned and assessed equally, according to the just value thereof? The first constitution of Maine provided that, "while the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years."

Art. IX, § 7. Section 8, immediately following, was, "All taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof." These provisions remained unchanged until 1875, when, by an amendment, the words, "and personal" were inserted after the word "real" in the eighth section. Prior to this amendment, there was no express constitutional requirement that taxes on personal property should be uniform; but it was left to the Legislature to determine the subjects, mode and rate of taxation of personal property, in its discretion, and without limitation or restriction, unless such exercise of power should degenerate into such arbitrary, oppressive and unreasonable exactions, as to be subversive of the principles of the constitution and the rights of the people. Cooley's Constitutional Limitations, pp. 616, 617.

The two sections 7 and 8, as they now stand, must be construed together, to determine their scope and extent.[1] Section 7 provides that, so long as the public expenses shall be assessed on polls and estates, to equalize the burden as nearly as practicable, a general valuation shall be taken as often as every ten years. By its terms, it necessarily implies a periodical and regularly recurring assessment of predetermined amounts, proportioned to the entire estates within the taxed district, to meet continuing and regularly recurring expenses; while section 8, manifestly referring to the same class of general taxes, provides for an equal apportionment and assessment according to value. It is clear that these sections contemplate only the general, constantly recurring assessment upon the same property, and do not include occasional, exceptional and special subjects and modes of taxation. The constant practice, hitherto unobjected to, of imposing a duty, or exacting a fee, for the right to exercise certain vocations, not illegal in themselves, but made so by statute for the purpose of deriving a revenue therefrom, such as that required of itinerant vendors, retail liquor dealers, while a license law existed, innholders, auctioneers, insurance brokers, etc., notwithstanding all the real and personal property of such persons, was assessed in common with the property of all others

in the State in the general and recurring assessments, conclusively shows that many subjects of taxation have constantly been regarded as not falling within the prohibition of sections 7 and 8 of the constitution. The tax imposed upon the franchises of railroads and other corporations, upon a basis which did not result in equal taxation according to value and proportion, has been held by this court, as not in violation of the constitution, but within the legitimate province of the Legislature. *State* v. *Telegraph Co.* 73 Maine, 527; *State* v. *Maine Central R. R.* 74 Maine, 382. So also the extensive exemptions of property from all taxation, such as the property of literary, benevolent and charitable institutions, acquiesced in for many years, without objection, afford a practical construction of sections 7 and 8, that they do not require an absolute equality; but that the Legislature may, in its discretion, exempt from taxation classes of property within the terms of these sections, although the effect is to increase the rate upon other assessable property, and may select classes of subjects from which duties and excises may be required, not, however, degenerating into arbitrary and oppressive burdens. The duties exacted by the State from justices of the peace, and other officers, and attorneys before admission to the bar, have never been regarded as a violation of the constitutional provisions in regard to taxation; but as excise taxes, rightfully levied. Cooley's Constitutional Limitations, pp. 617, 618, 619; *Portland Bank* v. *Apthorp*, 12 Mass. 256.

It is evident, therefore, that these constitutional requirements do not include every species of taxation, but all special cases like those referred to are, by implication, excepted.

The tax provided for in the statute under consideration is clearly an excise tax. *Scholey* v. *Rew*, 23 Wall. 346. The whole tenor and scope of the act is one of excise, and not a tax upon property, as that term is used in the constitution. It is not laid according to any rule of proportion, but is laid upon the interests specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the State liable to be assessed for public purposes. It is true that the act contains some language

indicating a tax upon property; but it should be construed according to its essential principle, object and effect. Substance, and not form or phrase, is the important thing. All exactions of money by the goverment are taxes; but they are not all levied by assessment upon values. The latter class refers to the burdens recurring periodically, which are assessed upon valuations of property, made at stated intervals. DANFORTH, J., in delivering the opinion of the court in *State* v. *Telegraph Company*, *supra*, said: "Such is the variety and extent of meaning attached to the word tax, or taxes, that no argument either way can be drawn from its use. It has been at different times applied to nearly if not quite every burden imposed upon persons, property or business for the support of government, and in acts for raising a revenue for public purposes it seems to be used as meaning the same thing as impost, duty or excise."

The tax under this statute, is once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the State. It is uniform in its rate as to the entire class of collaterals and strangers, which satisfies the constitutional requirement of uniformity. *State* v. *Telegraph Co. supra; Brewer Brick Co.* v. *Brewer*, 62 Maine, 74. "It is not levied as property taxes usually are. There is no given sum to be assessed in which the percentage is fixed by valuation, but the percentage is fixed by law, leaving the amount to be ascertained by the valuation." The value of the property is resorted to, to measure the amount of the excise. The act taxing telegraph companies, in terms imposed a tax of two and one half per cent on *the value* of any telegraph line, etc., and it was strongly urged by counsel that this was a property tax, and not an excise, and therefore violated the constitutional provision requiring equal taxation; but this court in *State* v. *Telegraph Co. supra*, held that the tax was an excise, and clearly within the constitutional right of the Legislature to impose. *Connecticut Ins. Co.* v. *Com.* 133 Mass. 162-163. The same reasoning applies with equal force to the tax on collateral inheritances. *State* v. *M. C. R. R. supra.*

The constitution guarantees to the citizen the right of acquir-

ing, possessing and protecting property, Article 1, section 1, which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our constitution, or that of the United States, which secures the right to any one to control or dispose of his property after his death, nor the right to any one, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right. 2 Blackstone's Com. pp. 10, 11, 12, 13; *Strode* v. *Com. supra*. At common law, prior to the statute of distribution in England, 22 and 23 Car. 11, descent of personal property could hardly be recognized and even after the statute requiring administration to be granted; the administrator, after the payment of the debts and funeral expenses of the deceased, was entitled to retain to himself the residue of his effects, the court holding that there was no power to compel a distribution. 2 Bl. Com. 515; *Edwards* v. *Freeman*, 2 P. Wms. 442.

Degrees of kindred, and the laws of descent, in the several states of the Union, differ widely. In this State there have been frequent changes in the law governing the subject. It is entirely within the province of the Legislature to determine who shall and who shall not take the estate, and the proportion in which they may take, and whether severally, or as joint tenants, *per capita* or *per stirpes*. In the absence of constitutional prohibition, the Legislature is supreme, and may dispose of an intestate decedent's estate, after payment of his debts, to any class or classes of his kindred, to the exclusion of any class or classes. It may limit heirship to lineal descendants, to the absolute exclusion of all collaterals. If it permits, as our laws now do, collateral kindred to inherit, no reason is perceived why the State is debarred from exacting an excise or duty from such collateral, for such privilege allowed by the State. It is necessary to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same class. But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent.

The right to dispose of estates by will is of very ancient origin, but is a creature of municipal law, and not a natural right. Redfield Wills, c. 1, § 1; *Mager* v. *Grima*, 8 How. 494. Before the statute of wills in England, 32, 34 and 35, Henry VIII, the right did not extend to real estate, and was limited as to personal, if the testator left a widow or children. If he had both, he could dispose of but one third of his personal estate by will; if but one, he could dispose of one half. This right has since been extended by statute to include real estate, and all personal. The restriction has never existed in this country, except as to widows, where right to dower and a share of the personal estate is secured by statute in most of the states, and in Louisiana, where the rules of the civil law prevail. Our statute of wills authorizes certain persons to make wills, and prescribes the mode of their execution. This is a statute right, and it is competent for the law making power to modify or take away the right. If the right itself can be wholly destroyed, it must be competent to impose conditions and limitations upon it. The greater always includes the less.

While it has always been the policy of our law to allow collaterals to inherit, in default of lineal descendants, and to allow the disposal of estates by will, which take effect only at the death of the owner, and when his ownership has ceased, the policy may be changed if the Legislature so determine; and it is competent for it, if it chooses, to retain this general policy, and to annex to the privilege of taking a decedent's property, by descent or will, such conditions as it may deem wise. An excise tax upon the value of the property so allowed to be received by the collateral or stranger to the blood, leaves him in much better condition than an absolute withdrawal of the privilege would. He cannot complain of unjust taxation, when the state allows him to take a property, subject to a duty of two and one half per cent when the state has the right to exclude him from the whole.

The exemption from the tax of certain classes, not any part of the classes taxed, is unobjectionable on constitutional grounds. *State* v. *Telegraph Co. supra.*

We think the act of 1893 imposed an excise tax upon certain inheritances and devises, and conveyances, to take effect after the death of the grantor; and is not a tax upon property within the meaning of Art. IX, sec. 8 of the constitution, and does not conflict with any provision of the constitution of Maine.

It is claimed by the appellant, that the act is in conflict with the fourteenth amendment to the Constitution of the United States, which prohibits any State from depriving, "any person of life, liberty or property, without due process of law." It is argued that the act fails to furnish sufficient means to parties interested for the protection of their rights, and confers upon probate courts powers and duties not authorized or contemplated by our constitution. The act, section 12, provides for an appraisal of the estate subject to the excise, upon application to the probate court, by the State assessors, or any person interested in the estate; and section 13, the probate court, having jurisdiction of the settlement of the estate, is authorized to, "hear and determine all questions in relation to said tax that may arise," etc., "subject to appeal as in other cases." These provisions fully secure the rights of all parties interested, and satisfy the requirement of, "due process of law." The act applies equally to citizens of this and other States, and therefore is not in conflict with another provision of the fourteenth amendment, that, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Whether the parties subject to the excise take by will or descent, it is only under and by virtue of the laws of this State that the right or privilege to take at all exists; and when that law places all upon an equality, as this act does, there can be no violation of this constitutional provision, in letter or spirit.

The question whether the exemption of five hundred dollars in the first section, is an exemption from the *corpus* of the estate, or a several exemption of that sum from each portion of the estate passing by will or descent to persons outside the exempted classes, is raised by the appeal. A careful examination of the statute satisfies us that the Legislature intended the exemption

to apply to each taker within the class subject to the duty. The language of section 1, is, that "all property . . . which shall pass by will or by the intestate laws of this State . . . other than to or for the use of the father," etc., . . . "shall be liable to a tax of two and one half per cent of its value above the sum of five hundred dollars," etc., and any grantee under a conveyance made during the grantor's life, to take effect after his death, "shall be liable for all such taxes." It is difficult to construe this language to mean other than that such taker, subject to the tax, shall be liable upon the amount received, above five hundred dollars. A grantee is made liable to "such taxes." What taxes? Plainly, two and one half per cent, upon the amount received in excess of five hundred dollars. This construction is greatly aided by the second section, which, in dealing with limited estates to the excepted classes, (whether including all or part of decedent's estate) and remainder to the taxable class, provides for an appraisal of the value of the limited estate, and when that is ascertained, that value, "together with the sum of five hundred dollars," is to be deducted from the value of such property, and the remainder becomes subject to the tax, or duty. This provision is plainly inconsistent with the claim that the five hundred dollars exemption, is to be taken once for all from the *corpus* of decedent's entire estate. The Legislature undoubtedly intended the same rule to apply in both sections. We think, therefore, that the decree of the Probate Court was correct, and the entry must be,

Decree of Probate Court affirmed.

NELSON WATSON *vs.* LUCY DELANO, Administratrix.

Somerset. Opinion July 31, 1894.

Costs. R. S., c. 82, § 117.

In a suit brought against a party as executrix *de son tort* to which the general issue had been pleaded, and pending the action, at a term subsequent to the entry, a plea *puis darrein continuance* was filed, alleging that the defendant had been duly appointed administratrix of the decedent, after the action brought, which plea was held bad on demurrer, and by leave of court, the

same defense had been interposed by brief statement, and then the plaintiff discontinued his suit without any ruling upon the matter set up in the brief statement, or any adjudication upon the claim in suit; the defendant is the prevailing party under R. S., c. 82, § 117, and entitled to costs.

ON EXCEPTIONS.

The defendant took exceptions to the ruling of the court below in refusing to allow her costs as the prevailing party.

Walton and Walton, for plaintiff.

Merrill and Gower, Powers and Powers, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, STROUT, JJ.

STROUT, J. This suit was originally brought against the defendant as administratrix of Moses L. Hamilton, and entered at the December term, 1890. By amendment at the September term, 1891, it was changed to a suit against her as executrix *de son tort*. At the December term, 1891, defendant, by plea *puis darrein continuance*, set up the defense that, in November, 1891, she had been legally appointed administratrix of said Hamilton. The plea was informal, and on special demurrer was adjudged bad, at the March term, 1892. Defendant had leave to plead over on payment of costs since demurrer was filed, and accordingly, at the same term, pleaded the general issue, and by brief statement alleged the same matter in bar of the further prosecution of the suit. Thereupon plaintiff discontinued the suit, and claimed and was allowed costs up to the time of the discontinuance. The defendant claimed that she was entitled to costs as the prevailing party. The question is, which party is entitled to costs?

In suits at law, costs are regulated entirely by statute. R. S., c. 82, § 117, provides that, "in all actions the prevailing party recovers costs, unless otherwise specially provided." We find no statute which provides otherwise in a case like this. The defendant denied any cause of action against the estate of Hamilton, and nothing appears to show that any existed other than bringing the suit. Without any trial or decision upon the merits of the case, plaintiff voluntarily discontinued the suit

and judgment went against him by his desire. In such case the defendant must be regarded as the prevailing party under the statute, and as such entitled to recover costs, and not liable to pay them. *Bates* v. *Ward*, 49 Maine, 87; *Foster* v. *Buffum*, 20 Maine, 124.

The case of *Leavitt* v. *School District*, 78 Maine, 574, is not inconsistent with this view. In that case, which was a real action, it was agreed that at the time of the commencement of the suit, the plaintiff had title to the lot demanded, but pending the action, the defendant acquired title to the lot, for a school house, by proceedings under the statute, and pleaded such title *puis darrein continuance*, and the court held such acquired title of defendant to bar the further prosecution of the action, and that plaintiff should recover costs to the time of filing the plea, and the defendant costs subsequently accruing.

Exceptions sustained. Costs for defendant.

NEWELL M. VARNEY *vs.* ROYAL B. BRADFORD.

Oxford. Opinion August 10, 1894.

Action. Assumpsit. Covenant. Lease.

In a contract under seal, containing mutual covenants, and which imposes an obligation upon one party to pay money to the other, but contains no covenant or promise to pay it, the contract having been wholly performed in all other respects, the money may be recovered in an action of assumpsit, upon an implied promise.

The defendant leased a farm May 10, 1890, to the plaintiff for one year, with certain privileges as to exchanging stock, &c., and the plaintiff, the lessée, covenanted that, in consideration of the lease and the sum of one hundred dollars payable in amounts of eight and one third dollars monthly, to board and care for the defendant's mother, during said term, with other covenants to be performed by him. The plaintiff, the lessee, took possession of the farm and performed all his agreements and covenants including the support of defendant's mother until her death June 30, 1890. The defendant paid the plaintiff the monthly installments for five months, the last payment being October 10, 1890. In an action to recover the remaining seven installments, *held*, that the death of the defendant's mother before the expiration of the year for which the lease was given did not terminate the plaintiff's right to future installments.

Also, that the court will not adopt an opposite construction, even if the language of the contract might permit, but does not require it, when, as here, the party writing the contract himself has better knowledge of the actual agreement than counsel can have and has acted upon one construction consistent with the language of the contract and makes repeated payments in accordance with that construction.

ON EXCEPTIONS.

This was an action of assumpsit commenced by writ dated August 20, 1891, to recover a balance of $58.33, claimed to be due the plaintiff under a contract, the material parts of which, with other facts, are stated in the opinion.

The case was submitted to the presiding justice upon an agreed statement of facts, both parties reserving the right to except; and judgment being rendered for the plaintiff, the defendant took exceptions,

Geo. C. Wing, for plaintiff.

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

Assumpsit does not lie, contract being under seal. *Pope* v. *Machias, &c. Co.* 52 Maine, 535; *Miller* v. *Watson*, 5 Cow. 195; *Richards* v. *Killane*, 10 Mass. 243; 1 Chit. Pl. 115, 116; *Hinkley* v. *Fowler*, 15 Maine, 285; *Charles* v. *Dana*, 14 Maine, 383; *Porter* v. *A. & K. R. R. Co.* 37 Maine, 350; *Goddard* v. *Mitchell*, 17 Maine, 368; *Holmes* v. *Smith*, 49 Maine, 242; *Andrews* v. *Montgomery*, 19 Johns. 162; *Wood* v. *Edwards*, 19 Johns. 205.

The defendant leased his farm to plaintiff, free of taxes, for the purpose of providing a home for his mother, Mrs. Bradford; the plaintiff paid no rent, and was assured the occupancy of the farm for the term of the lease, whether Mrs. Bradford lived or died, remained on the farm or not. If she lived on farm, plaintiff agreed to board and care for her for one hundred dollars, payable in amounts of eight and one third dollars monthly.

Mrs. Bradford was at liberty to leave the farm if she saw fit; she might remain there or not, and it cannot be contended that, had she left the farm and made her home with anybody else, defendant was under obligation to pay Varney.

The lease is silent as to the person by whom the payment was to be made. The service was to be rendered Mrs. Bradford; and in the absence of an express stipulation that defendant should pay for her care, there is more reason for saying that she should pay for her own care, than that he should.

Bradford furnished the farm and agreed, "that in case of the death of the said Mary B. Bradford before the expiration of said term, this lease shall continue for the balance of said term without payment of rent;" but no provision is made that the monthly installments shall continue.

Defendant's letter of August 10, 1890, written before advising with counsel, does not create any new or independent contract.

SITTING: PETERS, C. J., EMERY, FOSTER, HASKELL, WHITEHOUSE, STROUT, JJ.

STROUT, J. The contract, which is the foundation for this suit, was executed by plaintiff and defendant under seal and bore date April 19, 1890. By it, defendant leased a farm, with stock and tools thereon, to the plaintiff for one year from May 10th, 1890, with certain privileges as to exchanging stock, etc., not material to this cause, and the lessee covenanted that, "in consideration of this lease and the sum of one hundred dollars payable in amounts of eight and one third dollars monthly," to board and care for defendant's mother, Mary B. Bradford, during said term, with other covenants by the lessee to be performed. The plaintiff, the lessee, took possession of the farm, and it is agreed that he has performed all the covenants and agreements by him to be performed, including the support of Mary B. Bradford until her death on June 30, 1890. Defendant has paid plaintiff the monthly payment of eight and one third dollars for five months, the last payment being on October 10, 1890. The suit is to recover the remaining seven installments. Defendant claims that, under the contract, the monthly payment to plaintiff of eight and one third dollars was payable towards the support of Mary, and that upon her death no further payment was due the plaintiff.

The presiding justice, to whom the case was submitted, without a jury, decided that plaintiff was entitled, under the contract, to receive one hundred dollars, in monthly installments, and that the death of Mary B. Bradford before the expiration of the year for which the lease was given, did not terminate plaintiff's right to future installments. We think such is the true construction of the contract.

It is agreed that the contract was drawn by defendant. It stipulated that in case of the death of Mary B. Bradford, the lease should not terminate, but nothing was said as to the one hundred dollars, which was a part consideration for plaintiff's covenants, which, among other things, required him to, "endeavor to improve the farm and keep it and the buildings and fences thereon in a neat and tidy condition." The acts of the defendant show that he understood the contract to require him to pay the installments to the end of the term, notwithstanding the death of Mary before its expiration. She died on June 30th. Defendant paid the monthly installment for July, August, September and October following without objection. August 10, 1890, defendant wrote the plaintiff, asking various services and good offices from plaintiff, and concluded his letter with the statement that, "the uncertainties of life is the cause of your now having the entire use of the farm, stock, etc., free, with taxes and insurance paid, also $8\frac{1}{3}$ per month. While I make no claim beyond the requirements of the lease, I think you can afford to do well by me." After this letter defendant continued his payments for two months longer. These facts show conclusively that, for four months after the death of Mary, defendant understood that the payment of the one hundred dollars, was to be absolute, and was not affected by the death of Mary. After the October payment, defendant consulted counsel, and thereafterward declined to make any further monthly payments. While the advice of counsel in construing a contract to determine the legal rights of the parties is valuable, it is based entirely upon the language of the contract. A party to it, and one who, in fact wrote it, as in this case, has a better knowledge

of the actual agreement intended to be expressed, than the counsel can have; and when, as here, such party acts upon one construction, consistent with the language of the contract and with full knowledge of the facts, and makes repeated payments in accordance with that construction, the court will not adopt an opposite construction, even if the language of the contract might permit, but does not require it.

But it is strenuously argued that this action of assumpsit cannot be maintained, even if plaintiff is entitled to recover the unpaid installments. It is familiar law that suits upon covenants in sealed instruments must be either debt or covenant; yet without a violation of this rule, a sealed instrument may be used as evidence in an action of assumpsit, and may form the very foundation out of which the action arises, where in the sealed instrument there is no stipulation for payment or performance to the party to be benefited, or to some other person for his use. It will be noticed that, in this contract, while each party entered into various covenants with the other, there was no covenant or express promise to pay the one hundred dollars. It is mentioned as a consideration for plaintiff's covenants, and by a fair construction of the contract, was to be paid by defendant to plaintiff. A promise to pay it is therefore implied by law, and assumpsit will lie upon that promise. *Hinkley* v. *Fowler*, 15 Maine, 285. *Exceptions overruled.*

SKOWHEGAN SAVINGS BANK

vs.

SAMUEL A. PARSONS, and another.

Somerset. Opinion August 10, 1894.

Deed. Tax-Title. Assessment. Notice. Description.
R. S., c. 6, § § 70, 71, 73, 76.

To obtain a forfeiture of land for unpaid taxes, the provisions of the statute to that end must be strictly complied with.

In a sale of land for the non-payment of taxes, the following defects, *held*, fatally defective:

(1.) Want of copy of record of the State treasurer's doings.

(2.) Failure in the deed to show for what year the taxes were assessed.

(3.) Failure to show whether the taxes were assessed by the county commissioners, as provided by R. S., c. 6, § 70; or by the Legislature, as provided in § 71.

(4.) Failure to prove that the notice of sale was published in a newspaper printed in the county in which the land lies, as required in § 73; nor when, or in what paper it was published.

The following description, *held*, imperfect: "9098 acres in 2 R. 2 W. K. R. Highland;" "12093 acres in 2 R. 2 W. K. R."

ON EXCEPTIONS.

This was an action of trespass, *q. c.* in which the defendants justified under two deeds of the *locus* from the State treasurer upon a sale for the non-payment of taxes to Oliver Moulton, one of the defendants. The action was referred to referees, who made a report in the alternative based upon the validity of the deeds, and in their report referred the decision of that question to the court.

The presiding justice found and held, as matter of law, that the deeds were insufficient to pass the title to the *locus in quo* to said Moulton, under whose directions the trespass was committed, and therefore no defense to the action.

To this ruling the defendants excepted.

Walton and Walton, for plaintiff.

J. J. Parlin and S. S. Brown, for defendants.

SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, STROUT, JJ.

STROUT, J. By the alternative award in this case, the referees submit to the court the question whether the two tax deeds from George L. Beal, State Treasurer, to Oliver Moulton, one of defendants, conveyed to Moulton title to the land described in plaintiff's writ. To obtain forfeiture of land for unpaid taxes, the provisions of the statute to that end must be strictly complied with.

The Revised Statutes, c. 6, § 76, provides that the treasurer of state shall record his doings in every sale of land forfeited for non-payment of taxes, "and a certified copy of such record shall be *prima facie* evidence in any court of the facts therein set forth." The case does not show any such copy of the

record. The recitals in the deeds are not evidence of the facts. *Phillips* v. *Sherman*, 61 Maine, 551; *Libby* v. *Mayberry*, 80 Maine, 138. If they were, there is nothing in the deeds to show for what year the taxes were assessed, nor whether the taxes were assessed by the county commissioners, as provided in section 70, of the same chapter, or by the legislature, as provided in section 71, nor that the notice of sale was published in a newspaper "printed" in the county in which the lands lie, as required by section 73, nor when, or in what paper it was published. These are fatal defects. *Ladd* v. *Dickey*, 84 Maine, 194.

The description in one of the deeds is "9098 acres in 2 R. 2 W. K. R. Highland," and in the other, "12093 acres in 2 R. 2 W. K. R." Where is this land? What do these figures and initials mean? There is nothing in the case to explain their meaning. Such description is insufficient to convey title. *Griffin* v. *Creppin*, 60 Maine, 270.

The declaration in the writ describes the land, on which the trespass is alleged to have been committed as, "a certain parcel of land situated in township numbered two in the second range west of Kennebec river, in Bingham's Kennebec Purchase," and then follows a description by metes and bounds, "containing about five thousand acres." If the land described in the treasurer's deeds to Moulton were conceded to be in township 2, it by no means can be assumed, without evidence, that the plaintiff's five thousand acres are included in the 9098 acres in one deed, or the 12093 acres in the other deed. For aught that appears in the case, plaintiff's land may be a part of said township, and the lands described in the treasurer's deeds another and a different part. As the defendants justified under the treasurer's deeds, the burden of proof was on them to show title under their deeds to the land described in plaintiff's writ. This they have failed to do. It follows that the award of the referees in favor of the plaintiff must stand.

Exceptions overruled.

JOHN W. HOBBS *vs.* ELIJAH L. MOORE, and another.

Waldo. Opinion August 11, 1894.

Prom. Note. When and how payable. Trucking.

The legal construction of a note payable twenty-four months after date, in monthly payments, without interest, payable in trucking, is, that the monthly payments are to be made in the consecutive months immediately following the date of the note, so that the whole amount will be paid in twenty-four months after its date.

Held, that if the payee furnished the trucking to be done in such months, and the defendants neglected or refused to do it, an action may be maintained upon the note for such monthly payments, before the expiration of twenty-four months from its date.

ON REPORT.

The case is stated in the opinion.

W. P. Thompson, for plaintiff.

Jos. Williamson, for defendants.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

STROUT, J. Action upon the following note:

"West Winterport, Jan. 14, 1893.

"Twenty-four months after date, for value received, we jointly and severally promise to pay to John W. Hobbs or order, two hundred and fifty dollars in monthly payments without interest, to be paid in trucking."

The writ is dated October 28th, 1893.

The legal construction of the note must be had from the note itself. By its terms, the amount of two hundred and fifty dollars was to be wholly paid in twenty-four months after its date, and it was to be paid in monthly payments. To give effect to all the terms of the note, the monthly payments must be construed as the consecutive months immediately following the date of the note, so that if payments in trucking were in each month following the date, the whole amount of the note would be paid at the expiration of twenty-four months. Any other construction,

would require no payment till the expiration of twenty-four months, and if the monthly payments commenced after that time, the note furnishes no means of determining how much each monthly payment should be, nor how many months defendants might claim within which to make payment, and the absolute promise to pay the whole in twenty-four months would be inoperative. The parties could never have contemplated such a result, and the terms of the note do not require it. It will be noticed that the note is without interest. We think the legal construction must be the same as if the note read, within twenty-four months after date, etc. *Ewer* v. *Myrick*, 1 Cush. 16.

The plaintiff was bound to furnish trucking to be done by the defendant monthly, and in such amounts as would enable him to fulfill his contract. The evidence is that plaintiff did have, continually, for months before the suit, trucking for defendant to do and requested him to do it, but he refused.

The action is maintainable; and, according to the terms of the report, the case is to be remanded to the court at *nisi prius* for assessment of damages, and it is so ordered.

Action to stand for trial.

ISAIAH DONNELL, in equity,

vs.

KINGSBURY DONNELL, and others.

Androscoggin. Opinion August 17, 1894.

Insurance. Interest. Assignment. Lien. Mortgage. R. S., c. 49, § 52.

Fire insurance is, in effect, a contract of indemnity against loss or damage suffered by an owner or person having an interest in the property insured.

An attaching creditor has an insurable interest in the buildings covered by his attachment. But where he fails to procure any insurance on such interest and the debtor takes out a policy at his own expense, *Held*, that the latter effects insurance on his own interest in the property and not on that of his creditor.

After the adjustment and payment of loss under such policy, the funds being held through an assignment of the debtor to his sureties and a mortgage of the premises insured, the creditor claimed on account of the unsatisfied part of his judgment a lien on the insurance money, and of which there was an

excess in the hands of the sureties above their claim, upon the ground that the mortgage and assignment of the policy were in fraud of his rights. Upon a bill in equity to enforce the lien, *Held*, that the bill can not be sustained; that there is no privity of contract or of estate, between the plaintiff and either of the defendants, that could form a basis for such a lien.

Also, that the assignment of the policy to the sureties with the consent of the company was a new and original contract of indemnity with the assignees, who were not indebted to the plaintiff, and who had no contractual relations with him.

ON REPORT.

This was a bill in equity, heard on bill, demurrer of the defendants, Kingsbury Donnell, and the two insurance companies, and answers of the other defendants, and testimony.

The case appears in the opinion.

J. W. and C. B. Mitchell, for plaintiff.

Savage and Oakes, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. The question involved in this case will appear from the following statement of facts.

The defendant, Kingsbury Donnell, owned certain real estate with buildings thereon, and was indebted to the plaintiff. September 4, 1891, the plaintiff brought suit on his debt and attached Kingsbury Donnell's real estate. October 28, 1891, Kingsbury Donnell procured two policies of insurance on his buildings. January 18, 1892, Kingsbury conveyed this real estate to his sons, the defendants, Benjamin F. and Charles K. Donnell, and on the same day assigned to them the insurance policies.

The defendants, Potter and Bryant, were sureties on Kingsbury Donnell's bond as executor of an estate, and this bond has been put in suit. Thereupon, April 28, 1892, B. F. and Charles K. Donnell mortgaged the premises to Potter and Bryant to secure them for their liability on this bond.

The buildings were burned September 20, 1892, and due notice of the loss was given to the defendant insurance companies. Potter and Bryant, as mortgagees, also gave notice to

the companies, and seasonably began suit to enforce their lien as provided by statute. September 22, 1892, Benjamin F. and Charles K. Donnell gave an order to the insurance companies directing the money to be paid for the benefit of Potter and Bryant. December 8, 1892, they further secured Potter and Bryant by a written assignment of the policies and the money due thereunder.

The plaintiff's attachment was perfected by a sale of the land on execution December 10, 1892, and his judgment thus satisfied in part. The debtor had no other property available and sufficient for the payment of the plaintiff's claim.

The insurance companies, having been indemnified for so doing, paid the insurance money to Potter and Bryant, who now have in their hands a balance of $523.49, after paying the amount for which they were liable on Kingsbury Donnell's bond.

The plaintiff claims that he has a lien on the insurance money which can be enforced by this bill in equity, on the ground that the conveyance of the real estate and the assignment of the insurance policies from Kingsbury Donnell to his sons were made with a fraudulent purpose towards creditors.

We cannot concur in this view. There was no privity of contract or of estate between the plaintiff and either of the defendants, that could form a basis for such a lien. "An insurance of buildings against loss by fire," says Shaw, C. J., in *Wilson* v. *Hill*, 3 Met. 68, "although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity with an owner or other person having an interest in the preservation of the buildings, to indemnify him against any loss which he may sustain in case they are destroyed or damaged by fire." So in *Carpenter* v. *Ins. Co.*, 16 Pet. 503, it is said that, "policies of insurance against fire are not deemed in their nature incident to the property insured; but they are only special agreements with the persons insuring against such loss as they may sustain, and not the loss that any other person having an interest as grantee or mortgagee or creditor or otherwise, may sustain."

When Kingsbury Donnell effected the insurance in question the property was subject to the plaintiff's attachment. The plaintiff then had a right in the property which the court would enforce against it, a right so closely connected with it, and so much dependent for value upon the continued existence of it that a loss of the property would cause pecuniary damage to him. He therefore had an insurable interest in the property. *Rohrbach* v. *Ins. Co.* 62 N. Y. 54; *Herkimer* v. *Rice*, 27 N. Y. 163; Wood on Fire Insurance, § 298; *Cumberland Bone Co.* v. *Ins. Co.* 64 Maine, 466. But he omitted to procure any insurance on his interest as an attaching creditor; and when Kingsbury Donnell took out the policies in question, he effected insurance on his own interest in the property and not on the plaintiff's interest. So far as appears, the plaintiff was in no respect instrumental in procuring this insurance, was under no obligations to pay the premium for it, and in fact paid no part of the premium. If the buildings had been destroyed by fire before the conveyance of the property by Kingsbury Donnell and the assignment of the policies to his sons, the insurance money would obviously have belonged to Kingsbury Donnell. The plaintiff would have no interest in it, legal or equitable, for the simple reason that the contracts of indemity were not with him, but with Kingsbury Donnell; they did not relate to his interest in the property, but to that of Kingsbury Donnell. He could only have made it available for the payment of his claim by the ordinary trustee process as a debt due from the insurance companies to Kingsbury Donnell. His situation would not have been so favorable as that of a mortgagee at common law, since the mortgagee's interest arises from contract, while the process of acquiring a lien by attachment is wholly *in invitum*. Our statute (R. S., c. 49, § 52,) gives the mortgagee a lien upon any policy of insurance procured by the mortgagor, to take effect from the time he files a written notice with the company as there provided. But in the absence of such a statute, a mortgagee would have no more right than any other creditor to claim the benefit of insurance effected by the mortgagor. "We know of no principle of law or equity," says Mr. Justice Story

in *Ins. Co.* v. *Lawrence*, 10 Pet. 512, "by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor, on the mortgaged property, in case of loss by fire. It is not attached or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

But if the plaintiff would have had no claim to the insurance money, if the loss had occurred while the title to the property remained in Kingsbury Donnell, and the contracts of indemnity were with him, then *a fortiori* he has no right to it after alienation of the property and the assigment of the policies of insurance to his sons. The conveyance would have rendered the contracts of insurance with Kingsbury Donnell null and void, if the companies had not consented to the assignment of the policies. The effect of this transaction was to make a new and original contract of indemnity with the assignees, who were not indebted to the plaintiff, and had no contract relations with him. *Wilson* v. *Hill*, *supra*.

It is the opinion of the court that the entry must be,

Bill dismissed with costs.

STATE *vs.* JOHN LECLAIR.

Androscoggin. Opinion August 17, 1894.

Intox. Liquors. Seizure. Process. Judicial and Ministerial Officers. Clerk of Lewiston Mun. Court. Const. Law. Const. of Maine, Art. III; Art. VI, § 1; R. S., c. 27, § § 27, 39, 40, 43, 63; c. 132, § 6; Spec. Laws, 1871, c. 636; 1874, c. 626, § § 12, 13.

To a process for the seizure of intoxicating liquors a special demurrer was interposed to the complaint and warrant, specifying two grounds of objections: (1.) That the complaint and warrant constituted a seizure process and not a search and seizure process. (2.) That the clerk of the Municipal court of Lewiston and not the judge received the complaint and issued the warrant.

Held, that the complaint and warrant are properly made in accordance with the facts, and are unobjectionable in form.

When an officer has without a warrant seized intoxicating liquors kept for unlawful sale and thereupon makes his complaint and takes out a warrant as provided by statute, he is not required to insert in his complaint a false

recital that the liquors which he has seized and removed, "are still kept and deposited," by the defendant; nor is there any necessity of a command in the warrant to search premises for what the officer has already taken and knows cannot be found there.

The statute of 1870, c. 125, § 2 (R. S., c. 27, § 39), authorizing officers to seize is constitutional to the extent that seizures may be made when they may be accomplished without infringing against unreasonable searches prohibited by the constitution.

Chapter 626, Private and Special Laws of 1874 provides that: "The Governor, by and with advice of the Council, shall appoint a Clerk of said court [. . Lewiston Municipal Court . .] who shall hold his office for the term of four years, who shall be sworn and who shall give bond," &c., and section 13 provides that, "Said clerk shall hear complaints in all criminal matters, . . . draw all complaints and sign all warrants and make and sign all processes of commitment; but the same shall be heard and determined as now provided by law, but such complaints, . . . warrants or processes of commitment drawn and signed by the judge of said court shall be equally valid."

In view of these enactments, it cannot be reasonably questioned that the clerk who heard the complaint and issued the warrant in this case, was clearly and explicitly authorized so to do by the legislature.

The duties thus performed may involve to some extent the exercise of judicial attributes; but it was competent for the legislature to invest the clerk of the court with the authority in question, and in so doing, it did not encroach upon the judicial power contemplated by the constitution.

On exceptions.

To a seizure process against the defendant, and from whom intoxicating liquors were taken previously without a warrant, he filed a demurrer alleging:

(1.) The said process is a seizure process and not a search and seizure process as required by law.

(2.) Said process of complaint was made on oath before the clerk of the Lewiston Municipal Court and the warrant thereon issued and signed by said clerk, and said complaint not being heard on oath by the judge of said court and the warrant thereon signed by said judge as required by law, the said process of complaint and warrant is illegal and void. Wherefore, the said defendant prays judgment and that by the court he may be dismissed and discharged from the said premises in the said complaint and warrant specified.

After joinder, the demurrer was overruled, and the defendant took exceptions.

Frank L. Noble, for defendant.

The only warrant known to the prohibitory law in either search and seizure, or seizure cases, is the one set forth in R. S., c. 27, § 40, as amended by the statutes of 1891, and must be a warrant upon which the officer might search for and seize the liquors in the place where he found them. *State* v. *Dunphy*, 78 Maine, 104.

By R. S., c. 27, § 439, it is provided that: "In all cases where an officer is authorized to seize intoxicating liquors by virtue of a warrant, he may seize the same without a warrant." Then the question arises, in what cases is the officer authorized to seize intoxicating liquors intended for sale within this State, in violation of law by virtue of a warrant duly issued? The answer to this question is found in § 40, of said chapter 27, as amended. *State* v. *Grames*, 68 Maine, 418.

The warrant in this case was not one upon which the officer could search the premises where the liquors were found, and was therefore illegal and void.

The power given to an officer by this statute to seize property at pleasure without a warrant is an extraordinary one and can only be justified on the ground that the public good and the prevention of crime require it. The statute should be construed strictly. *Weston* v. *Carr*, 71 Maine, 356.

Section 39 of chapter 27 of R. S., authorizes an officer to seize liquors without a warrant in all cases where he could seize them upon a warrant; and as this includes dwelling-houses and shops, as well as depots and ware-houses, it violates § 5 of Article 1, of the Constitution of Maine, and therefore is unconstitutional and void.

If this process is sanctioned by decision of this court, then the spectacle is presented of an officer being given greater power acting without a warrant than with one; and the dwelling-houses and shops of our citizens may hereafter be invaded at the pleasure of petty constables acting under no higher authority than the unbridled license of their discretion, sanctioned by the Supreme Court of Maine.

Constitutional question: The receiving of the complaint

involving the conduct of a citizen, the lawfulness of his acts, and an accusation of crime against him, and the issuance of a warrant thereon commanding a search of premises specially designated and described, and the arrest of the person accused, are essentially judicial acts. Cooley Cons. Lim. p. 109.

The judicial power of the State is vested in courts and not in the officers, and judicial duties cannot be assigned to persons who do not constitute a court. Const. of Maine, § 1, Article 6; *State* v. *Noble*, 118 Ind. 350, reported in the 10th Am. St. Rep. 143; *Kilbourn* v. *Thompson*, 103 U. S. 168; *People* v. *Keeler*, 99 N. Y. 463.

By the general statutes of the State, the judges of municipal and police courts are charged with the hearing of complaints involving the examination of the complainant and his witnesses, and the issuance of warrants in criminal cases. Warrant issued by a magistrate in criminal cases shall be under seal and be signed by him at the time when they are issued. R. S., c. 132, § 6.

By R. S., c. 133, § 2, "The Justices of the Supreme Judicial and Superior Courts, judges of municipal and police courts, and trial justices in their counties, in vacation or term time, may issue processes for the arrest of persons charged with offenses."

Under the search and seizure sections of chapter 27, as amended by statute of 1891, c. 132, "If any person competent to be a witness in civil suits makes sworn complaint before any judge of a municipal or police court or trial justice," etc., "such magistrate shall issue his warrant," etc. All penal statutes are to be construed strictly.

When the Lewiston Municipal Court was created, all judicial power necessary to enable it to discharge its functions was vested in it by the constitution. The legislature had no judicial power and could neither create nor confer any.

The legislature could not delegate any of the judicial powers vested in said court to the clerk of said court, because it had none to delegate, and any attempt to thus delegate the judicial powers of said court was an encroachment on the independence of the judiciary, and thus violative of the constitution. *Langen-*

burg v. *Decker*, 16th L. R. A. 114; *State* v. *Noble*, 10th Am. St. Rep. 143; *Wright* v. *Defrees*, 8 Ind. 298.

The Clerk of the Lewiston Municipal Court is a ministerial officer and forms no part of the court, and in the act creating the court he is given none of the power or authority vested in said court. He need not be learned in the law, nor a member of the bar. His only qualification is, "that he be a citizen of said Lewiston." By section 5, Private and Special Laws, 1874, "Said clerk shall have such powers and perform such duties as are possessed and performed by the clerks of the Supreme Judicial Court," and we submit that those powers and duties are essentially and entirely ministerial and not judicial.

Those who are appointed as judges must themselves discharge all the judicial duties of their offices. The trust is a personal one and it cannot be delegated by the judges themselves, nor by anyone else for them. A deputy judge is unknown to the law. *VanSlyke* v. *Trempeaulieu*, 39 Wis. 390; 2 Bacon's Abr. 619; Cooley's Cons. Lim. 116, 139; *State* v. *Noble*, 10 Am. St. Rep. 143; *People* v. *Bolton*, 55 N. Y. 50; *Warner* v. *People*, 2 Denio, 272; *State* v. *Brunt*, 26 Wis. 412.

Section 13 of the Private and Special Laws of 1874, which authorizes the clerk of the Lewiston Municipal Court to hear complaints in all criminal matters, accusations in bastardy, draw all complaints and sign all warrants, is for the above reasons, illegal, unconstitutional and void.

Henry W. Oakes, County Attorney, for State.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. This is a process for the seizure of intoxicating liquors, and the case comes to this court on a special demurrer to the complaint and warrant, specifying two grounds of objection: First, that the complaint and warrant constituted a seizure process and not a search and seizure process. Second, that the clerk of the municipal court of Lewiston and not the judge received the complaint and issued the warrant.

I. With respect to the first objection, it appears that, by virtue of section thirty-nine of chapter twenty-seven of the Revised Statutes, the officer seized certain intoxicating liquors found in the defendant's shop and forthwith signed the complaint in question, representing that he believed the liquors so found were kept for unlawful sale and praying that a warrant might be issued authorizing a seizure of the same. The warrant in question was accordingly issued commanding the officer to seize the liquors named in the complaint and safely keep them until final decision of the court.

The defendant contends that the only warrant known to the prohibitory law is one which authorizes a search for, as well as a seizure of, intoxicating liquors. But the propriety of requiring an officer to insert in his complaint a false recital that the liquors which he has found and removed, "are still kept and deposited," by the defendant, or the necessity of a command in the warrant to search premises for what the officer has already taken and knows cannot be found there, is certainly not apparent. The forms set forth in § 63, c. 27, R. S., are declared to be sufficient in law for all cases, "to which they purport to be adapted." The form there provided for a, "complaint in case of seizure," was prepared before the passage of the Act of 1870, c. 125, § 2 (R. S., c. 27, § 39), and does not, "purport to be adapted," to the seizure without a warrant there authorized. This change in the statute obviously requires such change in the form of the process as will bring it into conformity with the facts.

In this case the complaint and warrant were properly made in accordance with the facts, and are unobjectionable in form. *State* v. *McCann*, 59 Maine, 383.

By the amendment of 1870, above referred to, "no new or additional authority is given to search. It is only to seize. It is to seize what the officer may be enabled to seize without the unreasonable searches prohibited by the constitution. The act to this extent is constitutional." *State* v. *McCann*, *supra*; *Jones* v. *Root*, 6 Gray, 435; *Mason* v. *Lothrop*, 7 Gray, 355.

II. The complaint in this case is addressed, "To the Clerk of our Municipal Court for the City of Lewiston," and is sworn to

before the clerk. The warrant issued on this complaint is signed by the clerk, but bears *teste* of the judge of the court.

As originally constituted, the municipal court for the city of Lewiston was declared to be a court of record consisting of one judge, who was authorized to appoint a recorder to act in his stead in certain contingencies named in the act. See chap. 636, Private Laws of 1871. But this act was amended by chap. 626 of the Private Laws of 1874. Section 12 of this Act provides that, "The Governor by and with the advice of the council shall appoint a clerk of said court . . . who shall hold his office for the term of four years, who shall be sworn and who shall give bond," &c.; and section 13 provides that, "said clerk shall hear complaints in all criminal matters, . . . draw all complaints and sign all warrants and make and sign all processes of commitment, but the same shall be heard and determined as now provided by law, but such complaints, . . . warrants or processes of commitment drawn and signed by the judge of said court shall be equally valid."

In view of these enactments, it cannot reasonably be questioned that the clerk who heard the complaint and issued the warrant in this case was clearly and explicitly authorized so to do by the legislature; but it is contended that, while the clerk is only a ministerial officer, the act of examining a complainant and issuing a warrant involves a judicial duty which can only be performed by the judge, and that the statute purporting to authorize the clerk to exercise this function is unconstitutional and void.

An act is deemed ministerial when it is performed, "by an officer in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority without the exercise of and without regard to his own judgment upon the propriety of the act being done." *Flournoy* v. *Jeffersonville*, 17 Ind. 169 (79 Am. Dec. 468); *Pennington* v. *Streight*, 54 Ind. 376. See also *Longfellow* v. *Quimby*, 29 Maine, 196. And the act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists, under which it is his right and duty to perform the act. *Betts* v. *Devine*, 3 Conn. 107; *State* v. *Knowles*, 8 Maine, 71. See also *Yates* v. *Lansing*, 5 Johns. 282.

With reference to this question the court says in *Com.* v. *Roark*, 8 Cush. 215: "The mere power to receive complaints and issue warrants, without any right or authority to hear or try the parties cannot be considered an exercise of jurisdiction on the part of a magistrate. It partakes more of a ministerial than a judicial character. It is laid down in 2 Hawk. c. 13, § 20, that when a warrant is issued for the arrest of one guilty of an offense not cognizable by the justice who issues it, the justice may be considered as acting ministerially." And if our attention were specially directed and confined to the language of section 40, c. 27, R. S., authorizing the search and seizure process, it might well be claimed that the act of the clerk in issuing the warrant in question was purely ministerial. That section declares that, "if any person, competent to be a witness in civil suits, makes sworn complaint before any judge of a municipal, or police court, or trial justice, ... such magistrate shall issue his warrant." This was undoubtedly intended to be a mandatory provision requiring the magistrate to issue a warrant whenever a sworn complaint should be made reciting the prescribed state of facts, without any judicial inquiry or the exercise of any discretion on his part. He is only to satisfy himself that the complainant is, "competent to be a witness in a civil suit."

But the general statute respecting the criminal jurisdiction of magistrates (R. S., c. 132, § 6), provides that they, "shall carefully examine on oath, the complainant, the witnesses by him produced, and the circumstances, and when satisfied that the accused committed the offense, shall issue a warrant for his arrest." Again, section 43, of c. 27, R. S., provides that, "no warrant shall be issued to search a dwelling-house, . . . unless the magistrate before whom the complaint is made is satisfied by evidence presented to him, that intoxicating liquor is there kept for sale in violation of law." And as the decision of other cases involving the action of this clerk under these statutes, as well as under section 40, is awaiting the result of this one, it seems proper and necessary to examine the question in the broader aspect thus presented.

Assuming, then, that in hearing complaints and issuing warrants under the statutes last cited, the clerk necessarily makes an examination involving the exercise of discretion and judgment on his part, and performs an act possessing a certain judicial quality, the question is whether it is competent for the legislature to say that this preliminary work may be performed by a clerk of the court to be appointed by the Governor and Council? We think it is. Such legislation is not in conflict with any provision of the organic law. "The judicial power of this State shall be vested in a Supreme Judicial Court, and such other courts as the legislature shall from time to time establish." Constitution of Maine, article VI, section 1. And, "no person or persons belonging to one of the departments," into which "the powers of this government shall be divided shall exercise any of the powers properly belonging to either of the others." *Id.* Article III.

In enacting the statute investing the clerk of the Lewiston court with the authority in question, the legislature did not encroach upon the, "judicial power." In *State* v. *Noble*, 118 Ind. 350 (10 Am. St. 143), cited by the defendant, the legislature undertook to create the office of commissioners of the Supreme Court and to provide for the election of these officers by the same General Assembly; and this was deemed unconstitutional. But here the legislature did not assume to elect or "appoint" a clerk for the Lewiston Court, but provided for his appointment by the Governor and Council in the same manner and with the same tenure of office as the judge.

Furthermore, this amendment of 1874, imposing the duties in question upon the clerk, must be viewed in connection with the prior statute of 1871, and all the acts constituting the court as it now exists, construed as a whole. The court is still to consist of one judge, and the additional duties imposed upon the clerk requiring the exercise to some extent of attributes of a judicial character, do not necessarily make him a judicial officer within the meaning of the constitution. In *Morison* v. *McDonald*, 21 Maine, 550, the recorder of the Municipal Court at Bangor, appears to have been in like manner appointed by the

Governor for four years, and authorized by the charter to act in the place of the judge in his absence in all criminal matters. In the opinion, WHITMAN, C. J., says: "But we cannot bring our minds to the conclusion that a recorder is in the sense contemplated by the constitution, a judicial officer. It seems evident that the framers of that instrument had in view those, who to a general intent and purpose were such, and not those who were incidentally and casually entrusted with the exercise of some attributes of a judicial character. The instances are numerous in which individuals are expected, in connection with the chief business characterizing the duties of their appointment, which in the main is in no wise judicial, to exercise as incident thereto, casually, some judicial power." Illustrations are thereupon given by reference to auditors and masters in chancery, who in connection with their ministerial duties perform sundry acts of a judicial nature; and to assessors of taxes, commissioners of insolvent estates, and commissioners to assess the damage in flowage cases. In addition to the instances there named, mention may also be made of our statutes authorizing the appointment of disclosure commissioners, who are intrusted with the discharge of duties of great importance involving the exercise of judgment and discretion. They are not expressly required to be justices of the peace, but, "shall be sworn and hold office during the pleasure of the court." As commissioners they cannot be deemed, "judicial officers," within the meaning of the constitution.

No specific or precise definition of, "judicial power," is found in the constitution or laws of the State; but the phrase is commonly employed to designate that department of government which it was intented should, "interpret and administer the laws and decide private disputes between or concerning persons." Cooley's Const. Lim. 109; *Merritt* v. *Sherburne*, 1 N. H. 199. By the, "judicial power," of courts is generally understood, "the power to hear and determine controversies between adverse parties and questions in litigation." *Daniels* v. *The People*, 6 Mich. 381. It is the, "inherent authority, not only to decide but to make binding orders or judgments, which

constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power and operate on the persons or things only through its action and by virtue of it." *Underwood* v. *McDuffee*, 15 Mich. 361 (93 Am. Dec. 194); *People* v. *Hayne*, 83 Cal. 111 (17 Am. St. Rep. 211). So in *Allor* v. *Wayne Co. Auditors*, 43 Mich. 76, it is held that the power to examine and commit persons charged with crimes beyond the cognizance of the justice to try is not in the proper sense of the term, judicial power. The court says: "It may be vested in other persons than courts as well as in courts. It belongs to the duties of conservators of the peace." The terms, "discretionary power," and, "judicial power," are often used interchangeably; but there are many acts requiring the exercise of judgment which may fairly be considered of a judicial nature, and yet do not in any proper sense come within the, "judicial power," as applicable to courts. *Cox* v. *Coleridge*, 1 B. H. 37; *Ex parte Gist*, 26 Ala. 156; *Kingsbury* v. *Dickinson*, 1 Day, 1; *Tillotson* v. *Cheetham*, 2 Johns. 63; *Ex parte Farnham*, 8 Mich. 89.

This conclusion, that the legislature did not exceed its powers in authorizing a clerk, appointed by the Governor and Council, to perform the duties in question, derives strong support from the practical construction which has been placed upon the constitutional limitations of the legislative and judicial departments of the government from the time of the adoption of our State constitution. In nearly all of the acts, establishing municipal and police courts in this State from its early history to the present time, will be found provisions authorizing the recording officer of such court, whether appointed by the Governor or by the judge of the court, either uniformly to perform certain duties involving the exercise of judicial attributes, or occasionally to act in the place of the judge in hearing and determining criminal cases in certain contingencies specified in the different acts. While, therefore, we now decide only the question before us, and while acquiescence for no length of time can legalize a clear usurpation of authority, it must be conceded

that a practical interpretation of the organic law, which has been accepted as correct for three fourths of a century, is entitled to respectful consideration, if not great weight, in the decision of such a question. Cooley's Const. Lim. 81-86.

It is also worthy of remark that, in *Guptill* v. *Richardson*, 62 Maine, 257, a warrant signed by the clerk of the Lewiston court under the Act of 1872, was brought in question, and the court says: "It is true as suggested that the warrant was issued by the clerk, but it was returnable before the court where the libel was filed. We therefore hold this a sufficient justification for the acts done under it."

Exceptions overruled. Judgment for the State.

CITY OF ROCKLAND *vs.* MARY C. FARNSWORTH.

Knox. Opinion August 17, 1894.

Taxes. Assessment. Void in part. R. S., c. 6, § 91. Rockland City Charter. Act of 1885, c. 482.

A city tax is invalid when the resolve raising it by the city council has not been legally passed or approved by the mayor as required by the city charter.

In action of debt to recover State, county and city taxes assessed *in solido*, it is no defense to the suit for the unpaid part of the State and county taxes, that the city tax, included in such assessment, is invalid.

See *Rockland* v. *Farnsworth*, 83 Maine, 228.

ON REPORT.

This was an action of debt to recover State, county and city taxes assessed against the defendant for the year 1885, as an inhabitant of the city of Rockland.

The defendant contended that the city tax was never raised by a vote of the city council; or if so, that the resolve was never presented to or approved by the mayor as required by its charter, being c. 482 of Acts of 1885.

An amended record made by the recording officer, after he had ceased to hold office, tends to prove the passage of the resolve raising the city tax, but it does not appear to have ever been submitted to the mayor for his approval as required by the city charter, or to have been approved by him.

W. H. Fogler, city solicitor, for plaintiff.
Mortland and Johnson, for defendant.

SITTING: PETERS, C. J., WALTON, VIRGIN, LIBBEY, FOSTER, HASKELL, JJ.

HASKELL, J. The defendant's tax for the year 1885, was $552. Upon this tax she paid $92, leaving a balance of $460 unpaid for which this suit is brought.

The defendant contends that the city tax is invalid, and we think it is. Nothing has been called to our attention showing the State and county taxes, that are included in the assessment, to be irregular or invalid; but it is claimed that the $92 paid more than pays the State and county taxes. This is not so. The State and county taxes included in the assessment against the defendant aggregate more than that sum. They amount to $98.06. Moreover, the $92 paid was levied upon real estate, and was applied by the parties to the payment of that tax, which included State, county and city taxes. Being so paid in reduction of the defendant's tax, it leaves a balance of $460 now sued for. Of this sum $80.70 is State and county tax, and although assessed *in solido* with the city tax against the defendant, appears to be a valid tax and may be recoverd in this action.

Judgment for plaintiff for $80.70, with interest from the date of the writ.

VIRGIN and LIBBEY, JJ., died before the decision of this case.

MARGARET J. GILPATRICK *vs.* CITY OF BIDDEFORD.

York. Opinion August 17, 1894.

Sewers. Municipal Officers. Towns. Agents. Biddeford City Ordinances. R. S., c. 16, §§ 2, 3.

It is provided by statute that the "municipal officers of a town may at the expense of a town construct public drains or sewers along or across any public way therein, and through any lands of persons or corporations when they deem it necessary for public convenience or health; and they shall be under their control."

In exercising this authority, the municipal officers act, not as agents of the town, but as representatives of the general government. In this respect they act upon their own responsibility, and are not subject either to the control or the direction of the inhabitants of the town. By simply electing municipal officers for such purposes, and expending money therefor, the town incurs no town liability for damages caused by the misconduct of such officers.

In an action of trespass against the city of Biddeford for acts performed by the street commissioner in the construction of a public sewer at the expense of the city across the plaintiff's field; *Held*, that the ordinances of the city of Biddeford were not designed to usurp the powers vested in the mayor and aldermen by the general statute, and the street commissioner was not thereby made the agent of the city in the construction of this sewer. Nor did the city by any special vote of the city council instruct the commissioner to build this sewer or give any directions in regard to the manner of building it.

The mayor unquestionably had the concurrence and support of the aldermen, however irregularly expressed, and deemed it proper to place the construction of the sewer under the immediate charge of the street commissioner.

The work may properly be said to have been done by order of the mayor and aldermen, acting not as agents of the city, but as public officers in the exercise of a power conferred by general law.

On report.

This was an action against the city of Biddeford, for breaking and entering the plaintiff's close and building a drain or sewer. It has been before the law court once on demurrer, and the demurrer was overruled, the rescript dated November 7, 1892, being as follows: "The demurrer admits the allegations in the declaration to be true. It charges the defendant with doing, by its workmen, servants and agents acts which for aught that appears therein might have been done in the assertion of some supposed corporate right, and for the doing of which under the immediate direction of the city government, the defendant corporation might properly be held responsible, according to the doctrine laid down in *Cumb. & Oxf. Canal Co.* v. *Portland*, 62 Maine, 504; *Lynde* v. *Rockland*, 66 Maine, 309, 315.

"But while the acts alleged are *prima facie*, acts of trespass, still if upon trial the acts alleged should prove to have been done by public officers of the city, in the line of their duty for the public benefit or use, the city in the absence of any directions to them would not be liable.

"The demurrer having been filed the first term, and overruled,

the defendant may plead anew in accordance with the provisions of R. S., c. 82, § 23."

The case appears in the opinion.

B. F. Hamilton and B. F. Cleaves, for plaintiff.

A sewer or drain is the property of the city. *Child* v. *Boston*, 4 Allen, 41. Built partly, at least, for the private gain and emolument of the city. City liable for acts of Shaw in same manner as a private corporation would be. *Darling* v. *Bangor*, 68 Maine, 108; *Thayer* v. *Boston*, 19 Pick. 516, and cases.

Where the officers or agents of a municipal corporation, under its authority or direction, take possession of private property without complying with the provisions of its charter or the statute, the corporation is liable in damages therefor. 2 Dill. Mun. Corp. § 791.

The city paid for the sewer, as is admitted, and thus ratified the acts of Mr. Shaw as street commissioner. *Green* v. *Portland*, 32 Maine, 433; *Stetson* v. *Faxon*, 19 Pick. 154; *Hill* v. *Boston*, 122 Mass. 359; *Thayer* v. *Boston*, *supra;* *Baker* v. *Boston*, 12 Pick. 104; *Peck* v. *Ellsworth*, 36 Maine, 393; *Woodcock* v. *Calais*, 66 Maine, 234; 2 Dill. Mun. Corp. §§ 968, 979, and cases.

Duty of constructing a sewer is merely ministerial. City liable for neglect whereby private property is injured. *Hill* v. *Boston*, *supra;* Damages: R. S., c. 16, § 3; *Hildreth* v. *Lowell*, 11 Gray, 345; *Oliver* v. *Worcester*, 102 Mass. 500. Street commissioner not acting as public officer, but as agent of city under ordinance. *Hawks* v. *Charlemont*, 107 Mass. 418. City took a fee, and not an easement in the land. *Sheridan* v. *Salem*, 148 Mass. 197, and cases. *Bulger* v. *Eden*, 82 Maine, 352, p. 358.

Chas. T. Read, city solicitor, and *N. B. Walker*, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

WHITEHOUSE, J. This is an action of trespass against the city of Biddeford for damages resulting from acts alleged to

have been performed by the city in the process of constructing a sewer across the plaintiff's field. The case has been before the court on a demurrer to the declaration which was overruled, and now comes up on report.

It is uncontroverted that, in 1887, the sewer in question, known as Fall street sewer, was built by the street commissioner across the plaintiff's field, for the public use and benefit, and that the city of Biddeford paid for the construction of it. The subject matter appears to have received the attention of both branches of the City Council of Biddeford, and to have been referred to the, "Committee on Streets, Sewers," &c; for we find from the records in the case that the mayor and aldermen and common council, concurred in accepting a report of their committee, recommending among other things, "a sewer to drain the vicinity of Fall street," and also in passing an order authorizing the city treasurer to negotiate a loan of $10,000, "to be expended for the completion of Fall and Pool street sewer and the extension of Alfred street sewer." No other action respecting the construction of this drain appears to have been taken by the city council.

But the plaintiff claims that the ordinances of the city make the street commissioner its agent for the construction of sewers, and render the city liable for his acts performed within the scope of that agency.

Section 2 of c. 9 of the city ordinances provides that, "it shall be the duty of each commissioner of streets to superintend the general state of the streets, ... and give notice to the mayor or city marshal of any obstructions therein; and to superintend the building and repair of any drain, sewer or reservoir in his district and make contracts for labor and materials for the same." Section 5 provides that, "all commissioners of roads and streets shall act and be under the special instruction and supervision of the committee on roads, streets, sewers and drains, subject nevertheless to the approval of the city council."

It does not appear, however, that in the prosecution of this work the street commissioner acted under the, "instruction or supervision of the committee on streets and sewers." On the

contrary, it does appear from the uncontradicted testimony of the street commissioner himself that he, "was acting under orders from the mayor and street commissioners."

Section 2 of chap. 16 of the Revised Statutes provides that, "the municipal officers of a town may at the expense of the town, construct public drains or sewers along or across any public way therein, and through any lands of persons or corporations, when they deem it necessary for public convenience or health; and they shall be under their control." Section 3, provides that, "before the land is so taken, notice shall be given and damages assessed and paid therefor as is provided for the location of town ways."

It is not claimed in this case that there was strict compliance with the statute in regard to notice and the assessment of damages; but it is alleged in the defendant's brief statement that the sewer was laid over the plaintiff's land by virtue of an agreement with and under a license from the plaintiff. Of this, however, the report discloses no evidence; and the defendant's contention now is that the street commissioner was not acting as agent of the city, nor under its direction; and whether he was acting as a public officer under the supervision of the mayor and aldermen, or without any legal authority from any source, he did not in any event render the city liable, whatever personal liability he may have incurred.

The diversified powers and varied duties of municipal corporations in their relation to the citizen and the property owner, as well as the circumstances and conditions under which officials chosen by them are deemed to act as corporate agents of the municipality, on the one hand, or on the other as public officers engaged in the discharge of duties imposed by general law, have been questions involving such frequent and exhaustive discussion in the recent opinions of this court that no general review of the subject is now required. By virtue of the statute above quoted, the authority to lay out and construct public drains and sewers, as well as the subsequent control over them, is clearly vested, not in the city or town as a corporation, but in the

"municipal officers," as representatives of the general government. There is no statute in this State conferring such authority upon the city or town, or upon any officials as agents of the city or town. Nor is such authority necessarily incident to the exercise of its corporate powers or the discharge of its corporate duties. True, the work must be done, "at the expense of the town." A proper system of drainage so directly concerns the public health, that the legislature has deemed it just and right to equalize the burden of constructing sewers by requiring payment to be made from the municipal treasury. But in exercising the authority conferred upon them by statute, the municipal officers act not as agents of the town, but as public officers intrusted with a large discretion and appointed by law to exercise absolute control over the subject matter. *Lemon* v. *Newton*, 134 Mass. 476; *Brimmer* v. *Boston*, 102 Mass. 19; *Child* v. *Boston*, 4 Allen, 41. In this respect, "they act upon their own responsibility and are not subject either to the control or the direction of the inhabitants of the town." *Bulger* v. *Eden*, 82 Maine, 352. By simply electing municipal officers for such purposes, and appropriating and expending money therefor, the town incurs no liability for damages caused by the misconduct of such officers. It has only performed its functions as a public agency of the state in obedience to general law. *Goddard* v. *Harpswell*, 84 Maine, 499. In this State the doctrine is now clearly established by the decisions of this court, that, "when a public officer in the line of his duty does a public work within a town for the public benefit or use, the town in the absence of any directions to him is not liable for his misconduct in such work even though it appointed him, and is obliged to pay the cost of the work." *Small* v. *Danville*, 51 Maine, 359; *Bulger* v. *Eden*, and *Goddard* v. *Harpswell*, *supra*; *Hennessey* v. *New Bedford*, 153 Mass. 260.

The ordinance of the city of Biddeford making it the duty of the street commissioner to superintend the building and repair of sewers and make contracts therefor, and also placing that officer under the, "supervision of the committee on streets and sewers," obviously was not designed as an attempt to usurp the

powers vested in the mayor and aldermen by the general statute. It was, doubtless, primarily intended to apply to the construction of sewers in the public streets, for the safe condition of which the city was responsible. Its peculiar terms were probably the result of a misapprehension in regard to the law. So far as it would have the effect to take away the authority and discretion of the municipal officers respecting the building of sewers wholly outside the limits of the street, the ordinance, being unauthorized either by the city charter or by the general law, is manifestly void. Furthermore, as already noticed, it appears that the street commissioner did not act under the, "supervision of the committee of the city council on streets and sewers," but, "under orders from the mayor." He was not thereby made the agent of the city.

Nor did the city by any special vote of its council ever instruct the commissioner to build this sewer or give any direction in regard to the manner of building it. The engineer who made the survey and plan for it was employed by the street commissioner, and so far as appears acted solely under his directions. The concurrent action of the city council in referring the matter to a committee and recommending the construction of this drain, may further indicate a failure to distinguish between the, "municipal officers," and the city council, or a misconception of the duties of the two branches. But it was not a vote to build the sewer, nor an instruction to any agent of the city to build it. It was rather an approval of a general proposition for the completion of several sewers, and it was naturally incident to their joint action in appropriating and raising a large sum of money to be expended on the work, as required by the general law. It was not an assumption of any power or responsibility other than that contemplated by the statute. In any event, the city would not be responsible for damages resulting from work done under the supposed authority of a vote that was illegal and void. *Lemon* v. *Newton*, *supra*.

It may fairly be inferred from the evidence, viewed in the light of the situation and circumstances, that the municipal

officers of Biddeford undertook in good faith to discharge an important duty imposed by law, for the public use and benefit. There may have been some confusion in their minds respecting the precise nature and limitations of their authority, but they clearly intended to proceed in the ordinary way. The mayor unquestionably had the concurrence and support of the aldermen, however irregularly expressed, and deemed it proper to place the construction of the sewer under the immediate charge of the street commissioner. Under these circumstances the work may properly be said to have been done by the order of the, "municipal officers," acting not as agents of the city, but as public officers in the exercise of power conferred by general law.

The city is not liable for any error of judgment, or misconduct on their part, or on the part of the street commissioner.

Plaintiff nonsuit.

JOHN A. SAWYER *vs.* DANIEL F. LONG.

Androscoggin. Opinion August 17, 1894.

Chattel Mortgage. After-Acquired Property. Trade Fixtures. R. S., c. 111, § 5.

A chattel mortgage does not pass the legal title in after-acquired property to the mortgagee without some new act sufficient to accomplish the purpose, like a delivery to and retention of the same by the mortgagee or a confirmatory writing properly recorded and the like. Things that have a potential existence are an exception to the rule. Equity, however, creates a lien upon the *res* when produced or acquired, leaving the legal title still in the mortgagor, who, by some act, may ratify the grant as by delivery of the property, when the legal title becomes complete in the mortgagee; and without such confirmatory act, equity will sometimes enforce the mortgage, when the balancing of equities requires it.

If a mortgage of chattels stipulates that the mortgaged property may be put on sale by the mortgagor, who is required to keep the security good by applying the proceeds of sale to the purchase of new articles of like kind to those sold, the chattels so purchased become substituted for those sold at the instance and under authority of the mortgagee, so that the legal title to them may be said to pass to him as effectually as if he had himself made the sale by assent of the mortgagor and with his own hand, replenished the *res*. The mortgagor by doing so simply executes a power, performs a trust created

by the mortgage, and thereby neither depletes the security nor defrauds his other creditors.

The doctrine of equitable estoppel, upon which chattel mortgages have been held to cover after-acquired property mentioned in the mortgage, stops with the mortgagor and his assignee in insolvency or bankruptcy, and does not apply to attaching creditors or *bona fide* purchasers.

A mortgage was given to secure $275, on the debtor's stock and fixtures then in his store; and he covenanted to keep said stock and fixtures up to a value of not less than $500. The mortgage also provided that the mortgagor might, in the usual course of trade, sell said stock, but not the fixtures, and with the proceeds of said sale replace said stock with other stock of like kind, which new stock should be subject to the mortgage. The mortgage was recorded and possession retained by the mortgagor. *Held*, that the defendant being a *bona fide* purchaser, and no estoppel arising as to him, the plaintiff mortgagee may recover so much of the stock replevied as he has shown was in existence at the date of the mortgage and that purchased with the proceeds of articles sold and substituted therefor, and no more.

The term fixtures may include chattels permanent in character, as not being the object of sale, of trade or manufacture, but subjects to facilitate those purposes, and aid in the convenience of business.

Held, that those fixtures only that were in the store, when the mortgage was made, passed by it.

The mortgagor had bargained for and received a soda fountain under a writing dated at Boston, Mass., that was in effect a conditional sale. *Held*, that, if it was a Massachusetts contract, it is subject to redemption under the laws of that State. *Also*, if it was a Maine contract, that as notes were given for the price of it, the agreement not being made and signed as part of the notes, it is void altogether under R. S., c. 111, § 5.

Allen v. *Goodnow*, 71 Maine, 424, approved.

On report.

This was an action of replevin of stock and fixtures. Both parties claimed under conveyances from Philip F. Morrison. The plaintiff obtained his mortgage July 1, 1889, and the defendant became a purchaser from Morrison's assignee, May 5, 1891. The mortgage was foreclosed March 9, 1891; sixty days redemption expired May 8, 1891. Date of writ June 3, 1891.

Other facts are stated in the opinion.

Tascus Atwood, for plaintiff.

Savage and Oakes, for defendant.

Sitting: Peters, C. J., Walton, Virgin, Libbey, Foster, Haskell, JJ.

HASKELL, J. Replevin. The plaintiff claims as mortgagee, and the defendant as purchaser from the assignee for the benefit of creditors of the mortgagor. The case must be decided at law, not in equity. The mortgage was given to secure $275 on, "my stock and fixtures in the store now occupied by me," &c. . . "and I covenant to keep said stock and fixtures up to a value not less than $500. It is agreed that [the mortgagor] may, in the usual course of trade, sell said stock, but not the fixtures, and with the proceeds of said sale replace said stock with other stock of like kind, which new stock shall be subject to this mortgage." The mortgage was recorded. Possession was not taken by the mortgagee, but retained by the mortgagor and went to his assignee, who transferred the same to the defendant as purchaser of the assignee's interest in the property.

I. As to the stock. In this State it has uniformly been held that a chattel mortgage does not pass the legal title of after-acquired property to the mortgagee, without some new act sufficient to accomplish the purpose, like a delivery to and retention of the same by the mortgagee, or a confirmatory writing properly recorded and the like. *Griffith* v. *Douglass*, 73 Maine, 532; *Pratt* v. *Chase*, 40 Maine, 269; *Morrill* v. *Noyes*, 56 Maine, 458; *Hamlin* v. *Jerrard*, 72 Maine, 77. The reason is, that, as the after-acquired property is not in existence to be conveyed by the mortgage, title to it cannot be transferred in advance, for, "a man cannot grant or charge that which he hath not." Things that have a potential existence are an exception to the rule. *Morrill* v. *Noyes*, *supra*, and cases cited. Equity, however, creates, "a lien upon the *res* when produced or acquired, leaving the legal title still in the grantor, who may by some act ratify the grant, as by delivery of the property, and then the legal title is complete in the vendee." *Edwards* v. *Peterson*, 80 Maine, 372; *Everman* v. *Robb*, 52 Miss. 653. And without such confirmatory act equity will sometimes enforce the mortgage, when the balancing of equities shows that it should be done. *Mitchell* v. *Winslow*, 2 Story, 630; *Holroyd* v. *Marshall*, 10 H. L. 223.

If a mortgage of chattels stipulates that the mortgaged

property may be put on sale by the mortgagor, who is required to keep the security good by applying the proceeds to the purchase of new articles of like kind to those sold, the chattels so purchased become substituted for those sold at the instance and under authority from the mortgagee, so that the legal title to them may be said to pass to him as effectually as if he had himself made the sale, by assent of the mortgagor, and with his own hand replenished the *res*. The mortgagor by doing so simply executes a power, performs a trust created by the mortgage, and thereby neither depletes the security nor defrauds his other creditors. *Abbott* v. *Goodwin*, 20 Maine, 408.

Allen v. *Goodnow*, 71 Maine, 424, was decided upon this ground, although the controversy was between the parties to the mortgage, and the *dictum* of the court limits the doctrine to them. But if the doctrine be sound, and we think it is, it cannot logically be so limited, for when the title has passed to the mortgagee it becomes paramount to any claim under the mortgagor, either of attaching creditor or purchaser. Having no legal title he can neither impart nor convey one. *Goss* v. *Coffin*, 66 Maine, 432.

The doctrine of equitable estoppel, upon which these cases have usually been decided, does not go beyond the mortgagor and his assignee in insolvency or bankruptcy; but as to these parties remains in full vigor to preclude them from disputing that the newly-acquired property was not purchased and paid for with the proceeds of sales instead of on credit or otherwise. *Deering* v. *Cobb*, 74 Maine, 332; *Williamson* v. *Nealey*, 81 Maine, 447.

The defendant being a *bona fide* purchaser, and no estoppel arising as to him, the plaintiff may recover so much of the stock replevied as he has shown a title to under the doctrines of this opinion, viz., that in existence at the date of mortgage and that substituted for articles sold by purchase from the proceeds of sales, and no more.

II. As to the fixtures. Those articles only that were in the store when the mortgage was made passed by it. The word fixtures, in the sense used by the parties, means chattels of a

permanent nature in contradistinction from those kept for sale, such as were incident to the convenient use of the store. As said by Lord Mansfield, "accessaries necessary for the enjoyment of the principal." 1 H. Bl. 260. In other words, chattels known as, "fixtures of trade," when placed for use, partake of the realty, because used with it. They may be attached to it or placed upon it. If removed by the tenant during his term, they remain chattels; but if left, belong with the freehold as permanently fixed to it. Chattels of this sort, while in use, in position, have always been spoken of as "fixtures." Some were removable, others were not. "The right between landlord and tenant does not altogether depend upon this principle, that the articles continue in the state of chattels; many of these articles, though originally goods and chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed they are part of the freehold." *Lee* v. *Risdon*, 7 Taunt. 191. Lord Holt speaks of "vats set up in relation to trade;" *Poole's case*, 1 Salk. 368; and Lord Kenyon, "of erections for the benefit of trade or manufacture." *Dean* v. *Allaley*, 3 Esp. 11. These decisions recognize a class of chattels known as "trade fixtures." They are what Lord Hardwicke calls mixed cases, "between enjoying the profits of land and carrying on a species of trade." *Lawton* v. *Lawton*, 3 Atk. 13.

Strictly, the word fixture relates to a freehold. It refers to a chattel transformed into land by assimilation. Commonly it refers to a chattel used with land, that may be or become a part of the freehold or not as conditions may require. Sometimes it is used to indicate articles of furnishing or furniture necessary or convenient for the carrying on of business, trade or manufacture, in contrast and to distinguish them from merchandise dealt in or goods manufactured. These uses have naturally enough grown from the expression, "fixtures of trade or manufacture," that came into use to distinguish erections of that description

that might be removed by the tenant of land during his term and not become irretrievably fixed to the freehold; as Lord Kenyon said: "The law will make the most favorable construction for the tenant where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage." *Dean* v. *Allaley*, *supra*.

It is easy to see, therefore, how the meaning of the word "fixtures" has come to include chattels permanent in character, as not being the objects of sale, of trade or manufacture, but subjects to facilitate those purposes, and aid in the convenience of business. The meaning of the word must be considered in relation to the subject matter referred to by the parties using it. When used in the sale of chattels it would naturally apply to chattels. When in relation to land or a freehold, it would naturally apply to those things that were or were to be or become a part of the freehold.

In the case at bar, the mortgagor wished to secure a debt upon the goods and chattels in his store. He conveyed them as "stock and fixtures," manifestly meaning to include goods on sale and the shop appliances used in the business. He had some meaning for the word "fixtures." He could not have meant articles that had become fixed to the building, that he could not remove. He must have meant articles that he could remove, and we know of no other rule by which to determine this case than to consider the meaning intended by the parties to the mortgage. The authorities are so numerous and conflicting that it would be useless to try and extract from them any hard and fast rule that shall govern all cases. It must be noticed that the issue here is not between an owner of land and the tenant, or between parties that hold that relation. It is between vendor and vendee of chattels; and the question is, what chattels, if any, were sold. Like all contracts, that intention of the parties must govern that is permissible from the language expressed in the document of sale. Chattels that had become fixed and a part of the freehold were sold as chattels by the tenant who affixed them, as against his assignee in bankruptcy, although the

owner of the freehold might well have held them as a part of the realty. *Re McKay*, 1 Lowell, 566.

III. The mortgagor had bargained for and received a soda fountain under a writing dated Boston, Mass., that in effect was a conditional sale. If a Massachusetts contract, it was subject to redemption under the laws of that state. *Gross* v. *Jordan*, 83 Maine, 380. If a Maine contract, not having been made and signed as a part of the notes given for the price, it is void altogether. R. S., c. 111, § 5. *Holt* v. *Knowlton*, *ante*, p. 456. The writing of sale had been assigned to the defendant, and the amount due thereunder was tendered him by the plaintiff before action brought. The tender was paid into court with the entry of the writ and became payment. The defendant could have taken it at any time, and can still take it. It is his money and has paid his claim upon the soda fountain from the vendor of it.

Judgment for plaintiff for one dollar damages with costs and for eight bottles of tamarinds and for all the fixtures replevied, except one ice chest, one easy chair, and one circular wooden stand.

Judgment for defendant for the ice chest, easy chair, and wooden stand and for all the stock replevied, except the tamarinds, with costs.

It is impracticable to assess damages for defendant. As to costs see *McLarren* v. *Thompson*, 40 Maine, 284.

Mandate accordingly.

VIRGIN and LIBBEY, JJ., died before the decision of this case.

STATE *vs.* ULRIC CHARTRAND.

Androscoggin. Opinion August 17, 1894.

Intox. Liquors. Search and Seizure. Warrant. Pleading. Surplusage.

It is no ground for arrest of judgment that a warrant for search and seizure contains a command to the officer to search the person, when no such corresponding allegation is contained in the complaint.

It may be regarded as surplusage, there being sufficient without it to constitute a record complete in itself, and upon which to found a verdict and judgment.

ON EXCEPTIONS.

The defendant having been convicted on a search and seizure process filed the following motion in arrest of judgment:

"And now after trial and verdict of guilty and before judgment, the said Ulric Chartrand comes, etc., and says that judgment ought not to be rendered against him, because he says that said complaint and the warrant annexed thereto, and the matters therein alleged, in the manner and form in which they are therein stated, are not sufficient in law for any judgment to be rendered thereon, and the said complainant and warrant is bad in the following particulars:

"The said complaint was made and sworn to by the complainant, F. L. Odlin, before the clerk of the Lewiston Municipal Court, and the said warrant was signed and issued by said clerk. The said process of complaint and warrant was therefore illegal, unconstitutional and void.

"Said warrant contains a command to the officer executing it to search the person of the defendant, Ulric Chartrand, if he shall have reason to believe that said defendant has the intoxicating liquors mentioned in said complaint concealed about his person; and there being no corresponding allegation in the said complaint, or prayer for process to search the person of the defendant, Ulric Chartrand, said warrant was illegal, unconstitutional and void.

"All acts of the legislature purporting to grant power to the said clerk of the Lewiston Municipal Court to hear all complaints and to sign and issue all warrants in criminal cases are *ultra vires* and unconstitutional and void.

"Wherefore, he prays that judgment on said verdict may be arrested, and that he may be hence dismissed and discharged."

The motion was overruled and the defendant excepted.

Frank L. Noble, for defendant.

Henry W. Oakes, County Attorney, for State.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

FOSTER, J. Search and seizure process. After verdict a motion in arrest of judgment was filed, which was overruled, and to this ruling the defendant excepts.

The ground of arrest which is relied on is, that the warrant contains a command to the officer not set out in the complaint.

The complaint and warrant specifically designate the premises to be searched. The warrant, however, contains the further command to the officer to search the defendant if he has reason to believe that he has concealed said liquors about his person, and if they are found upon him to arrest him. There is no corresponding allegation in the complaint or prayer for process to search the person of the defendant.

A motion in arrest of judgment reaches only such errors as appear upon the face of the record. *State* v. *Carver*, 49 Maine, 588; *State* v. *Murphy*, 72 Maine, 433.

Nothing appears from the record that the command complained of has ever been acted on. No such claim is set up. There was a valid complaint and corresponding warrant aside from the alleged objectionable matter.

Eliminating from the warrant so much as refers to the search of the person, and the process is sufficient. The objection urged is, not that the record contains too little, but too much. Not that it empowered the officer with no authority, but with more than he could properly execute. Assuming that to be true, we are of opinion that it may be regarded as surplusage, and enough remains with that stricken out to constitute a record complete in itself and sufficient upon which to found a verdict and judgment.

It is somewhat analogous in principle to the case of an indictment containing several counts, one or more of which is bad, and a general verdict of guilty is rendered upon the whole. The current of authority in this country is that judgment and sentence will be sustained upon such counts as are valid, and a motion in arrest will not be sustained; the judgment and sentence being considered as given in accordance with the offense properly laid and proved. *State* v. *Burke*, 38 Maine, 574; *Jennings* v. *Commonwealth*, 17 Pick. 80, 83.

It is unnecessary to consider the other objections as to the right of the clerk to hear the complaint and issue the warrant, as those have been passed upon by the court in another case. *State* v. *LeClair*, *ante*, p. 522. *Exceptions overruled.*

SARAH F. MILLER, in equity,
vs.
GEORGE B. KENNISTON, Judge in Insolvency.

Lincoln. Opinion August 17, 1894.

Insolvency. Dissolution of Attachment. Equity.

An attaching creditor will not be allowed to maintain a bill in equity to defeat proceedings in insolvency, properly begun, within four months of the attachment of the debtor's property, when the purpose will defeat an equitable division of an insolvent's estate.

ON REPORT.

The case appears in the opinion.

C. E. and A. S. Littlefield, for plaintiff.
George B. Sawyer, for defendant.

SITTING: PETERS, C. J., WALTON, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

EMERY, J. The plaintiff, in an action at law, in Lincoln county, against the Waldoboro' Packing Company claims to have effectually attached the property of the defendant company. This company was indebted to her and to the Medomak National Bank and others. Pending the action at law, and within four months after the attachment, a petition in the usual form purporting to be by the Medomak National Bank as creditor and signed by its president was filed in the Court of Insolvency, for Lincoln county, praying the court to adjudge the Waldoboro' Packing Company insolvent. The plaintiff, thereupon, moved in the same court for the dismissal of the petition upon the ground that it was never authorized nor ratified by the Medomak National Bank, in whose name it purported to be made. The Court of Insolvency overruled her motion to dismiss, and proceeded upon the petition to issue the usual warrant, and call the first meeting of creditors. The plaintiff, thereupon, brought this bill in equity against the judge of the Court of Insolvency

to compel him to dismiss the petition and discontinue all proceedings under it.

Her argument is, that she has a valid attachment which will be dissolved by the insolvency proceedings, if they are allowed to go on; that these proceedings were never properly begun, and should be dismissed for the reason that the party purporting to be the petitioning creditor never authorized nor ratified the petition; that she has no remedy by appeal, none being authorized by statute in such cases; that she has no remedy at law, and that, therefore, she is entitled to the interposition of the court in equity to save her attachment.

The plaintiff's plain purpose is to obtain not an equality with, but an advantage over, the other creditors of the insolvent company. Such a purpose is abhorrent to the very nature of equity, which was born of the principle of equality. According to Sir Henry Maine (Anc. Law, 55, 56), the primal meaning of the term *equitas*, in the Roman law, was either the idea of equal, proportionate distribution, or the idea of levelling in the sense of removing inequalities. The term equity in English and American law is derived from the Roman *equitas*, and in the long history of equity jurisprudence, from the Roman Prætors to this day, its original meaning has never been obscured. The maxim, "equality is equity," has long been familiar as a potent principle, and has lost none of its force.

Equity jurisdiction is often and repeatedly exercised to secure equality, but is never exercised to produce or even protect, an inequality among creditors. This court was granted this jurisdiction in cases of insolvency to facilitate the proportionate distribution of the insolvent's assets, not to prevent it.

The plaintiff's vantage ground, if such she occupy, was won with weapons drawn from the armory of the strict law. For its defense she must rely upon those same weapons. Equity's armory is not open to her.

Bill dismissed with costs.

THOMAS WELCH,
(Matthew O'Donnell, Administrator,)
vs.
MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Announced Law Term, Western District.

Opinion August 17, 1894.

Railroad. Negligence. Master and Servant.

One who has an interest in the work to be performed either as consignee or servant of a consignee, or in any other capacity, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants.

The court distinguishes between such a case and that of one who has no interest in the work to be performed, a mere by-stander, who voluntarily assists the servants of another, either with or without the latter's request, doing so at his own risk.

In the latter case the master is not responsible, in the former he will be.

The court apply this principle of liability of the master for injuries thus sustained by the plaintiff, where it appeared that the defendant corporation, while engaged in transporting earth by a gravel train for its own use, undertook to deliver earth from cars in the same train for the use of a third party; the crew in charge of the gravel train having requested the men employed by such third party to assist in dumping the earth out of the cars, and while so engaged one of the latter's crew was injured by a defective car that was improperly loaded. PETERS, C. J., LIBBEY, and HASKELL, JJ., dissenting.

Held, that the crew in charge of the gravel train had authority to make such request and give such consent as would authorize the servants of the consignee to remove, or assist in the removal of earth, from the cars. PETERS, C. J., LIBBEY, and HASKELL, JJ., dissenting.

The following instructions to the jury were sustained: One who voluntarily assists the servants of another cannot recover from the master for an injury caused by the negligence or misconduct of such servant; that one cannot by his officious conduct impose upon the master a greater duty than that which he owes to his own hired servants; that care must be taken, however, to distinguish a mere volunteer from one who assists the servant of another, at their request, for the purpose of expediting his own business or that of his master; for, in such a case, he will not stand in the relation of a fellow-servant to them, and, if injured by their negligence, their master will be responsible; that if the plaintiff (Thomas Welch), consented to assist in

dumping the cars, at the request of the railroad crew in charge of the train, to expedite or facilitate the work which he was engaged in performing, . . . he could not be regarded as such an intermeddler or volunteer as to preclude him from a recovery on that ground, provided the alleged negligence and injury were made out in other respects; nor could he be regarded as a fellow-servant with the employees of the railroad, so as to preclude him from a recovery on that ground. PETERS, C. J., LIBBEY, and HASKELL, JJ., dissenting.

Upon a motion to set aside a verdict for excessive damages, *Held*, that if under our statute no more than $5000, is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of $8000, for the death of an unskilled workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survived his injuries some six or seven months.

ON MOTION AND EXCEPTIONS.

This was an action on the case brought by Thomas Welch, and after his death prosecuted by his administrator, to recover damages for injuries received by said Welch, through the negligence of the defendant in using and improperly loading a defective dump car, which said Welch, at the request and by permission of the defendant, it was alleged, attempted to dump, and was injured while so doing.

The case was tried before a jury at the April term of this court, in Cumberland county, 1890, at which a verdict for $8000 was rendered for the plaintiff.

The plaintiff's testimony, taken on deposition, and that of his witnesses tended to show the following: On December 22, 1888, the plaintiff, twenty-three years of age, was in the employ of Thomas Shannahan, who was engaged upon a job for H. N. Jose, in filling up and grading a piece of Jose's land, on the westerly side of the track of the defendant's railroad, near the point where the same was crossed by Congress street in Portland. Prior to this time, the grade of the Maine Central railroad and of Congress street had been raised a little more than four feet, leaving the adjacent land owned by Mr. Jose that depth below the top of the street and track. Mr. Jose, who was a director of the Maine Central Railroad, made no claim for damages, as against the railroad, but the defendant, through Mr. Allen, its civil engineer, made an arrangement with Mr. Jose, by which the defendant furnished him dirt with

which to fill his land to a grade corresponding to that of the street and track. This dirt was loaded by the defendant's servants upon dump cars, owned and managed by the defendant, at a place not far from the Union Station, and known as the "Ogdensburg" cut. The method of operation was to make up a train of ten or twelve dump cars, which were loaded at the cut by means of a steam shovel, also owned and operated by the defendant. The earth loaded upon the cars was composed in part of clay and was wet and slimy, and was conveyed from the pit or bank to the car by means of a steam shovel consisting of a scoop hanging from a swinging crane, which deposited its load upon the center or side of the car, as desired.

The day was very cold and freezing, so much so that wherever the earth was exposed it froze in lumps. The loaded cars were hauled to the Congress street-crossing by the defendant, where two or three of them were left for Mr. Jose's men, and the remainder continued on to different points between the Congress street-crossing and the bridge over Portland street; the defendant being engaged in filling the land and grading its tracks between those points. The loading of the cars was at a point beyond the observation of the plaintiff, and was under the direction and control of the defendant railroad. There were about four trains each day which left cars containing dirt intended for the use of Mr. Jose, and these cars were stopped as required, by Timothy McGillicudy, Mr. Shannahan's foreman, by holding up the number of fingers representing the number of cars he needed to be set off. The cars were unloaded, and it required two hours and sometimes two and a half hours to haul away and level off the dirt which they brought. The dirt was shoveled into dump carts, from where it was left by the cars, and hauled a short distance from the track, and dumped on to Mr. Jose's land and levelled off by Shannahan's men. The dirt was conveyed on what is known as rocker dump cars, provided with strong sides, hinged at the top, and fastened by means of automatic catches at the bottom, which were released in the act of dumping, allowing the side of the car to be swung outward, and its contents to be dumped on the ground. This was done,

as is customary, by a part of the men engaged in the operation pressing down on one side of the car, while as many of the remainder as could work to advantage, lifted up the opposite side, by putting their shoulders under the sill of the car for that purpose.

On the first day of grading, the servants of the defendant connected with the train under the charge of Mr. Dolan, dumped the cars left for Mr. Jose. The business of dumping and what number of men should engage in it, was under the direction of Dolan, the conductor of the train, and a man by the name of Parent; and moreover, although the whole work was under the direction of Mr. Allen, the defendant's civil engineer, who went out each day to see how the work of dumping and cutting was getting on, in some instances, Mr. Dolan was authorized to hire men, when his crew was insufficient, as he thought, to do the work; and this authority was during the time that this work was going on.

The conductor, Dolan, requested Shannahan's men to assist in dumping the cars loaded with dirt for their use, the first day Shannahan's men began work there. After the first day, Shannahan's men, of whom the plaintiff was one, did all the dumping at the Congress street-crossing; the crew connected with the cars, with the exception of Dolan, going on towards the Portland street bridge with the remaining cars to be dumped there, leaving the necessity upon Shannahan's men of unloading the cars left at the crossing for Jose, in order to get the dirt necessary for their use.

These facts were known not only to Dolan but to Allen, the chief engineer of the defendant, who testified that he visited the work at Congress street every day to see how the dumping and cutting was getting on, and that in this case the work was so near the office that he took the immediate charge of it himself, and had the entire charge of the work. Under these circumstances, on the morning of December 21, 1888, the plaintiff, under his employment with Shannahan, commenced work in dumping cars, shoveling the dirt into dump carts, and dumping it on Jose's land, and leveling off the same in the process of

grading Jose's land. The work continued in the usual way until about half-past eleven Saturday, December 22, 1888, at which time a side board on one of the dump cars, provided and used by the defendant, was broken off in the process of dumping, by a lump of frozen dirt, and was removed by some of Shannahan's men, other than the plaintiff, by the request of Dolan, and was set up against the tool house near the track. Dolan was present at the time, as he was all of the time before the accident. The side of the car, from which the side-board was gone, was towards the same side of the track that the dirt was dumped on, but this was the opposite side of the car and track, and of the approaching train, from that on which the plaintiff stood when the car returned, and when the dumping at which he was hurt, took place. After the side-board was broken off the car, it was run back on the track towards the Union station, and the plaintiff had no knowledge to lead him to think that the defendant would continue to use the car in its disabled condition, or that it would not be switched off on the side track to go to the repair shop beyond the station, and out of the sight of the plaintiff. The jury viewed the car, and the track running to the "Ogdensburg" cut.

The accident to the side-board was at half-past eleven in the morning, and at twelve o'clock the men went to dinner and returned to their work at one o'clock. It took about two and one-half hours to take away and distribute the dirt left by the dump cars, so that a little after three o'clock, the train having been reloaded at the cut, returned and left three cars at the Congress street-crossing for Mr. Jose and his men. One of the cars was the one which had no side-board on the side of the car towards the "Creamery," which stood on Jose's land. Owing to this defect, the men in charge of the steam shovel had loaded the car with the dirt, so that the dirt was heaped up against the side board which was in place, and had fallen off of the side on which there was no side-board, leaving only a thin layer of dirt on that edge of the car, which had been permitted to so remain by the defendant's servants. This caused the car to tip a little towards the loaded side, as far as the links would allow it,

some two and a half inches; and the fact that one of the cars tipped down a little was noticed by the plaintiff as the train approached, but standing on the same side of the car and train as that upon which the side-board was in place, being unable to look over the car, having no reason to suppose the defendant would continue to use an improper and unsafe car, he did not know the cause of the tipping, which the uneveness of the track would sufficiently account for; and he testified positively that he did not know from which car the side-board was missing, or that the defective car was left for him to assist in dumping at the Congress street-crossing. In shovelling into the dump carts, his back would be towards the train both going and returning, and, when the business was over, going to the opposite side of the track, and not being warned as to the dangerous condition of the approaching car, he only gave it such casual attention as would be natural under like circumstances. Dolan accompanied the train on each trip to and from the cut, as conductor, and Allen says that it was not only Dolan's duty in case the car was not fit to haul, to set it off and report it, but that if it was improperly loaded it would be Dolan's duty, to look after it and have it corrected. The plaintiff says, "the time before that when the train came we broke the door that time, and after it came back again I didn't notice it was that car, for I was on the opposite side. I didn't know of any other break. The side-board of these cars, and the door I have spoken of as being broken off is the same thing."

After the train moved on, the plaintiff with others tried to dump this car. The day was cold and freezing, and the dirt coming down to the edge of the car from which the side-board was missing, was so thin on that side that it was frozen, for when the car was tipped up to dump the load, the dirt stuck and did not slide out from the car. After trying it once, the men dumped the other two cars, and then undertook to dump the defective car. The plaintiff not noticing which car it was that was defective, and not being able from his position to see that the side-board was gone, or that it was loaded unevenly on the

side next to him, put his shoulder under the sill or edge of the car, about midway of the car, and with the other men of the crew, undertook to lift the side of the car that was loaded. They succeeded in getting it up to its usual position, but could not hold it there, owing to the heavy weight on the side of the car on which the plaintiff was lifting. Without any warning, it suddenly came back, caught the plaintiff by the shoulder, and the impetus and weight tipped the whole dump car down, lifting the opposite wheels from the track, so that the whole mass fell upon and crushed the plaintiff to the ground, pinning him there, breaking the bones of his leg so that they protruded through the flesh, and breaking his back about half way between his hip and the point of his shoulder-blade.

The defendant contended: (1,) That it was not in fault. (2,) That under all the circumstances in the case, the plaintiff was a mere volunteer, and as such took all the risk attendant upon his uncalled-for interference with the business of the defendant, and therefore could not recover. (3,) That the plaintiff was not in the exercise of due care.

The defendant seasonably excepted to the following among other instructions given the jury:

"A person who voluntarily assists the servant of another, in a particular emergency, cannot recover from the master for an injury caused by the negligence or misconduct of such servant. He cannot by his officious conduct impose a greater duty on the master than that which the master owes to his hired servants; and it is immaterial whether the injury occurred while assisting the servant gratuitously, or at the request of the latter. Care must be taken, however, to distinguish the case of a mere volunteer from that of one assisting the servants of another, at their request, for the purpose of expediting his own business or that of his master. In such case he will not stand in the relation of fellow-servant to them, and if he is injured by their negligence, their master will be responsible.

"For I understand the learned counsel for the defendant to repudiate that distinction, and to claim that the law is otherwise. But I instruct you that such is the law; that if Mr.

Welch, although he was employed in the work that was being carried on for Mr. Jose, and was not in any sense of the word an employee of the railroad company, and although requested to assist in dumping those cars by those in charge of the train, who, by a rule of the company, had no right to hire or employ men,— still, if he and the crew then at work for Mr. Jose volunteered, with the consent or at the request of the crew employed by the railroad company, to assist in dumping those cars, he was not an intermeddler or a volunteer. I want you and the counsel to understand distinctly what I mean. When freight is to be delivered by a railroad, they have their own employees, of course, to deliver it; and whether it shall be delivered on the platform, or in the car, or at the warehouse, or at some distance from the platform, may be a matter of mutual arrangement between the carrier and the receiver of the freight. And this earth, if it was being transported for Jose's benefit, was freight; and whether it should be delivered on the ground at the side of the railroad, or whether the men at work for Jose should take it in the car, and either shovel it out or dump it out, was a matter which it was competent and legal for them to arrange between themselves.

"And I instruct you, if at the request of Dolan or the man in charge of the dump cars, for the convenience of both parties, and to facilitate the work which was being done for Jose, Jose's crew consented that those cars might be unshackled and left behind, while the rest of the train went ahead and the crew with it, and that they would dump the cars as they wanted the earth, that he was not an intermeddler or a volunteer; that being at work for another party, there was no such volunteering or intermeddling as would preclude him from recovering on that ground. If you find that he was at work as a day laborer in the crew of Mr. Jose, and that, at the request of those who had charge of the gravel train, Jose's crew consented to take the cars that were dropped off, left behind, and dump the dirt out, then in doing that he was not an intermeddler, nor a volunteer, and would not on that ground, be precluded from recovering. Whether he was or not, whether the facts are as

claimed, is a question for you. I am not to decide the facts; but I say, if you find such to be the facts, that while at work for Mr. Jose as a part of the crew doing his grading, that crew consented at the request of the railroad crew in charge of the gravel train, to take the gravel in the cars and dump it out, then he would not become such an intermeddler, or volunteer, as would preclude him from recovering on that ground, providing that the negligence were made out in other respects.

"And I say to you further, that, if you find such to be the facts, he would not be a fellow-servant with the employees of the railroad in such a sense as to preclude him from recovering on that ground."

Defendant also excepted to the following instructions upon the question of contributory negligence on the part of plaintiff Welch:

"It is claimed in defense, that if Mr. Welch knew of the condition of that car, knew that it was defective, and knew how it was loaded, and consented to assist in dumping it, as a matter of law he could not recover; that having a knowledge of the facts which constituted the negligence, it was as negligent in him to consent to assist in dumping it, as it would be in the railroad to leave it to be dumped in that condition; and that the negligence would be equal on both sides, and that there must be contributory negligence on his part. And I was asked, as a matter of law, so to rule. I declined, and I now decline so to instruct you. And that there may be no misunderstanding as to what I mean, and that you and the counsel may clearly understand the matter, I will illustrate what I mean.

"I concede that there are some cases and some *dicta* in the books which seem to go to that extent; but as I understand it, the later, the better and more reasonable rule is, that whether a party has or has not been guilty of contributory negligence which will preclude him from recovering, must depend upon all the circumstances attending the transaction, and it must go to the jury as a question of fact upon the evidence, and cannot be declared, except in a few rare cases, as a matter of law by the judge. I understand that to be the later, the better and more reasonable rule of law.

"Now, I say in some cases, that it is a question of law for the court to declare whether the plaintiff has or has not been guilty of contributory negligence, but those are exceptional cases. The later, better and more reasonable rule is, that where it depends upon a great variety of circumstances, it is a question of fact for the jury to determine; and I regard this as one of that class of cases. The court cannot declare as matter of law in all cases, that because a party knew of the danger, knew there was negligence on the other side, therefore he cannot recover. It will depend upon many circumstances, and must be decided in a reasonable way by the jury."

Defendant also submitted written requests for instructions to the jury covering the same points supporting their contention in defense of the action, but the presiding justice declined to give them.

Harry R. Virgin and *A. A. Strout*, for plaintiff.

W. L. Putnam, Drummond and Drummond, for defendant.

It was the duty of the servants of the company to deliver this gravel at a fixed place and the duty of the consignee to receive it at that place. By the contract, he had no warrant whatever to interfere with the transportation of the gravel in the slightest degree; and until it was dumped at the place agreed upon, the transportation had not terminated. Any previous interference therefore by the consignee, or by his servants without the authority of the company, makes him and them trespassers, and being such, they act at their peril.

The, "request or consent," of the dumping crew is made a necessary statement to avoid the result of unauthorized action. But wherein does that aid the plaintiff? It is not pretended that these parties had any authority to employ assistance in the discharge of their duties, or had any express authority from the company to waive its rights or modify its contracts, or any authority at all to make any waivers to affect the rights of the company, unless such authority is inherent in the business in which they were employed.

The proposition that a servant, charged with the manual duty of executing a contract in a prescribed manner, can modify that contract because he is charged with the execution of it, although only in a prescribed manner, and thereby affect the rights and liabilities of his principal, find no support in principle or authority, and is contrary to all our ideas of law or common sense.

But this doctrine allows employees to call to their assistance incompetent and unskilful men, and make the company responsible for the result of such incompetence and want of skill. Men hired to dump gravel are not employed to select capable men to do the same work. The fact, that this doctrine takes from the company its power to control the appointment of persons for whose acts it is responsible, shows that the doctrine is contrary to reason and therefore contrary to law.

If the servants of a railroad company may lawfully request or permit a person to assist them in order to expedite the business of such person, what is the limit? Where is the line to be drawn? On the same principle, the engineer of a freight train has authority to request the servants of the consignee to assist him in running his engine in order to expedite the business of the consignee by a quicker transportation of the freight. The engineer of a passenger train may request a passenger to assist him in running his locomotive in order to expedite the transportation of such passenger.

If the consignees or his servants have any right whatever, without authority from the carrier, to interfere with freight before the transportation has ended, they must have the right to interfere with it at any time after the transportation has commenced.

In *Holmes* v. *Ry. Co.* L. R. 4 Ex. 254, and *Wright* v. *Ry. Co.* 1 Q. B. Div. L. R. 252, the authority of the station master was admitted or not questioned. In *White* v. *France*, 2 L. R. C. P. 308, plaintiff went upon defendant's premises rightfully to do business with, and was injured by the defendant's negligence. So in *Indemaur* v. *Dames*, L. R. 2 C. P. 311. In *Heaven* v. *Pender*, 11 Q. B. Div. 503, the plaintiff was rightfully on the

stage while painting. In *Street Ry. Co.* v. *Bolton*, 42 Ohio St. 224 (S. C. 54 Am. Rep. 803), the distinction between removing a nuisance from the public highway and an obstruction upon a railroad is not observed. In *Eason* v. *Ry. Co.* 65 Tex. 577 (57 Am. Rep. 606), the request came from an "agent" and not "servants," the court assuming the conductor was agent of the company. In *Sherman* v. *R. R. Co.* 4 Am. & Eng. R. R. Cases, 589, the request was by one having authority. So in *Everhart* v. *R. R. Co.* 4 *Id.* 599, 603. *Wischam* v. *Richards*, 136 Pa. St. 109, sustains our position that a servant cannot make a request, or give a permission, that shall affect the master's rights without his authority or permission. Counsel cited: McKinney, Fellow-Servants, p. 49.

Reason, principle and the real authorities establish this rule: that when goods are to be delivered by a carrier in a particular manner or in a particular place, the consignee is an intermeddler and a wrong-doer, if he interferes of his own motion with the goods until so delivered; that he may be permitted to interfere sooner with the goods only by some one having authority from the carrier to change the manner or place of the delivery as the case may be; and that if having such authorized permission and in accordance with it, he assists in handling the goods, he does not thereby become a servant of the carrier or a mere licensee, as some have claimed, but acts in his own behalf and is entitled to the same protection as one rightfully upon the carrier's premises in the transaction of their mutual business.

SITTING: PETERS, C. J., WALTON, VIRGIN, LIBBEY, EMERY, FOSTER, HASKELL, WHITEHOUSE, JJ.

PETERS, C. J., LIBBEY, HASKELL, JJ., dissented.

The opinion of the court was by WALTON, J.

WALTON, J. It appears that the Maine Central Railroad Company, while engaged in transporting earth for its own use, undertook to deliver some earth for the use of Mr. H. N. Jose. And the evidence tends to show that the crew in charge of the gravel train requested the men employed by Mr. Jose to assist in dumping the earth out of the cars, and that while so engaged

a broken car, unevenly loaded, tipped over and fell upon one of Mr. Jose's men (Thomas Welch) and inflicted injuries of which he afterwards died. For these injuries the administrator of Welch has recovered a verdict against the railroad company for eight thousand dollars damages. The case is before the law court on exceptions and motion for a new trial. We will first examine the exceptions.

I. It is insisted in defense that it was the duty of the servants of the railroad company to dump Jose's earth out of the cars, and that they had no authority to employ Jose's men to assist them, and that Jose's men were trespassers in attempting to do so, and that, being trespassers, the railroad company owed them no duty, and was under no obligation to protect them against the carelessness of its servants.

It is undoubtedly true that, if one who has no interest in the work to be performed, a mere by-stander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk. And the jury were so instructed in this case. But it is equally well settled that one who has an interest in the work to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another, at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases the master will not be responsible. In the latter he will be. This distinction is sustained by every text-book to which our attention has been called, and is well sustained by adjudged cases.

Thus, in *Degg* v. *Midland Railway Company*, 1 H. & N. 773, where a mere by-stander, without any request from the servants of the railway company, volunteered to assist them in working a turn-table, and was carelessly injured by the servants of the company, the court held that he had no remedy against the company. And this case is approvingly cited in *Osborne* v. *Railroad Company*, 68 Maine, 49.

But, in *Wright* v. *London & Northwestern Railway Company*, L. R. 10 Q. B. 298, where the consignee of a heifer assisted in moving the car, in which she had been brought, in order to

hasten her delivery, and was carelessly run against and hurt, the court held that he had a remedy against the company — that the rule established in the *Degg* case did not apply. To the same effect is *Holmes* v. *Railway Company*, L. R. 4 Exch. 254, 6 Ex. 123.

So, in this country, in *Street Railway Company* v. *Bolton*, 52 Am. Rep. 803 (43 Ohio St. 224,) where a passenger on a street railway car assisted in backing the car on to the track at a turn-out, and was carelessly run against and hurt, the court held that the railway company was responsible, because the assistance rendered tended to expedite the passenger's journey and prevented his being regarded as a mere volunteer.

So, in *Eason* v. *Railway Company*, 57 Am. Rep. 606, (65 Tex. 577,) where, to facilitate the loading of lumber, it became necessary to move a car, and the shipper's servant, at the request of the conductor of the freight train, undertook to make the coupling, and was injured by the carelessness of the company's servants, the court held that the railway company was responsible — that the servant was not a mere volunteer, because the assistance which he undertook to render was to facilitate his own work and thus promote the interests of his employer. The rule of exemption and its limitations are very clearly stated in this case.

The distinction running through all the cases is this, that where a mere volunteer, that is, one who has no interest in the work, undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of *respondeat superior* does not apply. But where one has an interest in the work, either as consignee or the servant of a consignee, or in any other capacity, and, at the request or with the consent of another's servants, undertakes to assist them, he does not do so at his own risk, and, if injured by their carelessness, their master is responsible. In such a case the maxim of *respondeat superior* does apply. The hinge on which the cases turn is the presence or absence of self-interest. In the one case, the person injured is a mere intruder or officious intermeddler. In the other, he is a person in the regular pursuit of his own business;

and entitled to the same protection as any one whose business relations with the master exposes him to injury from the carelessness of the master's servants.

This distinction is sustained by the cases cited and by every modern text book to which our attention has been called; and we are not aware of a single authority which holds the contrary. The recent case of *Wischam* v. *Richards*, 136 Pa. St. 109, cited by defendant's counsel, is not opposed to it. It sustains it. In that case, the plaintiff was hurt while assisting the defendant's servants in unloading a heavy fly-wheel from a wagon. The court found as a matter of fact that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, and, consequently, that he had no remedy against their master. The court say that the plaintiff had no interest in the delivery of the wheel; that the delivery was not completed, but was going on when the accident occurred, and the delivery was the act of the defendant; that the participation of the plaintiff was not that of an owner receiving his own goods, but was that of a servant assisting the servants of the defendant, and that this circumstance brought the plaintiff's case within the rule of nonliability. "The distinction," said the court, "is refined, but it seems to be substantial, and we feel constrained to recognize it, and enforce it." The fact that the plaintiff was a mere volunteer, having no interest in the work which he undertook to assist the defendant's servants in performing, was the hinge on which the case turned, and defeated his right to recover. If the plaintiff had been sent to obtain the wheel, and, at their request or with their consent, had assisted the defendant's servants in unloading it, in order to hasten or facilitate his own work, and had been injured by their negligence, his right to recover would undoubtedly have been sustained. As already stated, the hinge on which the cases turn is the presence or absence of self-interest, or a self-serving purpose. In the one case, he is a mere volunteer — in the other, he is a person in the regular pursuit of his own business — a distinction very obvious and substantial.

Mr. Beach, in his work on Contributory Negligence, (sect. 120) says that where one assists the servants of another at their request, for the purpose of expediting his own business or that of his master, and he is injured by the servants' negligence, the master is liable; that, in such a case, the relation of fellow-servant does not exist; and, in case of injury, the rule of *respondeat superior* applies.

Mr. Thompson, in his work on Negligence, (vol. 2, page 1045) says that, care must be taken to distinguish the case of a mere volunteer from that of one assisting the servants of another, at their request, for the purpose of expediting his own business or that of his master; for, in such a case, he will not stand in the relation of fellow-servant to them; and, if he is injured by their negligence, the doctrine of *respondeat superior* will apply, and their master will be responsible.

But, in the present case, it is urged by the learned counsel for the railroad company that the crew in charge of a gravel train have no authority to make such a request, or give such consent, as will authorize the servants of the consignee to remove or assist in the removal of earth from the cars.

We do not think that such a want of authority exists. It seems to us that the persons having the charge of freight are the very ones to give such consent or to make such a request. And it has been so held, both in England and in this country.

In *Wright's Case*, L. R. 10 Q. B. 298, it was so held. In that case Mr. Justice Field said that the agent to deliver freight is the proper person to give consent for the consignee to assist in its delivery. That was the heifer case already referred to.

And in *Lewis* v. *Railroad*, 11 Met. 509, it was so held. In that case a truckman was permitted by one M'Coy to assist in the removal of a block of marble from a car. The truckman was allowed to take the car to the depot of another railroad company, and there, by the use of the latter's derrick, to make the attempt to lift the block of marble from the car and place it directly on his truck. But the attempt failed. The derrick gave way and the block of marble fell and was broken. This brought into litigation, directly and sharply, the authority of these

two servants,— one a servant of the railroad company and the other a servant of the consignee,— thus to change the place and manner of delivering freight. And precisely the same argument was urged against the authority in that case as is urged against the authority in this case. It was said that M'Coy was in no sense a general agent of the railroad company; that his only authority was to receive and deliver freight; that his authority being thus special and limited, his consent to change the place and manner of delivering the freight was not binding upon the company. But the court held otherwise. The court held that the place and manner of delivering freight may always be changed by the servants of the carrier and the servants of the consignee; that their authority to make such changes is included in their authority to receive and deliver freight; that if the consignee of a bale of goods steps into a car and asks for a delivery there, and it is passed over to him, the delivery is complete. The rule established by the authorities seems to be this, that the persons having authority to deliver freight and the persons having authority to receive it, may always agree upon the place and manner of its delivery.

In the present case, the evidence tended to show that the railroad company, while engaged in grading a portion of its track in or near Portland, undertook to leave some earth at a point on the line of its road for Mr. Jose. Mr. Jose employed a contractor by the name of Shannahan to take the earth away. It appeared in evidence that, at the request of the railroad crew in charge of the gravel train, Shannahan's men had assisted in dumping the earth left for Mr. Jose out of the cars; and, on the day of the accident, when Shannahan's men came for more earth, the earth had been left in the cars, and the railroad men had gone on to where they were delivering earth for the use of the railroad. Consequently, Shannahan's men were obliged to dump the earth out of the cars themselves, or wait for an indefinite length of time for the return of the railroad men. It was a cold day in December, and to wait would be neither comfortable for themselves nor profitable for their employer. And so, for their own convenience and to facilitate their own work, Shannahan's

men undertook to dump the earth out of the cars themselves. The decedent was one of them. The evidence shows that he was an experienced man at that kind of work. But one of the cars was defective and had been improperly loaded, and it tipped over and fell upon him and inflicted the injuries of which, at the end of about seven months, he died.

The presiding justice instructed the jury that one who voluntarily assists the servants of another can not recover from the master for an injury caused by the negligence or misconduct of such servants; that one can not by his officious conduct impose upon the master a greater duty than that which he owes to his own hired servants; that care must be taken, however, to distinguish a mere volunteer from one who assists the servants of another, at their request, for the purpose of expediting his own business or that of his master; for, in such a case, he will not stand in the relation of a fellow-servant to them, and, if injured by their negligence, their master will be responsible; that if the plaintiff (Thomas Welch) consented to assist in dumping the cars, at the request of the railroad crew in charge of the train, to expedite or facilitate the work which he was engaged in performing for Mr. Jose, he could not be regarded as such an intermeddler or volunteer as to preclude him from a recovery on that ground, provided the alleged negligence and injury were made out in other respects; nor could he be regarded as a fellow-servant with the employees of the railroad, so as to preclude him from a recovery on that ground.

These instructions were several times repeated, and not always in precisely the same words; but such were the substance and effect of the instructions.

Counsel for the railroad company profess to be greatly alarmed at the consequences of such a doctrine. What, they ask, will be the limit of such a power? Where will the line be drawn? And they profess to believe that if such a power is conceded to the persons in charge of a gravel train, then the engineers of freight and passenger trains may turn over their engines to inexperienced persons, and the property and lives of the whole community be put in jeopardy. To thus enlarge and magnify

the consequences of a ruling may be an ingenious mode of argument, but we do not think it is sound. It does not follow that because the crew in charge of a gravel train may allow the servants of a consignee to assist in removing earth from the cars that, therefore, the engineers of freight and passenger trains may turn over their engines to inexperienced hands. We give no countenance to such a doctrine. Our decision goes no farther than to hold that the persons having the charge of freight may allow the servants of the consignee to remove it from the cars, and that the latter, while so engaged, have a right to be protected against the negligence of the former. In other words, that, in such cases, the rule of *respondeat superior* applies. Such a doctrine seems to be well sustained by authority, and we believe it to be sound.

II. We will now consider the motion. It is the opinion of the court that the jury were properly instructed, and that the evidence was sufficient to justify a verdict for the plaintiff; but we think that the damages assessed by the jury, ($8000) were clearly excessive. When one is negligently injured, and he dies immediately, the largest amount recoverable is $5000. The amount may be less, but never more. If the person injured survives for a considerable length of time, this limitation does not apply; or, rather, did not, when this action was tried. What the rule may be under the recent statute, (Act of 1891, c. 124) will not now be considered. But we think this statutory limitation, whether applicable to the particular case under consideration or not, is entitled to consideration in determining whether or not a verdict is excessive. The damages recoverable for negligently causing the death of a person must in every case depend largely upon what would probably have been the earnings of the deceased if he had not been killed. Other elements enter into the calculation; but the earning capacity of the deceased is always an important factor. The death of one capable of earning a large income is necessarily a greater loss to his estate than the death of one capable of earning only a small income. The earning capacity of the deceased in this case must have been small. He was not a skilled workman.

His only employments had been working in sewers and shoveling gravel. This appears from his own deposition taken before his death. And notwithstanding he was an unmarried man, and had no one dependent upon him for support, and twenty-three years of age, he had not saved a dollar of his earnings. We feel justified, therefore, in assuming that his earning capacity was small. Possibly, if he had lived, he might, later in life, have developed a capacity for more lucrative employments. Probably not. And, in estimating the loss to his estate, caused by his death, we must be governed by probabilities, not possibilities. Probably, if the deceased had not been injured, and had lived to the common age of man, he would have left but little, if anything, to his surviving relatives. It seems to us that in such a case the damages recoverable for the benefit of surviving relatives ought to be comparatively moderate; that if, under our law, no more than $5000 is recoverable for the negligent killing of a skilled workman, capable of earning a large income, when his death is immediate, a verdict of $8000 for the death of an unskilled workman, capable of earning only a small income, must be regarded as clearly excessive, though, as in this case, he survives his injuries some six or seven months. Influenced by these considerations, we think a new trial must be granted, unless the administrator remits all over $5000. If such a *remittitur* is entered upon the clerk's docket, the entry will be,

Motion and exceptions overruled.

APPENDIX.

In re ESTATE OF JOHN B. BROWN.

Will. Trust. Income. Distribution. Survivors.

The rule of construction for a will is the intent of the testator, to be gathered from the whole instrument.

A testator devised the residue of his estate to trustees during the life of the survivor of his children, the whole income to be distributed: first, in payment of annuities; second, balance annually, one tenth to a grandchild, and three tenths each to children during their respective lives; minors of a deceased child to be supported from the income during minority, but not beyond the term of the trust; and remainder over to grandchildren *per capita*.

Held; I. That the grandchild should be classed with the annuitants, and, having died without issue before the testator, its legacy lapsed and fell into the balance of income to be annually distributed among children, who took as a class, to share equally, but with the incident of survivorship.

II. That the share of a deceased child vested in the survivors, who might legally by deed of trust appoint its distribution to the deceased child's family during the continuance of the trust, so as to work equality among all the children and their respective families.

Bill in equity, heard on bill and answers, brought by the trustees under the will of John B. Brown, of Portland. The cause was heard before Mr. Justice HASKELL, who filed the following written opinion, that is now published with the opinions of the full court because of its intrinsic merit and the importance of the questions discussed and decided.

The case appears in the opinion.

Symonds, Snow and Cook, for the trustees, contended that the shares of income bequeathed to a grandchild, and to Philip

Henry Brown, during life should be disposed of as intestate property and be distributed among the heirs-at-law.

Wm. Henry Clifford, for the surviving son and daughter, contended that such shares should go to them during life as surviving children.

Edward Woodman, guardian for the minor grandchildren, contended that the shares became a part of the trust fund and should accumulate and be distributed among the grandchildren at the termination of the trust.

HASKELL, J. This is a cause in equity brought by the trustees under the will of John B. Brown, against all of his heirs, asking for construction of certain portions of the will. The defendants, who have attained their majority, and the minors, by their guardian *ad litem*, being all the parties interested in this cause, appear and answer and join in the prayer of the plaintiffs for the construction sought. The cause is heard upon bill and the answers of the several defendants. The following material facts appear:

John B. Brown executed his will on the 12th of March, 1877, and a codicil thereto, 13th of February, 1879, and died on the 10th of January, 1881. At the time of executing the will and codicil he had three children living, two sons and a daughter, all married and having children, and one grandchild, the daughter of a deceased son, and her mother, the deceased son's widow, who had then remarried. The granddaughter died before the testator, but after he had made the codicil. The eldest child, a son, has died since the death of the testator. The other two children survive.

The will disposed of the testator's entire estate. For his wife he made ample provision in lieu of dower and of her distributive share. Numerous legacies and annuities were given to charitable institutions, collateral kindred and others not his heirs.

He devised in fee the Falmouth hotel, an unproductive piece of property, to his two sons, and conveyed, at his death, a parcel of real estate to his daughter.

He devised to the sons a block of stores and $100,000 each, less what they respectively might be owing him, and also $100,000 each upon the death of his wife, in all $200,000 each and a block of stores.

He devised to his daughter $50,000, and also $50,000 and a block of stores and land in trust. Also $100,000 upon the decease of his wife, in trust, to be paid to her at the discretion of his trustees, in all $200,000 and a block of stores and land.

He devised to the widow of his deceased son the income of $20,000 during life, and the principal to her daughter, his grandchild. He also devised to the grandchild a block of stores and a wooden house and land, and upon the decease of his wife $50,000 more, in all $70,000 and a block of stores and land. Showing an intent to give equal shares to his living children, and one third of a share to the grandchild.

He devised to each of his grandchildren living at the time of his decease $5,000.

Item twenty-sixth. "I give, devise and bequeath all the residue of my estate of every kind and description to . . . my trustees, in trust, to be by them held, invested, preserved, and disposed of as follows:

"The personal estate is to be safely invested in bank stocks or such other securities as will produce the best lawful income. The net dividends, income, rents and interest accruing and received from all this residuary estate, property and fund is to be by said trustees applied, so much thereof as may be required for that purpose, to the payment of the annuities hereinbefore directed to be paid by said trustees; and the balance thereof distributed annually or semi-annually, one tenth part thereof to my granddaughter, Matilda G. Brown, and three tenths part thereof to each of my children, Philip H., John M., and Ellen, during his or her life. At the decease of the last survivor of my children, all the residue of my estate and property is to be conveyed and distributed in equal proportions to and among my grandchildren then living, and to and among the lawful issue of any one deceased and lineal descendants therefrom. The grandchildren taking *per capita*, and their lineal descendants by right of representation."

Codicil. "I, John B. Brown, named as the testator in the will to which this is annexed, do hereby make this present codicil, which I do order and direct shall be taken as a part of my annexed last will and testament, and which in all respects, excepting wherein it is altered or modified by this codicil, I do hereby re-publish and affirm.

"Second. It is my further will and I do hereby direct that if, during the lifetime of any of my children, any of them should die having a minor child or children unprovided with a suitable support during minority, my said trustees shall provide for such child or children a suitable support from the income of the general trust fund created in and by the twenty-sixth clause of my will, during the minority of such child or children, but not beyond the lifetime of all my children."

In apt phrase, the tenor of the will and codicil may be expressed:

A devise of the residue of the estate to trustees during the life of the survivor of the testator's children, the whole income to be distributed, first, in payment of annuities, second, balance annually, one tenth to grandchild, three tenths each to children during their respective lives. Minors of a deceased child to be supported from the income during minority, but not beyond the term of the trust, remainder over to grandchildren, *per capita*.

The testator disposes of his entire estate. He creates a trust for an uncertain term, but for a term that is sure to elapse. He distributes the whole income of the trust annually. He first applies it to the payment of annuities, then one tenth of the balance to a grandchild by name, not during its life, but during the life of the survivor of his children, for, when that event happens, the trust is to cease, and this grandchild, if living, takes an equal share with the other grandchildren in the remainder. Its share although of uncertain amount, stands like the annuities, to be paid from the income, and may properly enough be classed with them. Both, so far as the words of the devise show, might continue beyond the term of the trust. The former, the annuities, if the annuitants survive all the children of

the testator, must be provided for, although the will makes no provision for such contingency. But, the share to the grandchild, were it then living, would be adeemed by the manifest intent of the testator, for it then would share in the principal fund, from the income of which it had previously received its annual share. But the grandchild having died before the testator without issue, its annual share of income, like an expired annuity, ceased to be a charge upon the whole income, thereby increasing the remainder to be divided under the terms of the will. The testator, perceiving that, perchance, some minor grandchild might need support by reason of the death of one of his children, whose share of income was limited to its life, made provision for such contingency by a carefully drawn codicil. In it, not a word is said about the shares specifically devised to his children and to the grandchild, undoubtedly because he supposed such share of income would fall into the balance that he had directed to be distributed annually. Moreover, the grandchild died before he did, and had he supposed that it would be thought that its share was not disposed of by the will, it is incredible that he would not only have made provision for that condition of affairs, but also for the contingency sure to come, some child's decease before the others.

What then is the situation at the death of the testator? A trust had been created to continue during the life of the survivor of his three living children. The income was to be distributed annually. Annuitants were to be first paid, and the balance remained for distribution among his three chilren or not at all. One of these children has since died. It is odd to say its share of income must be distributed under the express command of a will that fails to name to whom it shall go. To avoid such a conclusion, the whole will must be carefully scrutinized to see if intended donees are not indicated. Distribution to heirs follows from an entire absence of testamentary provision concerning a portion of the estate. We have seen no authority for distribution of income to heirs, under a command for distribution that did not indicate who should take the property. In the absence of such indication, it is more reasonable to disregard the

command, and let the income fall into the remainder and be distributed under the general residuary clause. This view seems to be sustained by the authorities cited at the bar. If, therefore, the will does not specifically distribute the whole income in this cause, the portion omitted falls into the capital of the trust as it accrues year by year and becomes a part of the trust fund as fast as received.

The manifest intention of the testator not to die intestate as to any part of his estate; his express direction that all the income of the trust shall be distributed annually; his provision in the codicil for minors of deceased children; his failure to mention in the codicil the share of income bequeathed to a deceased grandchild aided by the policy of the law against accumulations, lead to the irresistible conclusion that the testator intended to bestow the whole income, first to annuitants, and then to his children as a class, to be enjoyed equally and severally so long as more than one of them should survive, and that the survivor should take the whole until his death, when the trust shall cease and the trust fund be distributed equally among the grandchildren and the issue of a deceased grandchild by right of representation. The whole will speaks of equality, first among children and then among grandchildren *per capita*.

Nor does this view do violence to the established rules of law. The bequest of income to the granddaughter lapsed. "It was by implication conditional upon the event that the legatee survived the testator. The law presumes that just so much was taken from the general legatees for the benefit of the particular legatee, and the particular intent failing, the general intent prevails. The deceased legatee having no lineal descendant, R. S., c. 74, § 10, does not alter the result." *Stetson* v. *Eastman*, 84 Maine, 369.

The bequest of income to the three surviving sons in equal shares during, "his or her life," may be considered an estate to be enjoyed as tenants in common, that is, in equal shares, shares paid to each one, with the incident of survivorship. Such taking is not necessarily repugnant to the doctrine of survivorship. *Doe d.* v. *Abey*, 1 M. & Sel. 428. The expressed share of three

tenths each is merely declaratory of the law of enjoyment among joint tenants that all shall share alike. In *Stetson* v. *Eastman*, *supra*, it is said, in England, "a devise or bequest to two or more persons implies a joint-tenancy unless the contrary appears. Here it implies a tenancy in common unless a different intention is indicated by the will and attending circumstances. Our institutions and policies are adverse to the doctrine of survivorship as applied to tenants holding in their own right, although there may be meritorious exceptions." *A fortiori* are they adverse to accumulation.

The court further says: "We are not to be understood as opposing or deprecating the maintenance of joint estates, created by devise or deed, when the testator or donor intentionally constructs such an estate. On the contrary, it is the actual intention that we would ascertain if possible and be governed by it. The case of *Anderson* v. *Parsons*, 4 Maine, 486, cited by counsel, is an illustration of the extent to which the court may go to carry the intention of a testator into effect, in which case the theory of a joint-tenancy of real estate prevailed as having been actually intended by the testator. And still, we should not regard that as so strong a case in its facts for the application of the principle of survivorship as either of the cases cited from the Vermont reports. (*Gilbert* v. *Richards*, 7 Vt. 203; *Decamp* v. *Hall*, 42 Vt. 483.) The divergence between the learned court of that state and ourselves is that, whilst the principle of survivorship is by them apparently admitted, although as appears to us, not necessary to the results arrived at in their cases, we do not admit that the principle, as interpreted by the English courts, now exists or ever did exist in our jurisdiction. We do not contend that the doctrine is never applicable, but that it is not generally so. There are special cases where the principle has a most useful adaptation. Where the will speaks, that governs; but where the will is silent the law speaks and declares the intention of the testator. It declares for tenancies in common — in equality."

True, the court says in the same opinion: "The explanation of the apparent omission to embrace all kinds of property within

the legislative interdiction is that the lawmakers did not understand that the principle ever applied to any property other than real estate. Nor were they, in our judgment, mistaken in that supposition." The meaning is that the law does not make joint-tenancies in chattels or personalty. "Where the will is silent, the law speaks and declares the intention of the testator. It declares for tenancies in common — in equality."

"In ascertaining this intention the court is not confined to any particular clause, but is at liberty to consider all parts of the will, inasmuch as one clause is often modified or explained by another. The intention of the testator in one particular paragraph, if not entirely clear, may be ascertained when other paragraphs or clauses are considered and their bearing and relation one with another, taken into account. The intention of the testator must be the guiding star." *Bray* v. *Pullen*, 84 Maine, 187.

It must be noticed that the income is made a special trust fund for special purposes to be applied annually as it accrues, and that, at the expiration of this trust, the principal is devised to a class of persons then living, share and share alike. This remainder is not vested, but contingent, for the persons to share in it are uncertain and cannot be named until the devise over calls for distribution. So that, should part of the income fund fail of takers named in the will, it cannot be distributed at once among the remainder-men, for they are unknown, and it must be held to either accumulate or go to survivors or be considered intestate property that would have to be distributed among persons manifestly against the will of the testator.

In *Loring* v. *Coolidge*, 99 Mass. 191, the testator devised income in trust, "to be paid equally to my brother and to my sister during their natural lives, and, at their death, the principal I give to my nephews and nieces then surviving." The brother died and the court held that the sister took the whole income during the continuance of the trust. The court says: "The provision that the income is to be paid equally to the brother and sister does not necessarily imply a separation of their interests in the trust. Payment of the income, one half

to each during their joint lives, and the whole to the survivor, is equal as between them. If there were anything to indicate a gift over of income, the payment would be made equal by a division between the survivor and the successors to the share of the deceased beneficiary for life. *Jones* v. *Randall*, 1 Jac. & Walk. 100. The omission to make any other disposition of the income, during the life of the survivor, is quite as significant upon the one side as the omission to provide specifically for the right of survivorship is upon the other."

"In the case at bar, the argument for the heir at law is, that a gift, by will, to individuals described by name, though they may constitute a class, shows the testator's intention to give to them only as individuals. And this seems to be the established general rule of construction. So Lord Cottenham strongly states it in *Barber* v. *Barber*, 3 Myl. & Cr. 697, on a view of the decisions upon this point. 'A gift to a class,' he says, 'implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description, and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator gives a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C. and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child.' Subsequent cases in England have been decided on the same general rule. *Bain* v. *Lescher*, 11 Sim. 397; *Boulcott* v. *Boulcott*, 2 Drewry, 25. See also *Frazier* v. *Frazier*, 2 Leigh, 642; *Mebane* v. *Womack*, 2 Jones Eq. 293.

"But, as this rule of construction depends on the intention of the testator, it is clear that his intention cannot be conclusively inferred from the mere fact that he mentions, by name, the individuals who compose a class. It is only a *prima facie* rule. Lord Cottenham, in the case just cited, says the testator may undoubtedly give a right of survivorship *inter sese*, by expressly directing it. See also *Doe* v. *Abey*, 1 M. & S. 428. And it is not to be doubted, that when the intention of survivorship is in any other way plainly shown by the will itself, or by the will and such evidence of extrinsic facts as is legally admissible for the purpose of showing it, such intention must prevail. No rule of law gives an inflexible sense and effect to a bequest made to children of a family, by their several names, nor to a bequest to them 'equally,' or 'in equal shares.' The construction is to be made, not solely on the bequest itself, but on the bequest taken in connection with the context. *Knight* v. *Gould*, 2 Myl. & K. 298. The word 'equally,' says Lord Thurlow, 'has been held to give a tenancy in common in a legacy,' but that is always with reference to the other parts of the gift. The general intent of the testator will overrule the word 'equally,' rather than the word 'equally' shall overrule the general intent of the testator. *Frewen* v. *Relfe*, 2 Bro. C. C. 224. In that case a residue, given to executors equally, was held, upon the whole of the words, to be given to them as joint-tenants. See also *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215, and *Anderson* v. *Parsons*, 4 Greenl. 486." *Jackson* v. *Roberts*, 14 Gray, 550; *Schaffer* v. *Kettell*, 14 Allen, 528; *Dow* v. *Doyle*, 103 Mass. 489; *Dowe* v. *Johnson*, 141 Mass. 287.

"It is no doubt the general rule of construction, that, when a bequest is made to individuals by name, although they in fact constitute a class, the intention to give them individually is indicated, and thus the share of one dying before the testator will become intestate property. But this rule, founded on the supposed wish of the testator, may be controlled by those portions of a will, if such exist, which indicate an intent that such shall not be the result. If it appears from the whole will that the testator intended his beneficiaries should take as a class,

the share of one who dies before the testator will go to the survivors. The fact that the legatees are a class is important, and the circumstance that they are mentioned by name is far from conclusive that they are not to take as such." *Towne* v. *Weston*, 132 Mass. 516.

As said in *Jackson* v. *Roberts*, *supra*, "we may, therefore, safely adopt the conclusion of the Lord Chancellor Sugden, in *Shaw* v. *M'Mahon*, 4 Dru. & War. 438, that if we can discover in this will sufficient evidence of the intention of the testator that the remaining children should take the share of income bequeathed to" Philip Henry, "there is authority to give effect to that intention; and we are of opinion that sufficient evidence of that intention appears in this will."

The one tenth of income bequeathed to the grandchild, who died before the testator, has been withheld from distribution and added to the *corpus* of the trust. This should not have been. It should have been distributed among the children in equal shares, the same as the remaining balance of income has been distributed. And so much thereof as accrued and became payable before the death of Philip Henry should now be paid, one third to his executors and one third each to the surviving children. And whatever has accrued since then, and shall hereafter accrue, must be distributed as a part of the balance of income and not accumulate.

The two surviving children have, by their deed to the trustees, placed all the income from the estate that they are or may be entitled to receive above one third each, in special trust, for the benefit of their respective families, in case of their decease, and of the family of their deceased brother Philip Henry, so that the entire income distributed and to be distributed under their father's will shall be held and distributed by said trustees among the testator's three children, Philip Henry, John Marshall and Ellen Greely, and their respective families after the decease of either one, in equal shares of one third each during the period of the trust.

This deed creates a trust of property belonging to those who have so declared a trust. The property was their own, and

they had a right to dispose of it at their own pleasure. When accepted by the trustees, it becomes effective and binding upon them, and they may be required by the cestuis named in it to comply with its provisions and pay according to its terms. It declares equality, is meritorious and just and must be confirmed.

Decree accordingly. Costs to be paid out of the estate.

(No appeal was taken.)

In Memoriam.

PROCEEDINGS OF THE KENNEBEC BAR IN RELATION TO THE DEATH OF

HONORABLE ARTEMAS LIBBEY,

WHO WAS AN ASSOCIATE JUSTICE OF THIS COURT, FROM APRIL 24, 1875, TO MARCH 15, 1894, ON WHICH DAY HE DIED AT HIS RESIDENCE IN AUGUSTA, IN HIS SEVENTY-FIRST YEAR.

At a meeting of the Kennebec Bar, held in Augusta, at the March term of the Supreme Judicial Court, following the decease of Judge LIBBEY, Messrs. E. W. Whitehouse, E. F. Webb and Emery O. Bean were appointed a committee on resolutions. The committee subsequently submitted resolves which were unanimously adopted.

At the May term of the Law Court for the Middle District, held at Augusta, Saturday, May 26, 1894, Chief Justice PETERS, and WALTON, FOSTER, HASKELL, WHITEHOUSE, STROUT, JJ., being present:

E. W. WHITEHOUSE, Esq., chairman of the committee on resolutions, arose and said:

May it Please Your Honors: It becomes my most sorrowful duty to announce to this court the death of Honorable ARTEMAS LIBBEY, late a member of this bench, at his home in Augusta, on the 15th day of March, 1894.

Judge LIBBEY was born in Freedom, in the county of Waldo, on January 8th, 1823. In 1825 his family removed with him to Albion, where he continued to reside, attending the town schools, working upon the farm, and acquiring as best he could the rudiments of a common school education. His youthful ambition was for something higher than a farmer's life, and so

at the early age of seventeen years we find him pursuing the study of law in the office of Samuel S. Warren of Albion, where for the subsequent four years he continued his studies, varying it winters by teaching the town schools.

In the summer of 1844, Mr. Warren removing to Massachusetts, Mr. Libbey then entered and completed his course of studies in the office of Z. Washburne, of China, and in the fall of that year, was, at the age of twenty-one, admitted to the bar, and shortly afterward opened an office at Albion. Here he continued in the practice of law with varying success and somewhat increasing clientage, until, at the end of eleven years, he deemed it expedient to remove to a larger town, and in 1858 did remove to and open an office in Augusta.

Mr. LIBBEY here came in contact with such men as the late Lot M. Morrill, Joseph Baker, Sewall Lancaster, Samuel Titcomb, Eben F. Pillsbury, and our still living and honored brother, James W. Bradbury. With these men of rare minds, all lawyers of unusual ability, he frequently met in legal contest; and always with credit to himself. The sterling integrity of the man, his close, clear logic and reasoning, the method and system which he threw into every effort, soon secured for him that marked success which made him a leading member of the Kennebec Bar, and foremost among the lawyers of the State.

First practicing by himself, he, after some years, formed a partnership with Tobias Snow. Mr. Snow removing to Portland, Mr. LIBBEY entered into partnership with W. S. Choate, our present clerk of courts. This relationship having been dissolved, he then formed a third partnership with Daniel C. Robinson, now a prominent member of the Suffolk Bar, which continued until his appointment to the bench.

Judge LIBBEY was a man who cared little for political favor, scorning to seek office, yet, such was his good standing among his fellow men, that office came to him unsought. In 1852 he represented his town in the State Legislature, was a member of Gov. Samuel Wells' executive council in 1856, and in 1875 Gov. Dingley appointed him a member of the constitutional commission. Later in the same year, there being a vacancy on

the bench, and a representative from the opposite political party being desirable, Mr. LIBBEY was, on the 24th day of April, appointed a justice of the Supreme Court. This position he continued to fill, with the exception of a short period from April 24, 1882, to January 11, 1883, until the time of his decease.

By his marked ability and force of character advancing himself to the high position of a justice upon this bench, dying at the age of seventy-one years, high in the esteem of all, with a fair competency and ripe with honors, his, it may be truly said, was the life of a self-made man;

> "Strong to the end, a man of men, from out the strife he passed;
> The grandest hour of all his life, was that of earth the last."

The chairman then presented and read the resolutions adopted May 22d, inst., by the Kennebec Bar.

RESOLUTIONS.

Through Divine interposition Judge LIBBEY having been removed from our midst, and the bar by his death having lost one of its ablest members, the court one of its most efficient, wise and faithful counselors, the bench one of its most upright, dignified and learned associates, and the State one of its most honorable and distinguished citizens;

Therefore Resolved: That Judge LIBBEY, in his quiet and exemplary private life, in his faithful and honest devotion to his professional duties, and in his clear, conservative and learned administration of his judicial office has left a bright and shining example worthy of imitation from the highest and noblest manhood.

Resolved: That this tribute of respect to the memory of our departed brother be presented to the Supreme Judicial Court now in session at Augusta, with a prayer that it be entered upon its records, and that the secretary of the Kennebec Bar be instructed to forward a copy of the same to the family of the deceased, and also to the Daily Kennebec Journal and the New Age for publication in their columns.

Hon. E. F. WEBB then said:

May it please the Court: Memorial is like a painting. To be of value, it must be true in outline, correctly colored, and be faithful in review of the man and his career. Fulsome praise, like an overdrawn picture, does not give satisfaction. Public opinion assigns to every man his place in history.

I have known Judge LIBBEY as teacher, law-student, practitioner, and judge. The same characteristics were prominent in each phase of his life. His was a strong type of well-poised, dignified manhood. Born to no advantages of wealth or position, he raised himself to what he became by his own exertions.

His intelligent will which controlled others, enabled him to control himself and shape his own life in good outline and build a life structure that has honored the State.

He held a high place in his profession. His career at the bar was not of the type denominated brilliant, but rather solid and substantial.

He had learned, and remembered, what is too often forgotten, that on the argument no talent however commanding can supply the place of previous preparation; and that professional success depends far more on the well applied industry of counsel before the argument than on dramatic eloquence in the discussion of the case.

He had a strong memory of the facts of each particular case, and a singularly lucid method of stating his reasons and conclusions.

The death of Judge LIBBEY leaves a wide gap in the membership of this court. His chair stood for not less than one eighth part of the bench.

He came into the work of a judge untried but well equipped, and year by year during his eighteen years of service he grew in the estimation of the bench and bar, and at the time of his death, was recognized as one of the ablest judges of the long line of able and eminent men who have adorned the judiciary of the State. His opinions are models of judicial style. His style was simple, perspicuous, diginified; there was no diffuseness to obscure the sense; nothing which did not contribute directly to bring out and illustrate the point decided. His

legal learning was firm. He was not a voluminous writer; not so much a student of cases as of principles; while he had full reverence for decided cases, his opinions are not a collection of authorities, for they are sparingly cited. The philosophy of the law was what engaged his attention and that he studied as a science. To the high reputation this court has attained as one of the ablest tribunals of the country, he has contributed his full share. His eminent associates on the bench have been long accustomed to give him full credit for the strength he imparted to the court.

Being himself well-grounded in law, he was quick to discern legal shabbiness and very impatient of it. He was not always patient with the lazy, blundering lawyer who loitered in his profession and who presented indolent, careless briefs. He rebuked personal and plunder litigation in all forms. No one ever juggled with justice in his presence. Being exact himself in legal ethics, he required exactness of others. He sometimes spurred such attorneys and for that reason was deemed by some to be austere. But he was not. In truth, he was tender-hearted, although he did not always wear his heart upon his sleeve.

His social friendships were strong and faithful to the end; once formed, they never wavered, never faltered. His strength of character made him bold in thought and resolute in expression. He was generally right in his estimates and conclusions; but men with strong points of character often have strong prejudices. These two elements of human nature are often allies. It was so with Judge LIBBEY.

It is not just to judge a man by detached and separate incidents in his life; to comprehend him he must be judged as a whole.

We mourn Judge LIBBEY as one who has borne ripe fruit, who has run well his race, who has accomplished a long and honorable career.

Hon. EMERY O. BEAN addressed the court as follows:

May it please your Honors: To a few of the present members of the Kennebec Bar, this sad and suggestive memorial occasion

carries the mind back in personal recollections a full half century, to the time when our departed friend and brother entered upon the professional career so successfully filled, and lately, so honorably ended.

Judge LIBBEY was admitted to the Kennebec Bar in 1844, and immediately commenced the practice of his profession in the town of Albion. He resided there until 1858, when he removed to Augusta, where he continued in practice, until his appointment as one of the justices of the Supreme Court in April, 1875.

At the time he entered the profession, among the elder members of the Kennebec Bar, there were many experienced and able lawyers, whose practice was not confined to the county, and whose reputation was well known throughout the State.

Among those then in active practice, and those who about that time entered upon their life work with Judge LIBBEY, are recalled the names of Allen, Evans, Whitmore, DANFORTH and Clay of Gardiner; Clark, Emmons, Dumont, WELLS, Paine, Baker and Gilman of Hallowell; the Williams, Bradbury, Potter, Bronson, Woart, Vose, Lancaster, RICE, Baker, Titcomb and Fuller of Augusta; Boutelle, the Redingtons, Stark, Moore, Noyes, Heath, Stackpole and Chandler of Waterville; Belcher, the Mays, Benson and Burgess of Winthrop; Fuller, Foster, Estes, Morrill, Howe, Gile and Bean of Readfield.

Of all those named, with others, then starting in the race of professional life, there are only now remaining on this side of the silent river, Whitmore of Gardiner, Baker of Hallowell, Bradbury and Williams of Augusta, and Bean of Readfield.

To these surviving members of the bar, who were the contemporaries of Judge LIBBEY, this is a sad record, and may only be softened and relieved by the belief in a continued and progressive existence in the hereafter, coupled with the remembrance of well-spent lives in the faithful and earnest performance of duty.

Happy for us, could we look back upon our past, as filled with a measure of usefulness and honor, such as crowned the years of our departed friend.

While Judge LIBBEY did not mingle in society so much as

many men in his position, his attachments to family and associates were sincere and steadfast. In the quiet of his home, and in companionship with books and congenial friends, his enjoyment of life, and of the fellowships of life, afforded him contentment and happiness.

He was not particularly a demonstrative man in any of his relations or associations.

Sometimes in his hours of leisure and relaxation, story and joke and repartee, were indulged in and thoroughly enjoyed, but as a rule, the strong currents of his life ran in deep and silent channels.

He was truly in love with, and wedded to the work of his profession, and of his judicial office. His pride, his ambition and his enjoyment, in large measure, centered in these.

In his early practice, his love for the law was manifested in his studious and careful examination and preparation of all cases intrusted to his care. His zeal for his clients, his continuous persistent efforts to maintain and secure what he believed to be their legal and equitable rights, were always manifested in his conduct of jury trials, and in hearings before the law courts. But his zeal never allowed him to depart from the rules of courteous practice or to seek advantage in any way, but by fair, open, honorable combat.

In his professional intercourse and business relations, he was the soul of honor. Judge LIBBEY'S practice brought him face to face with the veteran lawyers of the county, and in his first legal contests, he manifested that mental make-up and sturdy traits of character which soon gave him prominence at the bar, and were the sure precursers of that high professional standing and reputation, ultimately attained.

His was pre-eminently, a legal mind. He had the rare faculty of stripping every question of its verbiage, and of laying bare the very sinews of the proposition to be determined. His naked statement of a case, was, in itself, an argument in its support.

He had the courage of his convictions, and never failed to stand by, and act upon them, until convinced of the error of his

conclusions, and then he yielded without question or complaint. For all shams and pretences he had a healthy contempt, which he rarely failed to make known when occasion required.

In trials before a jury, he was generally disposed to let lawyers manage their own cases in their own way, but his suggestions were frequently a great relief to attorneys, and never failed, when duly considered, to give progress to a cause on trial, towards the ends of justice and right. He admired briefness on the part of counsel, in the presentation of causes, and his good taste and judgment in this direction, were admirably illustrated, in his clear, concise, terse rulings, and written opinions.

In Judge LIBBEY'S departure from the duties and activities of earthly life, his family is deprived of most watchful and affectionate protection and care; society, of an upright and honest man; the bar, of one of its most conspicuous and respected members; the bench, of a true, helpful and trusted associate; while the State at large, mourns the loss of a learned, upright and honored judge.

Hon. J. W. BRADBURY said:

May it please your Honors: I have ventured out this morning to manifest by my presence, my respect for the memory of my late friend and neighbor, and your respected associate, Judge LIBBEY, who has recently gone to his reward.

At my age a very few words will suffice. And as I had largely retired from active practice when he became one of your associates, I knew him but as a lawyer, and shall speak of him as such, and leave it to others who practiced under him to portray his character as a jurist.

I remember Judge LIBBEY when he first commenced practice at the bar, and I recall his marked characteristics.

Without the advantages of a thoroughly classical education and of large association with the legal profession, he was well versed in legal principles, and with modest confidence in his own resources he was a self-reliant man.

He had a clear, discriminating mind, logical and well balanced, and consequently well adapted to discern the principles upon which the decision of a cause must rest, and skill in marshaling the facts in evidence that bore upon the vital issue.

With such qualifications and mental qualities, he took a good stand at the start. He was not a brilliant orator. He could not declaim, but what is better, he could reason logically and with strength and force.

I had been years in practice when he was admitted, and in the trial of causes I soon found him a strong and vigorous opponent. He was a fair practitioner with none of the pettyfogger about him. But he carefully guarded and secured every advantage his client was honorably entitled to have.

With increasing business and increasing power he steadily advanced to the front rank in his profession at a bar of ability; and he maintained his high position until his elevation to a seat with your honors.

I always regarded him as having a judicial mind, possessing those qualities that would make him useful in a body of legal associates; and I recommended his appointment to the bench, years before he received the distinguished honor.

On the first occasion when this court-house was occupied by the court, sixty-four years ago, I was present. The law term of this court, was then, as now, held in May. Chief Justice MELLEN, a dignified and courtly gentleman of the old school, presided. His associates were Judges WESTON and PARRIS. They did well their life work and have passed away. With two of them I became well acquainted, and I met the chief justice occasionally in society.

The next generation of judges of this court were SHEPLEY, WHITMAN and NICHOLAS EMERY. I was acquainted with them all and tried cases before each of them.

With SHEPLEY I read law a year or more and learned to love and venerate him.

It would be difficult to constitute a better court anywhere than SHEPLEY and WHITMAN alone would make. I next recall of the judges that I had the honor to know, GOODENOW, KENT, CUTTING, HATHAWAY, HOWARD, TENNEY, WELLS, APPLETON, MAY, STEPHEN EMERY, DANFORTH, with all of whom I was acquainted.

They all filled well the high stations they occupied, and have all gone to their reward.

Judge VIRGIN was of a later period, and his high merits are known to you all.

In this hasty recall of the past, without any books to refer to, I have probably omitted some well-known names.

It has been my lot to witness three generations of judges and three generations of lawyers that have passed away.

And last our neighbor is taken from your ranks. It found him at his post of duty.

Yours is a noble duty. It is to seek the truth and right, to ascertain, determine and enforce justice between man and man. And God has set his mark of approval upon it. He has so constituted the human mind that such exercise of its powers as you duly require is a healthy exercise, and tends to longevity, as is evidenced by the high average of age that jurists attain.

But the end comes to all; and the faithful discharge of our duty to God and to our fellow-men is the best preparation for the life hereafter.

Remarks of LESLIE C. CORNISH, Esq.

May it please the Court: I well remember the first time that I ever saw Judge LIBBEY. It was in the trial of the somewhat celebrated Hoswell murder case at the October term, 1870, of the Supreme Court in this county. His Honor, Judge WALTON, was the presiding judge; His Honor, Judge WHITEHOUSE, was county attorney and Judge LIBBEY was of counsel for defense.

I was attracted to the scene by idle curiosity but the proceedings were of intense interest, and the striking presence and manner of Judge LIBBEY made a lasting impression upon my mind. He was called to the bench some years before I was admitted to the bar but I can well imagine his power as a practicing attorney.

In the first place, his acute legal perception enabled him to discover the vital issue of every case. The late Joseph Baker, his adversary at this bar in nearly every important cause for many years, once told me that he never saw any other attorney who possessed the faculty of seizing upon the pivot of a case with the skill of Judge LIBBEY.

In the second place, his shrewd common sense and practical judgment combined to bring out the facts touching that issue with crystalline clearness. He never could have wasted much time nibbling about the edges but went directly to the heart of things.

And in the third place, his commanding presence and his decisive and incisive manner must have driven home those facts into the minds of court or jury with sledge hammer force. His countenance alone must have gathered in nearly half the jury to begin with, and his marshaling and handling of facts would bring the rest, more than his share of the time.

Of so-called eloquence he knew little; of the polished declamation of the schools he was equally ignorant. He doubtless cared for neither, but he possessed in an unusual degree that power to compel assent by the forceful statement of every day facts which is an attribute of only strong minds. His arguments must have been singularly free from flowery metaphors and historical illustrations, but he could talk as a plain man, with something to say, to plain men with something to do, and with a single homespun thrust, let the air out of many a rhetorical balloon. It is no wonder he was a dangerous antagonist at the bar.

As a member of the court he retained his individuality. His conception of the duties of the *nisi prius* judge would not permit him to sit idly by and allow what he considered the wrong side to prevail, though in accordance with legal methods. He did not believe that the court is merely a starter or time-keeper in the trial of a cause but that it is an important factor in reaching a just conclusion.

The members of the bar have often felt the strength of his hand in the guidance of a case, and when it fell too heavily there have doubtless been some complaints; but it should also be said that they have always felt that the strength was used impartially and that it was their cause and not themselves that received the chastisement.

As a member of the law court his work bore the stamp of the man. His mind was by nature a legal mind. It had not received

the aid of a classical education or of wide culture, but it was naturally strong and accurate; it worked like a logical machine and carried him from premise to conclusion with mathematical precision. He believed in cold law and his conservatism would not allow him to wander far from the beaten tracks. Though deeply versed in the principles of equity yet he held the reins with somewhat of legal tightness. I think the members of the bar will agree that he rarely granted an injunction in an equity proceeding. His written opinions are models of strong, close logic; free from all ornamentation, they always decide the point squarely and clearly. They could not be otherwise; what he thought, *he* thought and no one else for him, and what he said, *he* said in his own way. The judicial structures that he built were like the house in which he lived, with neither towers nor turrets, verandas nor bay windows, but with a firm foundation of solid granite, a superstructure plain but substantial and "four square to every wind that blows."

Such men are rare. They seem to be rarer now than ever. It sometimes seems as if the old growth of oak had been quite exhausted and as if the second growth were of less hardy grain. That, however, may be owing to the perspective, but certain it is that such strong characters as Judge LIBBEY's are not often met with; he was unique; he resembled no one else. It might not be best to have the court made up of eight such minds; out of the mingling of diverse intellects and temperaments the wisest conclusions are doubtless reached, as white light is the union of seven distinct colors. But the strength which he added to the bench will be granted by all, and especially by your honors who were associated with him. During the twenty years of his judicial life he rendered the State invaluable service, and left a record of which one might well be proud.

Born in comparative obscurity, deprived of early advantages, he rose to an honored and commanding position because of his innate strength of mind, persistent industry and strict devotion to his profession.

Judge LIBBEY will long be missed. The impassive face, the whitened locks, the dignified bearing, made him a marked

figure wherever he went. He looked the ideal judge. But to those who knew him his legal and judicial attainments were no less marked than his personal presence.

He lived a serious, genuine and rugged life, and died as he would have wished, in the midst of judicial labors. It is fitting, that here in this Court House which was the scene of his early successes as a lawyer, and at this law term at which he so often participated as a judge, we should pause a moment to pay our tribute of respect to his memory. Examples like his deserve our recognition.

A. C. STILPHEN, Esq., said:

Twenty-five years ago I was a student in the office of ARTEMAS LIBBEY, then recognized as one of the leading lawyers in the State, and in the intimacy of that relation saw his life as revealed in his untiring devotion to the cause of his client, his careful gathering, massing and application of all the evidence bearing upon it, in his comprehensive knowledge of the law and his faithful and impartial declaration of its principles; and in it all and above it all, his strict fidelity and love for honor and for truth.

Then was begotten an affectionate regard for, and confidence, in him which was strengthened and ripened as in after years, when often associated with me, he brought to my aid the experience and clear knowledge which I lacked.

As instructor, as associate or opponent, and as friend, he was ever true to his own convictions of right and manhood and truth; uninfluenced by fear or favor; self-contained and seeking self-respect before that of others; superior alike to the idle breath of praise or blame; and because of this he held the respect and admiration of all who truly knew the richness and strength of his nature.

It was because of this that he, a Democrat, was, at the request of Republicans and by a Republican governor, raised from the bar to the bench, the office seeking the man and not the man the office, and on this higher plain the same characteristics shone but the more brightly and proved the wisdom of clothing him in the ermine which he honored.

Words of praise can add nothing to the simple record of the life of Judge LIBBEY. That speaks louder than any words of ours.

The record of his life is embodied in the records of our courts, and what we say here to day is but to mark it and perchance attract to it the attention of coming men, who by that record may mould their lives to a fuller and more independent manhood than would otherwise be theirs.

The respected instructor, the appreciated associate, the venerated judge, has passed from us, and is with us but in memory, while the warm heart we had found in him, the friend we had learned to love, the noble, whole-souled man still has a place in our hearts, and our manhood is enriched by this association and by the part he has borne and will ever bear in our lives.

In the fulness of years and still in the rich maturity of his powers, he has gone on before us to the higher court where a life well spent here finds its full fruition in the further life beyond.

Hon. ORVILLE D. BAKER:

May it please your Honors: We cannot let the dead pass without the last salute. Judge LIBBEY was a striking and impressive figure, a survivor of what I think we may fittingly call one of the great periods of the Maine judiciary. A few other of those great names are still spared to us, and are held in affectionate esteem by every member of the bar throughout this State.

The career of Judge LIBBEY is full of hope and inspiration to the younger members of the profession. Particularly is it so to those young men who, perhaps, find themselves unable to secure all those advantages of liberal and classical knowledge which they would like to have. For Judge LIBBEY's career came to him as the result of persistent work and the full employment of a masterly mind. His career at the bar brought him one of the foremost places in all this State. Matched himself against great minds, antagonized in the courteous walks of the profession by men of ripe experience, of great ability, of trained

knowledge, Judge LIBBEY took and kept his place at the very front. No man was ever opposed to him or associated with him in a case but would recognize the power of the man. His analysis of a case was singularly lucid; his grasp of its facts was secure; his knowledge of its law well prepared and sufficient. If testimony was to be analyzed, no man could ever more searchingly bring forth the truth or more unerringly detect the falsehood. His cross-examinations were marvels of professional skill. In argument he addressed himself strictly to the great facts of the case, which he so readily recognized, and suffered nothing to draw him from their close grasp. The arts of oratory were a thing he sought not to cultivate. Mere phrases or tricks of rhetoric had for him no attraction. He massed his facts solidly; he presented his case logically; he brought to its discussion a marvelous memory, a retentive grasp of facts, an intense personality, and, perhaps, above all, a masterful mind; and these things formed a combination which gave him success and gave him power.

Of his career upon the bench it is not fitting, perhaps, that we should speak. His distinguished associates here have a more just appreciation of his great legal services as their associate. If any man came to the knowledge of law except by the ladder of toil, that man, it seems to me, was Judge LIBBEY. Not that he did not possess the power of labor and did not exercise the faculty of labor, but with him it seems to me, legal knowledge was in some sense intuitive. I have never met a mind that to me seemed to have a more instinctive power of unravelling the intricacies of a novel legal proposition, a question of novel procedure, perhaps, or some new point of law, than did Judge LIBBEY'S. I have never met a mind which would proceed to unravel and lay on the one side or the other the various threads that led to the correct conclusion as Judge LIBBEY'S did. It was to me a marvellous piece of mechanism. I believe, may it please your honors, that Judge LIBBEY is entitled to be called one of the greatest lawyers that New England has ever produced in the matter of pure legal intelligence and power to master and marshal facts.

Intellectually he had what may best be termed a compelling mind. He did not seek so much to persuade, as by clear and lucid arrangement and statement to compel conviction. He had little or none of that oratory which steals away men's hearts. He seldom appealed to the feelings, but stated with wonderful cogency, and sometimes resistless power, the bare, outlined, essential facts.

In his personal and private life, as we knew him, he was a rare specimen of American manhood. His integrity shone like a great pearl against the greed and gain-getting of a baser world. No man was ever suffered in his presence, on the bench or off it, to seek injustice without rebuke. He had a mind single to the just and right. He followed that true line undeviatingly himself, and he meant that all others, so far as he could control them, should do the same. And yet his character does not seem to me to be the untried and flawless whiteness of marble, but rather the rugged strength of granite, where the common elements, the quartz and the felspar, are intertwisted into strength, and the mica flecks the whole with soft touches of human nature; and this combination made a great character, a strong personality, intense in will, dominating in intellect, superior in faculty. And yet, with all the stern granite of his nature, there were many an unsuspected cleft where tender impulses nestled and clung like flowers, and found soil enough and gentlest care from him. A man of strong feelings and deep convictions, he took life seriously, earnestly and faithfully. And his end became his work. He died, I believe, as he would best have loved to die; died with the armor on; died with no belittling of his faculty; died in the stress and tide of work; died in the full possession of all his powers. His passing away was from the very midst of active duty. Silently, perhaps, in physique he had faded during the two or three years preceding his death, and yet no one of us realized that the end was near, and he himself, perhaps, as little as the rest. But the hour struck, and in the midst of the active exercise of his profession, admired and respected by all the people of the State, he passed from our midst, and has become a name and a dear memory to us who are left behind him.

I could not, may it please your honors, let this escaping moment pass without having said the word which to me seemed fit in honor of that memory, for to me he was a companion and something more even than a friend.

Remarks by the REPORTER OF DECISIONS.

If it please the Court: This beautiful and solemn custom which we observe to-day is not confined to one county or bar. Members of the legal profession throughout the State are always decent not to fail in offices of tenderness to pay meet homage to our noble dead. I do not, therefore, feel that, as a member of the bar of another county, I am intruding by adding a brief tribute to the memory of Judge LIBBEY besides the tender, true and feeling words already spoken by my brothers of the Kennebec Court.

My brethren have united in perpetuating in an imperishable record the life and services of one of their own number, at the bar and on the bench. The portrait which they thus hand down to all time, embalmed in love and veneration, is that of the honest man and judge who won his way to the highest honors in life, relying solely on his own merits.

The key note of his success is Loyalty. He was loyal to his profession as counselor and attorney; he was loyal to the State as an honored and ever trustworthy judge.

An intimacy of a few years has given me an opportunity to learn something of the minor lights and shades which the historian so often seeks in vain to discover and which blend together so harmoniously in his character. Emerson says, "the gentleman is always serene." This attribute was an ever-present factor in his life, constantly reminding us of its truth. Yet I can imagine that a shifty witness, writhing under the eye of the judge, who was merciless to liars and deceivers, could never believe that underneath all that quiet demeanor and sternness of aspect beat one of the tenderest hearts in the world.

He had but little of what society calls small-talk, and people were often impressed with the prolonged silence that would come into the conversation. I used to think they were in con-

demnation of every-day-chatter until I learned better. He loved to hear merry talk and could join in it too, but his words were few because they all meant so much. We are often told that it is those who exaggerate who should be more careful of their language, but I think the responsibility rests with those whose every word has an exact meaning; to say but little is a necessity with them, for with a very few words a small subject is exhausted. But if he talked little, he talked well on all subjects for which he cared, and which occupied his thoughts.

He was a great lover of a good story and had great enjoyment in telling or hearing one.

He liked the old authors. He was a lover of Sterne, and, at his best, found his humor irresistible; and his pathos always found a quick response in his tender heart.

Gibbon was another favorite author. In modern fiction of which he was a moderate reader, I recall *Lorna Doone* provoking his laughter with the absurdities of *Vice Versa*.

Walking was another thing he enjoyed very much, and he never confined his walks to those streets to which citizens point with pride where are the finest residences and the greatest signs of wealth. He loved rather to seek out the streets where the working people lived and judge of their condition; even the homes of the very poor were interesting to him, and in the most prosaic surroundings he could find matter for thought and interest. He liked to go up and down the river during his terms of court at Calais, enter the sawmills, watch the men at their work, stand listening to the roar of the water pouring over a dam, through sluices, or dashing over falls; a lover of nature in every aspect and a lover of all men who are simple and natural.

He might not have had more friends than other people, yet his friends had this characteristic, they loved him more, men and women alike. One of them said to me recently, "It would seem like botanizing on a grave to try and analyze the reason of my loving him. It was because that majesty, that belonged to his face and person, so extended to his mind and heart that

there was nothing about him that did not win respect and inspire love."

So his name will grow brighter as time marches on to the—

"One far-off divine event
To which the whole creation moves."

At the conclusion of the remarks of the members of the Bar, Chief Justice PETERS, in behalf of the full court, responded as follows:

Gentlemen of the Bar: Again is this court called upon to join the bar in commemorating by appropriate proceedings the life and character of one of its late members.

It has fallen to my lot, since I came upon the bench, to speak for the court in honor of the memory of quite an unusual number of my judicial associates, the very mention of whose names excites anew our admiration of their virtues; the list including the names of APPLETON, CUTTING, DANFORTH, BARROWS and VIRGIN. And now it becomes my sad but at the same time satisfactory duty to respond to the resolutions of the bar in honor of the memory of our late and personally-beloved associate, Judge LIBBEY. The scene reminds me that the hand of the reaper has been busy in gathering from the worldly field those who fifty years ago started with me in the race of life as professional associates. Judges VIRGIN and LIBBEY were a few months only younger than myself. I am beginning to feel that I am to-day standing not far from the verge where I might exclaim for the loss of friends in the words of the old poet, feelingly quoted by my official predecessor on a similar occasion:

"How some of them have died, and some they have left me,
And some they are taken from me—all are departed—
All, all are gone—the old familiar faces."

Judge LIBBEY and myself were early acquaintances, and I have ever entertained the highest respect for him as an associate and friend, as a lawyer and judge. I have no fear that I may overrate him in anything I shall say on this occasion. There

was nothing in his character or conduct requiring defense or excuse from anybody. Doctor Samuel Johnson, of literary fame, thought the old Roman maxim, *nihil de mortuis nisi bonum*, should be changed by substituting the word *verum* for *bonum*. I have no doubt that our late brother, could he tell his wishes, would ask that nothing but the truth be spoken of him. He was himself always an ardent lover of the truth.

He was a man of a strong nature and of a strong mind. All his moral and intellectual qualities were cast in a large mould. For many years before he became a judge he stood in the very front rank of his profession as a lawyer, and he certainly achieved great reputation and distinction in his career on the bench. He must have felt at an early period in his life a consciousness of his natural powers, to have been imbued with an ambition to pursue a professional employment, living, as he did in his youth, in modest if not adverse circumstances in a quiet country town where the opportunities for an education were limited and the encouragements for success certainly not great.

All the practical qualifications for a successful lawyer and judge were readily acquired, because they were natural to him. His perceptive qualities were remarkably quick and clear as well as strong. He was also endowed, as naturally follows from quick and clear perceptions, with rare powers of discrimination; and it was universally accorded to him that he possessed a good deal of natural sagacity and common sense.

These qualities were supplemented and supported by a strong will. He was a resolute, self-reliant man, independent in thought and action, and unalterable in his inclination to do what he believed to be right. He knew his own mind and always had the courage to act upon his own convictions. It may be very well supposed that one who possessed such strong characteristics would be likely to have such a degree of faith and confidence in his own views as to adhere to them with a good deal of tenacity. In some instances he may have erred in this respect. Still no one of his associates was ever overruled in fewer cases than he. And he was a broad-minded

man in all respects, generous and just, liberal and true. There was nothing narrow, perverse or selfish in his composition.

Withal he was a sincere and natural man. He manifested a good deal of self-respect without any tinge of vanity or egotism. No disguise was ever designed that could be made to fit him. He hated all disguises and false pretensions.

A noticeable trait in his character was the *directness* with which all his work was accomplished; a quality of mind which enabled him to discard to a great extent all collateral and superfluous materials in the composition of his opinions or in the construction of his charges to the jury. This admirable characteristic was seen in all his life. His mind traveled on a shorter and sharper route than the minds of most men, going almost in a straight line from premises to conclusion. He wasted no strength where strength was not required. When at the bar, his arguments before the court and before juries were brief and pointed and very effective. He sent bullets rather than scattering shot. Never was he anywhere diffusive or wasteful of words. I venture to say that not a useless sentence can be found in all his written opinions. Such self-control had he that he was rarely, if ever, loud or demonstrative but was calm and unruffled in voice and manner, although he naturally possessed great spirit and the internal fires might be working within him. His words were soft, but his arguments were hard—they were hits. He was gentle, but his very gentleness was strength. He was an attractive figure when standing before a jury in the role of an advocate, his arguments being always impressive and sometimes infused with a mental fervor amounting to eloquence. His charges to the jury from the bench were also always clear, concise and logical, sometimes very forcibly and impressively delivered.

He exhibited during all the time he was in judicial office a great fondness for constitutional questions, and he was familiar with all the cases involving such questions in the reports of the Supreme Court of the United States. Some of his own best opinions relate to constitutional law. All of his opinions in our own reports, though written with unpretentious style and

with no aim for the attainment of high literary merit, are notable for their clear expression, their brevity and precision, and the logical and conclusive argumentation exhibited in them.

Still he did not particularly fancy that branch of his judicial duties, and he expressed an apprehension, when he came to the bench, that the writing of opinions might be irksome to him. He felt, however, great contentment with the duties of the *nisi prius* terms. In that field he displayed a remarkable patience and endurance. His terms were never too many nor too long for him. They never were shortened from petulance or for his personal convenience. I never knew him to express the least objection to any work assigned to him. He exhibited great practical sagacity in the matter of receiving and weighing evidence and in his explanations of it to the jury. He had that "happy medium of promptness and deliberation," which is necessary for the easy and successful accomplishment of business. Possessing, as he did, a thorough knowledge of the common law, and a love and appreciation of its principles, the work of applying its principles to ever-changing and differing facts was evidently a fascination to him.

Not only was his memory a store-house for a vast amount of common as well as legal lore, but he had quite a masterful faculty for grasping and comprehending facts and intuitively perceiving their true force and effect. He had rare judgment in this wide field for investigation. How full of significance are facts in their infinite forms when truly interpreted! How full of light and logic and even of eloquence to some minds, and how full of darkness merely to other minds! It has been said that any solid block of marble may contain beautiful images which the hand of the sculptor only can chisel out. So does a mass of facts often contain deeply imbedded ideas which only the mind of a master can bring to the light. Said Edmund Burke on this idea: "Facts are to the mind the same thing as food to the body. On the due digestion of facts depend the strength and wisdom of the one, just as vigor and health depend on the other. The wisest in counsel, the ablest in debate, and

the most agreeable companion in the commerce of human life, is that man who has assimilated to his understanding the greatest number of facts."

It may readily be supposed, from what has been said of the mental and moral characteristics of our late associate, that he would be, as he was, particularly helpful in consulting over cases with the other judges. He was really a model for example in the consultations. Invariably calm and patient himself, courteous and considerate towards others, cautious in the expression of his views, and never unduly moved by any opposition to his views from others, no man in my day has had, or was entitled to have, more influence in the settlement of questions on such occasions than he. It is within my recollection that in a few instances at least he was extremely successful in some interpretation of facts or some expression of opinion which carried conviction to all minds, dissipating all doubts and differences previously existing among the judges; the incident reminding us of the success of the skilful bowman in the scene described by Tennyson:

> "When one would aim an arrow fair,—
> But send it slackly from the sling,
> And one would pierce an outer ring,
> And one an inner, here and there,
> And last the master bowman, he
> Would cleave the mark."

By his long-continued and arduous labors in all branches of the judicial service he has exerted an influence that will be permanently felt in the jurisprudence of our State. His own strong individuality has become impressed upon the pages of our judicial reports. He will long be remembered by the bar and by the public as a very able and honest judge. But not alone for the value of his ordinary judicial services will he be remembered by the people of Maine. The State is deeply indebted to him for the conscientious and courageous part acted by him in the scenes occurring in the year 1880, when a plot was meditated by misguided men to wrest the government of our State from the hands of its legitimate

possessors. In the necessarily hurried consultations held by the court, to consider questions of great public magnitude submitted for its opinion by the state officials, Judge LIBBEY was not a silent actor,—was not led but was himself a leader. His clear and strong understanding and his cool and well-balanced judgment excellently fitted him with ability to cope with the questions which arose in that momentous crisis, and enabled him to be of service in exposing the weakness and folly of the devices of the would-be political plotters. The seemingly formidable plot, having neither moral nor legal ground to stand upon, failed. Some of the bitterest of his political associates manifested spite against him because he failed to play the part of friend and partisan in furtherance of their wishes. But his honorable conduct will be commended by the better sentiment of all parties, and the State will not soon cease to respect the memory of one whose strong hand struck such hard blows against that memorable conspiracy.

The private life of Judge LIBBEY was worthy of all commendation. Although of quiet and modest manners, he was eminently social in his disposition. His bright wit and intelligence always made him companionable and interesting. He was very fond of his friends, loved the society of men and women and of children, and was fond of all kinds of domestic animals. He was strongly attached to his horse and dog, whenever he had either, and would kindly notice the pets of his friends. He was fond of nature in all of its aspects. All these features of disposition are proof of the fact that his heart was filled with feeling, sympathy, affection. He was dignified and imposing in personal appearance, a noticeable man everywhere.

Death came upon him while he was in the midst of the business of a term of court, struggling in a weakened physical condition to do all his duties to the end. But the spirit was stronger than the flesh. He became weary of his heavy burdens and has been laid at rest. He—

> "Has gone from this strange world of ours,
> No more to gather its thorns with its flowers;
> No more to linger where sunbeams must fade;

Where, on all beauty, death's fingers are laid.
Weary with mingling life's bitter and sweet,
Weary with parting and never to meet,
Weary with sowing and never to reap,
Weary with labor and welcoming sleep,"

his mysterious soul has fled away. The intelligent and beaming face, the fine and attractive form, the pleasant and simple manners, are to be familiar to us in his person no more; but the image of them will be imbedded in our hearts forever. But the last word must be spoken.

The court cordially concurs in the resolutions presented by the bar; and, in honor of the memory of the deceased, the clerk is ordered to spread the same on the records of the court. And, in further honor of the memory of the deceased, the court will now be finally adjourned.

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ERRATA.

Page 112. For W. B. Clark, read W. B. French.
Page 427. For R. S., c. 100, § 1, read c. 120, § 1.

MEMORANDUM.

On the twelfth day of April, 1894, Honorable SEWALL C. STROUT was appointed a justice of this court in the place of Mr. Justice ARTEMAS LIBBEY deceased, and took his seat on the bench on the twenty-fourth day of the same month, at a session of the court held at Houlton in the County of Aroostook.

CHAPTER 217.

An Act in relation to suits at law and in equity in the Supreme Judicial Court. . . . .

* * * * * * * *

Sect. 11. No justice of the supreme judicial court shall sit in the law court upon the hearing of any cause tried before him, or in which any of his rulings are the subject of review, nor take any part in the decision thereof.

Approved March 17, 1893.