REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By CHARLES HAMLIN,

REPORTER OF DECISIONS.

MAINE REPORTS,

VOLUME LXXXVII.

PORTLAND, MAINE:
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JUSTICES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN A. PETERS, CHIEF JUSTICE.
HON. CHARLES W. WALTON.
HON. LUCILIUS A. EMERY.
HON. ENOCH FOSTER.
HON. THOMAS H. HASKELL.
HON. WILLIAM PENN WHITEHOUSE.
HON. ANDREW P. WISWELL.
HON. SEWALL C. STROUT.

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, 1894.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May.

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

EASTERN DISTRICT, at Bangor, Third Tuesday of June.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL and STROUT, JJ.

WESTERN DISTRICT, at Portland, Third Tuesday of July.

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

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

GEORGE W. MERRILL FURNITURE COMPANY

vs.

GEORGE F. HILL.

Penobscot. Opinion August 29, 1894.

Sales. Delivery. Waiver. Subsequent Purchaser.

In a contract for the sale of personal property, where no agreement is made as to credit, the law presumes that the parties intended to make the payment of the purchase price and the delivery of possession concurrent conditions. The vendor has the right to retain possession until the purchaser is ready to perform his part of the contract. Or, if the goods have been delivered with the expectation of immediate payment, and this condition is not performed, the vendor may retake possession of the same.

But although a sale of this character is conditional and a vendor has a right to retain possession or to retake it under certain circumstances, these rights may be waived by him, in which case the sale becomes absolute and the title vests in the purchaser.

The mere fact of delivery, without a performance of the condition of payment, is some evidence of a waiver of this condition. It may be controlled or explained by other facts and circumstances, but this, with all of the other evidence in the case, should be submitted to the jury upon the question of waiver.

Where the property passed by delivery in the first instance, an unrecorded instrument made two months later, purporting that the title should remain in the vendor and that the property was leased to the vendee for a stipulated monthly rental until a particular sum in all was paid, when the payments should be treated as purchase money and the title pass, is ineffectual against an innocent purchaser for value without notice.

ON EXCEPTIONS.

This was an action of replevin, begun August 23, 1892, to recover two settees manufactured by the plaintiff for one Coburn, proprietor of the Penobscot Exchange, Bangor, and delivered at his hotel in the spring of 1891. The defendant as vendee of Coburn, in September following, claimed that the title to the settees had passed to Coburn; and that it was a question of fact for the jury to determine whether or not there was a sale and delivery and whether or not the title passed from the original vendors to the original vendee.

Plaintiff put in evidence the following documents:

"October 5, 1891.

"Mr. F. W. Coburn, to G. W. Merrill & Co., Dr.

April 25,	To merchandise as per bill rendered,	$51.00
July 25,	By cash to date,	20.00
		$31.00

(Copy of Document called Lease in the Testimony.)

"Bangor, April 25, 1891.

"Mr. F. W. Coburn this day hired and received of G. W. Merrill Furniture Co.,

One oak settee, leather, ten feet,	$35.00
One cherry settee, carpet, eight feet,	$16.00
	$51.00

"For the use of which I promise to pay the said G. W. Merrill Furniture Company, ten dollars on the receipt of the above furniture, and the further sum of ten dollars for each and every month I shall keep the same; and the said furniture to be returned to them on demand, and not to be removed without the written consent of G. W. Merrill Furniture Company. Provided, however, that if I shall well and truly make all said payments in manner as aforesaid until the same shall amount to the full sum of fifty-one dollars, which sum is the estimated value of said property, then said sums are to be treated as purchase money and said property is to become mine, otherwise the same is to be and remain at all times the property of said G. W. Merrill Furniture Company, with the right to take the

same without process of law and entering my premises therefor without hindrance from F. W. Coburn.

F. W. Coburn."

"Witness, N. W. Littlefield."

N. W. Littlefield, called by plaintiff, testified as follows:

"Mr. Coburn came to our store about the 20th of March, 1891, and wanted two settees, one upholstered in leather ten feet, and the other eight feet, upholstered in carpet. They were made and delivered. They were made and delivered as all sales are and considered cash payment. We made the settees and took them over there and in a week or ten days afterwards I sent the bill. About three weeks afterwards the money had not come in and I sent our boy over once or twice to Mr. Coburn to collect the bill. After that, along in April, about the 20th, I went over and saw Mr. Coburn myself. He was 'very sorry,' he said, 'but he could not pay that bill to-day.' 'All right,' I said. He said, 'come in again in about a week.' I went over in about a week and he could not pay it then. I said: 'Mr. Coburn, I think the best way is to give a lease and you pay us ten dollars down and ten every month thereafter until it is paid up.' He said: 'All right,' he would do it. I went over and met him the 19th of June, and he paid me ten dollars, and I took it over to the store. When the month came round he could not pay, but he paid five dollars July 22, and when we went over next time he paid five dollars more; and that was all that was paid when Mr. Hill took the house. The settees that are replevied, and returned to us, are the same ones that we delivered to Mr. Coburn. They are in our office now."

The presiding justice gave the following, among other, instructions to the jury: "These goods were delivered and there is no evidence that there was any particular time for payment, and therefore, the presumption is that the payment was due immediately. It went along. Mr. Hill was not the purchaser before this document, which they call a lease, was taken. Now, the seller, claiming that he had not lost the title to the property, and relying upon his first conditional contract, makes another and different conditional contract. It would have been more

appropriate if it had been signed by Merrill and the other party, but it is the same in effect. They make another conditional document. It is not a lease, but a conditional sale. It was an agreement between these parties, that the seller had the title and should keep the title until he got his pay in a certain manner of payments in the instrument named. Now, my idea is that they could substitute that old contract for the new, nothing intervening. Had Mr. Hill come in before, in my mind, that would have been another thing; but his purchase was made subsequent, and the tenor of the contract is that the seller holds the title and the buyer does not have it, and is not to have it until he makes full payment. Now, this manner of keeping the accounts is not inconsistent with this; it is buying, and he did buy, if the witness is not questioned, on the date which he took it. They used the word 'lease' in it, but they got no particular rights under that phraseology.

"Mr. Merrill cannot take and keep this property, because Mr. Coburn and Mr. Hill under him can go and take the property by paying the amount due. There is no forfeiture. Now, then, if Mr. Merrill and others — his firm — agreed to manufacture and deliver, and did manufacture and deliver, and made no waiver, by any agreement, of his lien upon the property until he got his pay, and it ran along even from April till June, and then they substituted this new contract for the old one, my opinion as matter of law, is that that contract holds the property until they have got the pay according to the agreement, the original price. . . .

"There is a distinction. They sold in one way and they substituted a new bargain before any purchaser or innocent person became interested in the property, and I think Mr. Hill's purchase afterwards makes no difference. . . . If you believe the testimony, I do not see any other way but to give a verdict for the plaintiff."

Other facts are stated in the opinion.

A. L. Simpson, for plaintiff.

Up to April 25th the only trade which had been made between

the parties was that the plaintiff should manufacture the settees for Coburn and as he had not asked for any credit and as no credit had been given, the settees remained the property of the plaintiff; the title still remained in him the same as in *Stone* v. *Perry*, 60 Maine, 48; *Seed* v. *Lord*, 66 Maine, 580. Coburn then as well as the plaintiff regarded the title to the settees in the plaintiff; their acts and the agreement prove conclusively that both parties considered the title in the plaintiff.

At the time the agreement was made between Coburn and the plaintiff, the title to the settees being in the plaintiff, they had a right to make any agreement in relation to the disposition of them that they pleased; and they made this conditional agreement with Coburn and he signed it.

Defendant has no occasion to complain of this agreement, for his rights were not interfered with in making the agreement; at that time he had not acquired any rights or interest in any of the property or furniture in the hotel.

This agreement having been made a long time before he made any purchase of any of the furniture in the hotel he could not have been affected by it. It was not for the plaintiff to notify him that he was the owner of the settees, for he could not be supposed to believe that Coburn would attempt to sell that which he did not own. It was the duty of the defendant to inquire into the title of the property that he was purchasing. *Caveat emptor* applies.

As Coburn did not have the title to the settees he could not give any title to the defendant. He might have fulfilled the agreement made by Coburn with the plaintiff and in that way acquired title to the settees.

Counsel also cited: *Gross* v. *Jordan*, 83 Maine, 380.

H. P. Haynes, *A. W. Wetherbee*, with him, for defendant.

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

WISWELL, J. On about March twentieth, 1891, one Coburn, then the proprietor of a hotel in Bangor, ordered of the plaintiffs

two settees, the property replevied, the same to be manufactured by the plaintiffs. On the twenty-fifth of April following, the settees having been completed were delivered at the hotel occupied by Coburn. Between that time and the nineteenth of the following June the plaintiffs called upon Coburn at various times for the purpose of collecting the pay for these articles, and on the latter date, nothing having been paid up to that time, and Coburn being still unable to pay, one of the plaintiffs proposed that Coburn should sign the written instrument called by the witnesses a lease, but in fact a contract providing that Coburn should pay the plaintiff ten dollars per month for the use of the articles until the sum of fifty-one dollars was paid, when the sums so paid should be treated as purchase money and the property pass to Coburn. This instrument was never recorded.

In the month of September following, the defendant bought these settees, with other hotel furnishings, of Coburn without notice of any claim upon them of the plaintiffs. The plaintiffs brought this action of replevin to recover possession of these settees.

The presiding justice instructed the jury that the question was principally if not altogether of law, and at the close of the charge said, "If you believe the testimony, I do not see any other way but to give a verdict for the plaintiffs." An examination of the evidence will show that this was in effect a direction to return a verdict for the plaintiffs.

At the time the goods were ordered, nothing was said about the time of payment and no agreement was made by the plaintiffs to give credit; under these circumstances the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. The plaintiffs would have had the right to retain possession until the purchaser had been ready to perform his part of the contract. Or, if the goods had been delivered with the expectation of immediate payment, and this had not been done, the plaintiffs had the right to retake possession of the goods.

But although a sale of this character is conditional and a ven-

dor has the right to retain possession or to retake possession under certain circumstances, the vendor may waive the conditions and these rights, in which case the sale becomes absolute and the title vests in the purchaser. *Peabody* v. *McGuire*, 79 Maine, 572.

The mere fact of delivery without a performance of the condition of payment is some evidence of a waiver of the condition. The rule that prevails in this State is thus stated in *Peabody* v. *McGuire*, *supra*: "But the doctrine which has the support of our own court upon this question, and which seems to be the correct and rational one, is, that even in a conditional sale the mere fact of delivery, without a performance by the purchaser of the terms and conditions of sale, and without anything being said about the condition, although it may afford presumptive evidence of an absolute delivery and of a waiver of the condition, yet it may be controlled and explained, and is not necessarily an absolute delivery or waiver of the condition; but whether so or not is a question of fact to be ascertained from the testimony."

In this case there was a delivery of the goods "without a performance by the purchaser of the terms and conditions of sale, and, without anything being said about the condition," this was some evidence of a waiver by the plaintiffs of their rights. It might be controlled or explained by other circumstances, but we think that it was a question for the jury and that it was error to direct, in effect, a verdict for the plaintiffs.

If the evidence was such that a verdict for the defendant would have been so clearly erroneous as to require it to be set aside, then the defendant could not complain of the instruction, but we do not think that such is the case. There are undoubtedly circumstances which have some bearing in favor of the contention on each side. For instance, one of the plaintiffs, and the one who had most to do with the transaction, testified upon cross-examination that when the goods were delivered he considered Mr. Coburn good and "expected the cash in thirty days." From this evidence, taken in connection with the unrestricted delivery, the jury would have been authorized in finding a waiver.

If the property passed by delivery, then the unrecorded instrument executed upon June nineteenth, but bearing date of April twenty-fifth, was ineffectual to give the plaintiffs any claim upon these goods as against the defendant; upon the other hand if the title did not pass, the parties merely substituted one conditional contract for another, as they might with propriety have done. So the case depends entirely upon the question of fact as to whether or not the property passed at the time of delivery. This issue, we think, should have been submitted to the jury.

Exceptions sustained.

CHARLES A. CORTHELL, and another, *vs.* EBEN A. HOLMES.

Washington. Opinion September 26, 1894.

Pleading. General Issue. Brief Statement. Demurrer. Practice. Way. Nuisance. R. S., c. 82, § 22.

When a general issue is pleaded to an action and joined, and defendant also files a brief statement, alleging three grounds of defense, two of which are admissible under the general issue, and the other contains matters in justification, but fails to state enough to afford justification, a demurrer to such brief statement will be sustained.

Brief statements should contain a specification of matters relied upon in defense, aside from such as would come under the general issue, and must be certain and precise to a common intent.

Demurrer to a brief statement cannot be treated as an admission of the truth of matters alleged in justification which are insufficiently pleaded, nor of the matters properly admissible under the general issue, such matters being improperly in the brief statement.

When a demurrer to a brief statement is sustained, the general issue having been pleaded and joined, the action will stand for trial upon the general issue, unless the *Nisi Prius* court shall allow further plea.

When a public nuisance obstructs an individual's right, he may remove it to enable him to enjoy that right. But the right to abate a public nuisance by an individual goes no farther. He is not authorized to abate it merely because it is a public nuisance.

See *Holmes* v. *Corthell*, 80 Maine, 31.

ON EXCEPTIONS.

This was an action of trespass, *q. c.*, to which the defendant pleaded the general issue and filed the following brief statement:

"And for brief statement the defendant says that the place of the alleged trespass is not, and never has been, the property of the plaintiffs, and that they have never been in possession of the same.

"The defendant further says, that the place where acts complained of as the alleged trespass were committed, has been recognized and used by the public, and by the defendants, and their grantors, as a public way, from Madison street to Water street, for more than fifty years without interruption.

"The defendant further says that plaintiffs' title deeds bound their premises upon the way aforesaid, and conveyed them no title whatever therein."

The plaintiffs demurred, as follows:

"As to the defendant's plea, in which he says he is not guilty and thereof puts himself upon the country, the plaintiffs do the like, as required by statute.

"And the said plaintiffs, as to the defendant's brief statement of defense by him filed above, saith that the same and the matters therein contained in manner and form as the same are stated and set forth are not sufficient in law to bar or preclude the plaintiffs from having or maintaining their aforesaid action against the said defendant, and the plaintiffs are not bound by law to answer the same, and this the plaintiffs are ready to verify.

"Wherefore, and by reason of the insufficiency of the said brief statement of the defense in his behalf, the plaintiffs pray judgment and for their damages by reason of the trespasses aforesaid.

"And the plaintiffs state and show to the court the following reasons and causes of demurrer to the said statement of defense:

"For that the first ground of defense in said brief statement contains no matter not in issue under his plea of the general issue, and tends to prolixity and confusion in pleading, and is inconsistent with other parts of said statement.

"The second ground of defense alleged in said brief statement contains no matter of fact constituting a defense to this action. And the matter therein as set forth is immaterial and irrelevant.

"The third ground of defense alleged in said brief statement as set forth therein is inconsistent with itself in that it states facts and a conclusion of law inconsistent with said facts, and nothing therein alleged amounts to more than the general issue."

After joinder by the plaintiffs, the presiding justice overruled the demurrer and ordered judgment for the defendant, and the plaintiffs took exceptions.

A. MacNichol and G. A. Curran, for plaintiffs.

E. B. Harvey, and G. R. Gardner, C. B. Rounds, with them, for defendants.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

STROUT, J. Under our statute, "the general issue may be pleaded in all cases, and a brief statement of special matter of defense, or a special plea, or double pleas in bar, may be filed." R. S., c. 82, § 22. Brief statements should contain "a specification of matters relied upon in defense, aside from such as would come under the general issue," and "be certain and precise to a common intent." *Washburn* v. *Mosely*, 22 Maine, 163.

Defendant pleaded the general issue, which was joined. By brief statement, he set out three matters in defense. Plaintiff demurred specially to the brief statement, which was overruled by the presiding judge, and judgment ordered for the defendant. To this ruling the plaintiff excepted.

The first and third grounds of defense in the brief statement were admissible under the general issue, and cannot be treated as "special matter of defense." The second ground of defense is, that the *locus in quo* "has been recognized and used by the public, and by the defendants and their grantors, as a public

way, from Madison street to Water street, for more than fifty years, without interruption." The declaration in the writ charges defendant with destroying a fence and gate, hauling upon the premises quantities of rocks and other materials, tearing down and destroying a clothes-dryer, platform and steps, injuring and encumbering the soil, turf and herbage, and so forth. The brief statement does not allege that any of these things encumbered the alleged way, or obstructed the individual right of the defendant in its use, nor that they were a public nuisance, from which he suffered a special damage beyond that of the public generally, which might authorize him to maintain an action therefor, or personally to abate it. When a public nuisance obstructs an individual's right, he may remove it to enable him to enjoy that right. But the right to abate a public nuisance by an individual goes no farther. He is not authorized to abate it merely because it is a public nuisance. *Brown* v. *Perkins*, 12 Gray, page 101.

The allegations in the brief statement, if true, are clearly insufficient to afford a justification to the defendant. The special demurrer should have been sustained.

The demurrer cannot be treated as an admission of the facts alleged in the brief statement, as two of the grounds therein were not of special matter, and should not be in the brief statement, and the other ground was insufficiently alleged. The plea of the general issue still remains, and upon it the parties have a right to be heard. *Nye* v. *Spencer*, 41 Maine, 276; *Moore* v. *Knowles*, 65 Maine, 494.

Exceptions sustained. Demurrer sustained. Brief statement adjudged bad. Action to stand for trial upon the plea of the general issue, unless the Nisi Prius Court shall allow further plea.

BANGOR SAVINGS BANK *vs.* DAVID WALLACE.
SAME *vs.* SAME, and another.

Penobscot. Opinion September 26, 1894.

Mortgage. Possession. Crops. Trespass. Action.

A mortgagee of real estate, in the absence of an agreement to the contrary, has the right at any time to take possession of the mortgaged premises if he can obtain it peaceably, and to take the crops that may be growing thereon, and apply the proceeds therefrom to the mortgage debt.

The treasurer of a savings bank, in the absence of evidence to the contrary, must be deemed to have authority in behalf of the bank to take possession of land upon which the bank holds a mortgage, for the purpose of gathering the growing crops.

If, after possession taken by the bank, and while the land is in possession of the bank as mortgagee, the mortgagor or other person wrongfully enters upon the land and takes and carries away a portion of the crops, the bank may maintain an action of trespass against him therefor.

If such action is brought by the direction of its treasurer, it will, in the absence of evidence to the contrary, be regarded as brought by the authority of the bank.

ON REPORT.

These were two actions of trespass, *q. c.*, brought by the assignee of the mortgagee, to recover the value of the crops removed by the defendants after foreclosure begun and possession taken by the plaintiff. The defendants justified as agents of the mortgagor, and the plaintiff claimed that it had acquired possession of the premises and crops through the foreclosure proceedings of an agent acting under the authority of its treasurer.

The facts appear in the opinion.

E. C. Ryder and Matthew Laughlin, for plaintiff.

The treasurer of a savings bank, without vote of the trustees, has authority to foreclose a mortgage, and, in any event Butterfield's entry for the purpose of taking the crops was an act capable of ratification. Entry sufficient to revest the estate. *Jenks* v. *Walton*, 64 Maine, 97. As to authority of treasurer to foreclose the mortgage, counsel cited: *Wallace* v. *First*

Parish of Townsend, 109 Mass. 263; *Trustees of Smith Charities* v. *Connolly*, 157 Mass. 272; *Bristol County Savings Bank* v. *Keavy*, 128 Mass. 298; *Cutts* v. *York Manf'g Co.* 18 Maine, 190. Presumption, in absence of all evidence, *Howard* v. *Hatch*, 29 Barb. 297.

An entry may be invalid for purpose of foreclosure and still be a lawful entry for the purpose of taking crops or of taking possession for any purpose. *Northampton Paper Mills* v. *Ames*, 8 Met. 1; *Cook* v. *Johnson*, 121 Mass. 326; *Perley* v. *Chase*, 79 Maine, 519; *Gilman* v. *Wills*, 66 Maine, 273; Jones Mort. §§ 697, 721, and 780; *Allen* v. *Bickmore*, 36 Maine, 436.

Entering for the express purpose of taking crops is an act capable of ratification and was ratified. Am. Dig. 1893, p. 974, § 232; *Planters' Bank* v. *Sharp*, 12 Miss. 75; Am. and Eng. Ency. p. 429, and citations.

Ratification: *Cook* v. *Tullis*, 18 Wall. 338; *Thorndike* v. *Godfrey*, 3 Maine, 429, p. 432; Story Agency, §§ 245, 246 and citations; *First Parish in Sutton* v. *Cole*, 3 Pick. 245; Whart. Agency, § 80; *Richards* v. *Folsom*, 11 Maine, 70; *Gibson* v. *Norway Savings Bank*, 69 Maine, p. 579.

A. W. Paine, for defendants.

Counsel argued: (1) That as mortgagee the bank had no right to sue the defendants as mortgagors and therefore cannot recover here, because the plaintiff had no actual possession of the premises, such actual possession being in defendants, with the right to gather the crops which by their cultivation they had raised.

(2) That at common law the plaintiff had no such possession of the premises as gave it a right to maintain an action of trespass, the defendants' occupancy and rights being such as authorized the acts complained of.

(3) That all the necessary preliminary acts, requisite for the prosecution and sustaining of the suits, were all performed by Butterfield without the authority or knowledge of the bank and hence were utterly void and of no effect, the subsequent ratification of the acts by vote of the plaintiff being equally of no force

but void and ineffectual and hence no cause of action has ever existed to justify or legalize either of the suits in question.

Counsel cited: *Hewes* v. *Bickford*, 49 Maine, 71; *Vehue* v. *Mosher*, 76 Maine, 469; *Page* v. *Robinson*, 10 Cush. 99-102; *Fernald* v. *Linscott*, 6 Maine, 234; *Judd* v. *Tryon*, 131 Mass. 345; *Jarvis* v. *Albro*, 67 Maine, 310; *Chase* v. *Marston*, 66 Maine, 271; *Long* v. *Wade*, 70 Maine, 358; *Noyes* v. *Rich*, 52 Maine, 115; *Mayo* v. *Fletcher*, 14 Pick. 525-532; *Russell* v. *Allen*, 2 Allen, 44; *Perley* v. *Chase*, 79 Maine, 519, p. 521; *Teal* v. *Walker*, 111 U. S. 249-50; *Judkins* v. *Woodman*, 81 Maine, 355; *Bennett* v. *Conant*, 10 Cush. 163; *Gilman* v. *Wells*, 66 Maine, 273; *Lunt* v. *Brown*, 13 Maine, 236-9; 4 Kent. Com. 119; *Treat* v. *Peirce*, 53 Maine, 71; *Clark* v. *Peabody*, 22 Maine, 500; *Fiske* v. *Holmes*, 41 Maine, 441; *Jones* v. *Bowler*, 74 Maine, 310; *Pease* v. *Benson*, 28 Maine, 333-353; *Chamberlain* v. *Gardiner*, 38 Maine, 548-552; *Northampton* v. *Ames*, 8 Met. 1.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

STROUT, J. These two cases involve the same questions and were argued together.

At the date of the alleged trespasses, the Bangor Savings Bank was the holder, by assignment, of a mortgage of the *locus in quo*, the title to the estate, subject to this mortgage, being in Mrs. Wallace, wife of David Wallace, under whom the defendants justify. The mortgage contained no provision as to possession; consequently the mortgagee had the right to take possession at any time; and upon taking possession, the bank, as assignee of the mortgage, had the legal right to take and hold, to be allowed upon its debt, any crops that might be standing or growing on the mortgaged premises, at the time possession was taken. *Gilman* v. *Wills*, 66 Maine, 273. No one lived upon the premises, and it seems, from the report, that no buildings were upon them. On July 14, 1893, one Butterfield, who is stated to have had some equitable interest in the

mortgage, as between him and the bank, wrote to the bank, directing his letter to "Bangor Savings Bank," and therein asked to have the mortgage sent to him, as he wished to make out a foreclosure in the name of the bank, "and take immediate possession, so as to hold the crops." In reply to this letter, James Crosby, treasurer of the bank, wrote Butterfield, and enclosed the mortgage as "per request." On receipt of this letter and mortgage, Butterfield, on July 21, 1893, in presence of two witnesses, entered unopposed upon the mortgaged premises, and stated to the witnesses that he took possession for the purpose of foreclosing "and taking possession of the crops." He then went to Wallace, and told him he "had entered and taken possession, had foreclosed the mortgage and taken possession to gather the crops, and he must not molest them in any way." He then went to Mr. Watson, who lived on the adjoining farm, and told him to look after the crops, and if there was any trespassing to immediately let him know. Wallace says he told Butterfield, when he, Butterfield, notified him of his entry and claim to the crops, that he, Wallace, "should harvest the crops." August 14, Butterfield found Wallace cutting oats and forbade him, and had him arrested the same day, but that suit was not entered in court. The trespasses complained of consisted of cutting and taking a portion of the crops between July 22, and August 23, 1893. The question is, did Butterfield have authority from the bank to enter and take possession of the premises, for the purpose of taking the crops; and whether, if he had such authority, he did in fact enter and obtain possession of the premises, for the bank; and whether he was authorized to institute these suits.

Whether the treasurer of the bank, without specific authority from the trustees, could foreclose a mortgage held by the bank, is a question of doubt. It is not necessary to decide it in these cases, and we do not decide it. *Treat* v. *Pierce*, 53 Maine, 71.

Butterfield's letter to the bank of July 14, apprised the bank of his purpose, and requested possession of the mortgage to enable him to carry out that purpose. When the mortgage was sent to him by the bank's treasurer, in response to that request,

it must be deemed an authority to Butterfield to proceed to take possession and gather the crops, if Crosby, the treasurer, could give such authority. Treasurers of savings banks have the custody of the securities of the bank, and it is part of their duty to collect and receive debts due the bank. Cases might often arise where speedy action would be necessary to protect property on which the bank held a mortgage, and there might not be sufficient time to call the trustees together for specific instructions.

If a mortgagor of personal property was in the act of removing the property beyond the state, or of destroying it, or in case of crops on mortgaged premises, after possession had been taken by the bank, the mortgagor should harvest, and was in the act of shipping them to another state, beyond the power of reclamation by the bank, we apprehend the trustees of the bank would expect the treasurer to act promptly to protect its interests. The early doctrine required corporations to act by vote, in nearly all cases. But since business corporations have become very numerous, that doctrine has been greatly relaxed. Now, in most corporations, and particularly in savings banks, the bulk of business is transacted by the treasurer, or other general officer, by the express or tacit consent and approval of the directors or trustees. The practice has become so general, and has been found so convenient, that it may fairly be assumed, in the absence of evidence to the contrary, that the treasurer of a savings bank has authority to perform the acts necessary to the preservation and protection of the property of the corporation which are usually done and performed by like officers of other business corporations by tacit permission and approval of the trustees or directors. In *Bristol Co. Savings Bank* v. *Keavy*, 128 Mass. 302, the treasurer of a savings bank, without a vote of the trustees, directed suit to be brought upon a note due the bank, and judgment was obtained, a levy on land made to satisfy the execution, seizin by an attorney employed by the treasurer, and a writ of entry brought to recover the land, the court held the treasurer had authority to institute both suits, and that, in the absence of evidence to the contrary, the suits were duly

authorized by the bank. The court said: "It would be a great obstacle to the successful management of savings banks and other corporations, if no suit for the collection of a debt could be instituted except by vote of the trustees or directors."

The treasurer of plaintiff bank, in the absence of evidence to the contrary, may be presumed to have had authority to take possession of the mortgaged property for the bank to secure the crops, and to employ an agent or attorney to take such action for the bank, and that, by his letter of July 19, 1893, to Butterfield, enclosing the Hanscomb mortgage, in reply to Butterfield's request of July 14, 1893, he conferred upon Butterfield sufficient authority to enter and take possession of the premises, to secure the crops.

That Butterfield did enter, unopposed, and take possession of the mortgaged premises, is abundantly shown. The verbal claim of Wallace, when notified of Butterfield's act, that he should take the crops, was of no avail to defeat Butterfield's previous peaceable entry. *Dyer* v. *Chick*, 52 Maine, 350. After possession was taken, Butterfield appointed an agent to look after the crops, and went himself nearly every day upon the land, until after the date of the last suit brought. It is difficult to see how any fuller possession of a lot of land, having no buildings and no resident occupant upon it, could be taken or retained. At the date of the several trespasses sued for, the plaintiff must be regarded as in lawful possession of the mortgaged premises, and the acts of the defendants in cutting and carrying away a part of the crops growing thereon, were unauthorized, and in violation of the plaintiff's rights.

These suits were brought by Butterfield's direction, without any further or other authority from the bank. But as the bank, through its treasurer, had conferred authority upon Butterfield as its agent, to enter upon the premises to secure the crops, such authority included all acts necessary to protect the interest of the bank therein, and to that end, to institute these suits for and in the name of the bank, to recover the value of the crops wrongfully taken from the premises by the defendants. That

the bank so regarded it, is shown by its subsequent approval of the acts, by vote of the trustees.

These suits must be regarded as brought by the authority of the bank, and the plaintiff is entitled to recover in both actions. By the terms of the report, judgment is to be entered for plaintiff in each case for sixteen dollars damages.

Judgment for plaintiff.

DON A. H. POWERS *vs.* LEONARD K. TILLEY.

Aroostook. Opinion October 8, 1894.

Trover. Trespass. Trees. Damages.

In an action of trover against a purchaser of sleepers made from trees cut on plaintiff's land by a trespasser, and by him manufactured into sleepers, the measure of damages is the value of the sleepers at the time of their conversion by the purchaser.

No deduction therefrom is to be made for the increased value put upon the trees by the labor of the trespasser before conversion by the purchaser.

ON EXCEPTIONS.

The case appears in the opinion.

F. A. Powers, D. H. Powers and L. C. Stearns, for plaintiff.

C. P. Allen, for defendant.

Rule of damages is value at time of tortious severance. Suth. Damages, p. 512, 516; *Cushing* v. *Longfellow*, 26 Maine, 306; *Moody* v. *Whitney*, 38 Maine, 174, cited with approval in *Blaen Avon Coal Co.* v. *McCulloh*, 59 Md. 403; *Forsyth* v. *Wells*, 41 Penn. St. 291; *Winchester* v. *Craig*, 33 Mich. 205; *Beede* v. *Lamphrey*, 64 N. H. 510 (10 Am. St. Rep. 426); *Omaha & Grant S. & R. Co.* v. *Tabor*, 16 Am. St. Rep. 185.

Counsel also cited: *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80; *Railroad* v. *Hutchins*, 32 Ohio, 371; *Wetherbee* v. *Green*, 22 Mich. 311; *Robinson* v. *Barrows*, 48 Maine, 186.

SITTING: PETERS, C. J., FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

STROUT, J. Trover for a quantity of railroad sleepers. The cedar logs, from which the sleepers were made, had been cut on plaintiff's land by two trespassers, and by them manufactured into sleepers, and then sold to the defendant. The question is, what is the rule of damages. The presiding judge instructed the jury, that the plaintiff was entitled "to recover the value of the sleepers at the time of conversion [by defendant], whatever the sleepers were worth in the market to sell;" that, "at the instant Mr. Tilley [defendant] made that conversion, that instant he interfered with Mr. Powers' rights, and Mr. Powers [the plaintiff] is entitled to compensation measured by the value of the sleepers at that time. If Mr. York [the trespasser] had added to the value of those sleepers by his labor, that does not matter." To this instruction defendant excepted. He now claims that plaintiff should recover only the value of the logs before manufacture into sleepers.

The logs being the property of the plaintiff when cut, the trespasser could not acquire any property therein by expending labor upon them. They still remained his property, and he could take them as such wherever he could find them, and the trespasser could have no claim against him for this increased value by reason of his labor thereon. When the defendant received the sleepers from the trespassers, and converted them to his own use, he took possession of plaintiff's property wrongfully. His conversion of the property could not antedate his purchase. That conversion was of the sleepers as they then were, not of the logs as when cut.

The rule of damages in trover is universal, that it is the value of the property at the time of the conversion. If the plaintiff had replevied the sleepers, it is difficult to perceive any defense that could have been made. Could the defendant have said, that he had a special property in the sleepers to the extent of the value added to the logs by the original trespassers, and require plaintiff to pay that value before maintaining his suit?

Clearly not. A rule that would relieve trespassers from all loss, would tend to encourage wrong doing.

It has sometimes been held, that when the trespass was involuntary and not willful, the owner should recover his actual loss, and not the increased value added by the trespasser. *Beede* v. *Lamphrey*, 64 N. H. 510. The supreme court of the United States, however, lays down a different rule in *Wooden Ware Co.* v. *United States*, 106 U. S. 432. But when the trespass is willful, the courts adopting the mitigated rule of damages against involuntary trespassers, allow the full value of the property in the condition in which it was at the time of the conversion. If defendant claimed that the trespass was not willful, it was for him to show it, before he could ask any mitigation of the ordinary rule of damages. We find no such evidence in the case.

In *Moody* v. *Whitney*, 38 Maine, 174, relied on by defendant, the court recognize and approve the rule, that in trover the damages are the value of the property at the time of conversion. But, in that case, the court said, "there is no evidence of a conversion by the defendants after they began to take away the timber from the place where it originally stood." The conversion was at the time of cutting, and the damages were necessarily the value of the timber immediately after it was cut, and had become personal property. This included the cost of cutting, in addition to the stumpage. And in *Cushing* v. *Longfellow*, 26 Maine, 306, which was an action of trespass *de bonis*, the cause of action accrued the moment the trees were severed from the land, and of course the damages were limited to their value at that time. But the court say the owners "might have seized them wherever they could find them; and might have demanded them, at another place, of one having them there, and in an action of trover have recovered the value of them there."

Upon principle and authority the instruction complained of was correct, and the entry must be,

Exceptions overruled.

Inhabitants of Deer Isle *vs.* Inhabitants of Winterport.

Hancock. Opinion October 10, 1894.

Pauper. Residence. Acts. Declarations. Evidence. R. S., c. 24, § 1, cl. VI.

Upon the question of a person's intention as to change of residence when leaving his town, his acts in breaking up house-keeping and storing his household goods two or three weeks previous to such leaving are competent evidence.

The declarations of such person during such acts are competent evidence upon the same question.

On motion and exceptions.

This was an action of assumpsit to recover supplies furnished by the town of Deer Isle to a pauper whose settlement it claimed was in the town of Winterport. A verdict was rendered in favor of the plaintiff and the defendant moved for a new trial and also had exceptions. The latter only were considered by the court.

From the exceptions it appeared that there was evidence tending to show that the pauper, Weed, with his wife and infant child, was, on the tenth day of September, 1889, residing in a rented tenement in the town of Winterport, known as the Pendleton house; that the rent was due and unpaid; that during that month, he called on one Daniel O. Clement, then living within fifty feet of the tenement occupied as aforesaid, to help him move his furniture and household goods, then packed, out of the tenement into Clement's house and stable, in the same town, where the pauper had arranged with said Clement to have a part thereof stored for a short time, to wit: all of his furniture and goods except one bedstead and some small articles which he sold, one parlor stove and all family clothing, which parlor stove, with the wife and child and the wife's and child's clothing, went with the wife and child about two or three weeks later to Deer Isle, the wife and child remaining at said Clement's that length of time, on account of the illness of the infant. The pauper the next morning after such removal into the Clement house,

went to Bangor to join the vessel on board of which he was serving as cook.

To prove the declarations of the pauper at the time of the breaking up and moving into the Clement house, defendant's counsel asked the pauper's wife the following question:

"Ques. What did your husband say his intention was at the time you packed up your clothing and the heater, and yourself and child and husband abandoned the Pendleton house?"

Also for the same purpose defendant's counsel asked the witness, Daniel O. Clement, the following questions:

"Ques. While you were there assisting Mr. Weed in moving his goods, did he state to you his purpose in breaking up housekeeping and storing his goods? Ans. I think he did, up near my house, near the pump."

"Ques. I will ask you what he did say?"

Both unanswered questions were objected to and excluded subject to exceptions.

There was evidence tending to show that at one time after leaving the Pendleton house and while the pauper with his wife and child were stopping in Deer Isle, he went to Winterport to the house of one Capt. John Philbrook, husband of his wife's sister, and returned the next day; that while there the witness, John Stokell, whom the pauper owed a balance for some of the furniture still stored at Clement's, had a conversation with him.

To prove the declarations of the pauper, the defendant's counsel asked the witness, John Stokell, the following question:

"Ques. Whether or not, when you had the conversation with Mr. Weed at the house of Captain Philbrook, he told you he was about to move his furniture anywhere? . . . Ans. Yes, sir, he did."

"Ques. Now, I ask you where he said he was going to move his furniture?" (Excluded subject to exception.)

Defendant's counsel stated that the reason he, (the pauper,) did not move his goods from Winterport to Deer Isle, was because the witness Stokell said, "Not till I am paid." (Excluded subject to exception.)

There was evidence tending to prove that during the pauper's

stay at Deer Isle, his wife, in his absence, took the child and went to her sister's, Mrs. Philbrook, in Winterport; that on the pauper's return to Deer Isle a few days after, he went to Winterport to take his wife and child back to Deer Isle, and did take them back against the will of his wife, and that while they were stopping at Deer Isle they had conversations about going back to Winterport.

To prove the pauper's declarations, defendant's counsel asked the witness, Sarah A. Weed, the following questions:

"Ques. What was the nature of his insistence in compelling you to return to Deer Isle?" (Objected to and excluded subject to exceptions, but the court admitted the fact of his insisting on her going back.)

"Ques. Whether or not, while you were at Deer Isle between September, 1889, and June, 1890, you and he talked about going back to Winterport? Ans. We did."

"Ques. What did he say?" (Objected to and excluded subject to exception.)

"Ques. Did he come there (Winterport) for the purpose of taking you back to Deer Isle? Ans. Yes."

"Ques. What did he say as an inducement or otherwise to have you go back?" (Excluded subject to exception.)

"Ques. Why did you go? Ans. He insisted upon me going."

"Ques. If he made any threats if you didn't go?" (Objected to and excluded.)

"Ques. What did he say? Were you willing to go? Ans. No, sir, I was not."

"Ques. What did he say if you didn't go?" (Excluded subject to exception, the fact having been testified to that he insisted, but the nature of the insistence excluded.)

There was evidence tending to show that after the pauper's wife with her child had gone to Deer Isle, and while there, the pauper on his return from the coasting trip, called at the house of Daniel O. Clement in Winterport.

To prove the declarations of the pauper at that time, counsel for the defendants asked the witness, Clement:

"Ques. What did he say to you, if anything, about where he was stopping or residing?" (Excluded subject to exception.)

Also to prove the declarations of the pauper while he was moving his goods from Clement's to another place in Winterport, for storage, his wife and child still being in Deer Isle, counsel for defendants asked the witness, Howard Grant, the teamster:

"Ques. Whether or not, during the act of loading or going from Mr. Clement's to Mr. Willey's store, he stated to you where the goods were eventually going?" (Excluded subject to exception.)

"Ques. Did he make any conversation about where he was living at that time? Ans. He did."

"Ques. Where did he say he was residing?" (Excluded subject to exception.)

There was evidence by the plaintiffs tending to show that the residence of the pauper and his wife at Deer Isle in 1889 and 1890, was as a visitor.

To prove the contrary, the defendant's counsel asked the pauper's wife:

"Ques. Whether or not it [referring to her going to Deer Isle from said Clement's house] was against your wish that you went?" (Objected to and excluded as immaterial.)

Defendant's counsel: "I ask the question for the purpose of showing that this was not a visit on her part, that she went involuntarily."

Court: "On that view of it perhaps it may be admissible. I exclude it on the ground that the husband has the control of the residence of the family, notwithstanding his wife's objection. I will admit it on that ground."

To all these rulings of the court the defendants excepted.

Elmer P. Spofford, for plaintiffs.

Declarations accompanying no act, of itself indicative of a design at that time to change his residence, and made two or three weeks prior to departure from the town, are too remote to be received as evidence bearing upon the question of intention.

Gorham v. *Canton*, 5 Maine, 266; *Wayne* v. *Greene*, 21 Maine, 362; *Corinth* v. *Lincoln*, 34 Maine, 313; *Richmond* v. *Thomaston*, 38 Maine, 235; *Haynes* v. *Rutter*, 24 Pick. 242; *Brookfield* v. *Warren*, 128 Mass. 287; *Carter* v. *Buchannon*, 3 Ga. 517. Notes added to the case of *People* v. *Vernor*, 35 Cal. 49 (95 Am. Dec. 60).

Declarations of the pauper are admissible only, when they accompany an act which of itself has a direct reference and near connection to the moving to or from a place, from one town to another and not from one place to another in the same town. In *Richmond* v. *Thomaston*, *supra*, the court say, "He was not then in the act of changing his residence; was not on his way to Camden, nor to any other place in search of a residence or home."

T. W. Vose, for defendants.

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

EMERY, J. The original pauper settlement of the pauper, Eben S. Weed, when he came of age, was in Deer Isle, the plaintiff town. That town therefore, in bringing this action, assumed the burden of proving that he had acquired a new pauper settlement in Winterport, the defendant town, by having his home therein for five successive years, under R. S., c. 24, § 1, clause VI. The defendant town, on the other hand, had the right to introduce any competent evidence tending to show an interruption of the continuity of the pauper's residence therein during such five years.

Mr. Weed, the pauper, was a sailor employed by a Winterport ship-master, on a Winterport vessel, engaged in the coasting trade out of the Penobscot river. His family, consisting at first of his wife and later of wife and young child, were kept by him in Winterport, the wife keeping house there in different houses. He stayed with his family there in Winterport when not with his vessel. But before five years of such residence had elapsed and near the last of September or first of October, 1889, his wife

and child were sent or taken by him to his mother's house in Deer Isle, where they remained till the following June. During this interval Mr. Weed also staid at his mother's house with his family when not absent fishing or coasting. Whether in thus leaving Winterport with his family at that time, the pauper abandoned or interrupted his home in Winterport, depended upon his intention in the matter. That intention either party was entitled to show.

A person's intention can only be shown by his acts and words, and any of his acts or words which tend to show his intention are admissible in evidence. With proper caution, however, the law does not admit mere words unconnected with any material act and which the person had no occasion to speak. A mere verbal expression of some past, or future intention, not called out by any relevant circumstances, but uttered voluntarily and perhaps officiously, may be too remote to be of any evidential value. Such an expression, however, called out by material circumstances, and naturally made at the time in explanation of some visible, relevant conduct, is of some, even if of small, evidential value as to a person's actual intention.

In this case, it appeared in evidence without objection, that about September 10, 1889, two or three weeks prior to the family of the pauper actually leaving Winterport, as above stated, he broke up the housekeeping. He also packed his furniture and other household goods, (except a bedstead and some small articles which he sold) and stored them in the house and stable of a neighbor, with whom he had arranged for the storage for a short time. He left his wife and child temporarily at this neighbor's on account of the illness of the child. He himself, then went to Bangor to join his vessel, but in two or three weeks came back and moved his wife and child, with their clothing and a parlor stove to Deer Isle as before stated, leaving the remainder of the furniture and goods packed in the neighbor's house and stable.

The act of the pauper in thus packing, removing and storing his furniture and household goods was followed at a short interval, (two or three weeks) by his further act of removing himself

and his family to Deer Isle. It is true that his intention in performing the latter act, the removal to Deer Isle, is the crucial question; but is there not at least a seeming, ordinary, natural relation between the two acts? Does not the former ordinarily and naturally precede the latter? Does not the former naturally tend to explain the character and purpose of the latter? In seeking to determine whether a person has left town for a simple visit, or for a change of home, is not his prior disposition of his house, furniture and household goods of some evidential value? We think there can be no doubt of the relevancy and materiality of the one act to explain the other.

But, if the prior act was properly in evidence, (as it clearly was) it was open to either party to introduce evidence to explain the character, purpose or intent of that act. If the furniture was soon afterward moved to Deer Isle, that would indicate one purpose of its original packing. If, instead, it was afterward set up in another house in Winterport, that would indicate another purpose. So, if at the time, the pauper said he was breaking up housekeeping, and storing his furniture to be sent to a new home in Deer Isle, that would be explanatory of the purpose. If, on the other hand, he said he was storing the furniture until he could find another house in Winterport, that would also be explanatory of the purpose.

The defendant town, Winterport, offered evidence of the statements made by the pauper in the act of removing and storing his furniture as to his purpose and intentions in so doing. The plaintiff objected, and the offered evidence was excluded. We think for the reasons given above that such exclusion deprived the defendant of a legal right. It is not questioned that such deprivation was injurious to the defendant.

The counsel for the plaintiff contends that the case *Corinth* v. *Lincoln*, 34 Maine, 310, is decisive authority for the exclusion of the evidence. In that case, however, the acts sought to be explained by evidence of declarations accompanying them were themselves immaterial. They "were not acts in the least indicative of a design at that time to change her residence from one town to another, or as going into the town of Corinth as

the place of her home; no more than those of passing to and from church or public meetings or in going from one part to the other of the house or appurtenances where she was at the time boarding." The difference between the acts in the two cases will be manifest upon comparison.

It is a sound and often recognized principle that when an act is admissible in evidence as indicating an intention, declarations accompanying and explanatory of that act are also admissible. *Richmond* v. *Thomaston*, 38 Maine, 232; *State* v. *Walker*, 77 Maine, 488; *Etna* v. *Brewer*, 78 Maine, 377. As an instance of how far the admission of declarations of intention has been carried, the late case of *Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285, may be cited. In that case one question was whether Mr. Walters was with Hillmon at Crooked Creek on March 18th. He had written a letter from Wichita, March 1, previous, in which he stated that he was soon to leave there with Hillmon for that neighborhood. The court said the statements of the letter were admissible in evidence upon that question.

Exceptions sustained.

STEPHEN YOUNG *vs.* BENJAMIN F. YOUNG.

Knox. Opinion November 8, 1894.

Guardian. Appointment. Notice. R. S., c. 67, § § 4, 5.

Revised Statutes, c. 67, § 4, clause 2, provides for an appointment of a guardian by the judge of probate for two classes of persons: First, those who have become incapable of managing their affairs, "by excessive drinking, gambling, idleness or debauchery of any kind;" and second, those, "who so spend or waste their estate as to expose themselves or families to want or suffering, or their towns to expense."

The latter class was intended to include such heedless, improvident and wasteful persons, as thereby expose themselves and families to want, without reference to habits of drinking or debauchery.

The selectmen of a town petitioned the probate court to appoint a guardian to the plaintiff, for the reasons as alleged in the petition, that he, "is an indolent and intemperate man, and who spends and wastes his estate so

much that he exposes himself and family to want and suffering, and his said town to expense by reason of said indolence and intemperate habits he is incompetent to manage his own estate or protect his rights."

Held; that the petition contained all the allegations required by the statute to authorize the appointment of a guardian to a person falling within the description of the second class mentioned in clause two of section four. The other allegations and inferences, not necessary to be alleged or proved, do not vitiate the important and necessary allegation which is properly alleged.

Such a petition, dated February 2, 1889, was addressed to the probate court to be held on the second Tuesday of March following. Plaintiff was notified of the proceeding, and cited to appear at the court, at its March term, by service upon him, in hand, on February 4, 1889, of a copy of the petition, and the order and citation to appear and show cause. He did not appear at the court, and the judge of probate made a decree that he, "is an indolent and intemperate man, who wastes and spends his estate so much that he exposes himself and family to want and suffering and said town to expense," and appointed the defendant as his guardian, who qualified and has ever since acted without objection thereto.

Held; that the decree contains all the elements required by statute as a basis for the appointment of a guardian to a person of this class, and must be presumed to be based upon a hearing by the probate judge, and satisfactory proof of the material allegation in the petition.

Also, where the municipal officers are petitioners in such proceedings, if they have given at least fourteen days' notice to such person by serving him with a copy of their application, the judge may adjudicate thereon without further inquisition, "if such person is present, or on such further notice, if any, as he thinks reasonable." It is a matter for the exercise of the judicial discretion of the judge, in such case, to order further notice, but he is not required to do so.

AGREED STATEMENT.

Assumpsit for money had and received. Date of writ, February 6, 1892.

Plea: The general issue with brief statement that the defendant is and has been since the second Tuesday of March, 1889, the legally appointed guardian of the plaintiff, and has during all said time acted as such, and that whatever moneys of the plaintiff he has received have been received by him as such guardian.

The case was submitted to the Law Court upon the following agreed statement:

At a regular term of the Probate Court of the county of Waldo, held at Belfast within and for said county, on the second Tuesday of March, 1889, on the petition of the selectmen of the

town of Lincolnville in said county, of which said town the plaintiff was a resident at the date of said petition and also on the date of the holding of said term, a decree of the Judge of Probate for said county of Waldo was made and passed appointing the defendant guardian of the plaintiff, an adult person, from which said decree no appeal was taken and said decree has never been annulled or reversed. The defendant accepted said trust and gave bond as required by law, and letters of guardianship in due form were granted and issued to him by said Judge of Probate on said second Tuesday of March, 1889, and the defendant has never been removed from said trust and has ever since acted in said capacity.

At the date of said petition and on said second Tuesday of March, 1889, the plaintiff was and ever since has been a pensioner of the United States, his pension being payable by the United States Pension Agent at Augusta, Maine. The plaintiff was not present nor represented in the Probate Court at the hearing on the petition and the adjudication of the Judge of Probate thereon.

The petition of said selectmen, the notice thereto annexed, the return of the officer thereon, and the decree of the Judge of Probate thereon, were made part of the case.

Since the appointment of the defendant, the United States pension payable to the plaintiff has been paid in quarterly payments by the United States Pension Agent at Augusta, Maine, to the defendant as guardian of the plaintiff, and the same has been received by the defendant in his said capacity.

The action was brought to recover the pension money so paid to and received by the defendant.

If the action was maintainable, judgment was to be for the plaintiff, and the damages are to be determined at *nisi prius*; otherwise judgment for the defendant.

(Petition.)

"To the Honorable Judge of the Probate Court next to be held at Belfast, within and for the county of Waldo, on the second Tuesday of March, A. D., 1889.

"George W. Young and Harrison Leadbetter, selectmen of

the town of Lincolnville, respectfully represent, that Stephen E. Young of Lincolnville, in said county, is an indolent and intemperate man, and who spends and wastes his estate so much that he exposes himself and family to want and suffering and his said town to expense by reason of said indolence and intemperate habits he is incompetent to manage his own estate or to protect his rights, and pray that Benjamin F. Young may be appointed guardian to said person.

"Dated this second day of February, A. D., 1889.

George W. Young,
Harrison Leadbetter,
Selectmen of Lincolnville."

(Notice.)

"Waldo, ss.—On the foregoing petition, you, the said Stephen E. Young, are hereby cited to appear at the Probate Court to be held at Belfast, within and for said county, on the second Tuesday of March, A. D., 1889, at ten o'clock in the forenoon, and show cause, if any you have, why the prayer of said petitioners should not be granted.

George W. Young,
Harrison Leadbetter,
Selectmen of Lincolnville."

(Service.)

"Waldo, ss. February 4, A. D., 1889. I this day gave in hand to the within named Stephen E. Young, a true and attested copy of the within petition and order thereon.

Benjamin F. Young, Deputy Sheriff."

(Decree.)

"State of Maine, Probate Court, Waldo County, second Tuesday of March, A. D., 1889.

"On the foregoing petition personal notice of the time and place of hearing having been given according to law, it is decreed that Stephen E. Young is an indolent and intemperate man, who wastes and spends his estate so much that he exposes himself and family to want and suffering and said town to expense, and it is also decreed, that Benjamin F. Young, of Lincolnville, in said county, be appointed guardian to said Stephen E. Young,

and that letters of guardianship issue to him, he first giving bonds in the sum of three hundred dollars.

George E. Johnson, Judge."

J. H. and C. O. Montgomery, for plaintiff.

A decree appointing a guardian, on allegations which do not state a cause for which a guardian may be appointed, is void, and may be so held in any collateral proceedings by plea and proof. *Peters* v. *Peters*, 8 Cush. 543; *Fowle* v. *Coe*, 68 Maine, 248; *Coolidge* v. *Allen*, 82 Maine, 23.

To place a citizen under guardianship the records must show, by distinct allegations, and not by implication or inference, that he falls within one of the clauses named in the statute, for whom a guardian may be appointed. *Overseers* v. *Gullifer*, 49 Maine, 360.

The notice to the plaintiff of the proceedings to appoint a guardian for him was not sufficient. A copy of the petition of the selectmen was all that he had; he was not present at the return term of the petition, and the judge made no further order of notice, but proceeded to adjudicate the case in his absence, and without further notice. He should have given him further notice. R. S., c. 67, § 5.

On the matter of notice to a person for whom a guardian is sought the statute is plain. First, for a party whom the municipal officers certify has been committed to the insane asylum, &c., without further action or notice to the party. Second, to insane married women, after personal notice, &c., without inquisition. Third, in all other cases where the municipal officers, &c., are applicants. If they have given at least fourteen days' notice to such person the judge may adjudicate thereon without further inquisition, if such person is present, or on such further notice, if any, as he thinks reasonable. The necessity of his presence at the hearing is to take the place of an inquisition. It seems to be for the purpose that no man shall be placed under a guardian without a personal observation by the tribunal to adjudicate the necessity for a guardian.

W. H Fogler, for defendant.

STROUT, J. Revised Statutes, chap. 67, § 4, clause 2, provides for an appointment of a guardian by the judge of probate for two classes of persons: first, those who have become incapable of managing their affairs "by excessive drinking, gambling, idleness or debauchery of any kind;" and second, those "who so spend or waste their estate as to expose themselves or families to want or suffering, or their towns to expense."

The latter class was intended to include such heedless, improvident and wasteful persons, as thereby expose themselves and families to want, without any reference to habits of drinking or debauchery.

In this case, a majority of the selectmen of Lincolnville petitioned the Probate Court for the county of Waldo, to appoint a guardian to the plaintiff, Stephen E. Young, upon the ground, as alleged in the petition, that he "is an indolent and intemperate man, and who spends and wastes his estate so much that he exposes himself and family to want and suffering, and his said town to expense by reason of said indolence and intemperate habits he is incompetent to manage his own estate or to protect his rights." It is admitted that Young resided in Lincolnville at the date of said petition, and at the date of the decree in the Probate Court.

The petition of the selectmen contains all the allegations required by the statute to authorize the appointment of a guardian, to a person falling within the description of the second class, mentioned in clause two of section four. It also contains other allegations and inferences, not necessary to be alleged or proved, but which cannot vitiate the important and necessary allegation, which is properly alleged. The petition bore date, February 2, 1889, and was addressed to the Probate Court to be held on the second Tuesday of March, 1889. Stephen was notified of the proceeding, and cited to appear at the Probate Court, at its March term, and show cause why the prayer of the petition should not be granted, by service upon him, in hand, on February 4, 1889, of a copy of the petition, and the order and citation to appear and show cause.

He did not appear at the Probate Court, and the judge of

probate made a decree that he "is an indolent and intemperate man, who wastes and spends his estate so much that he exposes himself and family to want and suffering and said town to expense," and appointed the defendant as his guardian. It is admitted that the defendant qualified and has ever since acted as guardian of Stephen, and no objection thereto appears to have been made by Stephen till the commencement of this suit on February 6, 1892.

The decree contains all the elements required by statute, as a basis for the appointment of a guardian to a person of this class, and must be presumed to be based upon a hearing by the probate judge, and satisfactory proof of the truth of the material allegation in the petition.

It is objected that the decree is void because the judge of probate gave no new or additional notice to Stephen, and that he was not present at the hearing. Section five of the statute provides that where the municipal officers are applicants, if they have given at least fourteen days' notice to such person by serving him with a copy of their application, the judge may adjudicate thereon without further inquisition, "if such person is present, or on such further notice, if any, as he thinks reasonable." The municipal officers had made such service on Stephen, and he was fully notified of the time and place for a hearing, but chose not to appear. The judge of probate could order further notice to Stephen, if he thought necessary or suitable, but he was not required to do so. It was a matter for the exercise of his judicial discretion. No suggestion is made that Stephen has been in any way prejudiced by the omission of a second notice, and we do not perceive any reason why another notice should have been given. Stephen has never sought to have the decree reversed in the Probate Court, nor to have the guardianship annulled. The subject matter, and the person of Stephen, was within the jurisdiction of the Probate Court; and the petition, notice and decree were sufficient and effective.

The defendant must be regarded as the legal guardian of the plaintiff, and as such entitled to the custody of the moneys sued for; and the action cannot be maintained. According to the terms of the report, the entry must be,

Judgment for defendant.

JOHN F. POLLARD *vs.* MAINE CENTRAL RAILROAD COMPANY.

Somerset. Opinion November 14, 1894.

Negligence. Railroad. Yard-Master. Line of Duty. Remote and Proximate Cause. Practice. Exceptions.

The plaintiff recovered a verdict for personal injuries caused by the negligence of the defendant's yard-master in breaking off a car stake that supported a load of lumber, thus causing several heavy joists to fall upon him from the top of the car.

Held; That to maintain the action, the plaintiff must establish three propositions: (1,) That in breaking down the stake the yard-master performed an act which an ordinarily careful and prudent person in the same relation would not have done: (2,) That the act was done in the course of his employment and in the line of his duty; (3,) That there was no contributory negligence on the part of the plaintiff.

The evidence relating to the yard-master's conduct was in dispute and therefore presented an issue of fact for the jury. In this case, the finding of the jury upon this point was not so palpably wrong that no jury of fair-minded and impartial men could reach such a conclusion.

Held; That the question whether the yard-master was acting within the scope of his employment cannot properly be determined by sole reference to the inquiry whether the car had been reported as ready for shipment. The nature of the employment, the character of the service required, the character of the act done, the circumstances under which it was done, and the ends and purposes sought to be attained, were all material considerations and formed the real test of liability.

Also, That the plaintiff's negligence with respect to his manner of loading the lumber did not proximately contribute to produce the injury.

The plaintiff's conduct in this respect was not a part of the immediate transaction which caused the injury, but a prior distinct and independent transaction. It may have afforded the occasion or opportunity of the yard-master's active agency in breaking off the stake, but it formed no part of the direct and efficient cause of the injury. Under such circumstances the plaintiff's conduct cannot legally be deemed a contributory cause of the injury.

The defendant excepted to certain remarks made by counsel for the plaintiff during the charge of the presiding justice. *Held;* That the irregularity as an interruption was a matter between the court and counsel, and was not prejudicial to the defendant, nor open to the defendant on exceptions.

The practice relating to the proper method of presenting exceptions to the law court prescribed in *McKown* v. *Powers*, 86 Maine, 291, affirmed.

O'Brien v. *McGlinchy*, 68 Maine, 552; *Lasky* v. *Canadian Pacific Ry. Co.*, 83 Maine, 461, affirmed.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

D. D. Stewart, for plaintiff.

E. F. Webb, *C. F. Johnson*, *and A. Webb*, for defendant.

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

WHITEHOUSE, J. The plaintiff claimed damages for a personal injury, alleged to have been sustained by reason of the negligent act of the defendant's yard-master in breaking off one of the car stakes supporting a load of lumber and causing several sticks of heavy joists to fall upon him from the top of the load.

At the trial of the action, in Somerset county, in March, 1892, a verdict was returned in favor of the plaintiff for twenty-seven hundred and fifty dollars. The case was carried to the law court on exceptions and motion for a new trial, and entered at the May term, 1892.

The arguments of counsel were presented to the court in May, 1894, and a printed copy of the case furnished August 16, 1894.

The following facts appear. In October, 1890, the plaintiff was requested by the shipper to employ some one to load a car of lumber for him, and to "see to the loading of it." He accordingly employed Harlow S. Russell to perform the service, but rendered personal assistance during the progress of the work.

The flat car assigned to the shipper by the defendant company was thirty-two feet long and had the usual cast-iron sockets, four on each side, to receive the necessary car stakes three by three inches, or three by four inches, in size; but it was not then provided with stakes, it being the duty of the shipper to furnish car stakes suitable for his load. The plaintiff thereupon procured six weather-worn stakes, hemlock and spruce and possibly one basswood, two by four inches in size and from six to eight feet in length; and these with two spruce stakes about four feet long, belonging to the Pulp Company, were adjusted by Russell to the sockets on the car. On the west side of the car at the northerly end was the hemlock stake in question two by four inches in size slightly decayed at the socket, and about

seven feet high, lengthened to eight feet by splicing a short piece of chamfered plank to the upper end. At the south end was another stake of about the same size and length, either hemlock or basswood, with a shorter hemlock stake and the short pulpwood stake in the middle. The car was then loaded from the platform on the west side, with 8226 feet of green pine deck plank, five by three and one-half inches in size, and 3928 feet of the same kind of lumber, four and one-half by three and one-half inches in size, varying from sixteen to twenty-eight feet in length and weighing 37,000 pounds.

It was found impracticable to load lumber of these dimensions on a car thirty-two feet long so that it would stand piled in regular tiers, or so that the tiers would be bound together. When completed the load reached a height of nearly eight feet, and pressing against the stakes, "flared out," or spread ten inches or more at the top. By this means the stake at the southwest corner was cracked when the last wagon load of lumber was put onto the car.

In the regular course of the defendant's business as a common carrier, it was the duty of the yard-master at Showhegan to enter this car upon his shipping book when it was reported to him by the shipper as ready for transportation, and also to see that it was properly loaded and securely staked so as to be safe to go in a mixed train of freight and passenger cars. The parties differ in their recollection respecting the time when this car was reported as ready to go. The yard-master, Howard, confidently asserts that the car was reported to him by the plaintiff himself on the morning of October 10, which he claims was the day before the accident; and that he at once made the entry on his shipping book; but upon inspection of the car he discovered that it was not properly loaded and staked and crossing out the entry on the book, he gave directions to have the car made "suitable to run;" that it was not done that day, but was reloaded after the accident on the 11th, and re-entered on the shipping book on the 11th. This is corroborated by the entries in the shipping book introduced in evidence.

It is not in controversy, however, that before the accident

Mr. Howard had notified the plaintiff that the car would not be allowed to go until the short stakes belonging to the Pulp Company were taken out, and also informed him that the hemlock stake in the northwest corner was not suitable for the purpose. The stake at the southwest corner which was cracked when the last of the lumber was put on, according to the testimony of the plaintiff's witness, was broken off by Howard himself, according to his own testimony, when he removed the "strapping." New stakes were accordingly ordered at the expense of the shipper, to supply the places of these three stakes on the west side and perhaps of some on the east side.

Under these circumstances, after the lumber was all on the car on the morning of the accident, the plaintiff in accordance with Howard's previous directions, undertook to draw out the short spruce stake belonging to the Pulp Company on the west side of the car, by striking up against it with an axe. While the plaintiff was thus engaged and for that purpose was standing on the platform in a stooping posture, Mr. Howard, the yard-master, advanced to the stake at the northwest corner remarking to the plaintiff that he could "break that off with one hand" or with "one finger;" and immediately seizing it near the upper end with one hand, according to his testimony, or with both hands according to the plaintiff's testimony, he suddenly pulled the stake towards him and broke it off at the socket, thereby letting the joists at the top of the load fall upon the plaintiff's back and leg, causing the permanent injury of which he complains.

I. The Exceptions.

The following instruction was requested by the defendant's counsel and refused by the Court: "If the jury find that the insufficiency of the stake furnished by the plaintiff and put in the car, or the improper loading of the lumber on the car either in the amount of lumber put on the car or the manner of loading the same, contributed in the least to produce the accident the plaintiff cannot recover."

The question of the plaintiff's contributory negligence, as well as that of the defendant's negligence, was one of fact for

the determination of the jury. The plaintiff may have furnished "insufficient" stakes or loaded the car in an "improper manner" and yet may not have been guilty of culpable negligence in so doing. The effect of the requested instruction would have been to take this question from the jury altogether.

Again, the request ignores an essential principle underlying the doctrine of contributory negligence. For if it be assumed that the conduct of the plaintiff in the use of defective stakes and the manner of loading the cars was negligent and that in a certain sense it "contributed" to produce the accident, it was still a question for the jury to decide, under appropriate instructions upon all the facts and circumstances of the case, whether it contributed to the accident in a legal sense so as to bar the plaintiff's recovery. It may be true that if there had been no defective stakes, there would have been no accident; but the contributory negligence of the injured party that will defeat a recovery must have contributed as a proximate cause of the injury. If it operated as a remote cause, or afforded only an opportunity or occasion for the injury, or a mere condition of it, it is no bar to the plaintiff's action. Cooley on Torts, (2d Ed.) 816. "It is not a proximate cause when the negligence of the defendant is an efficient intervening cause. That is, when the negligence of the defendant is subsequent to and independent of the carelessness of the person injured, and ordinary care on the part of the defendant would have discovered the negligence of the injured party in time to have avoided its effects and prevented the injury. There is no contributory negligence, because the fault of the injured party was remote in the chain of causation. Therefore, if the injury was not the ordinary or probable result of plaintiff's conduct, but was due to some wholly unlooked for and unexpected event which could not reasonably have been anticipated or regarded as likely to occur, such conduct is not negligent and cannot be set up as a bar to the action. . . . In all cases where negligence on the part of the plaintiff is connected with the cause of injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he

could have done so, the negligence of the plaintiff cannot be set up as an answer to the action." 2 Wood on Railroads, § 319 a; Addison on Torts, 41. In Shearman & Redfield on Negligence, § 25, it is said that the injured party cannot recover "if he, by his own or his agent's ordinary negligence or wilful wrong, proximately contributed to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him." Were it not for the solecism of the expression "ordinary" negligence this would seem to be a correct statement of the law. In his analytical treatment of the subject in Vol. 16 of the Am. and Eng. Encyc. of Law, Mr. Russell defines a proximate cause to be "that cause which in natural and continuous sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred;" and in § 41 of his work on Non-Contract Law, Mr. Bishop defines the "inadequate remote cause" as "one which has so far expended itself that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof."

But it is needless to multiply definitions or cite authorities from other jurisdictions, for the philosophy of causation involved in this class of inquiries has been clearly expounded and aptly illustrated in the recent decisions of this court. In *O'Brien* v. *McGlinchy*, 68 Maine, 557, it is said in the opinion by PETERS, C. J.: "Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. . . . But where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff, preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant." See also *Spaulding* v. *Winslow*, 74 Maine, 536.

The causal relation between the prior negligence of the plaintiff, if any, in the manner of loading the car, and the injury received, and the contributory negligence of the plaintiff at the time of the accident, were questions of fact for the jury, and they were properly submitted to the jury under instructions to which no exceptions have been presented to the court. The requested instruction was properly refused.

The defendant also requested an instruction that "if at the time of the accident the car from which Mr. Howard broke the stake had not been reported to the defendant company as ready for shipment, but was at that time under the control of Mr. Pollard acting for the shipper, then Mr. Howard was not acting in the line of his duty in interfering with the load upon said car or in breaking off the stake from the same and the defendant would not be liable." With respect to this request the presiding judge said to the jury: "I cannot give you that instruction as it is stated; I give it to you in other words, in other language. You must be satisfied that at the time Mr. Howard was acting within the general scope of his employment and for the Maine Central Railroad Company; but the mere fact that that car, if such is the fact, was not reported by Mr. Pollard to Mr. Howard as ready for shipment would not necessarily exonerate the company from the consequences of the act of Howard, if it was a negligent act, in going to that car and ascertaining whether it was in proper shape and was equipped with proper stakes, provided Mr. Howard at the time assumed to act as the agent or servant of the defendant corporation in the performance of that duty, notwithstanding the car had not been reported by Mr. Pollard to Howard as the agent of the company. . . . You must determine from all the evidence in the case whether or not Howard at the time of this accident was acting within the scope of his general employment as affecting some duty which he owed his employer. Was it within the scope of his general power and duties and did he assume so to act at the time of the accident? If he was not within the scope of his employment and he did not assume to act within the scope of his employment he would not render his master liable, because a servant of a

corporation may go outside of his employment and by acting either wilfully or negligently to effect some purpose of his own, and not as in the general employment of his master, render himself personally liable and not his master."

It was not at all in question but had been expressly and repeatedly conceded by the defendant's witnesses that under the general supervision of the station agent, the yard-master, Howard, had control of the loading of the freight cars in the yard; that although it was customary to leave a car in charge of the shipper to whom it had been assigned until the fact that it was ready for shipment and its destination, were reported by the shipper, it was still the duty of the yard-master to examine every loaded freight car before shipment to see if it was properly staked and strapped and "all right and safe to go."

Whether the plaintiff had intended to make a formal report of this car or not, it is a clear inference from all the evidence, including the entries in the shipping book and the conduct and statement of the parties at the time, that Howard understood that the car was to be ready to go on the morning of the accident. The work of loading the lumber on the car had in fact been completed. Howard had, in fact, inspected the car, condemned some of the stakes and ordered new ones to be substituted for them, and the plaintiff had acquiesced in this decision. There was no controversy that to this extent, at least, Howard had assumed control of the car. But it had not been definitely determined that all of the stakes on both sides should be removed as defective, and, for the purpose of confirming his suspicion and proving his assertion that the stake in the northwest corner was insufficient, Howard impulsively tested it in the manner stated.

The broken stake was exhibited to the jury and to the law court, and was manifestly defective and unfit for the purpose. The car was going in a mixed train and it was the plain duty of the yard-master, having due regard to the safety of passengers and the property interests of both the shipper and the defendant company, to have this stake removed and a more suitable one put in its place at some time before the car was allowed to go.

It is not suggested that further delay in performing this duty could have subserved any useful purpose either towards the shipper or the company.

With these facts and circumstances undisputed, the question whether the yard-master, in thus testing the stake, was acting within the scope of his employment and the line of his duty, could not be properly determined by sole reference to the inquiry whether the car had been formally reported as ready for shipment. The nature of Howard's employment, the character of the service required, the character of the act done, the circumstances under which it was done, and the ends and purposes sought to be attained, were all material considerations and constituted the real test of liability. 2 Wood on Railroads, 1398; Shearman and Redfield on Negligence, § 65; *Ramsden* v. *Railroad Co.* 104 Mass. 117; *Goddard* v. *G. T. Railway*, 57 Maine, 202.

The instructions actually given upon this branch of the case were adapted to the evidence and substantially correct, and the requested instruction could not properly have been given.

An exception was also taken to certain remarks made by the counsel for the plaintiff during the charge of the presiding judge.

The defendant's counsel had requested an instruction, and it was given in the exact language of the request. Thereupon, the plaintiff's counsel asked the presiding judge to call the attention of the jury to certain testimony bearing upon the instruction thus given. This the judge declined to do.

This request of the counsel for the plaintiff to have the attention of the jury directed to the facts in the case could not have been deemed improper if it had been deferred until the close of the charge. But its irregularity as an interruption was a question between the counsel and the court; it was not prejudicial to the defendant. This objection is obviously without substantial merit and in any event is not open to the defendant on exceptions. *Sherman* v. *Maine Cent. Railroad Co.* 86 Maine, 422.

The printed bill of exceptions contained in the report also states that the defendant's counsel excepted to the admission of

certain evidence and to certain instructions given in the charge, but it does not give the language of the charge to which exceptions were taken, nor specify what the evidence was to which objection was made. True, reference is made to numerous pages of the manuscript report where, it is said, this evidence and these instructions may be found; but as the manuscript copy of the report is not before us and the corresponding pages of the printed report are not given, we have no means of ascertaining the precise groundwork of these exceptions, and but for the elaborate argument of the learned counsel for the defendant, it might reasonably be inferred that they had been intentionally abandoned. It is a satisfaction to add, however, that a careful examination of the entire report has failed to disclose any substantial cause for complaint respecting either the admission of evidence or the instructions given to the jury. An authoritative declaration of the rule of practice prescribing the mode of presenting exceptions to the law court will be found in *McKown* v. *Powers*, 86 Maine, 291.

II. The Motion.

The plaintiff's contention that there was actionable negligence on the part of the defendant's yard-master which rendered the company liable for his injury, involved the decision of three subordinate questions of fact: (1,) In breaking off the stake in question, did Howard perform an act which an ordinarily careful and prudent person in the same relation and under the same circumstances and conditions would not have done? (2,) Was the act done in the course of his employment and in the line of his duty as yard-master? (3,) Was there contributory negligence on the part of the plaintiff? The jury answered all of these inquiries in favor of the plaintiff. True, there was but little conflict of testimony upon points vital to the result. There was substantially no controversy in relation to the conduct of Howard in breaking the stake, or the circumstances and conditions existing at the time. But the deductions of fact to be drawn from the evidence were in dispute and therefore presented an issue of fact for the determination of the jury. *Lasky* v. *Railroad Co.* 83 Maine, 461. The question of ordinary care

is one which especially calls for the exercise of a jury's functions, and cannot become a question for the court unless the facts are all admitted and there is but one inference that can fairly and reasonably be drawn from them. When a given state of facts is such that reasonable men may fairly differ upon the question whether there was negligence or not, the determination of the matter is for the jury. *G. T. Railway Co.* v. *Ives*, 144 U. S. 408; 2 Wood on Railroads, 1433, and cases cited.

The defendant claimed, that in breaking down the stake under the circumstances stated, Howard did nothing which an ordinarily careful and prudent man might not have done because it could not reasonably be foreseen that such a consequence would follow. But Howard knew that the southerly stake on the west side of the car was broken and that the two short middle stakes only remained besides the long one in question which he declared he could break with one finger. He had knowledge of the height of the load, of the size and kind of lumber, of the fact that it was pressing against the stakes and that the load was spreading at the top. He also observed the position of the plaintiff at the time, but gave him no actual notice of his purpose to apply such a violent test to the stake, and no warning at the moment it was applied.

The plaintiff claimed that the situation thus disclosed afforded ample reason for one in the exercise of due care and caution, in the position of the yard-master, to anticipate that if his experiment resulted in breaking the only remaining long stake on that side, the lumber at the top of the load would fall upon the plaintiff as it did. A simple proposition of fact was thus presented involving the consideration of familiar duties and experiences; and the jury evidently found that Howard's conduct was hasty and inconsiderate and without due regard to the rights and safety of the plaintiff. The question now is not whether other reasonable men might not arrive at a different result but whether this finding is so palpably wrong that no jury of fair-minded and impartial men could reach such a conclusion. "To set aside the verdict of the jury is to say that the inference drawn by the jury is indisputably wrong,—that

no such inference can fairly be drawn by any fair-minded men,— that the contrary inference is not only the more reasonable inference, but is the only reasonable inference." *York* v. *Railroad Co.* 84 Maine, 117. Under this rule the court is not authorized to reverse the finding of the jury upon this point.

With respect to the second element it was not claimed that the yard-master broke the stake with intent to injure the plaintiff or that in so doing he was attempting to serve any private purpose or accomplish any personal ends. It was admitted to be his duty to see that the car was properly loaded and staked before it left the yard and he was obviously engaged in doing what he was employed to do in the furtherance of the business of the defendant corporation; and the fact that he attempted to do it in an improper manner, or in a mode not contemplated by his superior officer, has no tendency to show that the act was not within the scope of his employment or the line of his duty.

Finally it is contended that there was negligence on the part of the plaintiff respecting the defective stakes and the manner of loading the lumber and that this contributed to produce the injury. But the plaintiff's conduct in these particulars was not a part of the immediate transaction which caused the injury, but a prior, distinct and independent transaction. It may have afforded the occasion or opportunity for the operation of the yard-master's active agency in breaking off the stake, but it formed no part of the direct and efficient cause of the injury. The fault of the plaintiff was the remote cause while that of the defendant's servant was the proximate cause; "the one a passive the other an active agency; the one having but a casual and the other a causal connection with the ultimate event." *O'Brien* v. *McGlinchy*, 68 Maine, 557. It appears further that the lumber was so loaded and so far supported by the defective stakes that the plaintiff stood upon the load with impunity when the last plank was placed upon it; and the jury must have found that the defendant's servant might by the exercise of reasonable care and prudence have avoided the consequences of any negligence on the part of the plaintiff. Under such circumstances,

it has been seen that the plaintiff's conduct cannot be legally deemed a contributory cause of the injury. *Davies* v. *Mann*, 10 M. & W. 546; *G. T. Railroad* v. *Ives*, *supra*; *O'Brien* v. *McGlinchy*, *supra*.

It is the opinion of the court that the evidence fairly authorized a finding in favor of the plaintiff on this branch of the case and that the entry must be

Motion and exceptions overruled.

HENRY W. GOLDER, and another, Executors,

vs.

ROSIE E. CHANDLER, and others.

Kennebec. Opinion December 12, 1894.

Will. Life Insurance. Deficiency of assets.

Upon a bill in equity for construction of a will, it appeared that the testator gave various pecuniary legacies "to be paid out of my [his] personal estate." His personal estate proved insufficient to pay the legacies. He had two policies of insurance upon his life; one "payable to his legal representatives for his heirs and assigns;" the other "payable to his executors, administrators or assigns." No reference to these policies is contained in the will. Testator, at his death, left a daughter, but no wife. There had been no assignment of either policy, and both have been paid to the executors.

Held; That the phrase in the will "to be paid out of my personal estate" cannot be construed to include the proceeds of any of the insurance money; and that there is no latent ambiguity in the term "my personal estate" which requires or permits parol evidence to vary, enlarge or explain its meaning.

The policy payable to testator's "legal representatives for his heirs and assigns," does not fall within the provisions of R. S., c. 75, § 10, which authorizes a disposition by will, under certain limitations, of money received from insurance on life. The rights of the parties are the same as if the policy was in terms payable to his daughter, the sole heir. The proceeds of this policy are held by the executors in trust for her, and are by them to be paid to her in full, with all interest received thereon by the executors, and without any deduction, except such amount, if any, as the estate of the testator may have necessarily expended in collecting the insurance.

The other policy, payable to testator's "executors, administrators or assigns" is within the provisions of the statute. It is not disposed of by testator's

will. An amount equal to the premiums paid thereon within three years prior to the death of the testator, with interest thereon, and expense of collection, is to be retained by the executors and be treated as part of the testator's personal estate, to meet the calls in his will. The balance, with interest received by the executors, must be paid to the sole heir, the daughter.

Under a specific devise of land the devisee takes the absolute title, subject only to be divested if the other estate of the testator, real and personal, prove insufficient to pay debts, funeral charges and expenses of administration.

If such deficiency shall arise, that deficiency is to be supplied from the devised land unless otherwise obtained.

If it becomes necessary to sell the whole lot, and the proceeds of the sale are not wholly exhausted in payment of the debts and expenses, the surplus, being the proceeds of devisee's land, belongs to him, and cannot be used to fulfill the bequests in the will, but must be paid to the devisee.

On report.

The will of Joseph H. Chandler, of Belgrade, which was submitted to the court for construction in this case, after providing for the payment of debts and expenses, is as follows:

"Secondly, I direct my said executors to cause my lot in the Belgrade Cemetery and also the lot adjoining in which the body of my father, Joseph Chandler, is interred, to be placed in good order and condition, and I hereby direct that the sum of five hundred dollars be set aside from my personal estate for said purpose.

"Third. I give, bequeath and devise to my daughter, Rosie E. Chandler, her heirs and assigns forever, the sum of fourteen hundred dollars from my personal estate to be placed in the Augusta Savings Bank and to be paid to her, principal and interest, when she shall have arrived at the age of twenty-one years.

"Fourth. I give and bequeath to my sister, Elvira F. Golder, the lot of land on which my house and store in which I now live is situated, together with all of the privileges and appurtenances thereunto belonging, bounded on the north by land of H. W. Golder, east by the county road, south by land of Mary E. Rollins, and west by Long Pond, to her and her heirs and assigns forever.

"Fifth. I give and bequeath to my nephews and nieces, Herbert L. Kelley, Minnie Kelley, Calvin D. Kelley and Maude L. Golder, the sum of fifty dollars each out of my personal estate.

"Sixth. I give and bequeath the sum of five hundred dollars out of my personal estate to my sister, Ellen J. Organ.

"Seventh. I give and bequeath to my sister, Elvira F. Golder, the sum of five hundred dollars out of my personal estate.

"Eighth. I give, bequeath and devise to my sister, Elvira F. Golder, her heirs and assigns forever, all the remainder of all the property, both real and personal, of every name and nature of which I may die possessed." . . .

The case was submitted, upon bill, answers and proof.

The plaintiffs offered the deposition of Henry W. Golder, one of the executors, who drafted the will. Being asked to state, subject to the objection of defendants as irrelevant, all that the testator said to him when instructed to draw the will, he testified:

"He said first he wished to give to his sister, Elvira F. Golder, all of his real estate, — he had but very little personal property except his life insurance and directed that it should be divided. He instructed me then to divide his life insurance as it is given in the will, with one exception. He directed the sum of five hundred dollars to be set aside from his personal estate for fixing up a burying ground lot for himself and father, next he told me to give his daughter, Rosie E. Chandler, one thousand dollars to be deposited in the Augusta Savings Bank to be paid to her, principal and interest, when she should arrive at the age of twenty-one; then he directed that Herbert L. Kelley, Minnie Kelley, Calvin D. Kelley, and Maude L. Golder should each receive the sum of fifty dollars out of his personal estate. He directed that his sister, Ellen J. Organ, should receive the sum of five hundred dollars and the remainder of his property should go to his sister, Elvira F. Golder, after all his debts were paid, expenses, etc. After I had made a memorandum for the will in that form, he read it over, said his life insurance came

to more than what he had bequeathed, that he had nothing but his life insurance to leave and he would change the bequest to his daughter, Rosie E. Chandler, to fourteen hundred dollars. He asked me what I meant by writing personal estate so many times in there,—why I did not say life insurance policies. I replied that after his death his life insurance became his personal property. He distinctly said several times, while giving these instructions, that this was his life insurance money that he was leaving to these parties.

"Ques. You say he instructed you to divide his life insurance as it is given in the will with one exception, what was that exception?"

"Ans. He afterwards increased his gift to his daughter from one thousand to fourteen hundred dollars. I omitted one bequest in my answer to the sixth question. He gave five hundred dollars to his sister, Elvira F. Golder."

All of the personal property, exclusive of the insurance policies, was valued in the inventory at about $525.00, and it was admitted in the answers that it was not sufficient to pay debts, expenses, &c.

E. S. Fogg, for plaintiffs.

The rule laid down in *Hathaway* v. *Sherman*, 61 Maine, 466, a leading case, does not conflict with the well-settled rule of law that the intention of the testator shall govern in the construction of the will. Had there been no life insurance in the case, there could have been no question of his intention. In applying the provisions of the will to the subject matter, the "personal estate," a latent ambiguity arises, whether he expected and intended to dispose of his life insurance as a part of his personal estate, which he had a perfect right to do. It is admitted and the case shows that, without the life insurance, all of the estate will be required for the payment of debts, expenses, etc.; and that the legacies with the five hundred dollars to be expended upon the cemetery lots will almost wholly consume the full amount of the life insurance, leaving but a small part to go into the residue,—strong circumstantial evidence of the testator's

intention to include his life insurance in the disposition of his personal estate.

Parol evidence is admissible in order to understand the meaning and application of the testator's words. 1 Greenl. Ev. § 289; *Moreland* v. *Brady*, 34 Am. Rep. p. 581; *Stoops* v. *Smith*, 100 Mass. 63; 1 Greenl. Ev. §§ 286, 287, 288 and 291; *Brown* v. *Thorndike*, 15 Pick. p. 400; *Wason* v. *Colburn*, 99 Mass. 342.

M. S. Holway, for Rosie E. Chandler.

SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, WISWELL, STROUT, JJ.

STROUT, J. Bill in equity for construction of the will of Joseph H. Chandler. Testator had two policies of insurance upon his life, one for twenty-five hundred dollars, "payable to his legal representatives for his heirs and assigns," the other for one thousand dollars, "payable to his executors, administrators or assigns." Both policies have been paid in full to the executors. The testator made various legacies, all of which he provided should be paid "out of my [his] personal estate." He also devised a lot of land to his sister, Elvira F. Golder, in fee. The personal estate proves insufficient for the payment of debts, legacies and expenses of administration. We are asked whether the money received from said policies, or any part of it, can be applied to the payment of debts, legacies, expense of administration, or for the purpose named in the second item of the will, relating to his cemetery lot.

The policy for twenty-five hundred dollars was made payable to his legal representatives, "for his heirs and assigns." The terms of this policy show very clearly that the testator did not intend the proceeds therefrom to constitute a part of his estate in any event, but that his personal representatives were to take it in trust for other parties. The phrase, "for his heirs and assigns," is obscure. Whether in using that language it was intended that the assured should retain to himself the power of assignment, if he should think fit to exercise it, and, if not

exercised, the trust funds should go to his heirs, or whether the word assigns was intended to mean the assigns of the heirs, as if the policy read "his heirs and their assigns" is uncertain. The latter construction would seem to affect the apparent intention of the assured. But as no assignment of the policy has been attempted, it is not necessary to determine the precise legal effect of the word assigns as used in it. Freed from that complication, the policy, at the death of Chandler, made his heirs the beneficiaries. It was the duty of the executors to collect the amount of the policy, but when the money was received by them, they held it charged with a trust for the heirs of the testator. As in this case Rosie E. Chandler is the sole heir of the testator, she is entitled to the whole fund. It did not constitute any part of the personal estate of the testator. *Cables, appellant*, 67 Maine, 582; *Stowe* v. *Phinney*, 78 Maine, 244.

This policy does not fall within the provisions of R. S., c. 75, § 10, which authorizes a disposition by will, under certain limitations, of money received from insurance on life. The rights of the parties are the same as if the policy was in terms payable to Rosie E. Chandler. No deduction of premiums for three years, as provided in § 10, is to be made from the proceeds of this policy; but the whole amount received, with the interest thereon, which the executors have received, is to be paid to the heir, Rosie E. Chandler, as her absolute property, less the expenses, if any, to the estate, in collecting the money.

The other policy for one thousand dollars was payable to the testator's executors, administrators or assigns. The proceeds of this policy are within the provisions of the statute. The premiums paid thereon within three years prior to his death, with interest thereon, are to be retained by the executors, and be treated as part of his personal estate, to meet the calls of the will. The balance will go to the heir, Rosie E. Chandler, there being no widow, according to the statute, unless it is disposed of by the will of the testator.

The provisions of the will are clear and explicit. In all the legacies, the testator specifies that they shall be paid out of his

personal estate. Can the fund derived from this one thousand dollar policy be regarded as the personal estate of the testator? We think not. By its nature it could never become actual, veritable property in his hands; by its terms it was payable after his death, never to him. While he had a qualified interest in it, he never could reduce it into possession, never use or invest the money. The statute allows it to be treated as part of his estate, if there was no widow or issue. If the estate is solvent, the statute allows it to be disposed of by will. If insolvent, and there is either a widow or children, or both, the disposition by will must be among them. *Hathaway* v. *Sherman*, 61 Maine, 466; *Hamilton* v. *McQuillan*, 82 Maine, 205. If the testator intended to dispose of the proceeds of this one thousand dollar policy, by his will, he should have used apt words to effect that intention. This court has said, in *Hathaway* v. *Sherman*, *supra*, in order to effect this object, "the testator must use language directly significant of his intention in this respect; that, classed by the legislature as this fund is, it is not to be appropriated to the payment of debts or of any pecuniary legacies couched in general terms merely, even to the widows or children, unless it is expressly referred to as the fund from which such payment is to be made, and that it does not pass by any general residuary clause; in short, that the testator's intention to change the direction which the law gives to this very peculiar species of property, is not to be inferred from general provisions in his will the fulfillment of which might require the use of such money, but must be explicitly declared." This will makes no mention of the life insurance; and no expression in it affords any evidence that the testator intended to change the direction which the law gives to such insurance money, except the fact that it *now* appears that the personal estate is insufficient to pay the debts and bequests in the will. It does not appear whether such was the case when the will was made or not. BARROWS, J., in *Hathaway* v. *Sherman*, *supra*, says such "fact is entitled to but little weight. The records of every probate court show too many instances of wills containing liberal bequests which the testators left no

means, or very inadequate means, to fulfill, to justify us in concluding from this circumstance that the testator designed to change the disposition which the law would otherwise make of this fund, which he nowhere mentions as a source from which money to pay the legacies he gives is to be derived." *Blouin* v. *Phaneuf*, 81 Maine, 176.

But it is claimed that parol evidence is admissible to show the testator's intention, upon the ground of a latent ambiguity in the will. While it is well-settled law, that latent ambiguities may be explained by evidence *aliunde* the will, it is equally well settled, that where the terms of the will are clear, definite and explicit, the intention of the testator must be ascertained from the will itself, and cannot be aided or explained by parol testimony. The phrase "my personal estate," frequently repeated in this will, is not ambiguous, uncertain, but its common and legal meaning are entirely clear. A man's "personal estate" includes all his property other than real estate, over which he has absolute dominion and control, which he may dispose of by gift or sale, at his option, which he may change from one species of property to another, and may use and expend for his personal needs, or pleasures, or which may be subjected to the payment of his debts. Most of these attributes do not attach to a policy on life. It cannot be reached by creditors during the life of the insured. But for any surplus of premiums paid for two years, in excess of one hundred and fifty dollars per year, they may have a lien upon the policy. R. S., c. 49, § 94.

If the insured dies intestate, the money received from insurance on his life, deducting three years' premiums, does not constitute a part of his estate for the payment of debts, if he leaves a widow, or issue. R. S., c. 75, § 10. The statute authorizes a disposition of the fund by will, under certain limitations, but this authority is more in the nature of a power of appointment than a direct legacy of property, and does not extend beyond the statute authority. We perceive no latent ambiguity in the will that requires or permits oral testimony in aid of its construction. It follows that the offered testimony of

testator's conversation with the scrivener who drew the will, and at the time it was drawn, is not admissible, and cannot be received to vary, explain or control, the plain language of the will.

The result is, that the proceeds of the one thousand dollar policy, and interest thereon received by the executors, less three years' premiums and interest thereon and expenses of collection, if any, are to be paid to Rosie E. Chandler, the sole heir, as her absolute property, and cannot be treated as part of the estate for any purpose.

The fourth item in the will makes a devise of a lot of land to Elvira F. Golder. We are asked whether this devise passed title in fee to the devisee, subject only to payment of debts, funeral charges, and costs of administration, if necessary, and whether it is liable for the payment of the sum mentioned in the second item of the will; and whether, in case it shall become necessary to sell the lot for payment of debts, and a surplus of proceeds should remain after accomplishing that object, to whom such surplus belongs.

The devise by the will, is a specific devise of a fee simple estate, and the devisee takes the absolute title, subject to be devested only, if the other estate of the testator, real and personal, prove insufficient to pay debts, funeral charges and expense of administration. If such deficiency shall arise, that deficiency must be raised from the devised lot, unless otherwise obtained. If it becomes necessary to sell the whole lot, and the proceeds of the sale are not wholly exhausted in payment of the debts and expenses, the surplus, being the proceeds of the devisee's land, belongs to her, and cannot be used to fulfill the bequests in the will, but must be paid by the executors to her.

Decree in accordance with this opinion.

STATE *vs.* ISRAEL D. LEAVITT.

Somerset. Opinion December 13, 1894.

Indictment. Pleading. Duplicity. Evidence. R. S., c. 131, §§ 4, 12.

Duplicity in an indictment is cured by a special verdict of guilty on one offense only.

To an indictment containing two counts, the first charging the defendant with an assault with intent to maim, and an assault with intent to kill, and the second count charging an assault and battery, the jury returned a special verdict, "guilty of assault with intent to kill."

Held; upon motion in arrest of judgment, that the second count does not support the verdict; a *nolle prosequi* of the intent to kill not having been entered, no judgment can be rendered on that count.

Also, That the first count is double in that it charges two substantive crimes, viz: assault with intent to maim and assault with intent to kill; and that the special verdict, "guilty of assault with intent to kill," operates as an acquittal of all else charged in the indictment and cures the duplicity.

A witness for the prosecution, a brother of the injured party, denied that he held defendant's horse by the bit at the time of the assault. The defendant on his cross-examination testified that other parties had told him that the witness and his brother had made different statements about it, and thereupon he offered to give the statements or conversation in full upon resuming his direct examination. *Held,* that the evidence was rightfully excluded.

State v. *Palmer,* 35 Maine, 13; *State* v. *Dolan,* 69 Maine, 573; *State* v. *Smith,* 61 Maine, 386, criticised; *State* v. *Payson,* 37 Maine, 361, approved.

ON EXCEPTIONS.

The indictment upon which the defendant was tried in this case sufficiently appears in the opinion of the court. After the jury had returned a special verdict of guilty of assault with intent to kill, the defendant filed a motion in arrest of judgment for the following reasons and grounds appearing upon the face of the indictment: 1. The first count in said indictment charges three separate offenses in the same count; whereas by law but one offense can be charged in one count. 2. The second count contains no legal and sufficient allegation of the time when said supposed offense was committed. This motion was overruled by the court and the defendant took exceptions.

The defendant also took exceptions to the exclusion of evidence, the bill of exceptions disclosing the following case.

The indictment charged the defendant with an assault with a dangerous weapon, to wit, a jack-knife, upon one Warren Spaulding, with intent to murder, maim and kill.

The government introduced evidence tending to show that the defendant while riding along the highway in Harmony in his road wagon, about three o'clock in the morning of August 20, 1893, passed by the house occupied by Benoice Spaulding and said Warren Spaulding, who are brothers.

The Spauldings testified that when the defendant saw them he stopped his horse and said "come here." That thereupon said Warren Spaulding went close up to the wagon and that the defendant stabbed him with a jack-knife. . . . That during the time required to make these stabs, the said Warren Spaulding offered no violence towards the defendant and did not retreat from the wagon. . . .

The defendant testified that he was riding by the house occupied by the Spauldings, and when he got nearly opposite the house in the highway the two Spauldings suddenly appeared. . . . Thereupon said Benoice Spaulding seized his horse by the bits and directed Warren to take him out of the carriage. That the moment Benoice seized the horse by the bits, he took his jack-knife out of his pocket and opened it, and that it was the only means of defense he had; that Warren Spaulding came to the wagon and undertook to pull him out. That his horse was restive, and he held the reins in his left hand, and when Warren Spaulding undertook to pull him out of the wagon he struck at him with the knife to defend himself and had no other means of defense. That said Warren Spaulding made several attempts to pull him out of his wagon, that he defended himself the best he could, and made the cuts on said Warren Spaulding in trying to prevent being pulled out of the wagon; and had no other intent or object than to defend himself.

It appeared that the defendant was arrested after dinner on the day of the trial and brought from Athens to the court house, a distance of ten miles or more, and put on trial the same afternoon and immediately after his arrival. That his counsel applied for delay till the next morning in order to procure the attendance

of witnesses to show that the Spauldings gave a different account of the matter the next day after it took place, or very soon after, and had admitted that Benoice seized the horse by the bits.

The state closed at six o'clock and court adjourned until morning. And after the defendant, who was the only witness in defense, had closed his testimony on the second day of the trial, his counsel again asked for a postponement until these outside witnesses could be obtained. This was denied by the court.

The county attorney then recalled the defendant and cross-examined him as follows:

"Ques. Have you made any talk that these Spauldings had made different statements about this? Ans. I made no talk about it only as other parties have told me that they have made different statements."

"Ques. Other parties have told you that they made different statements about it? Ans. Yes, sir."

"Ques. They have not made any different statements to you? Ans. No, sir; I have never spoken to them since."

The defendant's counsel then asked the defendant to state the whole of the conversation about which the county attorney had inquired, and claimed the right to have the statements as to what the Spauldings had said, submitted to the jury, under the peculiar circumstances of the case; and offered to show that in the conversation between other parties and the defendant, about which the county attorney had inquired of the defendant, they informed him that Benoice Spaulding had stated that he took the horse by the bit, a fact which said Spaulding had denied on the stand.

The court refused to admit the testimony and the defendant excepted to such exclusion.

Frank W. Hovey, county attorney, for State.

D. D. Stewart, for defendant.

The first count based on R. S., c. 118, § 25, charges the assault as made "with intent to murder, maim and kill." This court has decided that the statute embraces seven distinct

offenses. *State* v. *Neal*, 37 Maine, 468, 471; *State* v. *Waters*, 39 Maine, 54, 56. Three offenses cannot be joined in one count. *State* v. *Smith*, 61 Maine, 386; *State* v. *Burgess*, 40 Maine, 594.

Indictment is defective and judgment should be arrested. *State* v. *Smith*, *supra*; *Com.* v. *Symonds*, 2 Mass. 163; *Com.* v. *Morse*, 2 Mass. 128, 130; *State* v. *Nelson*, 8 N. H. 163; *State* v. *Foster*, 8 Foster, 184, 194; *State* v. *Burke*, 38 Maine, 574, 575; *Reed* v. *The People*, 1 Parker's Cr. Rep. 488-9; *People* v. *Wright*, 9 Wend. 193; *Com.* v. *Holmes*, 119 Mass. 198; *U. S* v. *Cook*, 17 Wall. 174; *U. S.* v. *Reese*, 92 U. S. 225; *State* v. *Stuart*, 23 Maine, 111; *State* v. *Haines*, 30 Maine, 65, 74; *Com.* v. *McLaughlin*, 12 Cush. 617, 618; *Com.* v. *McGovern*, 10 Allen, 194; *Com.* v. *Child*, 13 Pick. 200; *Com.* v. *Collins*, 2 Cush. 557; *State* v. *Waters*, 39 Maine, 54; *State* v. *Putnam*, 38 Maine, 297; *State* v. *Taggart*, 38 Maine, 301; *Com.* v. *Creed*, 8 Gray, 387.

2. If it was intended to charge the defendant with an assault, while armed with a dangerous weapon, with intent to murder, which is one of the offenses described in R. S., c. 118, § 25, the indictment should have alleged that he was armed with a dangerous weapon, and that being so armed, he made the assault with the intent to wilfully, feloniously, and with malice aforethought to kill and murder,—in other words, the indictment should have set out fully and precisely all the allegations and elements which constitute at common law the crime of murder. The statute uses the term "murder" in its common law sense, and we must necessarily resort to the common law for the definition of it; and all its elements should have been fully and precisely alleged. *Com.* v. *Clifford*, 8 Cush. 215; *U. S.* v. *Reese*, 92 U. S. 225 and 234; *Com.* v. *Kelley*, 12 Gray, 176; Heard's Cr. Pl. 172; *Com.* v. *Creed*, 8 Gray, 387; *Com.* v. *Collins*, 2 Cush. 557; *Com.* v. *Slack*, 19 Pick. 304. For the same reasons, if it was intended to charge the defendant with an assault, being armed with a dangerous weapon, with intent to maim, all the allegations and elements which constitute the crime of mayhem, should have been fully and precisely alleged.

At common law, the offense consisted of cutting off, or depriving the party injured of some member of the body which would lessen his capacity to fight, or to defend himself. Our statute has extended the crime so as to embrace other specific injuries. R. S., c. 118, § 15.

Whatever particular injury was within the intent of the defendant, should have been fully and particularly set out; and the intent must be proved, as alleged. *State* v. *Smith*, 37 Maine, 468; *State* v. *Palmer*, 35 Maine, 10. And the same considerations apply to an indictment charging an assault, with a dangerous weapon, with intent to kill. The material difference between such a count, and a count charging an intent to murder, would be the omission of the allegation "with malice aforethought."

This indictment sets out neither of these offenses correctly, while it does attempt to set out all three in one count, but in an imperfect manner as to each. The precedents and authorities are all against it. *Com.* v. *McGrath*, 115 Mass. 150; *Com.* v. *Clifford*, 8 Cush. 215; *Com.* v. *Kelley*, 12 Gray, 176; *State* v. *Neal*, 37 Maine, 469; Train and Heard's Precedents, 44, 43, 46, 45; Bishop's Directions and Forms, §§ 31, 33, 35. Archbold's Cr. Pleading: (Assault with intent to murder,) 459, 446, 447; (Assault with intent to maim,) 450, 451; (Assault with intent to rob,) 262; Wharton's Cr. Pl. & Pr. § 221; *State* v. *Smith*, 17 R. I. 373-4; *State* v. *Goddard*, 69 Maine, 181; *Com.* v. *Creed*, 8 Gray, 387.

3. The evidence offered and excluded should have been admitted. *Stuart* v. *Hanson*, 35 Maine, 507, 510; *State* v. *Walker*, 77 Maine, 488, 492.

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

HASKELL, J. Indictment containing two counts. The first count charges that the defendant "an assault did make, and him, the said Warren Spaulding, did beat, bruise and ill treat, with a dangerous weapon, to wit, a knife which said" [defendant] "then and there held, with intent him, the said Warren Spaulding, to murder, maim and kill, against the peace," &c. The

second count charges assault and battery. The verdict was: "Guilty of assault with intent to kill."

I. It is objected in arrest that the second count does not support the verdict, and that no judgment can be rendered upon it under that count. As the case now stands this objection is well taken, a *nolle prosequi* of the intent to kill not having been entered.

II. It is objected that judgment cannot be entered on the verdict under the first count, because it charges three distinct substantive crimes. If this were so, and the verdict had been general, that is, guilty of the indictment, the objection would have been well taken. *Commonwealth* v. *Symonds*, 2 Mass. 163; *State* v. *Nelson*, 8 N. H. 163; *People* v. *Wright*, 9 Wend. 193; *Commonwealth* v. *Holmes*, 119 Mass. 194; *State* v. *Smith*, 61 Maine, 386.

A few cases are cited as holding that duplicity is cured, even by a general verdict of guilty. They go upon the authority of *Commonwealth* v. *Tuck*, 20 Pick. 361, now disregarded in Massachusetts, if that be its doctrine. Among these are *State* v. *Palmer*, 35 Maine, 13; *State* v. *Dolan*, 69 Maine, 573, where the point is not given much consideration. Duplicity is cured however by a special verdict of guilty of one offense only. *State* v. *Payson*, 37 Maine, 361.

As remotely bearing upon the subject see *State* v. *Burke*, 38 Maine, 574; *State* v. *Hadlock*, 43 Maine, 282; *State* v. *Tibbetts*, 86 Maine, 189.

A distinction must be made between charging several substantive offenses in the same count, and charging several acts that, collectively, constitute one offense, but separately constitute several lesser offenses that are included in the greater offense, as assault, assault with intent to kill and intent to murder. In the former case the count would be defective for duplicity, a cause for demurrer, or for arresting judgment on a general verdict of guilty as it might be doubtful what sentence should be imposed. Nor should inconsistent acts be charged, either of which would constitute the offense. *State* v. *Haskell*, 76 Maine, 399.

If, however, the defendant waives his demurrer and goes to trial upon a count bad for duplicity, and the verdict be special, as the statute provides it may be, R. S., c. 131, § 4, the defect should be held cured. What good reason can be given why it should not be? The defendant stands convicted of a single offense upon a sufficient indictment therefor. Why should he complain of other charges of which he is acquitted? What prejudice have they worked him? We are aware of the dictum in *State* v. *Smith*, 61 Maine, 386. The considerations there were on demurrer, and the defendant was threatened with trial upon double charges in the same count. He had reason to object. His right of trial upon a single issue was likely to be denied him. But where a defendant waives the objection by going to trial, and the trial is so conducted that he is found guilty of but one offense, the matter has worked itself clear. The penalty to be imposed becomes certain, and he can be subjected to no greater penalty than he would have been had the charge been single.

But it is urged in the case at bar that the verdict is responsive to only one charge in the first count and silent as to the others, and, therefore, not such a verdict as authorized by our statute and upon which no judgment can be rendered. But the verdict, in effect, is responsive to the whole indictment, as its legal effect is an acquittal of the part not specifically responded to. So says the court in *State* v. *Payson*, *supra*. "When a person indicted for an offense shall, by verdict of a jury be acquitted of a part of it, and found guilty of the residue, he is, by the provisions of the statute [now R. S., c. 131, § 4], to be considered as convicted of the offense, if any, which is substantially charged by the residue, of which he is found guilty. The verdict, in this case, as presented, does not contain any formal words of acquittal of a part of the offense; yet, such is its legal effect. For when the verdict of a jury finds the accused guilty of a certain part of the offense only, the effect is an acquittal of everything else charged. The legal effect of the verdict, and not the language used in it, must have been intended by the provisions of the statute, for such verdicts are in the customary

course of business, presented orally and not in writing." In that case, the indictment was said to charge two substantive offenses in one count, and the verdict was guilty of one offense and silent as to the residue, and a motion in arrest of judgment for duplicity was overruled. The opinion was by Chief Justice SHEPLEY. The weight of authority sustains the same doctrine. They are cited in Bishop's New Criminal Law, § 1006. *State* v. *Cofer*, 68 Mo. 120; *Dickinson* v. *State*, 70 Ind. 247; *People* v. *Dowling*, 84 N. Y. 478; *Green* v. *State*, 17 Fla. 669; *State* v. *Gannon*, 11 Mo. Ap. 502; *Foster* v. *State*, 88 Ala. 182; *State* v. *Thompson*, 95 N. C. 596; *State* v. *McNaught*, 36 Kan. 624; *Nutt* v. *State*, 63 Ala. 180; *Sylvester* v. *State*, 72 Ala. 201; *Cheek* v. *State*, 4 Tex. Ap. 444; *State* v. *Sorrell*, 98 N. C. 738; *Thomas* v. *People*, 113 Ill. 531; *Kirk* v. *Commonwealth*, 9 Leigh, 627; *Weinzorpflin* v. *State*, 7 Blackf. 186; *Brooks* v. *State*, 3 Hump. 25; *Morris* v. *State*, 8 Sm. & M. 762; *Chambers* v. *People*, 4 Scam. 351; *Stoltz* v. *People*, 4 Scam. 168; *Brennan* v. *People*, 15 Ill. 511, 517; *State* v. *Twedy*, 11 Iowa, 350; *State* v. *Lessing*, 16 Minn. 75; *Commonwealth* v. *Bennett*, 2 Va. Cas. 235; *State* v. *Hill*, 30 Wis. 416; *State* v. *Belden*, 33 Wis. 120.

Contra, *United States* v. *Keen*, 1 McLean, 429; *Jones* v. *State*, 13 Tex. 168; *State* v. *Smith*, 5 Day, 175.

We are aware of the dictum in *State* v. *Smith*, *supra*, 61 Maine, 386, that a special verdict of guilty of one of two offenses charged in the same count cannot cure the duplicity; but no authorities are cited, and the earlier case of *State* v. *Payson*, *supra*, was unnoticed. That case holds squarely the reverse, and is sustained by the great weight of authority and has never been considered to have been overruled by our own courts.

In case of a new trial, the Wisconsin authorities limit the renewed jeopardy to the offense of which conviction was had. *State* v. *Belden*, 33 Wis. 120; *State* v. *Hill*, 30 Wis. 416. Others hold that a new trial opens the entire case. *Bohanan* v. *State*, 18 Neb. 57; *Commonwealth* v. *Arnold*, 83 Ken. 1; *Briggs* v. *Commonwealth*, 82 Va. 554; *Patterson* v. *State*, 70 Ind. 341. Bishop recommends that the order for new trial state the conditions in this respect.

But it is said the indictment is not open to the charge of duplicity in the first count. Let us see. It charges that the defendant, with force and arms, in and upon one Warren Spaulding an assault did make, and him, the said Warren Spaulding, did beat, bruise and ill treat with a dangerous weapon, to wit, with a knife which the defendant then and there held with intent him, the said Warren Spaulding, to murder, maim, and kill, *contra pacem*, &c.

More than one offense must be charged. A defective charge is no charge, and may be rejected as surplusage. *State* v. *Palmer*, 35 Maine, 9; *State* v. *Haskell*, 76 Maine, 399; *State* v. *Bennett*, 79 Maine, 55; *State* v. *Dunlap*, 81 Maine, 389; *State* v. *Dodge*, 81 Maine, 391.

The charge of assault with intent to murder is insufficient, and therefore is no charge, and surplusage. To be good for that offense it must charge malice. That is a necessary element of the crime. *State* v. *Neal*, 37 Maine, 468; and that which must be proved, must be averred directly and not by way of argument, implication or inference. *State* v. *McDonough*, 84 Maine, 489; *State* v. *Paul*, 69 Maine, 215. But had this charge been sufficient, the count would not have been double by reason of charging assault, or assault with intent to kill, as they are lesser crimes included within the greater. *State* v. *Waters*, 39 Maine, 54; *State* v. *Cobb*, 71 Maine, 206.

The charge of assault with intent to maim contains all the averments of the indictment against Palmer, that was held sufficient. *State* v. *Palmer*, *supra*. Hence here is one substantive offense.

The charge of assault with intent to kill as distinguished from assault with intent to murder, was unknown to the common law, because it was thought intent implied malice that was murder. It is made by our statute, and by the statutes of many other states, a substantive offense. *State* v. *Waters*, *supra*. It is an offense that may be committed without malice. Should the intent prevail, the crime would be manslaughter. And although a felony, the failure to charge the acts that constitute the crime to have been feloniously done, is not fatal, although

unwise, inasmuch as R. S., c. 131, § 12, provides that no indictment shall be quashed or judgment thereon arrested for the omission of the word "feloniously," unless it prejudice the defendant.

Many authorities hold that where the indictment charges a felony, a conviction for misdemeanor cannot be supported by proof of a felony. Different rights are sometimes accorded on trials of these offenses. But our statutes obviate all substantial differences of procedure in both classes of trials, except trials for some offenses formerly capital, and therefore the omission to charge the felony to have been feloniously done can work no prejudice to the defendant, inasmuch as the acts charged in the indictment of themselves sufficiently characterize the offense.

The first count, therefore, sufficiently charges two substantive crimes, viz., assault with intent to kill, and assault with intent to maim, whether the averment of the use of a dangerous weapon be considered a sufficient allegation of "being armed with a dangerous weapon" or not.

The defendant stands convicted of assault with intent to kill, and acquitted of all else charged against him in the indictment.

The evidence excluded was clearly inadmissible.

Exceptions overruled. Judgment on the verdict.

CORDELIA M. STRICKLAND *vs.* FRED O. HAMLIN.

Kennebec. Opinion December 21, 1894.

Contract. Payment. Wages. R. S., c. 111, § 1.

To an action by a married woman to recover wages for her personal labor, not rendered in the family of her husband, the defendant pleaded payment by the sale of a horse to her and her husband jointly, and that as a consideration for the sale she agreed that her wages might be applied in payment for the horse.

An instruction to the jury that, if there was a joint purchase of the horse, the defendant might apply the plaintiff's wages in payment therefor, was *held* correct.

Held; If the sale of the horse was not made jointly to the plaintiff and her husband, any mere voluntary assent by her afterwards, not in writing, that her wages might be so applied, would not bind her.

Instructions already given need not be repeated.

The plaintiff having obtained a verdict of the jury in this action tried in the Superior Court, for Kennebec county, the defendant took exceptions which are stated in the opinion.

Chas. F. Johnson, for plaintiff.

F. A. Waldron, for defendant.

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

HASKELL, J. Assumpsit by a married woman to recover a balance of twenty dollars, wages for her personal labor not rendered in the family of her husband.

Defense, payment by the sale of a horse to herself and husband jointly, and that, as a consideration for the sale, she agreed that her wages might be applied in payment for the horse. The evidence is not reported, and the most the defendant can claim is correct instructions upon the issue above stated.

The following instructions are excepted to by defendant:

I. In substance, that if there was a joint purchase of the horse the defendant might apply plaintiff's wages in payment therefor. Manifestly correct.

II. That, if the sale of the horse was not made jointly to the plaintiff and her husband, any mere voluntary assent by her afterwards, not in writing, that her wages might be applied to payment for the horse previously sold to her husband, would not bind her by reason of the statute of frauds, R. S., c. 111, § 1, requiring such contracts to be in writing and signed by the party to be charged thereby. The case does not show but that the wages sought to be so applied were to be earned in the future. It must be presumed, therefore, that they were, in which case the statute would apply. That would be purely a promise to pay the debt of another by future labor.

The following requested instructions were refused, and the refusal excepted to:

I. "If the plaintiff, at the time the defendant sold the team, either to the plaintiff, or to the plaintiff and her husband, consented that her wages might go in payment of that team, then

she would be bound by that agreement, even though it were not in writing."

This instruction had already been given and need not be repeated. Of course, if the sale was to her, she must pay; if to her and her husband jointly, then she must likewise pay, and the jury were so told in the first instruction, *supra*. The case does not intimate any evidence that the sale was to her alone.

II. "That the plaintiff is bound by the credits given in the bill," meaning her account annexed to the writ. Nothing appears to the contrary. They probably were allowed her. The Judge added: "As I have already instructed you, gentlemen, I do not think it necessary to multiply words. The amount claimed here is a balance of twenty dollars, and you cannot in any event find for more than that." We think so, too.

Exceptions overruled.

WM. M. E. BROWN, and another, *vs.* SAMUEL W. LAWTON.

Somerset. Opinion December 21, 1894.

Mortgage. Redemption. Tender. Parties. Waiver. R. S., c. 90, §§ 14, 15, 19.

The improper or unnecessary joinder of a party plaintiff will not defeat a cause in equity.

Tender, before the right to redeem a mortgage of real estate has become foreclosed, will support a bill to redeem brought afterwards, but within one year.

A bill to redeem will be sustained when the tender was made by authority of the plaintiff within the time, enlarged by agreement of parties, for redeeming the mortgage, and all other essentials of a tender were waived by the defendant.

As to whether the tender in this case has been kept good, *quaere*.

ON EXCEPTIONS.

This was a bill in equity to redeem a mortgage of real estate, inserted in a writ of attachment dated July 6, 1891, returnable at the following September term of this court.

The bill alleges the giving of the mortgage October 23, 1886, by the plaintiff, Wm. M. E. Brown, to the defendant, Lawton, to secure certain notes of his and provided for a foreclosure in

one year; also a quitclaim of the premises to the co-plaintiff, William B. Brown, by deeds dated August 17, 1887, and August 7, 1889. It next alleges a foreclosure of the mortgage by the defendant, Lawton, by notice in a newspaper July 18, 1889, and proceeds to allege as follows:

"And your orators say that the said Wm. M. E. Brown and Wm. B. Brown, being the owners of the equity of redemption in the property under and according to the mortgage hereinbefore mentioned, and hereunto annexed, and by reason of the conveyances hereinbefore described, and being allowed by law one year from the date of the first publication of notice of foreclosure, to wit: one year from the 18th day of July, A. D., 1889, in which to redeem said property, the said Wm. M. E. Brown by and with the consent and authority of the said Wm. B. Brown, did, although in feeble health, on Thursday the 17th day of July, A. D., 1890, go to the house of said Lawton, in said Skowhegan, and in which said Lawton was living, but that said Lawton was not at home, nor could the said Wm. M. E. Brown by diligent search find him anywhere; that on the next day, Friday, July 18th, 1890, the said Wm. M. E. Brown did go twice to the house of said Lawton; the first time he was not in, the second time he found him in, told him his business and asked said Lawton where the notes and mortgage were and the amount due. Lawton replied that he had the notes and that they amounted to about $350. The said Wm. M. E. Brown then asked him if that included the costs of foreclosure, and said Lawton replied that he supposed so. The said Wm. M. E. Brown then told him that he was prepared to pay the money and asked him if he should pay it at the Second National Bank or at Merrill & Coffin's office. Lawton replied that he could pay it at his house as he had the notes. The said Wm. M. E. Brown then said that he was not feeling well, that he was very feeble and did not like to go down to the bank unless necessary, and he asked said Lawton, if it would be all right if he should pay it the next day, and Lawton replied, 'I shall be at home to-morrow and it will be all right whether you pay it to-morrow or to-day.'

"And your orators say that, relying upon this waiver and promise of the said Lawton, the said Wm. M. E. Brown went away; and on the next day the said Wm. M. E. Brown went according to the agreement made with said Lawton, to said Lawton's house to pay him the money and redeem the property and meeting said Lawton upon the street near his, the said Lawton's house, he told him that he had come to pay him the money, and put his hand in his pocket to take out his money, whereupon said Lawton cried out, 'you need not make me a tender, you needn't take out your money for I will not take a cent from you' and when said Brown asked him why, said Lawton replied, 'The mortgage run off yesterday and I will not take a cent of money from you until you pay the note I sued you and Blunt for, and I will have no talk with you' and went into the house. And afterwards, on the same day, the said Wm. M. E. Brown and the said Wm. B. Brown went to the house of the said Lawton to pay the mortgage or to tender the money, but said Lawton was not at home, nor could they find him anywhere.

"And your orators further say that on the next Monday, to wit, July 21st, 1890, they went to the house of the said Lawton and the said Wm. B. Brown made said Lawton a good and lawful tender of $355 and demanded the mortgage, and that said Lawton refused to accept the money or to give up the mortgage or to have any talk with the said Browns; and that said Lawton has refused to give up the mortgage or to do anything in the premises from that time until the present.

"And your orators aver that they are and have been always ready and willing to pay the amount due upon said mortgage and notes, and that they are now ready to bring the same into court whatever your Honors shall find to be justly and equitably due upon said mortgage and notes secured thereby and to do any and all other things that your Honors may decree that your orators should do in the premises."

The defendant demurred to the bill and assigned the following causes of demurrer:

1. The plaintiff has not stated in said bill of complaint, any case within the provisions of the statutes of Maine which provide for, and regulate the right of redemption of mortgages of real estate.

2. The bill should have been brought within one year after the first publication of the notice of foreclosure; or, if the time was extended one day by the defendant, as alleged in the bill, then within such extended time, or it is too late. This was not done.

3. The allegations in the bill of complaint do not state a case within the equity jurisdiction of the court relating to mortgages of real estate.

4. By the allegations in said bill of complaint, William M. E. Brown is improperly made a party plaintiff. Having no interest in the mortgaged property described in said bill of complaint, he can maintain no bill for its redemption.

The court ruled, *pro forma*, sustaining the demurrer and dismissed the bill. The plaintiffs took exception to this ruling and the decree.

S. J. Walton, *L. L. Walton and Forrest Goodwin*, for plaintiffs.

D. D. Stewart, *E. F. Danforth and S. W. Gould*, for defendant.

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

HASKELL, J. Bill to redeem, brought by the mortgagor and his grantee. Dismissed below on demurrer. Exceptions.

I. It is objected that the mortgagor is improperly made a plaintiff. Suppose he is. The other plaintiff may well prosecute the suit and have redemption allowed him. The improper or unnecessary joinder of a party plaintiff will not defeat a suit in equity. The bill may be dismissed as to him. Too few plaintiffs may be fatal to an equity cause, never too many. All persons interested must be parties, either plaintiffs or defendants, and if, from over-caution, too many be joined, the mistake

is harmless and may be corrected on final decree, as the judgment may be several and so framed as to work full and substantial justice. These remarks are elementary and need no citation of authorities.

II. It is objected that the bill filed after the time for redemption had elapsed came too late. That would be so, if the essentials of redemption had not intervened before the right became barred by the lapse of foreclosure time. But they had intervened. The amount due on the mortgage had been tendered. But it is urged that the tender was made by the mortgagor, who had conveyed away his right to redeem. So it was, but it was done by authority of his grantee and may be considered his act. It is urged that the tender was too late, that it was made after the foreclosure time had run. That is true, but it was made within the extension agreed to by the mortgagee. It is urged that the tender was ineffectual because, as no money was produced, it does not appear that sufficient money, or any money, was at hand. But all this was waived by the mortgagee. The mortgagor told him "that he had come to pay him the money" and put his hand in his pocket to take out his money, whereupon the mortgagee replied: "You need not make me a tender. You needn't take out your money, for I will not take a cent from you, . . . the mortgage ran off yesterday." All necessary essentials of the tender were waived, except whether seasonably done, and that is shown by the bill, for the time of redemption was agreed to be extended one day and during that day the tender was made. The parties may agree by parol to extend the time for redemption of a mortgage, and the agreement will bind them. *Chase* v. *McLellan*, 49 Maine, 375; *Fisher* v. *Shaw*, 42 Maine, 32; *Stetson* v. *Everett*, 59 Maine, 376.

Payment extinguishes a debt. Tender, if of sufficient amount, when accepted, is payment; when rejected, operates as payment, so long as it is kept good. In the case at bar, the tender operated the same as if it had been payment, and gave the plaintiff interested a right to cancellation and surrender of the mortgage. This right might be enforced in equity at any time

until laches should prevent it, but for the limitation of one year fixed by R. S., c. 90, § 19.

Under § 14 of c. 90, the bill must be filed before the time for redemption has elapsed. Under § 15 tender or performance of condition must be made during that time, and the bill may be brought at any time within the year named in § 19. *Walden* v. *Brown*, 12 Gray, 102, very closely resembles the case at bar. Whether the tender has been kept good and has been paid into court, as in *Morrill* v. *Everett*, 83 Maine, 290, does not appear from the bill. No objections upon that ground are raised, and, as in *Richards* v. *Pierce*, 52 Maine, 560, need not be considered here.

Exceptions sustained. Defendant to answer.

HIRAM HUBBARD, and others, in equity,

vs.

WILLIAM WOODSUM, and others.

Oxford. Opinion January 2, 1895.

Counties. County Commissioners. Elections. County Buildings. Loans. R. S., c. 78, § § 14, 17; Stat. 1880, c. 248; Resol. 1880, c. 217.

A proposition, submitted by county commissioners to be passed upon by the voters of their county, to see if such commissioners shall be authorized to construct new county buildings, on a new site therefor, at a cost not to exceed thirty thousand dollars, and be further authorized to hire money on the credit of the county for the purpose of such construction, is not objectionable as covering more than one subject matter or thing; the elements of site, construction, cost and credit are no more than parts of one and the same proposition.

A vote of a county, in general terms authorizing its commissioners to hire money on its bonds or notes for public purposes, leaves to the commissioners to determine upon what time and other terms the same shall be issued.

It is not objectionable to require voters to cast their ballots, on special questions submitted to them, with only the word "yes" or "no" inscribed thereon; nor objectionable to require that such ballots be received in a separate box specially for the occasion. Such is the usual method and one sanctioned by legislative precedent.

ON REPORT.

This was a proceeding in equity brought by ten tax payers and inhabitants of Paris, Oxford county, under R. S., c. 77, § 6, par. IX, to enjoin the defendants, who are the County Commissioners and Treasurer of that county, from expending any money of said county, or obtaining any loan, issuing any notes, bonds or other obligations for the payment of money upon the credit of said county, for the purposes of locating or building new county buildings at South Paris.

The defendant's claimed to act under a majority vote, in favor of the proposed removal of the county buildings to South Paris, thrown at an election under R. S., c. 78, § 14.

By the returns made to the County Commissioners there appeared to be 3299 votes thrown in favor, and 3149 votes thrown against, the proposition.

The case is sufficiently stated in the opinion.

J. P. Swasey and O. H. Hersey, for plaintiffs.

Remedy: *Borne* v. *Smith*, 47 Ill. p. 482; *Wheaton* v. *Wyant*, 48 Ill. p. 364.

The question which the commissioners are only empowered or authorized by statute to submit, namely, "to erect buildings upon the location designated," cannot be coupled with any other proposition which might be made the subject or necessity of another distinct vote, involving different considerations of doubtful propriety or public policy. To vote upon this single question is a right which the legal voters have, and any modification of the form of submission not expressly and clearly prescribed in this section is an interference with, and an abridgement of their rights. 15 Mich. 85; 33 Mich. 292.

The incorporating into the submission the limitation as to the cost of the county buildings, and language "at a cost not exceeding thirty thousand dollars," was entirely beyond the authority of the county commissioners, and unwarranted by any precedent or law. What the object of the commissioners might have been, in thus incorporating into their submission such an extraordinary limitation, we can only infer. Our conclusions are that it was done for the very purpose of influencing the vote, and in our judgment it had that effect. In other

words, it was a trap, with which to catch votes, for in a county like Oxford, the question of cost of county buildings would have more influence, perhaps than in some of the other counties of the state. Submission to popular vote must be unconditional.

It is an important requirement in an election for the removal of the county seat that the notice thereof should in all respects conform to the law authorizing such election. *Darnelle* v. *Co. Com.* 3 Neb. p. 244.

Their first notice under the first section of the statute is of their intention to erect new county buildings, which is a paragraph separate and distinct. Secondly, by paragraph second they further notify the municipal officers that they desire the consent of the county to obtain a loan of money. It will be observed that the commissioners themselves in the form of their notification, treated the two propositions distinctly and separately, making them the subjects of two distinct paragraphs; but in the article submitted to the towns in their warrant for their March election, under said notices, they unite the two propositions in one article to be determined by a single vote of "yes" or "no."

By the statute, R. S., c. 78, §§ 14, 17, they are made separate and distinct propositions, independent in their character, and to be determined, undoubtedly by different, distinct votes. They are two distinct propositions, and in no way connected, nor can they be; and the voters have the right to express their will upon either or both independently, without any limitation or abridgment of that right. If in the union of these two propositions and their determination upon a single vote, there is no opportunity left for a voter to express himself by his ballot upon both, then we say, it is such an abridgment of a voter's rights, that it must be held legally void in law. *McMillan* v. *Lee Co.* 3 Iowa, 318; *Gray* v. *Mount*, 45 Iowa, 591; *Rock* v. *Rhinehart*, 55 N. W. Rep. 22.

Where there is no prescribed form, the ballot should show the specific question contemplated by the act so passed upon. 14 Mich. 28.

The simple "yes" on a slip of paper or "no" means nothing as a ballot upon the abstract proposition like the questions submitted in this case.

The vote provided by the county commissioners under the submission of this case, was entirely without precedent, legally insufficient, contrary to all precedents, and considered apart from the question submitted, absolutely meaningless.

Fraud in voting: *Attorney General* v. *Newell*, 85 Maine, 273; Am. & Eng. Ency. Law, pp. 353-4.

A. E. Herrick and S. S. Stearns, *Geo. D. Bisbee*, with them, for defendants.

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

PETERS, C. J. In instituting proceedings to obtain the consent of the county of Oxford for the erection of new county buildings, on a new site therefor, the commissioners of that county issued to the municipal authorities of all the towns and plantations in the county the following notice:

"You are herby notified that it is our intention to erect new county buildings, including court rooms, offices for the several county officers, jury rooms, library rooms, and fire-proof vaults for the records of the probate office, register of deeds, clerk of courts and county treasurer; also jail and jailer's house, at a cost not to exceed thirty thousand dollars, on the following described lot, situated in the village of South Paris, near the railroad station, and in the shire-town of Paris, but more than half a mile from the present location of the county buildings, to wit: Beginning on the westerly side of Western Avenue, at a point one hundred and ten feet southerly from the northerly corner of land belonging to the heirs of Ira Cleasby; thence north eighty degrees west, four hundred and twenty-nine feet; thence north four degrees east, two hundred and forty feet; thence south eighty degrees east, four hundred and twenty-nine feet, to said Western Avenue; thence southerly by said Western Avenue, two hundred and forty feet to the point begun at.

"And you are further notified that the consent of the county is asked that the county commissioners have authority to obtain a loan of money for the use of the county to the amount of $30,000, and issue therefor notes or obligations of the county, with coupons for lawful interest, to that amount. And you are hereby directed to insert the following article in the warrant for the town meeting at the next annual election, to be holden March next:

"'To see if the county commissioners shall be authorized to erect new county buildings, including court rooms, offices for the several county officers, jury rooms, library rooms, and fire-proof vaults for the records of the probate office, register of deeds, clerk of courts and county treasurer; also jail and jailer's house, on the lot selected by them at South Paris, and described as follows, viz.: Beginning on the westerly side of Western Avenue, at a point one hundred and ten feet southerly from the northerly corner of land belonging to the heirs of Ira Cleasby; thence north eighty degrees west four hundred and twenty-nine feet; thence north four degrees east, two hundred and forty feet; thence south eighty degrees east, four hundred and twenty-nine feet, to said Western Avenue; thence southerly by said Western Avenue, two hundred and forty feet, to the point begun at; at a cost not to exceed thirty thousand dollars; and to obtain a loan for the use of the county for said sum of thirty thousand dollars, or such a part thereof as they may need, and issue therefor the notes or obligations of the county, with coupons for lawful interest.'

"All in favor to give in their votes with the word 'yes' printed or written thereon, and all opposed with the word 'no' printed or written thereon.

"In order to secure uniformity of action in the several towns, we have prepared printed copies of the above article for use by the several towns, and we recommend that it be inserted in the town warrant next after the article providing for choice of moderator; and that the votes be deposited in a separate ballot box, and that the polls be kept open during the entire session of the town meeting held on that day. Said votes to be received,

sorted and counted, for and against said proposal, by the municipal officers, and they, the said municipal officers, and the clerks of the several towns and plantations in said Oxford county, shall certify and return such votes forthwith to the clerk of the county commissioners, that the same may be examined and action taken according to the statute in such case made and provided.

"And we further recommend that the check list be properly and seasonably posted and used in the several towns and plantations, in voting, and that the newly elected municipal officers be not sworn until after the closing of the polls on the foregoing proposal, so that the same officers may act throughout.

"Given under our hands and the seal of said court, this fourteenth day of February, A. D. 1893.

WM. WOODSUM,
W. W. WHITMARSH,
J. F. STEARNS,
} *County Commissioners of the County of Oxford.*"

It appears that the record of the county commissioners' court is in due form, properly authorizing a submission of the question to the legal voters of the county, and that the proposition was carried by a small majority of the persons voting. The closeness of the vote, and the feeling manifested against the result in some localities in the county led to the institution of this bill in equity to see if, upon close investigation and scrutiny, it might be discovered that the result should be avoided for fraudulent voting or for some illegality in the proceedings.

On the allegation of fraud the complainants fail. Enough fraudulent or illegal votes are not proved to change the result, although the evidence on that point may be enough to reduce somewhat the majority by which the record declares the vote to have been carried. We have examined the facts produced on that part of the case, but a judicial opinion is not the place in which to insert the many details and calculations of figures which produce the result.

Objections are taken to the form of the proposition submitted by the commissioners to the people. It is contended that two propositions should not have been submitted to be passed upon by one vote, and further contended that whether the county

would consent to new buildings was one proposition, and whether such new buildings should cost not exceeding thirty thousand dollars was another proposition. The argument is that there should have been as many distinct and independent votings as there were subjects or things to vote upon; that the two propositions united in one only would carry more votes than either one would carry alone, and that in that way a result might follow which would be unfair.

In the first place, we think it to be plain that the premises assumed by the complainants are not true. There were not two propositions submitted. But one proposition is contained in the phrase, "to build new county buildings at a cost not exceeding thirty thousand dollars." The most that can be claimed in that respect is that there are two parts in the proposition, such two parts being but one whole. Every whole has its part. The cost of the buildings is only descriptive of the buildings themselves, of their kind and degree. If a man sends his agent to buy a horse for him at a price not exceeding five hundred dollars, is that one proposition or two propositions? Does the agent do one errand or two errands? It would be an awkward situation if the agent reported that he had agreed with a seller of horses as to a price but not as to the horse, or *vice versa*. Or if the agent is intrusted with an authority to buy a house for his principal, to be situated on Oxford street and to be purchased for a price not exceeding thirty thousand dollars, is the agent thereby empowered to do more than one thing? Are not the price and locality parts of the proposition of purchase? Are they not merely descriptive of the house, in a general way defining the kind of house?

A proposition does not become two-fold by annexing to it some condition of qualification. The condition is not of itself a proposition, but only a part of one. It seems to us in the present case that the condition as to the cost of the structures was not only a natural but a necessary part of the question to be voted upon. If a tax-payer were inquired of whether he favored the idea of a new court-house, would he not be likely to answer the question conditionally, and would not his answer

depend upon his information as to where the court-house was to be located, and at what cost it was to be built, and also as to how the necessary means were to be obtained, to build with? And what an awkward result might have followed if these different parts of one and the same proposition had been voted upon separately. It would not be strange, in such a close election as this was, if the vote had resulted in favor of the locality and against all else, or also in favor of building but against the price, or in favor of the price and against building, or there might have been other inconsistent if not absurd results.

The idea on which this contention of the complainants is grounded is found in the construction which courts have given to constitutional provisions existing in some of the states prohibiting their legislatures from embodying two distinct and independent, private or local subjects in one act. In such states two or more schemes of private legislation cannot be grouped together. The object is to prevent a combination of different interests where each one may help the other; "to prevent," as Folger, J., expressed it in a New York case, "the joining one local subject with another or others of the same kind so that each subject should gather votes for all." *Harris* v. *People*, 59 N. Y. 599; *People* v. *Supervisors of Chatuaqua*, 43 N. Y. 10.

But in the cases cited, and in all kindred cases, it is clearly explained that parts of a subject are not to be regarded as separate subjects. In the case last cited it was held that an act to revive the charter of a municipal corporation in the state of New York where the constitutional inhibition referred to exists, had the effect to restore all the legislative, judicial, taxing and police powers which such municipality had previously possessed. The principle invoked by the complainants has been applied in a case where state aid to several different railroads was granted in the same bill, and also in a case where provisions for aiding a railroad and a school district were joined in one bill; and there are several decisions of that kind, but all the cases touching the principle disclaim any application to an act relating to a single subject or thing although involving even many particulars.

There can be no argument in the case before us that the whole proposition would carry more votes than its different parts would if submitted singly. Really the effect would have been the other way. The voter who disapproved of the location might vote against the proposition submitted. And so might one whose opposition was aroused against the amount of money called for as being either too large or too small. And still another might be opposed to a county debt, and vote in the negative on that account. But the man who would be sure of voting in the affirmative would be one to whom the proposition would be acceptable in all its particulars.

We can find no case whatever having any tendency to support the position of the complainants on this point, but the respondents have referred us to two very pertinent decisions which are directly in opposition to it. It was held in *Blood* v. *Mercelliott*, 53 Penn. St. 391, that an enactment enlarging the boundaries of a county, and locating anew the county site, with provisions for obtaining donations for erecting county buildings, related to only one subject and was not unconstitutional. There is a clear and satisfactory discussion of the same principle in a late case in Iowa not yet published in the regular reports of that state, but to be found in 55 Nor. West. Rep. 21 (*Rock* v. *Rinehart*), where the question submitted to the people was, "Whether a court-house, to cost not to exceed fifty thousand dollars, shall be erected from the proceeds of swamp lands belonging to the county," and it was there held that the ballot was not objectionable as containing more than one proposition. Omnibus bills and such as are of a multifarious character are those that are objectionable. *Davis* v. *The State*, 7 Md. 160. If the provisions all relate to one enterpise it is but one subject matter. *Gifford* v. *New Jer. R. R. Co.* 2 Stockton, 177. Or if such matters are not improperly connected with each other. *Thomasson* v. *The State*, 15 Ind. 455.

Another objection made against the form of the proposition submitted by the commissioners is that it asks permission to use notes or bonds of the county to raise the means with which to build the proposed new structures. But this objection easily falls with the others. They are of the same kind.

Then comes another objection, but of a different character, however, not that the vote submitted contained too much of proposition, but that it did not contain enough, it not being named therein on what time the notes or bonds of the county were to be issued. That is a matter which will take care of itself. It is enough to say that the obligations of the county should be issued on such time as may be reasonable in view of all the circumstances. The discretion of the commissioners must govern that matter. The credit was to be voted by the people,—the details of its execution are for the commissioners.

Whether equity would interfere and break up a result in such a case as this, in a state where there is no constitutional provision or legislative enactment against it, provided this were an instance of a double proposition presented for the ballots of the people, is a question which does not now require either decision or consideration at our hands.

Still another point of objection is made, which we believe to be utterly untenable, and that is that the proposition was wholly in the warrant, and no part of it on the ballot, there being on the ballot itself no indication of what was being voted upon excepting what was to be deduced from the "yes" or "no" thereon. The answer to this objection is that the method adopted here is the usual one, and the method employed in nearly all instances of the adoption of constitutional amendments in this state by a vote of the people. We quote from the language of chapter 217 of the Resolves of 1880, relating to a ballot on our last constitutional amendment which was voted upon and adopted that year:

"*Resolved*, That the aldermen of cities, selectmen of towns, and assessors of plantations, in the state, are hereby empowered and directed to notify the inhabitants of their respective cities, towns and plantations, in the manner prescribed by law, at the annual meeting in September next, to give in their votes upon the amendment proposed in the foregoing resolve; and the question shall be, 'Shall the constitution be amended so as to

change the term of office of senators and representatives, as proposed in said resolve?' And the inhabitants of said cities, towns and plantations shall vote by ballot on said question, those in favor of said amendment voting 'yes,' and those opposed voting 'no,' upon their ballots; and the ballots shall be received, sorted, counted and declared in open ward, town and plantation meeting, and fair lists of the votes shall be made out by the aldermen of cities, selectmen of towns, and assessors of plantations, and signed by them, and attested by the clerk."

Some criticism was passed, at the argument, upon the fact that a separate ballot box was recommended and used for the reception of the votes. That method also has legislative recommendation by the provision contained in chapter 248 of the laws of 1880, which is as follows:

"Whenever any constitutional amendment is submitted to the people for adoption, a ballot box shall be provided at every poll or voting place in the state, in which the ballots or votes for or against every such proposed amendment, shall be deposited separately from all other ballots or votes, and said ballot boxes shall be provided as at other elections."

It will be difficult for any person of dispassionate mind to find any appearance of unfairness in the conduct of the commissioners or any error in their proceedings. Uncommon care and particularity seem to have been observed by them.

It was represented strongly at the argument that thirty thousand dollars are not sufficient to build new buildings including a jail, and that in view of the narrow majority by which the vote was carried, and the insufficiency of funds voted, it would be wise to postpone action in the premises until some further arrangements can be perfected in behalf of the scheme of removal. Those are matters to be presented to the commissioners and not to us; but we assume that the commissioners will take all such suggestions into careful consideration.

On account of the uncertainty of the vote we have no doubt the complainants acted in the public interest in thoroughly investigating the matters, as they have, affecting the result of

the election; and we think it would be reasonable that they be exonerated from costs, and that they recover their court costs, including the expense of copies and printer's bill, but not including the cost of witnesses, the amount of all the same to be paid out of the treasury of Oxford county upon the warrant of the commissioners.

Bill dismissed.

STATE *vs.* CHARLES F. SWETT, and another, appellants.

Cumberland. Opinion January 5, 1895.

State and Game. Lobsters. Common Carrier. Stat. 1889, c. 292, § 2.

A common carrier who in the course of his business has short lobsters, which were packed in barrels, in his possession for the purpose of transporting them to market, without knowing or having reasonable cause for believing that they are short lobsters, is not liable to the penalty ordinarily attaching to the having possession of short lobsters; and no duty rests on him, not having such knowledge or reasonable belief, to inspect or examine such packages in order to see whether they contain short lobsters or not.

Bennett v. *American Express Co.* 83 Maine, 236, approved.

ON EXCEPTIONS.

This was a complaint against the respondents for the violation of section 2 of chapter 292 of the laws of 1889, by having in their possession short lobsters.

The case was tried to a jury in the Superior Court, for Cumberland county, on appeal from the Municipal Court for the city of Portland. The lobsters were seized by a fish warden, Cushman, without a warrant.

The jury found the respondent, Swett, guilty in manner and form as charged against him in the complaint and found the number of short lobsters in his possession as alleged in the complaint, to be nineteen hundred and twenty-four.

The respondent, Charles F. Swett, was the manager of "Swett's Express" doing business between the cities of Portland, Maine, and Boston, Massachusetts, and the other respondent, Christopher W. Leonard was one of the drivers of the express wagons in Portland.

(Complaint.)

Cumberland, ss.

To the Judge of our Municipal Court for the City of Portland in the County of Cumberland.

George E. Cushman on the twenty-sixth day of February in the year of our Lord one thousand eight hundred and ninety-two in behalf of said state, on oath complains, that Charles F. Swett and Christopher W. Leonard of Portland in said county, on the twenty-fifth day of February, A. D., 1892, at said Portland, between the first day of July in the year 1891 and the first day of May, A. D., 1892, to wit: on said twenty-fifth day of February unlawfully did have in their possession nineteen hundred twenty-four lobsters, each of said lobsters then and there being less than ten and one-half inches in length, said length of each of said lobsters being then and there measured by extending each lobster on the back its natural length, and taking the length of its back measured from the bone of the nose to the end of the bone of the middle flipper of the tail, which said lobsters when caught being shorter than ten and one-half inches in length measured in manner aforesaid, were not then and there liberated alive at their risk and costs, against the peace of said state, and contrary to the form of the statute in such case made and provided.

George E. Cushman.

The counsel for the defendant requested the court to instruct the jury as follows:

That lobsters are a legitimate subject of trade and commerce, and that a common carrier has a right to carry them from place to place and from state to state, under the regulations of commerce.

That the defendant Swett being a common carrier, had a right to the possession of lobsters for the purpose of carriage under the regulations of commerce; and that, if he had no reason to suppose they were lobsters less than ten and one-half inches in length, he had a right to carry them in the ordinary course of his business as a common carrier without inspection.

That when Cushman undertook, without legal process, to inspect and break into the barrel, or to take the property, he

became a mere trespasser; and the defendants, under the rule of common law would have been liable to the shippers if they had allowed the officers to take away the lobsters or to break into the barrels.

That the defendant Swett as a common carrier would have been liable to the shippers for any damage which he should do by breaking into the barrels within his possession for carriage.

That if the jury shall find that the defendant Swett had reason to suppose that the barrels contained lobsters, that even then the duty is not imposed upon him to examine and go through every package to find out whether there are lobsters in it less than ten and a half inches long.

That if the jury find that certain of the barrels of lobsters had been placed in the car, they had passed beyond defendant's control and custody and had gone out of his possession and were not for the purposes of this statute within the possession of the defendant.

That if they find that these barrels had been delivered at the freight station of the Boston & Maine Railroad, it is for them to find as a question of fact whether they had not passed from his custody into the custody of the Boston & Maine Railroad.

That if the jury find that the lobsters testified to in this case, had come into the possession of the defendant Swett as a common carrier for carriage from this state to another, then those lobsters were, within the intention of the law, started in transit and were liable to the rules of interstate commerce.

That if they find the lobsters testified to in this case, or any of them, had been committed to the defendant as a common carrier, they were an article of trade, and if they were intended to be carried from this state to another, then they were an article of trade and that commerce in them between the states had already commenced.

That so long as Congress has not passed any law to regulate the commerce in lobsters, or allowing the State of Maine to do so, it thereby indicates its will that such commerce shall be free and untrammelled.

That under the Constitution of the United States and of this

State and under the regulations of the act known as the Interstate Act, the provisions of the act of chapter 292 of the Public Laws of 1889 of the State of Maine are void, so far as they interfere with the duties of a common carrier in the carriage of goods from state to state.

That unless the jury shall find beyond a reasonable doubt from the whole testimony in the case, that these respondents knowingly and intentionally had in their possession lobsters less than ten and one-half inches long, they must return a verdict of not guilty.

That unless they shall find beyond a reasonable doubt from the whole testimony in the case that the defendants held the lobsters in their possession for other purposes than that of the ordinary purposes of transportation as a common carrier, they must return a verdict of not guilty.

The court refused to give these instructions in terms, but did instruct the jury as follows:

"These respondents are charged with having in their possession on the twenth-fifth of February last, 1924 lobsters, which measured less than ten and one-half inches in length, measured according to this statute. In other words, the respondents are charged with violating section 2 of chapter 292 of the Laws of 1889, which I will read: 'It is unlawful to catch, buy or sell, or expose for sale, or possess for any purposes, between the first day of July and the first day of the following May, any lobster less than ten and one-half inches in length, alive or dead, cooked or uncooked, measured in manner as follows; taking the length of the back of the lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, the length to be taken with the lobster extended on the back its natural length; and any lobsters shorter than the prescribed length when caught, shall be liberated alive at the risk and cost of the parties taking them, under a penalty of one dollar for each lobster so caught, bought, sold, exposed for sale, or in possession, not so liberated.'

"That is the statute, the violation of which these respondents

are charged. It seems from the testimony that the respondent Swett is a part proprietor and the manager of an Express line between this city and the city of Boston, and that the respondent Leonard drives one of his teams. That the respondent Swett is a common carrier and certain duties and obligations therefore rest upon him as a common carrier under the law. A common carrier is obliged to receive all goods with the exception of such as are contraband, offered to it for transportation from place to place. It appears that on the twenty-fifth day of last February the respondent Swett through his driver, Leonard, took into one of his teams twelve barrels delivered to it on Commercial wharf in this city. There is no question but that these barrels contained lobsters. These barrels of lobsters were then in one sense in the possession of both of these defendants. But bare possession, mere naked passive possession is not sufficient under this statute. The possessor must know in a legal sense that the contraband goods were in his possession or else he would not be guilty of violating this law. Now, while these respondents admit that constructively, in a certain sense, these barrels of lobsters were in their possession, still they deny that in a legal sense that they were in their possession; that is, that they had such a possession as would render them guilty of violating this statute. It is true, as claimed by the attorney for the respondent, that if a package is offered to a common carrier for transportation he is not compelled by law to break open the package for the purpose of ascertaining whether or not it contains contraband goods. A law requiring such strictness of examination would be an interference with the rights of shippers that would not be tolerated. If these respondents did not know that the barrels entrusted to them contained lobsters of some length, that is, if they were not aware that the barrels contained lobsters at all, even though they were constructively in their possession, then they cannot be found guilty. But while a common carrier is obliged to receive all goods offered him for transportation, he is not obliged to receive into his possession such goods as the law forbids him to receive into his possession. He is not obliged to receive short lobsters for

transportation because the law prohibits the possession of them for any purpose. But, gentlemen, I will go a little further, and I instruct you that if a common carrier receives into his possession for transportation or otherwise, lobsters, that is, if he receives barrels which he knows contain lobsters, then he is bound in law to know whether those lobsters are longer or shorter than ten and one-half inches, measured according to the statute; and if any such lobsters as matter of fact are less than ten and one-half inches in length, then short lobsters are in his possession within the meaning of the law and he would be guilty of violating this statute.

"Now you apply these principles of law to the testimony in this case, taking up each one of these respondents. If the respondent, Swett, knew when he sent his team to Commercial wharf that it was to receive twelve barrels of lobsters, and as matter of fact it did receive twelve barrels of lobsters, then he was bound to know whether those lobsters were shorter than prescribed by the statute which I have read; he is bound to know it in law, and if any of those lobsters were less than ten and one-half inches in length, measured according to the statute, they were in his possession and you would be justified in finding a verdict against him. But if you have a reasonable doubt as to any of these facts he is entitled to the benefit of it and must be acquitted."

To the foregoing instructions and refusals to instruct the respondent excepted.

Frank W. Robinson, County Attorney, for State.

A legal seizure was not necessary in order to give the court jurisdiction of proceedings against the respondent, however it might have been had proceedings been instituted upon the seizure to obtain a forfeiture of the lobsters. This case is not analogous to *Guptill* v. *Richardson*, 62 Maine, 257, 265, but falls within the principle applied in *Com.* v. *Dana*, 2 Met. 329.

Whether or not the law under discussion is constitutional as affecting lobsters brought into this state by a common carrier does not arise upon the facts in the present case. The statute

may be constitutional as applied to one state of facts, and unconstitutional as to others. *Tiernan* v. *Rinker*, 102 U. S. 123, 126; *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 562-4; *Hall* v. *De Cuir*, 95 U. S. 485.

A state has the authority to regulate the fisheries within its territorial tide-waters. *McCready* v. *Virginia*, 94 U. S. 391, 394; *Com.* v. *Manchester*, 152 Mass. 230, 242; *Massachusetts* v. *Manchester*, 139 U. S. 240, 262; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Kidd* v. *Pearson*, 128 U. S. 21, 22; *Smith* v. *Maryland*, 18 How. 71, 74. *Dunham* v. *Lamphere*, 3 Gray, 268; *Moulton* v. *Libby*, 37 Maine, 472, 494; *Phelps* v. *Racey*, 60 N. Y. 10.

As an incident to the right to regulate its fisheries, a state has the power to adopt enactments to prevent the unseasonable taking of fish, including shell-fish, and to render such legislation effective by suitable penalties. *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Smith* v. *Maryland*, 18 How. 74; *Gibbons* v. *Ogden*, 9 Wheat 203, 204; *Patterson* v. *Kentucky*, 97 U. S. 504.

The intent of the statute under consideration is to protect lobsters and prevent their unreasonable destruction. *Smith* v. *Craig*, 80 Maine, 88.

Legislation of the character mentioned is not in conflict with the interstate commerce provision of the Federal Constitution. *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Munn* v. *Illinois*, 94 U. S. 113; *R. R. Co.* v. *Husen*, 95 U. S. 471; *Bowman* v. *Railroad Company*, 125 U. S. 489, 490; *Nathan* v. *Louisiana*, 8 How. 80, 81. "It is no objection to the existence of distinct substantive powers, that, in their application, they bear upon the same subject." *Gibbons* v. *Ogden*, 9 Wheat. 235. "Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution." *Sherlock* v. *Alling*, 93 U. S. 99, 103, 104; *Kidd* v. *Pearson*, 128 U. S. 23; *Railroad* v. *Husen*, 95 U. S. 472; *Munn* v. *Illinois*, 94 U. S. 135; *Gross Railway Receipts Tax*, 15 Wall. 293.

Lobsters do not become articles of trade or commerce until lawfully removed under the regulations of the state. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380; *Turner* v. *Maryland*, 107 U. S. 58; *Kidd* v. *Pearson*, 128 U. S. 18. They do not become property in the hands of any person unless possession is lawfully obtained. *James* v. *Wood*, 82 Maine, 177; *Blades* v. *Higgs*, 11 H. L. 631; *Amer. Ex. Co.* v. *People*, *infra*.

The state owns the tide-waters and the fish in them, so far as they are capable of ownership while running. *McCready* v. *Virginia*, 94 U. S. 391, 394; *Manchester* v. *Massachusetts*, 139 U. S. 260, 261; *Martin* v. *Waddell*, 10 Pet. 410; *Moulton* v. *Libby*, 37 Maine, 472, 485, 487.

So far then as short lobsters are concerned, the statute does not interfere with commerce in the constitutional sense of regulating it, because such lobsters are not property — the shipper is not the owner of them.

It is contended that it was the duty of the common carrier as such to accept and carry the barrels of lobsters; that he was neither authorized nor permitted to inspect them if in his possession; that he could not insist upon knowledge of contents as a condition to acceptance for carriage; and hence that he was placed in the dilemma of being compelled by law to act, and then punishable by law for having acted.

Under the instructions given, the carrier is not prevented from carrying lawful lobsters. Nor is he compelled to open packages in his possession to learn their contents. The court did not instruct the jury that if, after receiving packages, the carrier discovers that they contain lobsters, he is bound to know whether they are of illegal length.

It is evidently true, as a general rule, that express carriers are not bound to know or authorized to find out, as a condition of receiving it, what a package contains that is offered to them for carriage. *The Nitro-Glycerine Case*, 15 Wall. 536; *State* v. *Goss*, 59 Vt. 272. But these cases do not hold that under no circumstances may a carrier insist upon such knowledge as a condition of carriage. And no case has been found that does so hold.

The Nitro-Glycerine case is one where the question at issue was that of negligence, and did not involve, as does the present case, the validity of a statute which, as here contended, dispenses with the element of *scienter*. The case of *State* v. *Goss* was not against a common carrier but its agent, and it was sought upon familiar principles to hold the respondent liable criminally in respect of a transaction in which he engaged as agent for the shipper of intoxicating liquor,— for participation in a misdemeanor. And it is admitted in the latter case that the law neither requires nor permits common carriers to do illegal acts; that they are not bound to transport and deliver intoxicating liquor nor other commodities, if thereby they would commit an offense or incur a penalty (p. 271).

It is everywhere conceded that the carrier may refuse to receive packages offered without his being made acquainted with their contents, if there is good ground for believing that they contain anything of a dangerous character. It is admitted in the Nitro-Glycerine case, that such is the effect of the decision in *Crouch* v. *The London & Northwestern Railway*, 14 Com. Bench, 291. The latter case, it will be found upon examination, decides simply that the proposition that a carrier is, in all cases, entitled to know the nature of the goods contained in the packages offered him for carriage, is not law.

The obligation of a common carrier to receive and carry all goods offered is qualified by several conditions which he has a right to insist upon before receiving them, and one of the conditions is that the person offering is the owner or his authorized agent. *Fitch* v. *Newberry*, 1 Doug. (Michigan) 1; S. C. 40 Amer. Decis. 1-38-43. He is not bound to receive goods from a wrong-doer. *Robinson* v. *Baker*, 5 Cush. 144.

The shipper of lobsters of less than the statutory limit of length is not the owner, and he is a wrong-doer.

In an action brought against a common carrier for refusing to receive and carry lobsters, would it not constitute a valid defense that the plaintiff was the unlawful possessor of them? It is intimated that such would be a good defense, if he had stolen goods. See *Fitch* v. *Newberry*, *supra*, p. 38.

The question presented, therefore, is whether or not the statute, as construed at *nisi prius*, is a valid exercise of the legislative right to regulate the fisheries of the state, and applies to common carriers. If decided in the affirmative, it would seem to follow by necessary implication that the carrier may exact knowledge of the contents of packages offered for carriage, when he knows they contain lobsters, or else that he is bound at his peril to ascertain their contents in some other way.

The state may prohibit transportation by a common carrier of lobsters illegally taken, and, *a fortiorari*, the possession of such lobsters by a common carrier. In *Amer. Ex. Co.* v. *People*, the Supreme Court of Illinois says: "If the legislature of the state thought that a statute preventing a citizen from killing quail for sale in the market, and imposing a penalty on a common carrier for shipping or transportation for sale, would result in protecting the game in the state, we perceive no valid reason why a statute of that character might not be enacted." *Amer. Ex. Co.* v. *People*, 133 Ill. 649; S. C. Am. 23 State Rep. 641. Also reported in Cen. Law Jour. vol. 31, p. 271, with note and citation of cases.

Bennett v. *Am. Ex. Co.* 83 Maine, 236, is not an authority against the position of the government. In that case it was claimed by the defendant's counsel that under the statute (R. S., c. 30, § 12, quoted in opinion), they could not lawfully take any more deer, or parts thereof, into their possession for transportation before the following January. "But," says the court, "we cannot adopt such a construction of this statute as would make it apply to common carriers. Such construction as claimed by the defendants would make it unlawful for the carrier to transport, between the first days of October and January, the carcasses of moose, caribou, or deer, lawfully killed before the first day of October" (p. 239). "The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold or exchanged is, without doubt, a constituent of commerce itself, and is protected by and subject only to the regulation of Congress" (p. 242). The facts upon which that case was decided show that the plaintiff was the

lawful owner and possessor of the deer seized. Comp. *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Kidd* v. *Pearson*, 128 U. S. 18; *Turner* v. *Maryland*, 107 U. S. 58.

Scienter on the part of the carrier is an essential of the offense under the Illinois law. But the Maine statute is silent as to intent or knowledge. The instructions to the jury as to *scienter* were in accordance with the manifest intention of the legislature. It is the policy of the law to prohibit arbitrarily the possession of lobsters of less than the prescribed length without reference to the possessor's knowledge of their illegal character. The language of the act is: "It is unlawful to . . . possess for any purposes."

It is competent for the legislature to make an act criminal regardless of the knowledge or motive of the doer of such act. And it is laid down by the authorities that this may be done by implication as well as by an express clause; that the question is one of public policy, and this may be taken into consideration when the legislative meaning is sought. *Whart. Cr. Law*, (9 ed.) vol. 1, § 88; *Halsted* v. *State*, 12 Vroom (41 N. J. L.), 552, 589, 592; *State* v. *Hopkins*, 56 Vt. 260.

Clarence Hale, for defendant.

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

PETERS, C. J. One of the proprietors of Swett's Express Company and a cartman in the employment of the company were tried on a criminal complaint against them for having in their possession nineteen hundred and twenty-four lobsters of less than ten and a half inches in length.

The complaint was brought upon section 2 of chapter 292 of the laws of 1889, which section reads as follows:

"It is unlawful to catch, buy or sell or expose for sale, or possess for any purposes, between the first day of July and the first day of the following May, any lobster less than ten and one-half inches in length, alive or dead, cooked or uncooked, measured in manner as follows: taking the length of the back of the lobster, measured from the bone of the nose to the end of the

bone of the middle flipper of the tail, the length to be taken with the lobster extended on the back its natural length; and any lobsters shorter than the prescribed length when caught, shall be liberated alive at the risk and cost of the parties taking them, under a penalty of one dollar for each lobster so caught, bought, sold, exposed for sale, or in possession, not so liberated."

There were twelve barrels of the lobsters packed in the customary manner for shipment to New York. There was evidence tending to show that the respondents knew that the barrels contained lobsters, but no evidence that they knew while the same were in their possession that they were short lobsters. The barrels had not been in their possession but a few moments before they were seized and carried away by a game and fish warden.

The counsel for the respondents asked for instructions appropriate to the positions of the defense, which were refused by the learned judge, who gave in their stead the following rulings:

"If these respondents did not know that the barrels entrusted to them contained lobsters of some length, that is, if they were not aware that the barrels contained lobsters at all, even though they were constructively in their possession, then they cannot be found guilty. But while a common carrier is obliged to receive all goods offered him for transportation, he is not obliged to receive into his possession such goods as the law forbids him to receive into his possession. He is not obliged to receive short lobsters for transportation, because the law prohibits the possession of them for any purpose. But, gentlemen, I will go a little further, and I instruct you that if a common carrier receives into his possession for transportation or otherwise, lobsters, that is, if he receives barrels which he knows contain lobsters, then he is bound in law to know whether those lobsters are longer or shorter than ten and one-half inches, measured according to the statute; and if any such lobsters as a matter of fact are less than ten and one-half inches in length, then short lobsters are in his possession within the meaning of the law and he would be guilty of violating this statute.

"Now you apply these principles of law to the testimony in this case, taking up each one of these respondents. If the respondent Swett knew when he sent his team to Commercial wharf that it was to receive twelve barrels of lobsters, and as matter of fact it did receive twelve barrels of lobsters, then he was bound to know whether those lobsters were shorter than prescribed by the statute which I have read; he is bound to know it in law, and if any of those lobsters were less than ten and one-half inches in length, measured according to the statute, they were in his possession and you would be justified in finding a verdict against him. But if you have a reasonable doubt as to any of these facts he is entitled to the benefit of it and must be acquitted."

We are of the opinion that the law is not so exacting as these rulings would make it, and we feel clear that, if the respondents neither knew nor had good reason to believe that the barrels contained short lobsters, they should have been acquitted.

There are in our markets long as well as short lobsters,—legal as well as illegal lobsters. And it must be presumed that the legal constitute the vast bulk of those that are the subject of traffic and transportation. Therefore, it may properly have been presumed by the respondents that the lobsters in question were of the length required by law, there being nothing indicating the contrary. The presumption is that the conduct of men will be in obedience to the requirements of the law when a violation of such law constitutes a criminal offense. Legal lobsters and illegal lobsters are two distinct and independent things.

What inconveniences and risks would men be subjected to who are only in an indirect way connected with commerce in lobsters, or commerce in other articles as well, if the rule given in this case in behalf of the government should prevail. All subordinates in railroad corporations and express companies would be as much punishable for handling freight containing illegal lobsters as their principals would be, including such classes as agents, clerks, cartmen, porters, and employees of every grade and kind. There can be no distinction between

the liabilities of the different classes of men engaged in exercising a control over the property. In fact, subordinates would be the persons usually to be caught in the net of the law. If a carrier who knows that packages delivered to him contain lobsters, not knowing whether they are long or short lobsters, transports them at his personal peril, his business will be profitless and hazardous as far as that kind of carriage is concerned. In such case the freight must be overhauled and examined, entailing a delay and consequently an injury to such perishable property. How long would it probably have taken the employees of this express company to measure these nineteen hundred and twenty-four lobsters, "by taking the length of the back of the lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, the length to be taken with the lobster extended on its back its natural length?"

How much more reasonable would it be to relieve carriers of such extreme impositions, as long as they are not conniving with law-breakers, and to leave the work of discovering such infractions of the laws to fish and game wardens and other official detectives. The judge in his charge in this case said: "It is true as claimed by the attorney for the respondent, that if a package is offered to a carrier for transportation, he is not compelled by law to break open the package for the purpose of ascertaining whether or not it contains contraband goods. A law requiring such strictness of examination would be an interference with the rights of shippers that would not be tolerated." Why do not these remarks apply here exactly? Why is not this a case where the argument of intolerable inconvenience applies as forcibly as in any other? The aim of the law is to attain only reasonable and practical results in all matters where public interests are concerned. If the respondents did not know or have reason to believe that the packages contained short lobsters, they were not under any obligation to explore and hunt as a detective would, to see if they might not perchance obtain such knowledge. Their possession was excusable at least.

An appeal in behalf of the government is made to the doctrine of the courts that for some statutory offenses a person may be held even though he be ignorant of the facts which constituted his offense. That principle is applied only in minor offenses upon some ground of public policy for the protection of society against abuses which cannot be prevented under any more liberal rule. But public policy requires the application of no such rigorous rule here, where an express carrier and his cartman could each be punished, if punished at all, in the sum of $1924 for having in possession for from five to fifteen minutes a property for the carriage of which the company would have received the sum of only six dollars. We do not think that the facts of the case present a very meritorious complaint against the respondents in any view of the law.

The authorities on this question are few, for the reason that hitherto extreme notions on the subject have not prevailed. The case of *Bennett* v. *American Express Co.*, 83 Maine, 236, is certainly in the direct line of the doctrine which we adopt in the present case. In the *Nitro-Glycerine Case*, 15 Wall. 524, it was held that no liability rests on a common carrier for injuries caused by dangerous explosives loaded on his ship, neither he nor his agent knowing or having reasonable cause to believe that the materials were hazardous merchandise. In the opinion the pending question is quite elaborately discussed on authority and principle. The doctrine of that case was followed in *State* v. *Goss*, 59 Vermont, 266, where the agent of an express company was complained of for selling intoxicating liquors, because he received packages of liquors and delivered them and received money therefor for the shipper, the sale taking place at the date of such delivery. The court decided that the respondent could not be held unless he knew or had good reason to believe that the packages delivered by him contained intoxicating liquors. And the court in closing its discussion in that case, says: "If, then, in the absence of suspicious appearances and circumstances, an express carrier is neither bound to know nor authorized to find out, as a condition of receiving it,

what a package contains that is offered him for carriage, it would be strange to hold him guilty of a criminal offense because of the character of its contents; for in such case he is bound to carry, and is liable if he does not; and the law will not compel a man to act, and then punish him for acting."

Exceptions sustained.

CHARLES H. CHILDS, and another, *vs.* SIMEON CARPENTER.

Aroostook. Opinion January 7, 1895.

Verdict. Jury. Practice.

A verdict of a jury like the following, "Verdict for plaintiff for two hundred and fifty-six dollars and eighty-five cents," signed by the foreman and sealed up, is a good verdict in substance, and may be amended by the jury under the direction of the court, so as to be more formally correct, at any time before the verdict has been affirmed, although the jury had separated after the verdict was sealed up and before it was brought into court.

ON MOTION AND EXCEPTIONS.

The jury having returned a verdict for the plaintiff, the defendant filed a general motion for a new trial and incorporated into his motion, as an additional reason, the same facts which are stated in his bill of exceptions and recited in the opinion.

Don A. H. Powers and Vinal B. Wilson, for plaintiff.

Louis C. Stearns and H. M. Briggs, for defendant.

The verdict was made by the foreman under the direction of the court from written memoranda furnished by the foreman. It was not a correction of a verdict which the jury had agreed upon and rendered, as in the cases of *Hoey* v. *Candage*, 61 Maine, 257, and *Readfield* v. *Shaver*, 50 Maine, 36, but was the making of a verdict in court.

The jury had agreed upon and brought in a certain finding which was too uncertain and informal to have any force or effect as a verdict on the issue before them. It contained neither the title of the court, the names of the parties, nor their finding on the issue, nor was there anything upon the paper to in any way

connect it with the case. The jury were directed to bring in a sealed verdict, and while a verdict so agreed upon by them could undoubtedly have been amended in matters of form, matters of substance could only be corrected by recommitting the case to the jury for their further consideration.

Mistakes merely formal may be corrected by the court or by the foreman. Errors of substance can be corrected only by directing the jury to reconsider the case and bring in the new verdict. *Snell* v. *Bangor Steam Navigation Co.* 30 Maine, 337; *Bucknam* v. *Greenleaf* 48 Maine, 394.

"If the jury return a verdict into court which is not such as the issue requires, the court may send them back to reconsider their verdict at any time before it is received and recorded as a verdict." *Goodwin* v. *Appleton*, 22 Maine, 453.

In the case of *Sawyer* v. *Hopkins*, 22 Maine, 268, where the court changed the form of the verdict, the original verdict rendered by the jury contained the title of the court, the names of the parties, and everything necessary to ascertain from it their intention to render a verdict in the particular case which was in their hands. The verdict in this case as originally rendered contains nothing which can connect it with the action which was tried before the jury.

Counsel cited: *Little* v. *Larrabee*, 2 Maine, 37; *Emery* v. *Osgood*, 1 Allen, 244; *Winslow* v. *Draper*, 8 Pick, 169; *Ward* v. *Bailey*, 23 Maine, 316; *Hoey* v. *Candage*, 61 Maine, 257.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

PETERS, C. J. In this case these facts appear: The jury having sealed up their verdict and separated after the adjournment of the court at night, upon the bringing in of the verdict the following morning, it appeared that the printed blank verdict given the jury was not filled in, but that accompanying and sealed up with the verdict was the written finding of the jury, signed by the foreman, as follows: "Verdict for plaintiff for $256.83, two hundred fifty-six 83-100ths dollars. G. W. Marston, Foreman."

Thereupon the court, against the objection of the defendant, directed the foreman to fill in the printed blank verdict in accordance with the written verdict returned by them, which was done, and the verdict thus amended was affirmed accordingly.

This was no more than an alteration of the verdict in a matter of form, and therefore was not objectionable. The one form of verdict was just as legal as the other. They were in substance the same. The old writers declare a general verdict to be one by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or the defendant. 4 Bla. Comm. 461. This was clearly such a verdict for the plaintiff. To preserve a regularity of form the court properly ordered the amendment. *Little* v. *Larrabee*, 2 Maine, 37.

Exceptions and motion overruled.

HENRY EMERY *vs.* JAMES MAGUIRE.

Kennebec. Opinion January 8, 1895.

Fences. Fence-viewers. Notice. Adjudication. R. S., c. 22, § § 4, 5, 6.

A notice by fence viewers to co-terminous proprietors to meet on a certain day for a hearing of the parties before them "unless very stormy, and, if very stormy, on the next pleasant day following except Sunday," is bad for uncertainty, rendering any adjudication made by them void, it not appearing that the parties were actually present in pursuance of such notice.

An adjudication of fence viewers is void if it does not declare the fence built by the complaining party "to be sufficient."

ON REPORT.

The case appears in the opinion.

J. A. Sheehan, for plaintiff.

F. E. Southard, for defendant.

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

PETERS, C. J. This is an action by the plaintiff to recover of the defendant the statutory penalty for the latter's neglect to

build a parcel of division-fence on a line between their respective estates as co-terminous proprietors. It is claimed by the plaintiff that proper proceedings were had under the statutes and that his claim has been legally established by an adjudication of fence-viewers in his favor.

We see, however, no way to escape the conclusion that the proceedings must be declared to be void upon either one of two grounds of objection presented by the defendant.

First: In all the notices given by the fence-viewers to the parties, directing any meeting on the premises, a day certain is named with the following qualification annexed thereto, "unless very stormy, and, if very stormy, on the next pleasant day following, except Sunday." This notice would serve its purpose provided the parties appeared in pursuance of the same. But it nowhere is shown that the defendant paid any attention to the proceedings at any time. The notices should have been unqualified and unconditional. For this defect the proceedings are void.

Second: The fence-viewers do not in their adjudication declare the fence built by the plaintiff to be "sufficient." For this reason also are the proceedings void. *Briggs* v. *Haynes*, 68 Maine, 535.

Plaintiff nonsuit.

REUBEN JONES *vs.* ELISHA G. JONES.

Franklin. Opinion January 9, 1895.

Judgment. Execution. Discharge. Purchase. Assignment. Stat. 1835, c. 195; R. S., 1857, c. 113, § § 32, 33, 34.

It has never in this State been a defense to an action of debt on a judgment that the judgment debtor had been arrested on an execution issued on the judgment, and been liberated from arrest by giving a poor debtor bond and disclosing thereon.

There is no illegality in a purchase of a judgment by one who was a surety of the judgment debtor on a poor debtor's bond given by the latter on an execution issued thereon.

ON EXCEPTIONS.

The case is stated in the opinion.

H. L. Whitcomb, for plaintiff.

S. Clifford Belcher, for defendant.

(1.) A commitment of a debtor in execution is, by the common law, a discharge of judgment. *Coburn* v. *Palmer*, 10 Cush. 273; see also *Miller* v. *Miller*, 25 Maine, 110 (113).

But by the provisions of Act of 1835, chap. 195,—the original statute for relief of poor debtors—the rule of the common law was changed. *Spencer* v. *Garland*, 20 Maine, 75.

The Court say: "The twelfth section [sect. 42, chap. 148, R. S., 1840] . . . provided that the discharge of the debtor should not in such cases impair the rights of the creditor to obtain satisfaction out of any property or estate of the debtor not exempted by law."

This twelfth section, (sect. 42, chap. 148, R. S., 1840) was omitted in the Revised Statutes of 1857, which were in force when the defendant in this action was committed on execution and released by giving statute bond.

A surety on a bond given under the statute to relieve a debtor from arrest cannot purchase the judgment. His situation is similar to a surety on a note, or to one of two judgment debtors.

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

PETERS, C. J. This is an action of debt on a judgment recovered by Leonard Keith against the defendant in this court in Franklin county in 1857; the plaintiff being the owner of such judgment by an assignment thereof from Keith. The defendant soon after the judgment was recovered was arrested on an execution issued thereon, gave a poor debtor's bond to save his commitment to jail, and was discharged upon a disclosure made under the terms of such bond.

It was contended at the trial of this case that no action can be maintained upon the judgment for the alleged reason that, by the provisions of the poor debtor chapter contained in the Revised Statutes of 1857, applicable hereto, the judgment was

satisfied and discharged by the debtor's arrest and the giving of a bond for his release therefrom. The argument to sustain this position, which was sustained by the presiding judge, seems to have been that there was omitted from the statutes of 1857 an act which had existed in our statutes up to the date of that revision from the date of its passage in 1835 (see ch. 195, Laws of 1835), which act expressly provided that the discharge of a poor debtor upon his disclosure should not have the effect to impair any right which the creditor had to obtain satisfaction of his judgment out of the debtor's estate or property not exempted by law. The contention is that the supposed statutory omission revived the rights of the parties as they would have been at the old common law, under which an arrest of a debtor deprived the creditor of all other remedy for the collection of his debt.

We cannot concede the correctness of any of these propositions. In the first place the law would be the same with or without the enactment of 1835. That act was a declaration merely of the law as it stood before, and this court virtually said so in its opinion in the case of *Spencer* v. *Garland*, 20 Maine, 75. It necessarily resulted from our poor debtor laws that an arrest of a debtor and his subsequent discharge from arrest could not have the effect to bar the creditor from collecting his claim out of the debtor's property.

The common law system and our statutory system on this subject are widely unlike. At the old common law an arrest upon an execution was largely designed as a punishment of the debtor for not paying his debt, and he could be held in imprisonment until he did pay it. On the contrary, our very humane system is one in no respect involving punishment or degradation, but seeks only to obtain a discovery of the debtor's property and its situation, in order that the creditor may be the better enabled to satisfy his judgment out of such property.

Further than this, we have no idea that the act of 1835 was eliminated from the statutes of 1857. Its bodily form may have fled away, but its soul is distinctly visible in sections 32, 33 and 34 of ch. 113 of that revision, which sections read as follows:

"Section 32. The debtor, on delivering the certificate to the prison keeper, or filing it in his office if imprisoned, shall be set at liberty, so far as relates to this execution; and his body forever after shall be free from arrest thereon, and on every subsequent execution issued on the judgment, or on any other judgment founded thereon, except as provided in sections thirty-six and forty-six.

"Section 33. A creditor may discharge his debtor from arrest, or imprisonment on execution, by giving to the officer or jailer having him in custody a written permission to go at large; and it shall have the same effect as a discharge or disclosure.

"Section 34. A certificate of a discharge on execution in any of the modes hereby authorized, and of the cause of it, shall, at any time, at the creditor's request, be indorsed on the execution by the officer who had such debtor in custody; and if it is before the return day of the execution, it may still be levied on his property; if after, it may be renewed like other executions, against his property only; and the judgment may be revived or kept in force, with said execution, as judgments in other cases."

Another objection to maintaining the action, urged by the defense, is that the assignee, now prosecuting this action in his own name, was one of the defendant's sureties on his poor debtor bond given on his arrest on the original judgment. That objection does not avail anything. The debt is founded on one contract and the bond is another.

Exceptions sustained.

GEORGE W. HOWE *vs.* OLIVER MOULTON.

Kennebec. Opinion January 9, 1895.

Taxes. Action. Evidence. R. S., c. 6, §§ 97, 100.

In an action in the name of a town collector to recover taxes assessed upon an inhabitant of such town, the assessment of the taxes may be proved by the production of the list of taxes committed to the committee by assessors under their hand with their warrant; that is an original paper and not merely a copy of other records.

ON EXCEPTIONS.

This was an action of debt in the name of the collector to recover taxes assessed by the town of Randolph against the defendant. It was tried in the Superior Court, for Kennebec county, before the presiding judge with the right to except on questions of law. The plaintiff offered no evidence of assessment of taxes except the warrant of commitment as set forth in the case. No evidence of intended suit was presented in the case except notification to the defendant of amount due. The defendant offered to show that property was taxed to him which he did not own, but court excluded the evidence. Defendant claimed that there was not sufficient evidence of the assessment of the taxes against defendant. The court held the evidence sufficient. Defendant claimed that the notice required by statute before commencement of suit was not proven. This claim was overruled by the court,—judgment for plaintiff. To the foregoing rulings of the court the defendant excepted.

A. M. Spear and C. L. Andrews, for plaintiff.

S. S. Brown, for defendant.

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

PETERS, C. J. In making up the exceptions in this case several questions were raised by the defense, no one of which seems to have been relied on at all in the argument, excepting that involved in the position of counsel that, in an action by a collector for the collection of taxes, it is not competent, for proving the assessment of taxes upon the person sued, to produce merely the lists of taxes which were committed with accompanying warrant to the collector by the assessors; but that to sustain the action other record evidence should be produced. This position of the defense cannot be sustained.

By R. S., c. 6, § 97, the assessors are required to assess upon the polls and estates in their towns all town taxes and their due proportions of any state or county tax; make perfect lists thereof under their hands; and commit the same to the collector or constable of their town, with a warrant under their hands as

prescribed by the statute. Such a list and warrant were the evidence presented in proof of the alleged assessment in the present case.

By section one hundred of the same chapter it is provided that the assessors shall make a record of their assessments, and of the invoice and valuation from which they are made, and that they shall, before the taxes are committed to the officer for collection, deposit it, or a copy thereof, in the assessor's officer, if any, and otherwise with the town clerk.

Now, the papers committed to the collector's hands are just as much original papers as are those to be filed in the office of the assessors. Each set is original evidence of what is contained in them. Two sets are made so that either could be made available in case of error in or loss of the other. *Bath* v. *Whitmore*, 79 Maine, 182.

Exceptions overruled.

ELIAS C. HALL *vs.* HENRY S. GREEN.

Lincoln. Opinion January 9, 1895.

Husband and Wife. Marriage and Divorce. Support of Children.

When a wife by the decree which divorces her from her husband obtains the right of having the custody and care of their minor child, she thereby assumes and the husband relinquishes the responsibility and duty of thereafter supporting such minor child, although he may be required to assist her in supporting the child by such contributions and allowances as the court shall impose on him for that purpose, by the original or by any subsequent decree in the proceedings of divorce. But no common law action can be maintained against him by any one for any expenses incurred for such support which accrued after the date of the decree of divorce.

Harvey v. *Lane*, 66 Maine, 536, approved.

Gilley v. *Gilley*, 79 Maine, 292, examined.

ON REPORT.

This was an action of assumpsit for the support of a minor child of the defendant after he had been divorced on the libel of the mother, who afterwards married the plaintiff. The facts are sufficiently stated in the opinion.

True P. Pierce, and Howard E. Hall, for plaintiff.

Counsel argued: The divorce and the decree giving the custody of the child to the mother did not absolve the father from liability to support his child. The defendant ought not to be permitted to take advantage of his own wrong,—his misconduct toward the wife and child,—to avoid his liability, &c.

Counsel cited: *Miller* v. *Miller*, 64 Maine, 484; *Gilley* v. *Gilley*, 79 Maine, 292; *Bazeley* v. *Forder*, L. R. 3 Q. B. 559; *Gill* v. *Read*, 5 R. I. 343; *Burritt* v. *Burritt*, 29 Barb. 124; *Brow* v. *Brightman*, 136 Mass. 187; *Stanton* v. *Willson*, 3 Day, 37; *Finch* v. *Finch*, 22 Conn. 411; *McCarthy* v. *Hinman*, 35 Conn. 538; *Walche's appeal*, 43 Conn. 342; 17 Am. & Eng. Ency. p 354, note 2 and cases; *Gladding* v. *Follett*, 2 Demarest, 58, S. C. 30 Hun, 219, 95 N. Y. 652.

J. B. Peaks, for defendant.

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

PETERS, C. J. The plaintiff is the husband of a former wife of the defendant, and has been supporting in his family a daughter of his wife by her former husband (the defendant), the wife having obtained a divorce from the latter for his fault. By the decree of divorce the custody of such minor child was committed to the mother. The plaintiff now claims to recover in this action for the child's support for a period from 1884 to 1893 the sum of nearly thirteen hundred dollars. No express agreement is pretended and only such an implied agreement as can legally result from the relations of the parties.

We are of the opinion that the action cannot be maintained. We think that, when a divorce is granted to a wife and as a consequence of it she has committed to her the care and custody of her minor child, it follows that the father becomes entirely absolved from the common-law obligation which previously rested upon him to support such child; and that the only obligation of the kind afterwards resting upon him consists in such terms and conditions in respect to alimony and allowances as

the court may impose on him in the decree of divorce or in some subsequent decree in the same proceeding.

Mr. Bishop in his treatise on Marriage and Divorce, which contains a discussion of this question and of the authorities touching it, expresses our views in the following statement: "It seems to be a principle of the unwritten law that the right to the services of the children and the obligation to maintain them go together. The consequence of which would be, that, if the assignment of the custody to the mother goes to the extent of depriving the father of his title to the services of the children, he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation. When the court granting the divorce and assigning the custody to the wife, makes, under the authority of the statute, provision for their support out of the husband's estate, he would seem, upon principles already mentioned, to be relieved from all further obligation." Bish. Mar. & Div. (6th ed.) vol. 2, § 557.

And we have no doubt that the same exoneration from common-law liabilities and remedies follows when the court awards the custody of the child to the mother, but is silent in its decree on the question of allowances for the support of the children or for herself.

The implication of the decree in such case is that the wife voluntarily assumed the burden of supporting the children, or that there was some other special reason for the omission. It is well known that the record does not tell the whole story of many divorce cases. It is a common thing for parties to arrange matters of alimony and allowances among themselves before the cause is heard by the court. And the court permits such settlements. *Burnett* v. *Paine*, 62 Maine, 122. And allowances to the wife for herself and allowances to her for the support of her children are usually included in one sum. And then the wife very often relinquishes all claim for either alimony or allowance for the support of her children, in order to remove opposition by her husband to her divorce.

We have very little doubt that there was something behind the record in the decree of divorce put in evidence here. The

libel alleges instances of extreme cruelty and prays for allowances for the wife and child. The defendant was personally notified but did not appear. And, still, costs were not granted nor any sums of any kind allowed. The inference is quite irresistible that the divorce was procured by some arrangement of the parties. And the inference is made stronger by the fact that the libel alleges that the respondent was possessed of real estate in Rockland and personal property in Boston.

Although a husband loses the services of his divorced wife and the earnings of their children, still he is not altogether relieved from the legal duty of assisting according to circumstances in the support of either the wife or children. The common-law obligation no longer exists, but a statutory obligation is substituted in its place. The burden of such support falls on the wife in the first instance. But the husband may be compelled at any time to assist her. There is nothing inconsistent in an application by her in subsequent proceedings in the original cause of divorce for an allowance for the support of children, if she has not had any, or for an additional allowance if she has. The statute so declares and the court has so held. *Harvey* v. *Lane*, 66 Maine, 536.

In this way all the equities of the parties can best be considered and all their rights upheld. It would be unjust to allow both a common-law remedy and the statutory remedy to exist at the same time, and it would operate too severely on a husband for him to be constantly exposed to action by his divorced wife and also by strangers to recover of him sums expended by them for the support of his children over whom he is not allowed to exercise any control. Especially would such a rule operate vexatiously when all such claims can be considered and adjusted on either legal or equitable grounds in one and that an already existing proceeding.

We regard the case of *Gilley* v. *Gilley*, 79 Maine, 292, as virtually establishing the law of the present case. It was there held that a wife could maintain an action against a husband, from whom she had been divorced for his fault, for the expense of supporting their minor children in her possession, but only

expressly so held because she did not have the legal custody of the children. And we consider that the doctrine adopted by us in this discussion is sustained by the weight of the adjudged cases generally, although there are some authorities of a very positive character the other way. We have no doubt, at any rate, that our own policy is the better one on the questions here presented. There can be no more significant evidence of it than the fact that no such action as the present has ever until now been before the court in this state. The same question came before the Massachusetts court in the case of *Brow* v. *Brightman*, 136 Mass. 187, and was there determined adversely to the plaintiff.

Judgment for defendant.

EDITH S. RANDOLPH *vs.* BAR HARBOR WATER COMPANY.

Hancock. Opinion January 10, 1895.

Contract. Action. Parties. Consideration.

The general rule is, and always has been, that a plaintiff, in an action on a simple contract, must be the person from whom the consideration for the contract actually moved, and that a stranger to the consideration cannot sue on the contract.

An action cannot be maintained in the name of the tenant to recover money paid under protest for water rates past due at the beginning of the tenancy, claimed to be illegally extorted by a water company, it appearing that the money so paid was the landlord's and not the tenant's.

ON REPORT.

Declaration: In a plea of the case for the defendant is a public corporation chartered by the legislature of Maine and organized under its said act of incorporation for the purpose of conveying to and supplying the village of Bar Harbor, in the town of Eden, Hancock County, Maine, with pure and wholesome water, and for that purpose is vested with and has exercised the right of eminent domain.

And the plaintiff during the year 1892 and on and after August 30th in said year was the tenant and occupant of a house known as Buena Vista, situated on Eden street, in said Bar

Harbor, on the line of the defendant's water main, which said house was then and there connected with said main; that said defendant corporation was then and there bound and obliged by law to supply all residents of said Bar Harbor with water for domestic purposes for a reasonable price and without discrimination: and particularly that said defendant was then and there bound and obliged by law to furnish the plaintiff with water to be used for domestic purposes in said house for a reasonable price and without discrimination; that a reasonable price to be charged for the water used for the year 1892 in the premises occupied by the plaintiff was thirty-seven dollars, and that said sum of thirty-seven dollars is and was then and there the regular water rate for said premises for one year as determined by the defendant's schedule of water rates; that on the 30th day of August, 1892, the defendant shut the water off from said house and disconnected it from their system; whereupon the plaintiff tendered and paid to said company the sum of thirty-seven dollars as aforesaid and demanded that said water be again turned on and the house again connected with said system, which the defendant refused to do until the further sum of one hundred twenty-nine dollars and seventy-four cents should be paid to them, being the amount of a debt claimed to be due to said Company from James Hinch, deceased, former owner of said house, and which debt the plaintiff was under no obligation to pay; whereupon the plaintiff paid said amount to the defendant, not voluntarily, but under protest, for the purpose of inducing the defendant to perform their said duty, to the great damage of the plaintiff, to wit., in the sum of three hundred dollars, whereupon the defendant became liable and in consideration thereof then and there promised the plaintiff to pay her said sum on demand.

The plea was the general issue.

And for brief statement the defendant says, that if any sums of money were received by the defendant as the plaintiff has alleged in her declaration, said money was not the money of the plaintiff but was the money of John T. Hinch.

L. B. Deasy and J. T. Higgins, for plaintiff.

Defendant refused to turn on the water until a further sum of $129.69 should be paid, being an old bill against the insolvent estate of James Hinch, former owner of the same house, whose heirs had rented the house to plaintiff. Thereupon the further sum of $129.69 was paid under protest, after which the water was again turned on. The money thus paid to the Bar Harbor Water Company was retained by them.

The present action was subsequently brought to recover the amount thus paid in excess of the regular water rate. The defendant corporation was under obligation to furnish water to residents of Bar Harbor for reasonable prices and without discrimination. Being vested with the right of eminent domain for the purpose of supplying the people of Bar Harbor with water, it is charged with the corresponding duty to so supply them. *Rockland Water Co.* v. *Adams*, 84 Maine, 474.

Whenever the aid of the government is granted to a private company in the form of a monopoly or donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. The same rule applies to companies invested with special privileges at the expense of the public for the purpose of supplying cities with water. Mor. Corp. § 1129.

"As the defendant could not carry on the business of supplying water without the franchise, the city must have intended in granting such franchise to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant in accepting the benefit of the grant must have assumed the performance of such duties.

"In a word, the acceptance of a franchise, under such conditions carries with it the corresponding duty of supplying the public with the commodity which the corporation was organized to supply to all persons without discrimination." *Haugen* v. *Albina Light and Water Co.* 21 Ore. 411. *Louisville Gas Co.* v. *Citizens Gas Light Co.* 115 U. S. 683; *N. O. Gas Light Co.* v. *Louisiana Light, &c. Co.* 115 U. S. 650; *Olmsted*

v. *Proprietors*, 47 N. J. L. 333; *Lowell* v. *Boston*, 111 Mass. 454, 464; *State* v. *Telephone Co.* 17 Neb. 126; *Commercial Union Telegraph Co.* v. *N. E. T. & T. Co.* 61 Vt. 241; *State* v. *Tel. Co.* 36 Ohio State, 296; *People* v. *R. R. Co.* 104 N. Y. 58; *Vincent* v. *R. R. Co.* 49 Ill. 33; *Trust Co.* v. *Henning*, 17 Am. Law Reg. (N. S.) 266.

It is equally well settled that where a corporation charged with a public duty makes an overcharge for the performance of such duty, such overcharge may be paid and recovered. Am. & Eng. Ency. of Law (Title, Duress) Vol. 6, page 77; *Swift Co.* v. *U. S.* 111 U. S. 343; *R. R. Co.* v. *Lockwood*, 17 Wall. 379.

W. P. Foster and Joseph Wood, for defendant.

The water having been shut off from the premises in consequence of the non-payment of $129.74 as soon as defendant thought it ought to be paid, and this having been thereupon paid by Hinch to have water again turned on, and having been paid voluntarily, in the legal sense of that term, to compromise a doubtful claim, cannot be recovered back. *Parker* v. *Lancaster*, 84 Maine, 512.

Legality of by-law or regulation of a corporation depends upon whether the by-law or regulation is a reasonable one. *Rockland Water Co.* v. *Adams*, 84 Maine, 472. Regulation a reasonable one. *Appeal of Brumm*, Am. Dig. (1888) p. 1379.

If this money was paid by Mrs. Randolph, it was a voluntary payment and the money cannot be recovered back. Demand upon a person for the payment of money though the demand is illegal, does not render the payment involuntary unless the person making the same can save himself and his property in no way. If other means are open to him by a day in court or otherwise, he must resort to such means. *De La Cuesta* v. *Ins. Co. of N. Y.* 136 Pa. 62; S. C. 9 L. R. An. 631; *Amesbury Co.* v. *Amesbury*, 17 Mass. 461; *Preston* v. *Boston*, 12 Pick. 14; *Harvey* v. *Girard Nat. Bank*, 119 Pa. 212; S. C. 11 Cent. Rep. 675; *Radich* v. *Hutchins*, 95 U. S. 210; *Rogers* v. *Greenbush*, 58 Maine, 390.

If the first tender of August 30th was made by Mrs. Randolph, and the defendant water company thereby became liable to furnish water to her, she was not without a speedy and complete remedy; mandamus lies to compel a water company to furnish water to one entitled thereto. *Haugen* v. *Albina Light & Water Co.* 21 Ore. 411; *People* v. *Green Island Water Co.* 56 Hun, 76; *Townsend* v. *Fulton Irrigating Ditch Co.* (Colo.) 29, p. 453. See also *Central Union Telephone Co.* v. *State*, 118 Ind. 194; S. C. 19 N. E. 604; *State* v. *Del. & Lackawana & C. R. R. Co.* 48 N. J. L. 55; S. C. 57 Am. Rep. 543; *Wells* v. *N. P. Ry. Co.* 23 Fed. Rep. 269; *R. R. Comm'rs* v. *P. & O. C. R. R. Co.* 63 Maine, 569.

Payment was not made under duress. Fact that it was paid under protest renders it none the less, in legal sense, a voluntary payment. *Emmons* v. *Scudder*, 115 Mass. 367; *Fleetwood* v. *City of N. Y.* 2 Sandf. 475; *Forbes* v. *Appleton*, 5 Cush. 115; *Benson* v. *Monroe*, 7 Cush. 125; *Cook* v. *City of Boston*, 9 Allen, 393; *People* v. *Wilmerding*, 62 Hun. 391; *Ashley* v. *Ryan*, 6 Ohio Cir. Ct. R. 208.

Defendant has no money in its treasury, by reason of this payment, which it may not in good conscience retain.

If the money was Hinch's and defendant took an illegal way to collect it, still the action for money had and received is not open to him. *Hayford* v. *Belfast*, 69 Maine, 63.

And if the money was Mrs. Randolph's and with it she has paid the just claim against another, payment having been made voluntarily she cannot recover the money so paid. *Schlaefer* v. *Heiberger*, 4 N. Y. S. 74.

If the defendant company is under any liability to Mrs. Randolph, it is for damages only sustained by her in consequence of shutting off the water, she having first proved that the shutting off was illegal.

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

EMERY, J. The facts found by the court are these: James Hinch, who died in July, 1891, owned some cottages at Bar

Harbor. After his death his son, John T. Hinch, had the care of these cottages. In 1892 John T. Hinch leased for the season one of the cottages called "Buena Vista," to Mrs. Edith S. Randolph, the plaintiff. By the terms of the lease Mrs. Randolph was to pay the water rates for that season.

The Bar Harbor Water Company, the defendant, had been for some years supplying water to the Hinch cottages. Its charges for such water supply were made to the owner of the cottages. Prior to August 30, 1892, the company had some conferences with John T. Hinch about its water bills against the Hinch cottages for that and previous seasons, which bills the company claimed were unpaid. The company finally made such corrections or reductions that the amount claimed to be due was left at $166.69, including the season of 1892. Mr. Hinch was notified that unless this sum was paid, the water would be shut off from the Hinch cottages, or at least from the cottage "Buena Vista," occupied by the plaintiff. The bill not being paid, the company on August 30th shut off the water from "Buena Vista.' Thereupon Mr. Hinch through his attorney tendered to the company, thirty-seven dollars as the amount due for the season of 1892, and demanded that the water be turned on. The company made no question as to the amount for the season of 1892, but refused to turn on the water until the whole sum for that and previous seasons ($166.69) was paid. Mr. Hinch then through the same attorney paid a further sum of $129.74, but under protest as not being rightfully due. The company then turned on the water.

All the money thus paid to the company through the attorney was the money of Mr. Hinch. The attorney, however, paid the money to the company in Mrs. Randolph's name, and made demand for the water in her name; but Mrs. Randolph did not furnish the money, and does not seem to have been aware of the use of her name, or of what was being done. Mr. Hinch asked the company's collector to collect the water bill of 1892 of Mrs. Randolph. The collector did so, andturned Mrs. Randolph's check over to Hinch.

Mr. Hinch then instructed the same attorney to bring an action against the water company in the name of Mrs. Randolph to recover back the money so paid by him under protest, and this is that action.

It must be evident that this whole dispute and transaction were solely between Mr. Hinch and the water company. The money paid under protest and sought to be recovered back, as unlawfully extorted, was paid by Mr. Hinch out of his own funds. He employed the attorney and furnished the money. If any money should be refunded, it should be to him. If the water company is under any obligation to repay any part of the money its obligation is to Mr. Hinch whose money it was. He alone seems to have any grounds of complaints or any cause of action.

"The general rule is, and always has been, that a plaintiff, in an action on a simple contract, must be the person from whom the consideration for the contract actually moved, and that a stranger to the consideration cannot sue on the contract." *Mellen* v. *Whipple*, 1 Gray, 317, 321; *Bank* v. *Rice*, 107 Mass. 37. There may be some exceptions to this rule, as in the case of negotiable instruments, but this case is not within any established exceptions.

Plaintiff nonsuit.

MARY F. SPEAR, and others, petitioners for partition,

vs.

MARY A. FOGG, and others.

Androscoggin. Opinion January 16, 1895.

Will. Vested and Contingent Remainder. Costs. R. S., c. 88, § 10.

The following devise by will was *held* to create a contingent, and not a vested, remainder in the children of the devisees respectively: "I give to my sisters, Mary S. Pecker and Frances S. Fogg, in equal shares, all the rest and residue of my estate, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, to have and to hold the same for and during the term of their natural lives, and at their decease, to descend to their children respectively, and to be equally divided among them or the survivors of them."

Also, that the children of one of the devisees, Mary, having all died intestate and without issue before her, the estate descends to the heirs of the testator. They being brothers and sisters it goes to their descendants respectively by right of representation.

ON REPORT.

This was a petition for partition in which the petitioners allege as follows:

Mary F. Spear, married woman and wife of Nahum Spear, Augusta A. Pettengill, married woman and wife of Leonidas Pettengill, both of Monmouth, in the county of Kennebec and State of Maine; Charles H. Prescott of Haverhill, in the county of Essex, George Prescott and Edward Prescott, both of Boston, in the county of Suffolk, and all in the Commonwealth of Massachusetts, respectfully represent and show unto your Honors that they are seized in fee simple, and as tenants in common, of and in certain real estate, situated in Lewiston, in said county of Androscoggin, on the easterly side of Park street, and being the same real estate of which Lydia W. Prescott, late of said Lewiston, deceased, died seized and possessed (description of premises); each being seized of one undivided tenth part thereof, with one Mary A. Fogg, of Old Orchard, in the county of York, who is seized of one undivided half part thereof, &c.

Mary A. Fogg, the original respondent, filed no pleadings and made no defense. The respondents, George S., Charles E., and Frank B. Fogg and Clara M. Yates upon motion were admitted as parties respondent and filed a brief statement claiming title; the petitioners filed a counter statement denying the title of said respondents.

The parties agreed to the following statement:

Lydia W. Prescott, a resident of Lewiston, died in 1856, or early part of 1857, seized in fee of the premises described in the petition. She died unmarried, leaving neither father nor mother. Her will dated March 25, 1856, was duly proved and allowed in Androscoggin county on the second Tuesday of March, 1857.

The residuary clause in said will as follows: "I give to my sisters, Mary S. Pecker and Frances S. Fogg, in equal shares, all the rest and residue of my estate, real, personal, or mixed,

of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, to have and to hold the same for and during the term of their natural lives, and at their decease, to descend to their children respectively, and to be equally divided among them or the survivors of them. The said Mary S. and Frances S. to erect at my grave a suitable monument or grave stones, and furnish an iron fence sufficient to enclose my grave, together with the graves of my parents and sister, Clara."

The premises described in the petition constituted a part of said residuary estate. The said Frances S. Fogg and Mary S. Pecker went into occupancy of said premises under said devise, and continued to occupy the same as tenants in common until the death of Frances S. Fogg, which occurred August 30, 1881. And after the death of said Fogg, the said Mary S. Pecker continued to occupy said premises as co-tenant with the respondent Mary A. Fogg and those under whom she claimed title, until the death of said Mary S. Pecker which occurred June 3, 1893.

At the death of Frances S. Fogg, her surviving children were a son, George E. Fogg, and a daughter, Clara P. Myers; she also left a granddaughter, Fanny M. Crosby, who was the sole daughter of Charles E. Fogg, a deceased son of said Frances, who had died before his mother. Since October 25, 1884, the respondent Mary A. Fogg has acquired title to one undivided half part of the premises described in the petition, through certain conveyances from said George E. Fogg, Edward P. Myers, husband of Clara P. Myers, and said Fannie M. Crosby.

George E. Fogg died intestate October 15, 1892, leaving as his heirs at law three sons and one daughter, being the remonstrants, George T. Fogg, Charles E. Fogg, Frank B. Fogg and Clara M. Yates.

Clara P. Myers died intestate, after the death of her mother and prior to May 23, 1883, leaving no lineal descendants. The petitioners do not admit that Fanny M. Crosby had any title to said premises or any part thereof except such as she acquired as heir of said Clara P. Myers.

In her lifetime Mary S. Pecker had three children, Mary F., Clara P. and George A., of whom Clara P. and George A. were living and Mary F. had died prior thereto intestate and without issue at the date of said will and at the death of Lydia W. Prescott. All of the children of Mary S. Pecker died intestate, without issue.

Mary S. Pecker survived all her children and died leaving no lineal descendants. George A. Pecker was her last surviving child; he died November 10, 1890, intestate, leaving his mother as his sole heir.

At the death of Lydia W. Prescott, her next of kin were two brothers, Samuel T. Prescott and Ebenezer Prescott and two sisters, the said Frances S. Fogg and Mary S. Pecker.

Samuel T. Prescott died intestate February 2, 1869, leaving as sole heirs at law, two sons, George Prescott and Edward Prescott, now living, being two of the petitioners.

Ebenezer Prescott died intestate March 21, 1887, leaving as sole heirs at law, three daughters, Mary F. Spear, Augusta A. Pettengill and Charles H. Prescott, being three of the petitioners.

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

At the death of Mary S. Pecker, the title descended to her heirs, the petitioners, who are her nieces and nephews, excluding the respondents, who are grandnephews and grandnieces, children of George E. Fogg, a nephew, who died before Mrs. Pecker.

Mary A. Fogg files no pleadings and makes no defense.

The other respondents have been admitted upon motion and each claim title to one twenty-fourth part of the premises; their claim of title is denied by petitioners, who are the nieces and nephews of Mary S. Pecker, and her heirs.

The first question for consideration is upon the claim of title made by the four new respondents. *Marr* v. *Hobson*, 22 Maine, 321.

At the death of Mary S. Pecker, the life tenant, June 3, 1893, the fee in one-half of the estate had vested in her by the prior deaths of her two children, Clara P. Pecker and George A.

Pecker, intestate and without issue; and the estate then passed to her nieces and nephews, who are the petitioners, to the exclusion of her grandnephews and grandnieces, who are the respondents contesting and claiming shares. R. S., ch. 75, § 1, par. V; *Davis* v. *Stinson*, 53 Maine, 493.

The general rule is, that where a will gives a life interest to one, with a devise over, either for life or in fee, to a definite class of persons, those take who constitute the class, not when the event occurs, but when the devise becomes operative by the death of the testator. *Merriam* v. *Simonds*, 121 Mass. 198, in which the language was "and after their [the life tenants] decease to be equally divided among their children or their legal representatives." *Whall* v. *Converse*, 146 Mass. 345; *Cummings* v. *Cummings*, 146 Mass. 501, in which the provision was, "and at her [wife's] decease to divide the principal equally between my blood relations." *Dorr* v. *Lovering*, 147 Mass. 530, 534; *Loring* v. *Carnes*, 148 Mass. 223. Upon this principle, Clara P. and George A. Pecker took a vested interest in the estate, at the death of the testatrix, and that interest descended to their mother, the life tenant, and at her death descended to her heirs, the petitioners.

First. The interest of the children of Mary S. Pecker was a vested remainder.

It has long been a settled rule of construction in the courts of England and America, that estates, legal and equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event; and no remainder will be construed to be contingent, which may consistently with the intention, be deemed vested. *McArthur* v. *Scott*, 113 U. S. 340; *Blanchard* v. *Blanchard*, 1 Allen, 223, 225; *Doe* v. *Considine*, 6 Wall. 458; *Leighton* v. *Leighton*, 58 Maine, 63; *Dingley* v. *Dingley*, 5 Mass. 535.

A devise for life, with remainder to the children of the life tenant, creates a vested remainder in the children, unless there is some expression sufficient to show the contrary. *Gibbens* v. *Gibbens*, 140 Mass, 102; *Pike* v. *Stephenson*, 99 Mass. 188;

Wight v. *Shaw*, 5 Cush. 56; *Bowditch* v. *Andrew*, 8 Allen, 339, 342; *Parker* v. *Converse*, 5 Gray, 336.

Second. There are no words in the will of Lydia W. Prescott, sufficient, upon well established rules of construction, to show any intention that the remainder should be contingent.

At the death of the testatrix, as well as at the date of the will, two children of Mrs. Pecker, Clara P. and George A., were living.

There are absolutely no words of contingency such as, "to their children, if they shall be living at her death," or "to such of them as shall be living at her death," or "when he shall arrive at the age of twenty-one years, or at the death or marriage" of the life tenant, as in *Snow* v. *Snow*, 49 Maine, 159, or "should the wife die or marry, the land shall then be equally divided among the surviving sons," as in *Olney* v. *Hull*, 21 Pick. 311. In this case the estate in remainder is not limited to take effect either to a dubious or uncertain person, or upon a dubious or uncertain event. *Hunt* v. *Hall*, 37 Maine, 363, 366; *Leighton* v. *Leighton*, 58 Maine, 63, 68.

In this instance the persons who were to take upon the death of the life tenant were living and ascertained: there was no time when there was not, or when there must not be, by force of the will, and the law governing its application, a person *in esse*, having a capacity to take whenever the possession should become vacant. *Brown* v. *Lawrence*, 3 Cush. 390, 398; *Childs* v. *Russell* 11 Met. 16.

This will seems rather to belong to that class of cases, in which the terms of survivorship are referred to the death of the testator, and not to the termination of the particular estate. *Moore* v. *Lyons*, 25 Wend. 119; *Branson* v. *Hill*, 31 Md. 181; S. C. 1 Am. Rep, 40; *Mowatt* v. *Carow*, 7 Paige, 328; *Ross* v. *Drake*, 37 Pa. St. 373.

Nor do the words "at their decease" create any contingency. These words are construed to refer to the time of payment or possession, and do not postpone the moment when the gift shall operate. *Lombard* v. *Willis*, 147, Mass. 13, and cases cited; *Doe* v. *Considine*, 6 Wall. 458; *Clews' Appeal*, 37 Pa. St. 23.

The use of the words "to descend," supports this view, for those words do not imply any contingency, or any postponement of the time when the remainder shall vest in interest, until the termination of the life estate; but, like the word "inherited," they imply "taking immediately from the testator upon his death, as heirs take immediately from their ancestor upon his death." *McArthur* v. *Scott*, 113 U. S. 340; *Parker* v. *Converse*, 5 Gray, 336; *Dove* v. *Low*, 128 Mass. 38, in which the language was, "After the death or marriage of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." Held, that the word "then" was not inserted by way of description of the persons who are to take, but by way of defining the time when they should come into the enjoyment of that which is devised to them, and that the devise over was to those who were the heirs of the testator at the time of his death. This result was considered to be "fortified by the use of the word 'decease,' which ordinarily denotes the vesting of the estate by operation of law in heirs immediately upon the death of the ancestor."

H. Fairfield and L. R. Moore, for respondents.

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

HASKELL, J. "I give to my sisters, Mary S. Pecker and Frances S. Fogg, in equal shares, all the rest and residue of my estate, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, to have and to hold the same for and during the term of their natural lives, and at their decease, to descend to their children respectively, and to be equally divided among them or the survivors of them."

Does this devise create a vested, or a contingent remainder in the children of the devisees respectively? If a vested remainder, the children of Mary having all died intestate and without issue before her, she inherited the same from them, and having since

died it goes to her heirs, nephews and nieces, the plaintiffs, petitioners in this case, to the exclusion of defendants, her grandnephews and nieces. But if a contingent remainder that never vested, it descended to the heirs of the testator, his brothers and sisters then living, and by right of representation to their descendants, both the plaintiffs and defendants, nephews and nieces and grandnephews and nieces. The share of Mary, however, going to her heirs, the plaintiffs, her nephews and nieces, and not to the defendants her grandnephews and nieces.

A vested remainder is an estate *in presenti*, although to be enjoyed in the future. A contingent remainder is an estate to vest upon the happening of some future event.

The devise in question is to Mary for life, and at her decease equally to her children or to the survivor of them. If she had no children the remainder could not vest. If she had several, it would go to those surviving at her death, and it could not vest before that time, because of the uncertainty as to which of them might survive. If one only should survive, he would take and no mortal could tell which one he might be. None survived her, and none had any estate in the devise that she could inherit.

In *Hunt* v. *Hale*, 37 Maine, 363, the devise was to the widow for life, and at her decease equally among all his children and the "heirs of such as might then be deceased." And the court held the remainder contingent, from the uncertainty as to who would take at the death of the widow, an event to happen in the future.

In *Leighton* v. *Leighton*, 58 Maine, 63, the devise was to the widow for life, then to "My third son Reuel," and the court held the remainder vested, and distinguish between the case and *Hunt* v. *Hale*, *supra*, remarking in that case the division was to be equal "between the children of the testator and the heirs of such as may then be deceased," and that "if the estate were to be construed as vesting at the death of the testator, then one of the heirs might convey his share by deed, and if he died before the termination of the life estate, leaving heirs, his conveyance might defeat their estate, which would be contrary

to the express provision of the will." A reason that demonstrates the true construction of the will before the court; for if the remainder vested, a conveyance by one child, who should not prove to be the survivor, might deprive the survivor of estate specifically appointed to him by the will.

In *Read* v. *Fogg*, 60 Maine, 479, a deed gave a life estate to Margaret, and the remainder "after her decease to her legal heirs." The court held the remainder contingent; saying the heirs might be different individuals during the continuance of the life estate, and therefore the remainder was contingent. That "such has been the uniform decision of this State and in Massachusetts," citing *Hunt* v. *Hale*, *supra*; *Richardson* v. *Wheatland*, 7 Met. 171; *Putnam* v. *Gleason*, 99 Mass. 454. See also *Smith* v. *Rice*, 130 Mass. 441; *Denny* v. *Kettell*, 135 Mass. 138, a case exactly in point.

Under the settled doctrine in this State, the remainder mentioned in the devise in question was contingent and did not vest, therefore the estate descends to the heirs of the testator. They were brothers and sisters, and it goes to their descendants respectively by right of representation. Mary's share, however, goes to plaintiffs only.

Partition accordingly, with costs for defendants.
R. S., c. 88, § 10.

BENJAMIN F. GRAY, in equity,
vs.
ANDREW P. JORDAN, and others.

Hancock. Opinion January 16, 1895.

Equity. Resulting Trust. Husband and Wife.

Equity deals with the substance of things regardless of form or methods.

While an equitable estate does not easily arise out of legal forms, but where the legal forms are grounded upon equitable substance, and the rules of law do not forbid the proof, the equity remains substantial, and may be transformed into legal interests whenever chancery sees fit to so decree.

A husband bought a farm and had it conveyed to his wife, with the intention of paying for it himself. The wife gave her notes secured by a mortgage of the land to secure the payment of the farm, and the husband afterward paid the notes out of his own money in pursuance of an original intention, not intending the conveyance, or the payment, to be a gift to his wife. *Held;* That the wife took the fee charged with a trust in favor of the husband.

ON APPEAL.

Upon the hearing in the court below on bill, answers and testimony, a decree was made dismissing the bill; and the plaintiff appealed.

The facts in the case as stated in the decree are as follows:

"Lemuel D. Jordan was formerly the owner in fee of the land described in the bill. In November, 1880, Benj. F. Gray, the complainant, went to Mr. Lemuel D. Jordan and negotiated for the purchase of the land. Mr. Gray and Mr. Jordan agreed upon the terms of the purchase and conveyance. The price fixed was $200. Nothing appears to have been paid down at the time. The deed of conveyance was made by Mr. Jordan to Mary Jane Gray, the wife of Mr. Gray. Mary Jane Gray gave back two notes of $100 each on six and twelve months, and secured the same by a mortgage of the land dated the same day as the deed to her. It is doubtful whether these notes were also signed by B. F. Gray. Mr. Jordan has an impression that they were. The mortgage, however, was signed by Mrs. Gray alone, and does not mention Mr. Gray as a co-signer of the notes.

"Mr. Gray did the business and it was at his request that the deed was made to Mrs. Gray. Mr. Gray paid nothing at the time, but entered upon the land and cleared it, (taking the wood and timber) and made extensive improvements. Sometime afterward, presumably in the fall of 1886, for that is the date of the discharge of the mortgage, Mr. Gray paid the notes and Mr. Jordan delivered them to him. These notes were none of them paid before maturity.

"Mrs. Gray, on several occasions, spoke of this parcel of land as belonging to Mr. Gray. He seems to have had the exclusive possession and control of it. I find, therefore, that Mr. Gray sometime after the conveyance to Mrs. Gray, paid

her notes given for the land out of his own money, and that he did this in pursuance of an original intention. I further find that he did not intend the conveyance or the payment to be a gift to his wife." . . .

Hale and Hamlin, for plaintiff.

A. W. King, for defendants.

A resulting trust must arise, if at all, at the time the legal title is taken. Payment of the purchase money must have been made, or an obligation to pay incurred, at the time of the purchase. 1 Perry on Trusts, § 133; 2 Pom. Eq. § 1037; *Neill* v. *Keese*, 5 Tex. 23; S. C. 51 Am. Dec. note, p. 755.

But, if the subsequent payment be made in pursuance of an original intention and agreement; if it be made in discharge of an obligation assumed and understanding had between the trustee and *cestui que trust* at the time of the original purchase, then it is not a subsequent independent payment, but relates to and forms part of the original transaction and the resulting trust may be established. *Buck* v. *Pike*, 11 Maine, 9; *Dudley* v. *Bachelder*, 53 Maine, 403; *Burleigh* v. *White*, 64 Maine, 23; *Jackson* v. *Stevens*, 108 Mass. 94; *McDonough* v. *O'Niel*, 113 Mass. 92; *Boyd* v. *McLean*, 1 Johns. Ch. 582.

If the original payment, either in money or notes, be made by or in behalf of the party claiming the trust; or if the original payment be made as a loan of money or credit to the party claiming the trust, he at the same time assuming the obligation of repaying the loan of money or discharging the obligation given for the purchase, then, upon the repayment of the money or discharge of such obligation, although at a time subsequent to the original transaction, the trust can be enforced which became fixed upon the property at the time of purchase. *Perry* v. *Perry*, 65 Maine, p. 401; *Farnham* v. *Clements*, 51 Maine, 428; *Dudley* v. *Bachelder*, 53 Maine, 403, 409 and case there cited in Vermont; *Bailey* v. *Hemenway*, 147 Mass. p. 329; *Richards* v. *Manson*, 101 Mass. p. 487.

To establish a resulting trust "full proof, of a high degree of force and weight in the testimony offered" is required. *Whitmore* v. *Learned*, 70 Maine, p. 285.

Where the transaction is between husband and wife it would seem that no relaxation, at least, in the proof required to overcome the presumption that the intention was for the wife to hold the property as hers and not as trustee, ought to be allowed.

The undisputed facts in the case at bar are that the property was purchased in the name of the wife and her own note given for the full consideration secured by a mortgage on the same property; that the plaintiff did not at the time pay any money, or become party to any of the notes given.

Some years afterward the notes were paid as appears by the discharge of the mortgage, and from the testimony of Jordan it appears that the plaintiff paid over to him the money due on the notes.

To establish a resulting trust it should appear that the *cestui que trust*, at the time the conveyance was made paid the consideration. It need not have been, perhaps, in money, but whatever was paid, whether notes or money, should have been unequivocally his. If the notes of another person were used they must have been loaned to him and he must have in some legal and binding way obligated himself at the time to pay the notes if notes were given. *Dudley* v. *Bachelder*, and cases, *supra*.

Where the grantee gives his note secured by a mortgage on property for the full consideration, on which notes the *cestui que trust* is not a party either as maker, indorser, surety or guarantor, or in any other way no resulting trust would arise. *Fowke* v. *Slaughter*, 3 A. K. Marshall, 56; S. C. 13 Am. Dec. 133.

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

HASKELL, J. Bill in equity by a husband against the administrator and heirs-at-law of his deceased wife, to declare a resulting trust in his favor of a farm purchased by him and conveyed to his wife.

The bill was dismissed below, and the cause comes up on appeal. The presiding justice who tried the cause below, found the following facts: "I find therefore that Mr. Gray [the plaintiff], sometime after the conveyance to Mrs. Gray, paid her notes given for the land out of his own money, and that he did this in pursuance of an original intention. I further find that he did not intend the conveyance or the payment to be a gift to his wife." The evidence amply supports this finding, and the question comes, do these facts create a fee simple in the wife, or a fee charged with a trust for the husband? The conveyance was made to the wife, without any payment by her other than her notes, which were paid by the husband "in pursuance of an original intention." "He did not intend the conveyance or the payment to be a gift to" her. How, then, could she get the estate? It was not given to her; and it was paid for by the husband, according to the "original intention." These facts clearly create a resulting trust. The husband bought the farm and had it conveyed to his wife, with the intention of paying for it himself. This intention he performed. The giving of notes and a mortgage by the wife, with intention that they were to be paid by the husband, was merely a convenient method by which he might purchase the farm. The purchase was his. The payments were his. The farm was his, subject, perhaps, to any equitable lien that might attach to it while the notes of the wife were unpaid.

Equity deals with the substance of things regardless of form or methods. To be sure, an equitable estate does not easily arise out of legal forms, but where the legal forms are grounded upon equitable substance, and the rules of law do not forbid the proof, the equity remains substantial, and may be transformed into legal interests whenever chancery sees fit to so decree.

In the case at bar the substance of the transaction was, a conveyance to the husband and his notes, indorsed by his wife, secured by mortgage of the farm, given in payment therefor. Until she paid something on the notes she had no interest in the farm. When she might do so, she would take an equity in the mortgage subject to the prior claim of the mortgagee. The

plaintiff's equity is the underlying substance of the transaction, clothed in legal forms; but with intent and purpose all the while to preserve it, and not choke it. The purchase is found and shown to have been for the plaintiff, and this may be shown by parol; a trust therefore results in his favor. *Buck* v. *Pike*, 11 Maine, 9. That case shows the distinction between *Boyd* v. *McLean*, 1 Johns. Ch. 582, and *Battsford* v. *Burr*, 2 Johns. Ch. 405, upon which the dictum in *Farnham* v. *Clements*, 51 Maine, 428, is grounded, although the case was rightly decided upon other grounds. *Dudley* v. *Bachelder*, 53 Maine, 403; *Burleigh* v. *White*, 64 Maine, 23; *Perry* v. *Perry*, 65 Maine, 399; *McDonough* v. *O'Niel*, 113 Mass. 92. *Bourke* v. *Callanan*, 160 Mass. 195, is not in conflict with the doctrine here laid down. Defendant's shield has been fairly pierced, "not with weapons drawn from the armory of the strict law," but by the chancellor's unerring lance.

Bill sustained with costs. Decree below reversed.

BENJAMIN F. BRIGGS, and another, *vs.* JEROME B. HUNTON.

Androscoggin. Opinion January 16, 1895.

Warranty. Stallion. Registration of Animals. R. S., c. 38, § 61.

There is no implied warranty, in a contract for the service of a stallion for breeding, that the animal is free from disease that may be transmitted to offspring.

Where the use of property is private, and not deleterious to public health or welfare, so as to come within proper police regulation, its use may be enjoyed free from legislative control.

Held; That the price of service for a stallion, when the animal has not been registered as required by R. S., c. 38, § 61, may be recovered when the animal has not been advertised or held out for public use.

ON EXCEPTIONS.

This was an action on the case upon an account annexed, the principal item of which was for services of the plaintiffs' stallion, "Sir William," to the defendant's mare in 1889, when said mare was bred to said stallion. The evidence tended to show that

the plaintiffs were then engaged in the business of keeping and owning other stallions for breeding purposes; that defendant attempted to breed his mare to another of the plaintiffs' stallions at an agreed price of seventy-five dollars, but was unsuccessful; that these plaintiffs offered defendant the service of Sir William, then two years old, then kept and owned by plaintiffs for breeding purposes only as appears by the evidence, for the sum of fifty dollars, and that thereupon defendant's mare was bred to said Sir William; that there was no express contract as to the condition of said stallion, and no express condition to said contract of service, except that the mare should prove to be in foal; that said mare did prove in foal and dropped a colt the following season; that said colt, the defendant claimed, was dropped weak, sick and diseased, and lived only four days.

The defendant claimed that the evidence tended to show that said stallion at the time of said service was afflicted with an incipient disease, which afterwards developed into fits (this, however, was denied by the plaintiffs), and thereupon the defendant claimed that there was an implied warranty in the contract of service that said stallion was not then diseased, and that if the jury should find that said stallion was so diseased, it would be a defense to said item.

But the presiding justice ruled otherwise, and that even if said stallion was at the time of said contract and service afflicted with any incipient disease, unknown to the plaintiffs, it would be no defense to said item.

The plaintiffs admitted that prior to said contract and service, they had filed no certificate with the register of deeds in the county where said stallion was owned or kept, stating the name, color, age and size of the same together with the pedigree of said stallion as fully as attainable, and the name of the person by whom he was bred, as provided in section 61, chapter 38, of the Revised Statutes; but the plaintiffs claimed and offered evidence tending to show that prior to said contract and service, they had not advertised the services of said stallion by any written or printed notices. All the other items in the account annexed were admitted.

Thereupon the defendant requested the presiding justice to rule that the plaintiffs could not in this action recover compensation for said service, namely, said item of fifty dollars. But the presiding justice declined so to rule, but ruled, *pro forma*, that the plaintiffs could recover for said service, notwithstanding their failure so to file such certificate, and directed the jury, there being no other defense offered, to return a verdict for the plaintiffs for the full amount of their account annexed, including said item, and which they accordingly did.

To all these rulings and the directions so to return a verdict, the defendant took exceptions.

George C. Wing, for plaintiffs.

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

We have not been able to find a case exactly parallel with this, and therefore the analogies to be drawn from decided cases are not perfect.

It is not the case of a sale; it is more nearly akin to a case of contract to manufacture, or perhaps a sale of goods manufactured by the owner.

There is in such cases an implied understanding that the articles manufactured or sold for a specific purpose will answer the purpose. See Note to 24 Am. Rep. 104.

No analogy from the doctrine of *caveat emptor* can apply. The defect was not discoverable; the disease was latent. See note to *Chandelor* v. *Lopus*, 1 Smith's Leading Cases, 318.

The trouble, not being in its nature discernible, and the undoubted purpose being to obtain a colt that was at least healthy or free from hereditary disease, it must be beyond question in such a case that there was an implied understanding, stipulation or warranty that the stallion was in that respect fit for breeding purposes. See note to *Chandelor* v. *Lopus*, *supra*; *Warner* v. *Arctic Ice Co.* 74 Maine, 475; *Downing* v. *Dearborn*, 77 Maine, 457; *Thoms* v. *Dingley*, 70 Maine, 100.

II. The second question is whether failure to file a certificate of pedigree, etc., as required by R. S., chap. 38, section 61, is a defense.

The plaintiffs claim (a) that the stallion was not "kept" for breeding purposes, and (b) they "had not advertised the services of said stallion by any written or printed notices."

(a) As to the first point, the case shows that the plaintiffs "were then engaged in the business of keeping and owning other stallions for breeding purposes." The defendant unsuccessfully tried to breed his mare to another stallion of plaintiffs at an agreed price. Plaintiffs then "offered" the service of Sir William, the stallion in question, which was accepted.

It is immaterial whether Sir William had been used for customers' mares before that. There always has to be a first time. They used him this time in their business of "keeping stallions," etc., and as a substitute for another. They contracted his services for a price, which they are seeking to recover. He was a part of their stud, and apparently used as such when occasion required. The purpose of the statute applied to him just as much as to any other stallion.

The fact that he was ungelded shows why he was "kept," and being so kept the statute should be applied to him.

(b) In answer to plaintiffs' second claim, we say that the statute is explicit: "Whoever neglects to make and file such certificate shall recover no compensation," whether he has advertised or not.

The advertising is not a condition to the forfeiture of compensation.

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

HASKELL, J. Two questions are presented:

I. Does a contract for the service of a stallion for breeding, contain an implied warranty that the animal is free from disease that may be transmitted to offspring? The element of deceit, that might result from the concealment of disease known to the owner of the animal, must be eliminated from the consideration of this question, as that element might be cause for a remedy differing from that sought here. It does not pertain to this case.

In the sale of chattels by the manufacturer, for specific uses, an implied warranty arises that the article is fit for the use intended. *Downing* v. *Dearborn*, 77 Maine, 457.

In the sale of chattels, without express warranty of quality, and without fraud, *caveat emptor* applies, and no warranty is implied by law. *Kingsbury* v. *Taylor*, 29 Maine, 508; *Winsor* v. *Lombard*, 18 Pick. 57; *Mixer* v. *Coburn*, 11 Met. 559; *French* v. *Vining*, 102 Mass. 132; *Howard* v. *Emerson*, 110 Mass. 320. If, however, the sale be by description, without opportunity for inspection, the article must not only meet the description, but be salable or marketable, of the kind described. Said Lord Ellenborough: "The purchaser cannot be supposed to buy goods to lay them on the dunghill." *Gardiner* v. *Gray*, 4 Camp. 144; *Warner* v. *Arctic Ice Co.* 74 Maine, 475.

In the sale of provisions, other than to the consumer, it seems settled that the rule of *caveat emptor* applies. *Howard* v. *Emerson*, *supra*; *Giroux* v. *Stedman*, 145 Mass. 439; *Moses* v. *Mead*, 1 Denio, 378; *Humphries* v. *Comline*, 8 Blackf. 516; *Ryder* v. *Neitge*, 21 Minn. 70. But some authorities except sales of provisions to the consumer for domestic use from the rule. *Van Bracklin* v. *Fonda*, 12 Johns. 468; *Hoover* v. *Peters*, 18 Mich. 51; *Sinclair* v. *Hathaway*, 57 Mich. 60; *Copas* v. *A. A. Provision Co.* 73 Mich. 541. Other cases are sometimes cited to the same point, but in these the defect was known, as it was in the leading case, *Van Bracklin* v. *Fonda*, *supra*.

In the case at bar, the owner sold the services of his stallion for breeding purposes. Had he known the stallion to have been diseased, and concealed the fact, it would have been fraud. Not knowing this, upon what ground, or from what principle of law, can warranty be implied? Why not apply the rule of *caveat emptor*? The purchaser had the same field of inquiry open to him as the seller.

In *Kingsbury* v. *Taylor*, 29 Maine, 508, winter rye was innocently sold for seed spring-rye, whereby the purchaser lost his crop, and the court held no deceit, and in effect say there was no warranty implied.

In *Winsor* v. *Lombard*, 18 Pick. 57, mackerel were sold as No. 1 and No. 2; held, no warranty that they were not No. 3 in quality.

In *Howard* v. *Emerson*, 110 Mass. 320, a cow was sold by a farmer to retail butchers, and it was held that there was no implied warranty that she was fit for food.

In *Giroux* v. *Stedman*, 145 Mass. 439, a farmer killed a hog and sold the flesh, knowing that the purchaser intended to eat it, and the court said there was no warranty that it was fit for food.

If a warranty is to be implied in the case at bar, it must arise from the principle of sale for specific use. There was no sale of a chattel, but the sale of the use of a chattel. No authority has been cited that any implied warranty arises from the contract of letting that the thing let is fit for the use intended where the selection is made by the lessee.

In *Deming* v. *Foster*, 42 N. H. 165, a particular yoke of oxen were sold to work on a farm, and the court held there was no implied warranty of their fitness. The court illustrates by quoting from *Keates* v. *Cadogan*, 10 C. B. 591, 2 E. L. & E. 320, and shows the difference between: "Sell me a horse fit to carry me," and "Sell me that gray horse to ride." In the case at bar, the plaintiff did not sell the service of a stallion fit to beget offspring; but the service of "Sir William." He knew no reason why he was not fit for the purpose, and the law does not imply a warranty that he was.

II. Can the price of service for a stallion be recovered when the animal has not been registered, as required by R. S., c. 38, § 61? That statute provides: "The owner or keeper of any stallion for breeding purposes, before advertising, by written or printed notices, the service thereof, shall file a certificate [describing the animal]. Whoever neglects to make and file such certificate shall recover no compensation for said services," and is subjected to the penalty for knowingly filing a false one.

The statute manifestly applies to animals kept for public use, because being applied to the use of the public, it is proper enough to require a truthful description and pedigree to be

stated on a public record. The use being dedicated to the public, the public may by law regulate it so far as necessary for their protection. *State* v. *Edwards*, 86 Maine, 102. But where the use of property is private, and not deleterious to public health or welfare, so as to come within proper police regulation, the use may be enjoyed free from legislative control.

In this case, the owner of the stallion had not advertised him, had not held him out for public use, and therefore might enjoy the fruits of his service in such way as he might choose to do. He might breed his own mares to him. He might breed his neighbors' mares to him, or to the mares of a stranger, without violating any law. Contracts for such service would be valid and binding upon the makers of them.

Exceptions overruled.

CITY OF DEERING, appellant, *vs.* COUNTY COMMISSIONERS.

Cumberland. Opinion January 16, 1895.

Way. Commissioners. Committee. Jurisdiction. Petition. R. S., c. 18, § 1; Spec. Law, 1889, c. 506, § 4.

County Commissioners have jurisdiction over highways within the several cities of this State.

The manifest intent of the Stat. 1866, c. 47 (R. S., c. 18, § 1), was to establish a uniform rule that should apply to all city charters, whether granted before or after the act.

When the petition asks that a way be suitably widened, it is the function of the committee to say how wide a way common convenience and necessity demand, and leave the commissioners to locate it upon the face of the earth; but these considerations do not apply to a petition for a specific widening in a specified place.

Petitions for the location or change of highways are not to be considered too critically where the result makes the matter clear and works no injustice.

Held; That a report of a committee may be recommitted when its form and detail are not justified by the original petition, but may be easily corrected by stating what width common convenience and necessity required the commissioners to give between the *termini*, leaving them to carry out the decision by locating the increased width upon the face of the earth.

Bryant v. *Commissioners*, 79 Maine, 128, followed.

ON REPORT.

This was a petition by the city of Deering to the commissioners, for the county of Cumberland, praying for an alteration and widening of Forest Avenue in that city. The cause came on for hearing, in this court below, upon motion for leave to amend the original petition, and upon motion for the acceptance of the report of the committee; and by agreement of counsel, the case was reported to the law court to enter such judgment as the legal rights of the parties might require.

(Petition.)

To the honorable board of county commissioners of Cumberland county, in the State of Maine:

The city of Deering by W. W. Merrill, mayor of said city, duly authorized so to do by vote of the city council, respectfully represents that public convenience and necessity require the alteration or widening of Forest Avenue, so called, in the city of Deering, beginning at a point near the residence of Joseph L. Winslow and extending to the Portland & Rochester Railroad crossing at Ocean street, Woodford's corner. Your petitioners therefore request that your honors will, after due notice, proceed to view said route, hear the parties, and alter or widen said highway as provided in Revised Statutes, chapter 18, sec. 1. And as in duty bound will ever pray.

February 4th, 1893.

The City of Deering,
By William W. Merrill, Mayor.

The denial of the petition by the commissioners, the appeal from their decision, the appointment of a committee, and the report of the committee are sufficiently stated in the opinion, as well as the objections to the acceptance of the committee's report.

(Motion to amend.)

And now comes said petitioner and moves that it have leave to amend its said petition by inserting after the words "view said route, hear the parties and alter or widen said highway," the words "to the extent that the easterly side line of said widened highway shall begin . . . (courses and distances here follow).

The westerly side line of said widened highway shall be as follows, to wit: . . . (courses and distances here follow).

Charles A. True, County Attorney, for Cumberland county.

Counsel cited: *New Vineyard* v. *Somerset*, 15 Maine, 22; *Harkness* v. *Co. Com.* 26 Maine, 356; *King* v. *Lewiston*, 70 Maine, 408. Case last cited may be distinguished from the present case. When private and general legislation conflict, the general legislation will ordinarily prevail. Time of the passage of the law is an important element. The special legislation giving the city of Deering a charter in 1889 should prevail over the general statute; but it is claimed that the importance of the present case demands a re-examination of the question.

Petition defective: *Sumner* v. *Co. Com.* 37 Maine, 113; *Howland* v. *Co. Com.* 49 Maine, 146; *Raymond* v. *Co. Com.* 63 Maine, 113; *Hayford* v. *Co. Com.* 78 Maine, 153; *Byrant* v. *Co. Com.* 79 Maine, 128. It fails to state how much of an alteration or widening is desired and at what points; it does not give interested parties notice of what is to be done, or to what extent their interests are to be affected.

The committee exceeded its powers. *Irving* v. *Co. Com.* 59 Maine, 513.

Amendment: Comes too late. *Jewett* v. *Hodgdon*, 3 Maine, 103; *Com.* v. *Cambridge*, 7 Mass. 158.

I. L. Elder, City Solicitor, for city of Deering.

George C. Hopkins, by consent, filed a brief for the city of Deering.

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

HASKELL, J. The city of Deering represented to the county commissioners that public convenience and necessity required the alteration or widening of "Forest Avenue, so called, in the city of Deering, beginning at a point near the residence of Joseph L. Winslow and extending to the Portland and Rochester railroad crossing at Ocean street, Woodford's Corner," and

petitioned them to "alter or widen said highway as provided in Revised Statutes, c. 18, § 1."

The commissioners adjudged that "common convenience and necessity do not require the alteration or widening of Forest Avenue, so called, in the city of Deering, as prayed for."

On appeal to this court a committee was appointed, and their report finds that "common convenience and necessity require the alteration or widening of Forest Avenue aforesaid, to the extent hereinafter described; and we determine that said Forest Avenue, from a point near the residence of Joseph L. Winslow to Ocean street, Woodford's Corner, shall be widened to the extent determined by the following described side lines; to wit," . . . locating the side lines on the face of the earth by monuments, courses and distances, so as to specifically describe the way as widened, and as shown by a survey filed with their report.

Objections to the acceptance of the report are made by the county of Cumberland, to wit:

I. That exclusive jurisdiction of said way is vested in the city council of Deering by the city charter, special act of 1889, c. 506, § 4.

The charter provides: "The city council shall have exclusive authority to lay out, widen or otherwise alter or discontinue any and all streets or public ways in said city." It further provides for an appeal, as in the case of town ways, that is to the county commissioners, making their jurisdiction in such matters wholly appellate.

The charter of Portland contains the same provision, word for word, but does not give any appeal. Act of 1832, c. 248, § 6. Other city charters, granted prior to 1866, contain the same provisions, and it was assumed that these exclusive provisions took from county commissioners all jurisdiction over highways within city limits. The act of 1866, c. 47, provides: "Nothing in any city charter, or in acts additional thereto, shall be so construed as to deprive county commissioners of the power to lay out, alter or discontinue county roads within the limits of such cities." R. S., c. 18, § 1.

In view of this act, some charters since granted have excepted from the exclusive jurisdiction given to city governments the jurisdiction of county commissioners over highways; and some granted prior to the act do so. The Biddeford charter does. Act of 1860, c. 383, § 2. The Lewiston charter seems to. Act of 1861, c. 105, § 7. The Brewer charter, Act of 1889, c. 328, § 17, like the Portland charter, does not; and unlike the Deering charter, granted the same year, Act of 1889, c. 50, § 4, does not grant any appeal from location.

The manifest intention of the act of 1866 was to establish a uniform rule that should apply to all city charters, whether granted before or after the act. Its phrase is: "Nothing in any city charter . . . shall be so construed as to deprive county commissioners" of jurisdiction over "county roads within the limits of such cities."

The charter of Deering, granted after the act of 1866, contains words of the same sweeping character as contained in charters granted before the act. "Exclusive authority to lay out, widen, or otherwise alter or discontinue any and all streets or public ways in said city." At first glance, the word "exclusive" would seem to exclude all other authority over public ways within the city limits; but when considered with the context, and in view of the act of 1866, which, by the way, purports to declare the meaning of city charters and not to regulate the subject, it will be seen to refer to other matters. The inhabitants of towns, by vote, may lay out town ways. When Deering was made a city, to be governed differently from towns, by a city council instead of selectmen, it was necessary to confer jurisdiction over streets somewhere, and, therefore, the authority in such matters was exclusively given to the city council, not as against commissioners touching county roads, but as against the inhabitants relating to streets, who had previously acted in such matters.

This view gives to the words "exclusive authority" an appropriate meaning, and removes conflict with the act of 1866, that would give county commissioners authority in Portland and not in Deering, in Bangor and not in Brewer, would "mar the

symmetry of the law" and put the whole matter in confusion. The act of 1866 must be held to apply to all charters, whether granted before or after its passage, unless its application be restricted in terms.

II. That the petition is too indefinite to sustain any judgment upon the report of the committee, and that the report exceeded their authority and is therefore void.

The duties of a committee are defined by statute. They may affirm or reverse, in whole or in part, the doings of the commissioners, who are to carry out the decision of the committee. Now, the sufficiency of a petition may depend very much upon the judgment finally entered. If its prayer be wholly denied on the merits, its sufficiency becomes immaterial. If it be granted in whole or in part by the commissioners, and their judgment be affirmed by the committee, then indefiniteness in certain respects may be cured by a result, that makes the judgment practicable of execution and the determination clear. But if it be denied in whole or in part by the commissioners, and granted in whole, or in part beyond that given by the commissioners, then indefiniteness becomes material, for the committee can only affirm or reverse in whole or in part; and if they reverse in whole, the want of a proper prayer in the petition leaves no basis for the committee to act on, inasmuch as they cannot execute their own decision. To illustrate, suppose a petition to widen does not specify any desired width, and the commissioners deny the petition and the committee reverse the doings of the commissioners and desire to grant the prayer of the petition and there be no specific prayer to go upon, then they must either enter no decision, or locate the way as widened, a function not given to the committee, because they have no power to assess damages to land owners, a consideration entirely for the commissioners, and, may be, a very important element as to where on the face of the earth the widening shall take place, or determine the increased width necessary and leave the location to the commissioners whose duty it is to locate. If the committee were to reverse the doings of the commissioners and decide that the way should be widened as prayed for in the

petition, and the petition be that the way be suitably widened, then the commissioners might nominally widen or unreasonably do so, and their decision would be final, as no appeal is provided for in such cases. If it were, and the same method were adhered to, the case might go back and forth in the courts and never get decided. If however, the committee were to reverse the doings of the commissioners, and decide that the way should be widened a specified distance, and do no more, then the commissioners might carry the decision into effect, and in locating the new width take into consideration the cost for land damages in determining to which side of the road the increased width should be added. With such result, the case would be the same as if the commissioners had widened in the first instance and the committee should affirm their judgment. In short, when the petition asks that a way be suitably widened, it is the function of the committee to say how wide a way common convenience and necessity demand, and leave the commissioners to locate it upon the face of the earth. These considerations do not apply to a petition for specific widening in a specified place, as a given number of feet on a specified side of the road. No general rule can be given as to the necessary allegations in petitions of this sort that will apply to all cases. The conditions likely to arise are too numerous and complicated to permit it.

Petitions for the location or change of highways must not be too critically considered where the result makes the matter clear and works no injustice. *Bryant* v. *Commissioners*, 79 Maine, 128. In the case at bar, the report of the committee in form and detail is not justified by the original petition; but may be easily corrected by stating what width common convenience and necessity required the commissioners to give between *termini* named, leaving them to carry out the decision by locating the increased width upon the face of the earth. For such purpose it is competent to recommit the report. *Bryant* v. *Commissioners*, *supra*.

Report recommitted.

THOMAS LAPAGE *vs.* BENJAMIN J. HILL.

Androscoggin. Opinion January 16, 1895.

Insolvency. Warrants. Seizure. Fraudulent Sale. Officer. Damages.

An officer, under a warrant from the insolvent court, commanding him to take the property of the insolvent, may not lawfully take chattels that the insolvent had conveyed away prior to his insolvency, even in fraud of creditors; and in a suit by the purchaser thereof against such officer, he cannot set up in bar of the action that such conveyance was made in fraud of creditors, but in reduction of damages only.

ON EXCEPTIONS.

This was an action of trespass brought by the plaintiff against the sheriff of Androscoggin county to recover damages for the act of his deputy in seizing the plaintiff's goods as the property of one Beliveau by virtue of a warrant and injunction issued by the Court of Insolvency.

The plea was the general issue with a brief statement in which the defendant justified as an officer, viz., as messenger of the Court of Insolvency, and denied the plaintiff's title to the property in question.

At the trial the evidence tended to show that Beliveau, having liabilities to the amount of thirty-five hundred dollars, executed a bill of sale dated March 24th, A. D., 1893, to LaPage, the plaintiff, and put him in possession of his entire stock of groceries, books of account, etc., the consideration being one thousand five hundred and ninety-two dollars, of which sum one hundred dollars was paid down and a mortgage for the balance, payable at the rate of fifty dollars a month, given. Both papers were duly recorded.

Four days after the execution of the papers, viz., March 28th, the creditors of Beliveau petitioned him into insolvency, and on the following day the defendant, acting by virtue of the warrant and injunction of the Court of Insolvency, by his deputy, Benjamin F. Beals, seized the property above mentioned as the property of Beliveau.

The testimony of the defendant tended to show that the sale and transfer of the property was in fraud of the creditors of Beliveau and therefore void. The jury found for the defendant.

The following instruction was asked for by the plaintiff: "Even if the transfer was fraudulent as to the creditors it was valid as between the parties, and the officer, having notice of such transfer, exceeded his authority in ousting LaPage from possession. The action should be by the assignee to set aside the fraudulent transfer as provided by the statute."

The presiding justice refused the instruction and the plaintiff excepted.

F. L. Noble and R. W. Crockett, for plaintiff.
George C. Wing, for defendant.

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

HASKELL, J. Trespass against the sheriff for the act of his deputy in taking, under a warrant from the insolvent court, property that the insolvent had conveyed and delivered to the plaintiff prior to the insolvent proceedings.

Defense, that the conveyance was in fraud of creditors and therefore void.

"A conveyance made in fraud of creditors is valid between the parties, and can be avoided only by creditors, or by the assignee in insolvency representing them; and, if he affirms it, it stands good." *Freeland* v. *Freeland*, 102 Mass. 477; *Butler* v. *Hildreth*, 5 Met. 49; *Snow* v. *Lang*, 2 Allen, 18; *Harvey* v. *Varney*, 98 Mass. 118; *Drinkwater* v. *Drinkwater*, 4 Mass. 353; *Randall* v. *Phillips*, 3 Mason, 388; *Nichols* v. *Patten*, 18 Maine, 231; *Ellis* v. *Higgins*, 32 Maine, 34; *Thompson* v. *Moore*, 36 Maine, 47; *Andrews* v. *Marshall*, 43 Maine, 272; *Same case*, 48 Maine, 26.

When insolvency intervenes, the assignee only may attack the conveyance, or he may confirm it. By operation of law he becomes invested with only such rights as the insolvent had, except in cases of fraud. *Herrick* v. *Marshall*, 66 Maine, 435;

Williamson v. *Nealey*, 81 Maine, 447. The warrant from the insolvent court ran against the property of the insolvent, not property that he had conveyed away, in fraud of creditors, if you please, for that no longer remained his property. The legal title had passed from him by the conveyance, and the title so conveyed could only be disturbed by due process of law, process that ran against the grantee. In *Andrews* v. *Marshall*, *supra*, 43 Maine, 272, an officer attached a stock of goods that the debtor had mortgaged, and was sued for their value by the mortgagee. The officer set up in defense that the mortgage was in fraud of creditors and void; but the court held that, although it might have been in fraud of creditors, it was not void, but valid between the parties, and therefore not to be attached as the property of the debtor who had conveyed it away. The court says: "Suppose a creditor had taken possession of the property without the intervention of an officer, could he have justified as a creditor against a suit of the vendee? It was decided in *Osborne* v. *Moss*, (7 Johns. 161, citing *Hawes* v. *Leader*, Cro. Jac. 270, and Yelv. 196, and *Anderson* v. *Roberts*, 18 Johns. 527,) where that question was directly raised, that he could not. If not, can he be aided by the illegal acts of an officer? An affirmative answer would mar the whole symmetry of the common law, which, notwithstanding all that has been said to the contrary, approaches nearer to the 'perfection of reason' than many of the acts of modern legislation." The same judgment was affirmed in the same case when again before the court. 48 Maine, 26. The dissenting opinion concedes this doctrine, but contends that it should not apply where possession of the property was retained by the mortgagor.

In the case at bar the property had been delivered to the vendee. The title had passed to him. It might be assailed by creditors, if fraudulent, under the statute of Elizabeth, or in cases of insolvency, by their assignee; but only on due process of law. Neither can forcibly take it. Nor could the messenger, under his warrant, commanding him to seize the property of the debtor, do so. A fraudulent conveyance will not justify a trespass. The conveyance is good until destroyed by judgment

of court. The statute says that the conveyance shall be void and the assignee may recover the property. In substance, not that the assignee may take the property, but that he may recover it, if he elects to treat the conveyance void. Until he is chosen, no one has the power of election; and until then the grantee may retain the property.

But it is said this doctrine would open too wide a door for debtors to convey their property. That such conveyances might be made to irresponsible persons who might put the property beyond the reach of the assignee, when chosen; but not so. The doors of chancery stand wide open to prevent the consummation of such fraudulent purposes. Moreover, if it were so, less harm would be likely to arise, than if officers of court should determine arbitrarily the validity of all transactions of the insolvent, and seize such property of other persons as they might think belonged to the debtor, or to his creditors. Such power is placed elsewhere.

The defendant wrongfully dispossessed the plaintiff, and became answerable for the value of the property, with interest from the time he took it. *Warren* v. *Kelley*, 80 Maine, 532. He may, however, show in mitigation of damages that the property did not belong to the plaintiff, but that it has been surrendered to the true owner. *Squire* v. *Hollenbeck*, 7 Pick. 551; *Lowell* v. *Parker*, 10 Met. 309; *Kaley* v. *Shed*, *Ib.* 317; *Case* v. *Babbitt*, 16 Gray, 278; *King* v. *Bangs*, 120 Mass. 514; *Dahill* v. *Booker*, 140 Mass. 308. These authorities do not differ in principle from *Carpenter* v. *Dresser*, 72 Maine, 377. There the attaching officer tendered back the goods and the owner refused to receive them. In these cases the owner did receive them, although not the plaintiff, from whom they were taken.

The case of *Perry* v. *Chandler*, 2 Cush. 237, is precisely in point. The plaintiff had a mortgage of goods and was in possession of them. The defendant, as an officer, attached them as the property of the mortgagor. The writ miscarried. The mortgagor was adjudged bankrupt. The plaintiff brought trespass for the goods. The defendant was chosen assignee, and attacked plaintiff's mortgage as a fraudulent preference, and

it was adjudged void. The court held that the plaintiff's suit could be maintained, but for nominal damages only. And it so held upon the doctrine of the above cases, that the title of property wrongfully taken may be shown to have been in another, to whom it has been delivered, not in bar of the action, but in reduction of damages. But the delivery must have been made, and that brings these cases within the rule of *Carpenter* v. *Dresser*, *supra*, for there, had the plaintiff accepted the goods, their value would have gone in reduction of damages.

In the case at bar, the defense that the plaintiff's title was in fraud of the insolvent law should only have been allowed in reduction of damages, and not in bar of the action.

Exceptions sustained.

MARY J. BENNETT *vs.* KENNEBEC FIBRE COMPANY.

Penobscot. Opinion January 16, 1895.

Flowage. Deed. Grantor and Grantee.

These words in a deed, viz: "Also, the right of flowing the Great Pond" *held*, to mean a grant of uses suited to the existing conditions at the time the grant was made,—flowage incident to the maintenance of the then existing dam when repaired, made secure and tight.

ON REPORT.

This was a complaint for flowage. It was agreed that the right to maintain the complaint depended upon the construction of the deed, found below.

In the deed are these words:—"Also the right of flowing the Great Pond." The defendant corporation claimed that by this clause in the deed an unlimited right of flowage was conveyed, and that, by subsequent conveyances, they are now the owners of that right. The plaintiff claimed that by this clause in the deed only a limited right of flowage was conveyed—namely, the right to flow Great Pond to the extent to which the then existing dams flowed it,—and, as the defendant's dam now flows the pond to a much greater height, and he, the plaintiff, owns land bounded on the pond, which by reason of this

increased flowage, is submerged and injured, the above mentioned deed, though binding upon him, did not preclude him from a recovery for damages for such increased flowage. The parties agreed to submit its interpretation and construction to the law court. If, as claimed by the defendant, the right conveyed was a right to flow Great Pond to an unlimited extent, the complaint should be dismissed, and a judgment for costs was to be rendered in favor of the defendant. But if, as claimed by the plaintiff, the right conveyed was limited to a right to flow Great Pond to the extent to which the then existing dams flowed it the action was to stand for trial.

(Deed.)

Know all men by these presents, that I, John Benson, of Newport, Esq., in consideration of the seventeen hundred and fifty dollars paid to me by Joseph M. Moor of Newport, and Asa Redington of Augusta, as mentioned in my other deed to them of this date, do hereby release, remise and forever quit claim to them, their heirs and assigns forever all my right in the land under the lower bridge and road across the Sebasticook river in Newport. Also all my right of flowing water by the dam and of using the same in the pond or of drawing it through the dam, all my right of repairing the dam or of booming or securing lumber upon my shores in said pond or in the great pond above it, with the right of passing on said shores for said purposes, doing as little damage thereby as may be practicable. Also the right of flowing the great pond: Also the right upon my land in Elm street to throw lumber over the bank to be put into the mill pond, but without doing injury to any trees or buildings which now are or hereafter may be placed there. Also the right of a landing place for lumber on my lot adjoining and south of I. M. Josslyn's land. The said Moor and Redington hereby stipulating to indemnify me, my heirs, executors and administrators against liabilities arising from any further neglects or refusals on their part to carry out and perform all stipulations relative to the subject matters of this grant and contained in any conveyances made by me or by any of the persons under whom I derive title.

In witness whereof, I, the said John Benson, and I, Thirza A., the wife of said John Benson, in token of hereby relinquishing all right of dower in the premises, hereunto set our hands and seals this first day of July, one thousand eight hundred and fifty-four.

John Benson, [L. S.]
Thirza A. Benson. [L. S.]

H. H. Patten, for plaintiff.

Where an owner of a mill dam and water privilege and also of land above, conveys the dam and mill privilege with a right of flowage, this court held that the grant would give the right to flow the land as the dam stood at the time of conveyance. *Butler* v. *Huse*, 63 Maine, 447.

For thirty-five years from July 1, 1854, to the fall of 1889, none of the grantees exercised the right to flow the Great Pond any higher than the dam would flow that was in existence when John Benson conveyed the right of flowing the Great Pond.

Judge VIRGIN says in the above named case: "And the manner in which this privilege was for so long a time openly and notoriously used and permitted to be used, is swift evidence of what the parties to the grant intended and understood to pass by it."

The existing facts at the time of conveyance all show that the grantor, John Benson, did not intend to convey any right of flowing his land any higher than the then existing dam would flow. It was the right of flowing the Great Pond which he quit claimed, and certainly that could not have been any higher than the dam would flow at that time, viz: July 1, 1854.

To ascertain the intention of the parties to a deed, it is proper to look at the existing facts at the time of conveyance. *Abbott* v. *Abbott*, 53 Maine, 360.

Orville D. Baker, for defendant.

There is no reason apparent from an examination of this instrument why this sentence should be limited in its effect when its terms are as broad as those of other grants in the same deed which are clearly unlimited.

Suppose that the grantor had fully intended to give the right to flow as high as the grantees might desire, he could hardly have expressed that intention more clearly than he has in the words used. The language is plain and simple. A fair inference is that he intended that should be taken as plainly. He intended to grant all the right of flowage which he possessed, and not a part only.

If the construction for which the plaintiff contends can be forcibly imposed on the language here, we see no reason why any other arbitrary line might not be adopted as well. This line might be above or below the point at which the water was at the time of making the deed. If we once depart from the language of the deed and endeavor to set up a boundary which does not exist in fact, and for which no warrant is found in the instrument, we have the whole realm of conjecture from which to draw a possible intention, and may select the one which best fulfills our wishes. We have no guide but our own desire.

But in construing this sentence there is no need of importing any new matter, or of imputing to the grantor any intention which we do not know that he had. The interpretation which we seek to have sustained does no violence to the language of instrument. It does not compel us to establish arbitrary bounds, without warrant. It does not require us to grope in the dark for possible intentions of the grantor. It stands on the language of the deed and invokes the familiar rule that ordinary words shall receive their ordinary meaning, no strong, substantial reason appearing to the contrary. We simply take the deed at its word, the language being plain and unambiguous.

Deed to be construed most strongly in favor of grantees. *Veazie* v. *Forsaith*, 76 Maine, p. 179; *Child* v. *Ficket*, 4 Maine, 474; *Lincoln* v. *Wilder*, 29 Maine, 182; *Grant* v. *Black*, 53 Maine, 376; Co. Lit. 183, a; *Morse* v. *Marshall*, 13 Allen, 290.

SITTING: EMERY, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

HASKELL, J. Complaint for flowage, reported to the court for the construction of a single clause in a deed. The clause is:

"Also the right of flowing the great pond." If the deed conveys an unlimited right of flowage, the complaint is to be dismissed with costs, otherwise to stand for trial. The only evidence reported is the deed, and from that alone its true construction must be sought.

Some of the familiar rules of construction are, that the language of a deed must be given that interpretation which it will best support; that where the meaning is doubtful it must be construed most strongly against the grantor, provided that it so accord with the apparent intention of the parties.

In the case at bar, the grantor conveyed the land under the bridge, the right of flowage by the dam, and of using the water in the pond or of drawing it through the dam, and of repairing the dam, of booming or securing lumber on the shores of the pond or in the great pond above, with the right of passage on the shores for the purpose, doing as little damage as practicable. "Also the right of flowing the great pond." Also the right of throwing lumber over the bank into the mill pond, and the right of a landing place, &c.

He conveyed various rights appertaining to a mill; land, flowage by the dam, use and right of repair of the dam, boomage rights in the mill pond and in the great pond above, and the right of flowing the great pond. There was a mill pond and a great pond above. Now, the grantor having conveyed rights touching the dam and mill pond adds, "the right to flow the great pond above." Not an indefinite right, but a specific right — the right necessary and incident to the uses required by the whole grant. Manifestly the parties had in mind the grant of an entirety. Such flowage of the great pond above as the existing dam, when in perfect order, repaired, made tight, would cause, and no more. The parties could not have intended the construction of a different dam, one that might work destruction to the riparian rights of the grantor, and flow out his land beyond what ever had been, or so far as he knew, had ever been thought of. Had such extraordinary flowage been contemplated by both parties, surely the deed would have specified it. The grantor naturally would not have suspected it, and if the grantees intended it,

they should have made their intentions known. Had they done so, they would have been careful to have had the grant commensurate therewith.

We think the plain import of the grant is of uses suited to the conditions existing at the time the grant was made, to wit, of flowage incident to the maintenance of the existing dam when repaired, made secure and tight.

Action to stand for trial.

ALMONT R. PENNEY, and another,

vs.

NEWTON A. EARLE, and another.

Androscoggin. Opinion January 17, 1895.

Sales. Execution. Place. Officer. Mortgage. R. S., c. 91, § 1.

The court adheres to the rule that execution sales of personal property shall be what they purport to be, public, with the property exposed for examination, so that bidders may observe and appreciate the qualities of the property offered for sale.

Held; that a sale on execution was void by reason of non-compliance with the law, it appearing that the officer who attempted to make the sale, being other than the one who made the attachment, never saw the property; never had the key to the building in which it was contained; that he took no possession of the property other than by the plaintiffs' attorney telling him he had possession of it; that he advertised the sale at the attorney's office some distance from where the property was located; and that the property was not exposed for sale, for examination or inspection; was sold in a lump and never delivered to the plaintiffs, who were the purchasers, other than by their retaining the key.

ON REPORT.

This was an action of replevin of an engine and boiler to which the plaintiffs claimed title as purchasers at an execution sale and the defendants, who were mortgagees. The judgment debtors on the twenty-fifth day of February, 1890, mortgaged the property replevied to the defendant Earle and one Edgar W. Salisbury. Both mortgagees resided in Rhode Island. Harris, one of the judgment debtors, then resided in Minot, Androscoggin county; and Lee, the other judgment debtor, always resided in Rhode Island. The mortgaged property was then in Minot, and always

remained in the same building where it was at the time of the mortgage up to the time of the sheriff's sale. The mortgage was recorded October 19, 1892, in the town records of the town of Minot. At that time, Harris had removed to and resided in the town of Poland. The mortgage was also recorded June 14, 1893, in the town records of the town of Mechanic Falls. In the meantime, in February, 1893, that portion of Minot in which Harris lived, when the mortgage was given and in which the property was located and that portion of Poland in which Harris lived on June 14th, 1893, had become incorporated within the town of Mechanic Falls. The judgment debtors conveyed absolutely to the defendant Earle and Salisbury, June 14, 1893; and the grantees took possession of the property prior to the execution sale and removed it to Mr. Earle's place on the Poland side of the river.

The plaintiffs' claim was, that the property was attached December 1, 1892, on a writ in favor of J. W. Penney & Sons against Harris and Lee, the mortgagors. This attachment was made by filing an attested copy, etc., with the town clerk of Minot. Execution was issued in said action June 5, 1893. The date of the judgment was May 11, 1893, and it appeared that on the tenth day of June, which was within thirty days after the rendition of judgment, the officer returned that he seized the property replevied as the property of the within named Ernest A. Harris and Charles F. Lee; that he gave notice on the nineteenth day of June of a sale to be had on the twenty-second day of June, and that on the twenty-second day of June the articles replevied were sold to the plaintiffs for one gross sum by the officer and the proceeds applied to the execution.

It appeared that on the tenth day of June the officer gave notice of a sale of the same property to be had on the nineteenth day of June, and in that notice described the parties as Almont R. Penney and Samuel R. Penney as creditors and Ernest A. Harris as debtor. The name of Lee did not appear in that notice. The defendant, Earle, by his pleadings denied the title of plaintiffs and claimed title in himself and Salisbury.

Other facts relating to the sale of the property on the execution are stated in the opinion.

F. O. Purington, for plaintiffs.

At time of attachment, December 1, 1892, Harris, one of defendants, in execution, resided in Poland, Maine, and had since May, 1890, when he removed from Minot, and the mortgage under which defendants claim was never recorded in Poland, but was recorded at Mechanic Falls, June 14, 1893, four days subsequent to seizure on execution. The plaintiffs are entitled to judgment unless there has been some irregularity in their proceedings to vitiate them, or the mortgagees' title is better.

The mortgage bears date February 25, 1890, and was first recorded October 19, 1892, in a town (Minot) other than that in which the mortgagor then (at time of record) resided. R. S., c. 91, § 1.

The question is, where shall a mortgage be recorded, the record of which is deferred two years and eight months from its execution and two years and four months, at least, after mortgagor has changed his residence. The language of the statute "in which the mortgagor resides" must mean where he resides at time of record. The mortgage isn't a mortgage as to third parties until recorded. It would have been easy, had the legislature wished, to have added the words "at the time of the execution thereof," as the New York statute reads. "Resides," by any fair interpretation must mean place of residence at time of record. The New York case cited in Jones on Chattel Mortgages is based on the New York statute and is not applicable to the present case. In *Witham* v. *Butterfield*, 6 Cush. 217, the court expresses a doubt as to the proper place of record in a case parallel to the one under consideration, the Massachusetts statute being like our own in this particular.

Where one of two innocent people must suffer, the one guilty of negligence shall be the one, is applicable here, and the mortgagees, having by their negligence misled the plaintiffs, must bear the consequences. Presumably, had the mortgagees recorded their mortgage seasonably, the plaintiffs could have protected themselves by refusing credit to the debtors (mortgagors).

Certainly so large a mortgage, if recorded, would have caused plaintiffs to have taken very different steps. Will the court say that when one examines records two years and more after a debtor has left town, he must still continue to watch the records of the debtor's former residence, and may not thereafter be safe in examining only the records of the town to which the debtor has removed?

The case shows that the sale was properly advertised. There is no suggestion of fraud or that any unfair means were employed. Chattels it appears had been in same place a long time, easy of access, near place of sale. The law does not require formality for formality's sake, but that justice shall be done to all. No one made request to see the chattels. The sale was open and fair and was analogous to the sale in *Phillips* v. *Brown*, 74 Maine, 549. The language in *Bergin* v. *Hayward*, 102 Mass. pp. 426 and 427, applies here and is a full answer to the further objection suggested by defendants that officer should have sold each chattel separately.

Jesse M. Libby, *A. R. Savage*, *and H. W. Oakes*, with him, for defendants.

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

HASKELL, J. Replevin of an engine and boiler. The plaintiffs claim title under sale on execution, by virtue of a seizure made June 10, 1893. The defendants, by virtue of a mortgage properly recorded June 14, 1893, but dated February 25, 1890. The case is presented on the issue of property in the defendants and not in the plaintiffs. They can recover only upon proof of title. If the sale was void by reason of non-compliance with law, they must fail.

It appears that the property was supposed to have been attached on the writ and put into the possession of plaintiffs' attorney by giving him a key to the building in which the property was contained, one of the debtors retaining another key to the same.

The officer who attempted the sale on execution was not the same officer who is supposed to have made the attachment. He testifies, in substance, that he never saw the property, never had the key to the building, that he took no possession of the property other than by the plaintiffs' attorney telling him that he had possession of it. He advertised the sale at the attorney's office, some distance from where the property was located. The property was not exposed for sale, for examination or inspection, was sold in a lump, and never delivered to the plaintiffs, who were the purchasers, other than by their retaining the key.

"The general rule is, that the sale of personal property by an officer on execution must be had where the property is situated, or so near, that those present at the sale can examine it." *Lawry* v. *Ellis*, 85 Maine, 500. There may be exceptions, as in *Phillips* v. *Brown*, 74 Maine, 549. There a barn was sold during "an inclement season of the year." This sale was in June. There the property was itself open to inspection by all observers who might go near it. Here it was locked up in a building where no one might see it without its being exposed to view. It was not exposed, nor offered to be exposed, so far as the case shows. It should have been. No good reason appears why the sale was not had on the premises. It is best to hold to a rigorous rule, that such sales shall be what they purport to be, public, with the property exposed for examination, so that bidders may observe and appreciate the qualities of the property offered.

Other questions are presented that are unnecessary to consider. The defendants may have mistaken the proper place for recording their mortgage in the first instance, but it appears to have been an honest mortgage, and the equities are strongly in their favor. *

Judgment for defendants and for return.

* By an act approved February 21, 1895, amending R. S., c. 91, § 1, it is provided that chattel mortgages shall be recorded in the town where the mortgagor resides "when the mortgage is given." Stat. 1895, c. 39. REPORTER OF DECISIONS.

MARION E. MITCHELL, *pro ami*, *vs.* ANNETTE E. CHASE.

Piscataquis. Opinion January 21, 1895.

Action. Amendment. Dog. Keeper. R. S., c. 30, § 1.

A declaration in the common law form, in an action of trespass against the keeper of a dog for injuries caused by such dog, is amendable by adding an averment thereto that the action is brought under the statute which allows the recovery of double damages for such injury.

A person may be liable for an injury caused by a dog which is kept by such person without the consent and against the wishes of the owner of the dog.

ON EXCEPTIONS.

This was an action of trespass to recover damages caused to the plaintiff by the bite of a dog, of which the defendant was alleged to be the owner and keeper in the first count, and keeper in the second count of the declaration.

After the jury had been impanelled and before the beginning of the trial, the plaintiff obtained leave against the objection of the defendant, to amend the writ by inserting a third count, similar to the second and declaring upon the statute, R. S., c. 30, § 1. The defendant took exceptions to the granting the amendment.

(Amended Declaration.) Also for that the said defendant, at said Milo, on the sixteenth day of July, A. D. 1891, was the keeper of a large dog, and on the said sixteenth day of July aforesaid, the defendant's said dog assaulted the plaintiff; bit her and scratched her, tore and lacerated the plaintiff's ear so that it has been badly swollen and inflamed ever since, impairing the plaintiff's hearing, and disfiguring the plaintiff's ear forever; and the assault of the said defendant's dog aforesaid, gave the plaintiff a severe nervous shock, so that she is unable to control her nerves, but jumps and cries out in her sleep and is unable to control herself when awake but is afraid of being bitten by dogs, and will run and scream when a dog goes toward her even in a playful manner; and said plaintiff has been by the assault of said defendant's dog disfigured for life; has had her hearing

impaired if not destroyed, and has been subjected and is now subjected to great pain and suffering and great nervous distress and suffering; whereby and by force of the statutes in such case made and provided, an action hath accrued to the plaintiff to have and recover of said defendant double the amount of damages done as aforesaid, to the damage of said plaintiff (as she says) the sum of two thousand dollars. . . .

After the verdict which was for the plaintiff, the defendant also took exceptions to various portions of the charge to the jury, among which are the following:

"Negligence is not an element in this case, because, however careful an owner of a dog might be, if the dog did injury, the owner or keeper would be liable, and however gross negligence might be attributable to the owner or keeper of a dog, it would not add to the liability of such owner. . . .

"It is only necessary in this action for the plaintiff, taking upon herself the burden of proof, to satisfy you by a preponderance of testimony of the truth of two propositions. First, either that the defendant was the owner or keeper of the dog that did the injury, and, second, that the injury was done. . . .

Now, I have said to you that either the owner or the keeper would be liable. In this action there are three counts, as it is called, in the declaration; in one of those counts the plaintiff declares against the defendant as the owner and keeper; in the other two counts she declares against the defendant as the keeper. Now this statute is a penal statute to a certain extent, and must be construed strictly. Inasmuch as the plaintiff has alleged in one count that the defendant is the owner and keeper, to entitle her to a verdict under that count she must prove to your satisfaction that the defendant was both the owner and keeper; and in the other two counts inasmuch as she has alleged against the defendant that the defendant was the keeper, she must satisfy you by a preponderance of the testimony that the defendant was the keeper of the dog. That is, the two propositions under the statute and under this writ which the plaintiff must satisfy you of, are these; that at the time of the alleged injury the defendant was either the owner and keeper or the

keeper. If the owner alone on the 16th day of July, 1891, and not the keeper, this wouldn't satisfy the allegations in the writ. This might have been different under different declarations; but in this particular case the plaintiff must satisfy you, I say, either that the defendant was both owner and keeper upon the one hand, or simply keeper upon the other hand; being owner alone and not the keeper wouldn't be sufficient; being keeper alone and not the owner would be sufficient. . . .

"A keeper of a dog is the person who has the care of the dog, who has the custody of the dog, who has its control. It is not sufficient,—to take this particular case,—that the dog was at the house in which the defendant was living at the time of this affair, because the dog might have happened there; it might have followed its keeper there, or its owner, or its owner and keeper. It might have been called there by some member of the household for the moment, for the purpose of entertaining some member of the household by its tricks. But if a dog is enticed to the house of a person, there to be kept for a particular purpose, even for a short time, that person might become the keeper of the dog. . . .

"If you are not satisfied by a simple preponderance of the testimony,—and the amount of that and the effect of it you are to determine as I have frequently explained to you, gentlemen; —if you are not satisfied that Mrs. Chase was the owner and keeper upon the 16th day of July, 1891, then upon that proposition the plaintiff fails, and you come to the next proposition in the case, which is: Was Mrs. Chase on the sixteenth day of July, 1891, the keeper of the dog? That is, the person who at that time, for some period, either with the knowledge and consent of the real owner, or without, who had the care, the control or custody of the dog. And if such keeper, whether owner or not, then she is just as much liable as if owner. . . .

"Who was the keeper of the dog? If Mr. Buswell was the owner of the dog, but still for the purpose of protection, or for any other reason, Mrs. Chase had obtained the consent of Buswell to keep the dog on her premises,—by that I do not mean continually, of course, upon her premises,—but to make

the home of the dog upon her premises, then she would be the keeper of the dog and liable for any injury that the dog committed."

J. B. Peaks and M. W. McIntosh, for plaintiff.

Amendment: As to common law liabilities, counsel cited: *Van Leuven* v. *Lyke*, 1 N. Y. 515, quoted in 44 Maine, 330; *Earle* v. *Van Alstine*, 8 Barb. 630. (Pleading): 1 Chit. Pl. 2d Am. Ed. p. 359; *Smith* v. *Montgomery*, 52 Maine, 178; *Mitchell* v. *Clapp*, 12 Cush. 278; *Hussey* v. *King*, 83 Maine, 568; *Reed* v. *Northfield*, 13 Pick. 94; *Clark* v. *Worthington*, 12 Pick. 571; *Worster* v. *Canal Bridge*, 16 Pick. 541. Amendment allowable as matter of form: *Barter* v. *Martin*, 5 Maine, 78; *Kellogg* v. *Kimball*, 142 Mass. 124; *Loring* v. *Proctor*, 26 Maine, 18; *Brewer* v. *East Machias*, 27 Maine, 489; (other amendments) *McVicker* v. *Beedy*, 31 Maine, 314; *Rand* v. *Webber*, 64 Maine, 191; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Steward* v. *Walker*, 58 Maine, 304; *Merrill* v. *Curtis*, 57 Maine, 152; *Page* v. *Danforth*, 53 Maine, 174; *Harvey* v. *Cutts*, 51 Maine, 607; *Walker* v. *Fletcher*, 74 Maine, 142; *Dodge* v. *Haskell*, 69 Maine, 429; *McFadden* v. *Hewett*, 78 Maine, 24; *Kelly* v. *Bragg*, 76 Maine, 207; *Place* v. *Brann*, 77 Maine, 342. R. S., c. 82, § 10.

Henry Hudson and G. W. Howe, for defendant.

Plaintiff waived statute remedy by bringing action at common law. Oliver's Prec. 4th Ed. 685-6; Suth. Stat. Construction, § 358 and cases; *Reed* v. *Davis*, 8 Pick, 514; *Bay City R. R. Co.* v. *Austin*, 21 Mich. 390; 2nd, Inst. 200; Comyn's Dig. (action upon statute) p. 322, 4th Ed. "C"; *Palmer* v. *York Bank* 18 Maine, 166; *Pierce* v. *Conant*, 25 Maine, 36; *Mason* v. *Waite*, 1 Pick. 452; *Hobbs* v. *Staples*, 19 Maine, 219; *Heald* v. *Weston*, 2 Maine, 348; *Barter* v. *Martin*, 5 Maine, 78; *Bayard* v. *Smith*, 17 Wend. 88; *Smith* v. *Moore*, 6 Maine, 274; *Peabody* v. *Hoyt*, 10 Mass. 38. Amendment allows double damages in place of single damages at common law.

Exceptions: A person cannot be keeper of a dog unless the dog is lawfully in possession of such keeper; and in order to be

lawfully in possession of such keeper a dog must be kept by such person either with the knowledge or consent of the owner. A person cannot be said to be the keeper of a dog that does not either have the consent of the owner to keep it, or keeps it with the knowledge of the owner. There must be some consent. The instruction to the jury, "the person who at that time, for some period, either with the knowledge and consent of the real owner, or without, had the care, control or custody of the dog," was not in conformity with the law.

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

PETERS, C. J. This is an action of trespass for injuries suffered by a child from the result of an attack upon her by an enraged dog; the original declaration containing two counts in which it was charged that the defendant was at the time of the attack the owner or keeper of the dog. Objection was taken to the allowance by the court of an amendment by adding a third count containing the substance of either of the original counts with the words appended thereto, and not in the original counts, as follows: "Whereby and by force of the statute in such case made and provided an action hath accrued to the plaintiff to have and recover of the defendant double the amount of damages done as aforesaid."

There is no doubt that the action is remedial and not penal in the technical sense, and that the declaration is amendable, if an amendment be considered desirable for a fuller statement of the plaintiff's claims in the case. The form of the action indicated the intention of the pleader to institute an action under the statute which allows double damages.

Detached portions of the judge's charge are grouped together in an irregular way in the bill of exceptions, in the main unquestionably favorable to the defendant, and we do not understand by the defendant's brief that any objection is urged against these sayings or rulings of the court, excepting that complaint is made of the remark by the judge that

the defendant might be regarded as the keeper of another person's dog so as to establish her liability under the statute referred to, even though she might be keeping the dog without the owner's consent. It seems the defendant set up the contention that, although formerly the owner of the dog, she had prior to the injury complained of sold him to another person, and that, if she harbored the dog after the sale, it was without the owner's consent. We think such an instruction would be unobjectionable. If the dog persisted in returning to his former mistress and she allowed him to remain, she would become his keeper for the time being. One may be in the wrongful possession of a dog and still be his keeper. The question was whether a keeper or not and not whether a rightful keeper. A person might even steal a dog and become his keeper. The fact relied on would be a legitimate piece of evidence bearing on the issue whether she was really the dog's keeper or not.

Exceptions overruled.

BESSIE J. GRINDLE *vs.* YORK MUTUAL AID ASSOCIATION.

Hancock. Opinion January 22, 1895.

Life Insurance. Payment. Action. Presumption as to Funds. Stat. 1889, c. 237, § 6.

In the trial of an action against a life-insurance company organized on the assessment plan, brought by a person entitled to a benefit in consequence of the death of a member of such company, the burden is not on the plaintiff, in order to sustain his action on the policy or certificate of insurance, to show that the company is in possession of funds sufficient to pay his claim it appearing that the company is required by its charter and by-laws to assess its members on the occurrence of the death of any one of them, and to keep on hand an emergency fund collected from annual dues and also a general reserved fund to be derived by the company from several various sources, facts which raise a presumption of sufficient resources or funds.

ON MOTION AND EXCEPTIONS.

This was an action by the plaintiff upon a certificate of insurance, in the sum of two thousand dollars, issued by the defendant association, May 31st, 1892, upon the life of Forest A. Grindle.

The certificate was issued under what is known as the club plan, whereby one-half of the benefit in the event of the death of the member was to be paid to certain persons, or the survivors of them, named in the certificate and the other half to his wife, the plaintiff, who was named in the certificate as the beneficiary.

The plaintiff brought the action to recover of the defendant association the one-half of the benefit which was to be paid to her, under the terms of the certificate, in the event of her husband's death, viz., the sum of $1000 and interest from the time when it should have been paid.

The defendant association answered the suit in its brief statement that the certificate was null and void because, as was alleged, certain answers of the deceased in his application for the insurance were false. The trial proceeded on this issue, raised by the defendant, that there was no liability whatever as the certificate was void

After the presiding justice had given instructions upon the questions raised in the trial upon the issue of the validity of the certificate, and was instructing the jury as to their verdict, in case they found the certificate valid under the evidence and the instructions given, the defendant's counsel requested the following instructions.

"If the plaintiff is entitled to recover under the evidence, it is incumbent upon her to prove the amount of damages she is entitled to; and as it is provided by the certificate that the amount to be paid, if the certificate is valid, is to depend upon the amount received by the defendant from one death assessment less twenty (20) per cent, . . . and as no evidence has been offered of the amount received or that might be received from one death assessment by the defendant, I instruct you that the plaintiff is entitled to no more than nominal damages.

"2. If the plaintiff is entitled to recover, no evidence of the damage sustained having been offered except the certificate, I instruct you as a matter of law, that the plaintiff is entitled to nominal damages only."

These instructions were refused, and the presiding justice instructed the jury as follows:

"I instruct you, that the amount which the plaintiff would be entitled to recover under this certificate will be one-half the benefit therein named, and the benefit therein named is $2000, so that she will be entitled to recover, if she is entitled to recover, one-half thereof, or one thousand dollars, together with interest from and after the expiration of ninety days from the filing of the proofs of the loss."

To the refusal to give the instructions requested, and to the instructions given, the defendant excepted.

The jury returned a verdict for the plaintiff of $1062.00. The defendant after verdict also filed a general motion for a new trial.

A. W. King and E. E. Chase, for plaintiff.

J. O. Bradbury and G. F. Haley, for defendant.

Counsel cited: *Curtis* v. *Mut. Ben. Life Co.* 48 Conn. 98; *Eggleston* v. *Cent. Mut. Life Assoc.* 18 Fed. Rep. 14; *Smith* v. *Cov. Mut. Ben. Assoc.* 24 Fed. Rep. 685; *Mut. Acc. Assoc.* v. *Tuggle*, 39 Ill. App. 509.

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

PETERS, C. J. The plaintiff claims one thousand dollars as due her on a certificate of insurance granted upon the life of her husband by the defendant company. The case was tried to the jury, under the general issue, upon the important question whether the certificate was or not obtained from the company by the fraudulent representations of the husband.

At the close of the evidence, without previous notice or intimation that the point would be raised, the counsel for the company asked for a set of instructions the point of which was that the plaintiff could not maintain the action, or at any rate maintain it for more than nominal damages, because no proof had been adduced that any assessment had been made producing funds with which to pay the loss, and that there was no proof that in any other way the company had any funds for such purpose. And the company now contends that the burden of proof was on the plaintiff to show these facts. The presiding

justice ruled, however, and we think correctly, that the plaintiff could maintain her case, on this point, upon the presumption that the company was in possession of sufficient funds, and that the burden was on the company to show the contrary if the contrary were true. *State* v. *Churchill*, 25 Maine, 306.

The certificate or policy under which the plaintiff asserts her claim is not exclusively on the so-called assessment plan, but there are other features combined with that principle. The promise of the certificate is not merely that the company will upon the death of a member assess so much on the surviving members, and collect and pay over the money collected to the beneficiary. There is much more than that to it. The promise is unconditional on the inside and outside of the policy. On the back of the same are printed these words: "All claims are payable within ninety days after due notice and proof of death." On its inside is written and printed that the: "Association will within ninety days after receipt of satisfactory proof of said death pay to [the beneficiary] one-half of the benefit herein named," the whole sum named being two thousand dollars.

There are several good grounds for supposing the company to have funds, if it does its duty. Its charter and by-laws provide that an assessment shall be made on the occurrence of each death in order to provide the association with means to enable it to pay its losses, and the responsibility for the collection of assessments must be on the company and not on the beneficiary. Besides assessments and dues, four dollars are annually payable by each member for the creation of an emergency fund, and forfeitures are also provided for to enure to the benefit of the company and add to its funds. We quote a by-law which would also indicate the probable possession of funds:

"Section 1. Not less than twenty per cent of all moneys collected on assessments levied to meet death and disability benefits shall be deducted and invested in accordance with section six of an act relating to life and casualty insurance on the assessment plan, approved March 1st, 1889, and shall only be used to meet death and disability claims whenever it would

be deemed necessary by the board of directors to collect more than six assessments to meet such claims in any one year. After March 5th, 1899, the income of said fund shall be equitably divided among certificate holders."

The act of 1889, above referred to, requires every company which is organized on the assessment plan to have on hand an amount of funds equal to what would be one assessment on all its members.

We are aware that there are differences among courts as to the remedies most appropriate for the collection of claims against a company of a mutual and assessable character, and a considerable question has been whether the proceeding should be one in law or in equity. We feel clear, however, that on such a policy as this is, an action at law is a proper though perhaps not an exclusive remedy to recover a loss, although a resort to equity might be necessary to collect the legal judgment after it has been obtained. These views are fully supported by several cases and especially by the case of *U. S. Mut. Accident Association* v. *Barry*, 131 U. S. 60.

The correctness of the verdict upon the facts is doubtful, but we think it better stand.

Motion and exceptions overruled.

SHELDON REED *vs.* WILLIAM E. KNIGHTS.
SAME *vs.* SAME.

Somerset. Opinion January 23, 1895.

Deed. Description. Caveat Clause. Quitclaim.

The description in a deed, by metes and bounds, was as follows: "Commencing on the east line of the road leading from Skowhegan to Madison Mills at the southwest corner of land of Alvin Smith [a point admitted]; thence east on said Smith's south line and south line of N. Blanchard to the southeast corner of said Blanchard's land [a point not in dispute]; thence south to Charles Baker's north line [a point not in dispute]; thence west," &c., to the place of beginning. It was contended by the defendant that the call, "thence south to Charles Baker's north line" meant southeast to said Baker's northeast corner, thereby including a small triangle of land, the premises in dispute, at the east end of the lot described.

Held; that the description is plain, unambiguous, by courses and to monuments; that Baker's north line is a monument, the course running to it specific, south, and therefore the triangle is not embraced in the description.

Also, that a caveat clause at the end of the above description, "Meaning to convey the north half of Dean Reed farm," standing alone, did not enlarge the specific grant.

The defendant for further claim of title relied on a quitclaim deed of all the right, title and interest of the plaintiff's grantor delivered and recorded in 1881. It appeared that plaintiff's grantor had previously conveyed the same to the plaintiff in 1875 by warranty deed, recorded in 1893.

Held; that no title passed to the defendant by the quitclaim, because his grantor had none to part with, notwithstanding the plaintiff's deed of warranty was not recorded until after defendant's quitclaim.

ON REPORT.

These were two actions, one being a real action and the other trespass *q. c.*, in which the plaintiff claimed title to a small triangle containing about three acres, lying at the east end and adjoining the defendant's land in Madison, Somerset county. Plea, general issue. Both cases were submitted to the law court, upon so much of the testimony as might be found competent and admissible, to render such judgment as the legal rights of the parties required.

The defendent testified, subject to objection, that at the time he purchased his land of the plaintiff, including that adjoining the disputed strip, the title to which was not controverted, the plaintiff told him that the land run east as far as Baker's, and that the fence on the east end was the east line. This conversation was not upon the premises. The case appears in the opinion.

E. N. Merrill and G. W. Gower, for plaintiff.

E. F. Danforth and S. W. Gould, S. J. and L. L. Walton, with them, for defendant.

Plaintiff estopped by his statements to defendant. *Louks* v. *Kenniston*, 50 Vt. 116; *Hendricks* v. *Kelly*, 64 Ala. 388; *Woodward* v. *Tudor*, 81 Penn. St. 382; *Rutherford* v. *Tracy*, 48 Mo. 325; *Bigelow* v. *Foss*, 59 Maine 162.

In starting from Blanchard's southeast corner the monument to be reached to the south is the Charles Baker land. It is familiar law that monuments govern courses and distances. The

point on the Baker line nearest from the Blanchard corner is the northeast corner of the Baker land, and is forty-six rods and fifteen links, while in running due south it takes forty-seven rods and three links to reach the Baker land.

Where in the description of a tract of land, an ascertained or natural object is called for, the same must be reached by one straight line, irrespective of course or distance; and when such ascertained and natural object is of an extensive character, such as another tract of land, a river, or a swamp, this line must be run to the nearest point in such object. *Campbell* v. *Branch*, 4 Jones (N. C.), L. 313; *Spruel* v. *Davenport*, 1 same, 203.

Construing the deed according to the manifest intention of the parties and in case of doubt most strongly against the grantor and harmonizing all the circumstances and acts of the parties, including the statements made by plaintiff to defendant, it seems clear that the easterly line of the plaintiff's deed to defendant runs from Blanchard's southeast corner to Charles Baker's northeast corner. *Worthington* v. *Hylyer*, 4 Mass. 195; *Herrick* v. *Hopkins*, 23 Maine, 217.

Defendant having no knowledge of the other deed from Webster Reed to plaintiff, having obtained the quitclaim deed on December, 1881, and recorded at that time, holds the territory against plaintiff's deed of prior date but of later record. *Dow* v. *Whitney*, 147 Mass. 1.

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

HASKELL, J. Report. Writ of entry and trespass *quare clausum*. Plea, the general issue, in both cases. The declaration in the writ of entry admits defendant's possession, and *nul disseisin* is a good defense to the action, until the plaintiff shows that the possession is rightfully his. This he attempts to do by showing legal title in himself. He reads in evidence several warranty deeds to himself that show him to be the legal owner of all the land demanded, at least on January 18, 1893, prior to the date of his writ in September following;

so that, unless the defendant shows an earlier title in himself, the plaintiff must prevail.

Defendant reads in evidence a warranty deed from the plaintiff to the defendant and his son of a part of the demanded premises, and contends that it conveys the whole of the same; but the contention is not sound. The description is by metes and bounds: "Commencing on the east line of the road leading from Skowhegan to Madison Mills, at the southwest corner of land of Alvin Smith [a point admitted], thence east on said Smith's south line and south line of N. Blanchard to the southeast corner of said Blanchard's land [a point not in dispute], thence south to Charles Baker's north line [a point not in dispute], thence west," &c., to the place of beginning. It is contended that the call, "thence south to Charles Baker's north line," means southeast to Baker's northeast corner, thereby including a small triangle of land, here in dispute. The description is plain, unambiguous, by courses and to monuments. Baker's north line is a monument. The course running to it is specific, south. The point in Baker's north line is made certain by the course that reaches it. Now south means south, not southeast nor southwest when other calls in the deed do not control, to make it so. *Foster* v. *Foss*, 77 Maine, 279.

But it is said that there is a caveat clause at the end of the description: "Meaning to convey the north half of Dean Reed farm, so-called, as situated on the east side of said road, containing thirty-five acres, more or less, and being the same premises conveyed to me by Webster Reed," &c. Now that deed refers for description to a deed from one Palmer. That deed says: "Easterly to land of Sheldon Reed [the plaintiff], thence northerly and westerly by land of Sheldon Reed to land of Quincy Blanchard," the point where the disputed line begins to run south. The easterly line in that deed is uncertain. It is described, northerly and westerly, not northwest, but two courses by land of plaintiff; so the fair inference is that the plaintiff, in his grant to the defendant, meant to make a straight line on the east end of the lot, that may have been uncertain, as the evidence shows that a crooked brush fence once existed on

it, or near it. He meant to convey, a perfectly shaped rectangular lot, and did so in terms. The words, "Meaning to convey the north half of Dean Reed farm," standing alone, cannot enlarge the specific grant. *Brown* v. *Heard*, 85 Maine, 294. Taken in connection with the context, they show no intention to have done so.

Plaintiff's declarations at the time he gave the deed, which are denied, cannot affect the result. *Stubbs* v. *Pratt*, 85 Maine, 429; *Ames* v. *Hilton*, 70 Maine, 36.

But defendant reads in evidence a quitclaim deed from plaintiff's grantor, dated in 1881, claimed to cover the *locus* in dispute. Suppose it does. Plaintiff's grantor had previously conveyed the same to plaintiff in 1875 by warranty deed, recorded in 1893, and defendant's quitclaim therefore passed no title to him, for the grantor had none to part with; and the fact that plaintiff's deed was not recorded makes no difference. Had defendant's deed been a warranty, it would have been otherwise. *Walker* v. *Lincoln*, 45 Maine, 67; *Coe* v. *Persons Unknown*, 43 Maine, 432; *Johnson* v. *Merithew*, 80 Maine, 114.

Judgment for plaintiff, in the writ of entry, for the triangular lot in dispute; and for one dollar damages in the action of trespass.

GEORGE H. M. BARRETT, and others,

vs.

EDWIN H. BOWERS, and others.

KNOX. Opinion, January 23, 1895.

Injunction Bond. Damages. Counsel Fees. R. S., c. 77, § 32.

In an action upon an injunction bond conditioned to pay all damages sustained if the injunction is finally dissolved, *held.* that this was not the bond prescribed by statute (R. S., c. 77, § 32) but is a binding obligation according to its terms.

Damages within the meaning of the bond are pecuniary losses arising from the restraint imposed by the injunction, and not expenditures for counsel fees in the defense of the injunction suit.

Thurston v. Haskell, 81 Maine, 303, affirmed.

ON REPORT.

The case is stated in the opinion.

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

Plaintiffs are entitled as damages to the expenses incurred by them for counsel fees; first, upon the motion to dissolve the temporary injunction; and second upon the hearing before the law court, or more properly, the continuation of the hearing, before the law court, on the motion to dissolve the temporary injunction. The right of the plaintiffs to damages accrues only at the termination of the final hearing; and as the issue upon the motion to dissolve the temporary injunction, and the only issue involved in the bill at the final hearing, are identical, it would seem that the language of the bond clearly gives the right to recover for all counsel fees incurred in both hearings, or in the continued hearing on the motion to dissolve.

Counsel cited: Am. & Eng. Ency. Vol. 10 p, 999; *Andrews* v. *Glenville Woolen Co.* 50 N. Y. 282.

The fact that the issues involved, in the motion to dissolve and the final hearing were identical, and that the final hearing was necessary in order to be rid of the injunction, and involved no other issue, should be borne in mind in an examination of the authorities, because in every case where it appears that the final hearing was necessary for the sole purpose of getting rid of the injunction, the courts have always held that counsel fees incurred in that hearing are recoverable under an injunction bond. This distinction is noticed in *Disbrow* v. *Garcia*, 52 N. Y. 654; *Newton* v. *Russell*, 87 N. Y. 527; *Edwards* v. *Bowdine*, 11 Paige, 224; *Cochran* v. *Judson*, 24 N. Y. 109. Counsel also cited: *Rice* v. *Cook*, 92 Cal. 144; *Creek* v. *McManus* 32 Pac. Rep. 675; *Lindsey* v. *Parker*, 142 Mass. 582. *Thurston* v. *Haskell*, 81 Maine, 303, turns upon the point that no effort was made to get rid of the temporary injunction, and that therefore nothing appeared to show that the plaintiffs had sustained any damage by the temporary injunction.

W. H. Fogler, for defendant.

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

HASKELL, J. The municipal officers of Rockport had been enjoined, pending suit, upon bond filed, from constructing a sidewalk across the plaintiff's lawn, claimed to be within the limits of a street. The defendants moved that the injunction be dissolved, and the justice who heard the motion, declined to act upon the motion until final hearing on the bill. On final hearing the bill was dismissed. The present action is upon the bond. Damages are claimed for the expenditure incurred on motion to dissolve and on final hearing, upon the ground that further hearing upon motion to dissolve was adjourned to the final hearing on the bill.

The condition of the bond is, that plaintiff shall pay all damages sustained "if said injunction is finally dissolved." The statute required the condition to be, "to pay all damages and costs caused thereby, if he is finally not entitled to such injunction, unless a single justice, on motion to dissolve the same and hearing on the merits thereof, refuses to dissolve it." R. S., c. 77, § 32.

The bond filed was not a statute bond, but, nevertheless, a binding obligation according to its terms. It enabled the plaintiff to procure his injunction, and there is no reason why he should not respond to the condition he voluntarily entered into as a pre-requisite in that behalf.

The condition calls for the payment of all damages sustained, not including costs, if the injunction be finally dissolved; and it has been dissolved by a dismissal of the bill. The only question, then, is to assess the damages. The only damages shown are the defendants' expenditure for counsel fees in the suit. Are these damages within the meaning of the bond? We think not. Damages mean pecuniary loss arising from the restraint imposed by the injunction, not the expenditure in the defense of the suit. This is the doctrine of *Thurston* v. *Haskell*, 81 Maine, 303. It is not an open question in this state. The object of the bill was a permanent injunction. The expenditure was incurred in resisting the prayer of the bill — in defending the suit. This is not damages within the meaning of the bond. No damages have been shown, therefore there is no breach of the condition of the

bond. Had the bond been a statute bond, and had the injunction been dissolved on motion, either in whole or in part, and had it restrained action other than that sought by the prayer of the bill, the case might have been different; but of this, we have no occasion to express any opinion.

Plaintiffs nonsuit.

ALBERT M. RICH *vs.* CITY OF ROCKLAND.

Knox. Opinion January 23, 1895.

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

In an action to recover damages for personal injuries caused by a defective street, it appeared that the defect was created by a servant of the city. *Held;* that he was not such an officer of the city as the statute requires should have notice of the defect in order to make the city liable on account of it.

ON REPORT.

This was an action against the city of Rockland to recover damages for an injury received by reason of a defect in the highway in said city.

The only question as stipulated in the report, was whether or not the city of Rockland had such notice of the alleged defect as would entitle the plaintiff to recover.

The defect complained of was a pile of ice and snow about two feet high within the limits of the street and near a catch-basin. It was not claimed that either of the municipal officers, or the road commissioners, had been given any actual notice of the existence of the defect.

The plaintiff claimed that the defect was created by a servant and agent of the city, a foreman under the road commissioners, and that, for that reason, the fact of the existence of the alleged defect was known to the defendant and they had no occasion for notice thereof. It was admitted that Mr. Simmons was the sole foreman employed by the road commissioners of Rockland, and was instructed by them to keep the roads broken out and the sidewalks shoveled off within the limits where the accident occurred. From this admission the plaintiff claimed that, when he was clearing away the sidewalk and the catch-basin, and

leaving the pile of ice and snow in the street, he was not only in the employ of the road commissioners and the city of Rockland, but was acting under their express instructions.

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

Counsel cited: *Holmes* v. *Paris*, 75 Maine, 559; *Buck* v. *Biddeford*, 82 Maine, 433; and commented on them and the authorities therein cited and approved. This act of the foreman was the act of the street commissioners, and the act of the city, and constituted all the notice that was necessary of the existence of the defect. Counsel also cited: *Monies* v. *Lynn*, 119 Mass. 273; *Hinckley* v. *Somerset*, 145 Mass. 326; *Stoddard* v. *Winchester*, 157 Mass. 567; *Wilson* v. *Troy*, 135 N. Y. 96.

W. R. Prescott, city solicitor, for defendant.

The case discloses facts differing from cases cited by plaintiff. The snow was the prime cause of the injury. The snow fell into the street and upon the sidewalk in Rockland as it does everywhere else, and none of the city officers caused it to fall, there was no active agency on the part of the city in placing the snow where it fell. An employee of the city in removing what was legally in the street made a cause which might or might not by subsequent freezing produce a defect. There is no evidence that the road commissioners had notice or knowledge of the defect causing the accident. And there is nothing in the evidence that warrants the conclusion that even Mr. Simmons had any knowledge that any hard pile of snow existed at the time of the accident. Counsel cited: *Smyth* v. *Bangor*, 72 Maine, 252.

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

HASKELL, J. Action for damages sustained from a defective street. It appears that a servant of the city, in cleaning the sidewalks of a Sunday morning, in a "little drizzling rain," left a pile of snow in the street a couple of feet high that later in the day began to freeze, and on Monday became frozen hard. This was the defect complained of, and the only question presented

is, whether defendant had such notice of the defect as the statute requires.

The man who shoveled the snow was not such officer of the city as the statute requires to have had at least twenty-four hours' notice of the defect before the accident. But it is contended by the plaintiff that the defect was created by an employee of the city, in the discharge of his duty in the repair of streets under the road commissioners, and, therefore, no further notice to the city is required under the doctrine of *Holmes* v. *Paris*, 75 Maine, 559, and *Buck* v. *Biddeford*, 82 Maine 433. In the first case, the highway surveyor, and in the other, the street commissioner, officers to whom notice of a defect may be given, created the defects, respectively; and both cases hold that no other notice is necessary. Neither of these cases apply to the case at bar. Here a servant of the city, not a person whose notice of a defect is necessary to charge the city, as in the cases above cited, created the supposed defect. No officer of the city knew of it, and the city cannot be held chargeable for it.

Plaintiff nonsuit.

SAMUEL P. SMITH *vs.* CALIFORNIA INSURANCE COMPANY.

York. Opinion January 25, 1895.

Exceptions. Insurance. Arbitration. Waiver. Stat. 1881, c. 82, § 69.

Exceptions to the admission or exclusion of testimony cannot be considered by the law court unless enough of the case be stated to show whether the exceptions are material or not.

In the trial of an action to recover for a loss sustained under a fire-insurance policy which contains an arbitration clause, in this case valid and binding on the parties because the insurance was effected by a Massachusetts policy on goods situated in that commonwealth when insured as well as when destroyed by fire, it could not properly be ruled, as a matter of law, that the agreement of arbitration was waived in this state by the company for the reason that it gave no notice until the expiration of about nine months after the proof of loss was made, but about eight months before this action was brought, that it should insist upon a settlement of the amount of loss under the terms of such arbitration clause.

The sending of a case involving the settlement of the amount and value of a stock of goods to an auditor for the determination of those questions in an action upon a fire-insurance policy, although acquiesced in by both parties, deprives neither party of his right to rely upon any other questions arising in the case.

See *Smith* v. *California Insurance Company*, 85 Maine, 348.

ON EXCEPTIONS.

The case is stated in the opinion.

B. F. Hamilton and B. F. Cleaves, *G. F. Haley*, with them, for plaintiff.

By the submission the plaintiff contends that the defendant waived the right under the policy to submit the case to arbitration. The policy states that the parties may waive that right. The submission being a matter of record introduced in the case, the effect of that submission was a question of law for the court and not a question of fact for the jury. When a domestic record is put in issue, it is to be tried by the court. The construction of it was for the court. *Sawyer* v. *Garcelon*, 63 Maine, 25.

The jury are to decide matters of fact and those only. When the facts are found by uncontradicted and unquestioned testimony or by agreement or by special verdict, their legal effect is a matter of law, to be determined by the court. *Todd* v. *Whitney*, 27 Maine, 480; *Witham* v. *Portland*, 72 Maine, 539; *Roberts* v. *Shirley*, 74 Maine, 144.

As a rule, both in civil and criminal cases, cases of libel to some extent excepted, writings are to be expounded by the court. The meaning of the instrument, the promise it makes, the duty or obligation it imposes, is a question of law for the court. *State* v. *Patterson*, 68 Maine, 473; *Nash* v. *Drisco*, 51 Maine, 417; *Fenderson* v. *Owen*, 54 Maine, 372.

The contract as originally made was that in case of loss the claim should be submitted to arbitrators, subsequently they made an independent contract to submit the case to an auditor thereby waiving the agreement to submit to arbitration, the submission to the auditor being inconsistent therewith. The effect of a subsequent contract upon a pre-existing one is a

question for the court to determine from the terms. *Cocheco Bank* v. *Berry*, 52 Maine, 293.

That the proof of loss was given upon November 21st, 1888, and the defendant did not notify or request arbitration until August 5th, 1889, were two uncontradicted facts. The facts being uncontradicted it was the duty of the court to declare the legal consequences following therefrom. Cases, *supra*. *Saunders* v. *Curtis*, 75 Maine, 493; *Rice* v. *Dwight Co.* 2 Cush. 80; *Short* v. *Woodward*, 13 Gray, 86; *Pratt* v. *Langdon*, 12 Allen, 544; *Globe Works* v. *Wright*, 106 Mass. 207.

There was no dispute but that nine months, after the proof of loss, expired before the defendant requested arbitration. Whether that was within a reasonable time was a question for the court. *Atwood* v. *Clark*, 2 Maine, 249; *Howe* v. *Huntington*, 15 Maine, 350; *Hill* v. *Hobart*, 16 Maine, 164; *Portland* v. *Water Co.* 67 Maine, 135. It was a proper case to be sent to an auditor. *Clement* v. *Insurance Co.* 141 Mass. 298.

By consenting that the case be submitted to an auditor they admitted a liability, and no defense was open to the defendant, the only question open being the amount of liability. Revised Statutes, chap. 82, § 69, provides when an auditor may be appointed and it is only when an investigation of accounts or an examination of vouchers is required. The court decreed it was required. The defendant agreed that it was required. It was not required unless there was a liability.

By reason of the submission to the auditor, there was no defense open to the defendant except that which was recited in the rule to the auditor. Nothing could be tried except the auditor's finding. *Closson* v. *Means*, 40 Maine, 338; *Howard* v. *Kimball*, 65 Maine, 327; *Black* v. *Nichols*, 68 Maine, 227.

The consent of parties and decree of court that the case be submitted to an auditor takes the place of the interlocutory decree to an action of account. Cases, *supra*.

By consenting that the case be sent to an auditor they waived the question of liability. *Kimball* v. *Baptist Society*, 2 Gray, 517; *Kendall* v. *Weaver*, 1 Allen, 277.

Edwin Stone, for defendant.

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

PETERS, C. J. A verdict in this case for the plaintiff was set aside on the motion of the defendants, as see 85 Maine, 348, and now the case returns to us with a verdict for the defendants and a bill of exceptions by the other side.

The first exception, relating to the admission of certain testimony, is probably not now relied on and must be overruled for the reason that there is not any statement of facts showing its relevancy to any issue in the case.

The second exception must be overruled for the same reason. The plaintiff, while on the stand as a witness in his own behalf, was required to state on his cross-examination that his brother George, when the plaintiff last saw him, was in the Massachusetts state prison. The parties at the trial may have understood the pertinency of the question, but, there being no report of testimony, there is nothing to inform us what bearing the question or answer had in the case. It does not appear whether George was a witness or not, or whether he was in prison for the purpose of punishment, or, if so, whether for the punishment of any offense having any connection with this investigation. *State* v. *Pike*, 65 Maine, 111.

Other exceptions are taken which depend for their decision upon a clause in the insurance policy upon which the action is brought, taken in connection with certain admitted or uncontested facts affecting its interpretation. The clause is as follows: "In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third to be selected by the two so chosen, the award in writing of a majority of the referees to be conclusive and final as to the amount of loss or damage; and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss." This being a Massachusetts policy,

issued on goods situated in that commonwealth, and the fire occurring there which occasioned the loss, the law of that commonwealth, where such a clause is fully upheld as an essential part of the policy, must be on that point the law of this case.

The policy was taken out November 6, 1888. The loss occurred November 9, 1888. The proof of loss was made November 21, 1888. The action was commenced April 18, 1890, the declaration containing counts on the policy without any averment on or allusion to the arbitration clause. On August 5, 1889, nearly nine months before the date of the writ, the defendant company gave the plaintiff notice that they should insist upon a settlement of the loss under the arbitration clause.

On these facts the counsel for plaintiff requested the presiding justice to rule that as a matter of law the defendants had waived their right to arbitration. This the justice declined to do, but, explaining what might constitute a waiver, he submitted the question to the jury to determine for themselves, on all the facts both those admitted and those disputed, whether there had been such waiver or not; the jury being authorized to consider the notice and its lateness as circumstances with other facts in the case.

We do not see how the company's silence for nine months can be construed as a legal waiver of the right of arbitration. The clause constituted an essential element in the contract, and did not merely extend an option to either party. It was as much the duty of one party as of the other to initiate the proceeding, unless it may have possibly been more the duty of the plaintiff as the affirmative party. The company might be led to suppose that the insured would not press his claim in the face of the accusation of fraud alleged against him, and especially, if, as is stated, the plaintiff commenced an action on the policy in a Massachusetts court immediately after proof of loss and shortly afterwards abandoned it. The plaintiff himself took no step indicating waiver by him until the bringing of his action nine months later than the notice by the defendants insisting upon an arbitration.

Upon another ground also does the plaintiff claim that a waiver of the right of arbitration was effected. It appears that

at some term of court prior to the term, when the action was tried, the case was sent to an auditor to examine and report upon the accounts of the parties. The plaintiff contends that this proceeding cut the defendants off from all their grounds of defense to the action other than that of the amount of loss. This is an utterly untenable proposition. There being several independent positions of defense taken by the defendants in their pleadings, it was desirable to relieve the court of the drudgery of wading through an investigation of hundreds of disputed items. And it would have been an impossible task for the jury.

By § 69, ch. 82, stat. of 1881, it is provided that, "when an examination of accounts or an investigation of vouchers is required, one or more auditors may be appointed by the court to hear the parties and their testimony, state the accounts and make a report to the court in such matters therein as may be ordered by the court, and the report is *prima facie* evidence upon such matters only as are expressly contained in the order." It will, therefore, be seen that parties are not estopped by the report, even in matters submitted to the auditors, from further defense in such matters, the effect of the auditors' report being no more than merely to change the burden of proof. And, *a fortiori*, an auditor's report can create no estoppel in matters not submitted to him.

Stress is given by plaintiff's counsel to the fact that, as it is asserted, the case was sent to the auditor for an investigation of accounts "with the consent of both parties." This phrase is taken from the commission to the auditor, the clerk using an old-time printed form which was in vogue anciently when consent of parties was required. It is otherwise now. But there is nothing on the docket in this action indicating that any consent to the submission was given or required.

But it is immaterial whether the case was sent to an auditor by consent or not. The court could send it there with or without consent. It went there by the direction of the court and on its responsibility. The cases cited by counsel on this point are not applicable here. They involve strictly actions of account at

the old common law, still maintainable in this state, in which there can be no accounting until all defenses in bar or abatement of the action are first disposed of. There cannot be an action of account to collect a loss upon an insurance policy.

Exceptions overruled.

S. M. DAVIS *vs.* W. G. PHILBRICK.

Somerset. Opinion January 25, 1895.

Plea in Abatement. Misnomer.

A plea in abatement by a defendant that his name is not W. G. Philbrick as he is described in the writ, but that his true name is W. J. Philbrick, is bad, for not giving his first name in full instead of merely giving the initial letter thereof; and, if he has no first name other than the letter W, that would be a fact so unusual that it should be so specially stated in the plea.

ON EXCEPTIONS.

The plaintiff brought suit before a trial justice on an account annexed and the defendant filed a plea in abatement claiming a misnomer. The plaintiff filed a general demurrer. The trial justice sustained the demurrer, and the defendant appealed. The presiding justice in the court below sustained the demurrer, affirmed the judgment of the lower court, and the defendant excepted.

(Plea in Abatement.)

State of Maine. Somerset ss.

At a trial justice court holden before H. H. Powers, trial justice, in and for the county of Somerset, aforesaid, on this twenty-seventh day of January, in the year of our Lord one thousand eight hundred and ninety-four, in the action of S. M. Davis v. W. G. Philbrick, the writ therein in said action being returnable this 27th day of January, A. D., 1894, at ten o'clock A. M., before said H. H. Powers, trial justice, aforesaid, at the office of J. W. Manson in Pittsfield, in said county, now, therefore, comes W. J. Philbrick upon whom the plaintiff's writ was served in the above named action and who is thereby impleaded by the name of W. G. Philbrick, in his proper person comes

and defends, by his attorney, Frank W. Hovey, at the time and place aforesaid, and says he now is and always was called and known by the name of W. J. Philbrick, and not W. G. Philbrick as by the writ and declaration in the above entitled action is alleged, and this he is ready to verifiy.

Wherefore he prays judgment of said writ that the same may be quashed, and for his costs.

W. J. Philbrick.

By his attorney, Frank W. Hovey.

I, Frank W. Hovey, of Pittsfield, aforesaid attorney of W. J. Philbrick, make oath and say that the plea hereunto annexed is true in substance and fact, and I have subscribed and hereby sworn to the same this 27th day of January, A. D., 1894.

Before me, H. H. Powers, Trial Justice.

(Letter of Attorney.)

Know all men by these presents that I, W. J. Philbrick, of Pittsfield, in the county of Somerset and state of Maine, do hereby constitute and appoint Frank W. Hovey, of said Pittsfield, my attorney irrevocably in the premises, hereby specially authorizing and instructing him to answer by plea in abatement and otherwise to a suit commenced against me returnable before H. H. Powers, trial justice, at a court to be holden by him at the office of J. W. Manson in said Pittsfield, on Saturday, January 27th, A. D., 1894, a summons being served on me whereby I am impleaded by the name of W. G. Philbrick, and whereas my name is W. J. Philbrick, I hereby authorize my said attorney to file a plea in abatement, at said time, and otherwise conduct the proceedings in said action.

In witness whereof I have hereunto set my hand and seal this twenty-fifth day of January, A. D., 1894.

W. J. Philbrick. (Seal.)

Witness, H. S. Nickerson.

The letter of attorney was filed in the appellate court after the entry of judgment affirmed. The plaintiff also, afterwards, filed a motion to amend the writ by substituting the name W. J. Philbrick for W. G. Philbrick, which motion was allowed.

J. W. Manson, for plaintiff.

Counsel cited: *Hazzard* v. *Haskell*, 27 Maine, 550; *Getchell* v. *Boyd*, 44 Maine, 482; *State* v. *Flemming*, 66 Maine, 150. Misnomer should be pleaded in person and not by attorney. *Foxwist* v. *Tremaine*, 2 Saund. 209; Sto. Plead. Abatement, Misnomer and notes: *Guild* v. *Richardson*, 6 Pick. 370. Plea repugnant and inconsistent. It is W. J. Philbrick "in his own proper person comes and defends by his attorney." Prayer should be judgment of both writ and declaration. 2 Chit. Pl. (16 Ed.), citing *Davies* v. *Thompson*, 14 M. & W. 161. Plea of misnomer should give the full name and not initials merely. *State* v. *Homer*, 40 Maine, 438; *Sistermans* v. *Field*, 9 Gray, 331; *U. S.* v. *Upham*, 43 Fed. Rep. 68; *State* v. *Knowlton*, 70 Maine, 200.

A general demurrer to a plea in abatement will reach all defects whether of substance or form. *Severy* v. *Nye*, 58 Maine, 246; *Hazzard* v. *Haskell*, 27 Maine, 550; *Adams* v. *Hodsdon*, 33 Maine, 225; *Getchell* v. *Boyd*, 44 Maine, 482. Even to form of affidavit. *Bellamy* v. *Oliver*, 65 Maine, 108.

Letter of attorney filed after hearings cannot affect the case. Amendment allowable. R. S., c. 82, § 10.

F. W. Hovey, for defendant.

It was early decided and the rule is still in force, that for misnomer an application or motion to amend after issue joined, would be refused. Chit. Pl. p. 464; *Moody* v. *Aslatt*, 1 Cr. M. & R. 771, S. C. 5 Tyr. 492.

Amendment not allowable after plea filed and issue joined. *Fogg* v. *Greene*, 16 Maine, 282; *Maine Cent. Inst.* v *Haskell*, 71 Maine, 487. Pleading in person: Chit. Pl. p. 104.

Some of the very oldest authorities under the earlier English law hold that, if pleaded by attorney, there should be a letter of attorney, but hold that it can be done in this case. But this rule would not apply in this country, where the duties of attorney and the earlier duties of barrister under the English law are so widely different, that no special letter of attorney is here required.

Had the plea in abatement prayed for judgment in the beginning and close of the plea, it would have been bad. Where

the plea is for matter *dehors*, as misnomer, the plea should only conclude with that prayer. Chit. on Pl. p. 478; *The King* v. *Shakespeare*, 10 East, 87. The affidavit is correct in form, it relates that the plea is true in substance, and in fact is in accordance with the approved form. Chit. Pl. p. 480. Coverture may be pleaded by attorney, and the plea in abatement held good, and if the defendant can plead that she was mismated by attorney, what sense or reason would there be in refusing to allow her to plead by attorney that she was misnamed? *Atwood* v. *Higgins*, 76 Maine, 423. The defendant has not properly demurred to the plea in abatement, as by Chitty on Pleading, (16th Ed.) p. 482, the demurrer should pray judgment that the writ may be adjudged good and that the defendant may answer further thereto. There are no cases and no pleas in abatement that cannot be plead by attorney, except to the jurisdiction; all law writers on pleading give this rule.

SITTING: PETERS, C. J., FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

PETERS, C. J. The writ in this case describes the defendant as W. G. Philbrick and the plaintiff as S. M. Davis. To describe parties only by the initial letters of both their first and middle names, unless some excuse for it is intimated by the pleader, is a style of description not commendable in any court. The defendant asserts his objection to it by pleading in abatement that his own name was not W. G. Philbrick but W. J. Philbrick. To this plea in abatement a general demurrer is filed by the plaintiff. Some sharp thrusts are made by the arguments and points submitted on each side.

We incline, however, to the belief that the demurrer should be sustained, because the defendant in lieu of the name given him by the writ does not give the whole of the name which belongs to him. He should not only correct the mistake as to the middle initial of the name, but should supply what the first initial stands for.

We are, we think, correctly assuming that the letter W is not the real name of the defendant. If it be so, or if he is

known only in that way, it would be so unusual and unlikely a thing that he should so state it specially in his plea.

Inasmuch, then, as we must presume that the defendant has pleaded his true name in part only correctly, his plea in abatement fails.

Demurrer sustained. Plea bad. Judgment for plaintiff.

FRANCES E. HURLEY, in equity,

vs.

JAMES H. H. HEWETT, administrator.

Knox. Opinion January 25, 1895.

Actions. Executors and Administrators. Equity. Creditor. Claim. Counter Claim. R. S., c. 87, § 19.

Under a bill in equity instituted by virtue of § 19, chapter 87, R. S., which provides that a creditor who has not been guilty of culpable negligence by his omission to prosecute his claim against an estate within the time ordinarily allowed by statute therefor, may prosecute such claim in an equitable proceeding subject to certain conditions and limitations, no claim other than the one directly covered by the bill can be proved; together with any counter claims of the respondent which would have been a legal defense thereto.

ON REPORT.

Bill in equity heard on bill, answer, amended answer, replication, docket entries and master's report.

The case appears in the opinion.

W. H. Fogler, for plaintiff.

D. N. Mortland and M. A. Johnson, for defendant.

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

PETERS, C. J. Samuel Pillsbury, the defendant's intestate, died February 6, 1890, and the defendant was appointed his administrator in the same month.

The case comes to the law court on the finding of the master's report, no objection being made thereto.

The bill is dated March 8, 1893, and is brought under § 19, ch. 87, R. S., which section reads as follows: "If the supreme judicial court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding sections, is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill."

The complainant claimed that she came within the provisions of the statute and instituted this bill to recover her account against the estate of her father accordingly.

The answer denies that the complainant was not guilty of neglect in her delay in presenting her account, denies that anything is due to her in any manner, and claims, on the contrary, that she is and was for many years largely indebted to the estate instead of the estate being indebted to her. And the answer sets up some other independent claims as due to the estate from her.

The master reports that there is a balance due the estate from the complainant of $1696.07 in the accounts between the parties.

The master also reports, without any findings of law or recommendation, the facts upon the claim of the defendant to recover against the complainant upon certain notes held by the respondent's intestate against a copartnership of which the complainant was a member, and difficult and complicated questions have arisen on the facts so reported. And the respondent sets up in evidence other matters of claim against the complainant.

But these latter matters will need no consideration at our hands, as we think it plain that none of them are pertinent to the only question properly before us for our decision; which question is whether or not the complainant establishes any amount as due her from the estate represented by the respondent. The process adopted by the complainant is a direct and simple one to ascertain in this way what would have been

ascertained in a more advantageous way but for some mistake which she alleges happened without her culpable neglect. An equitable process is substituted for the legal process, in form different processes, in substance and effect intended to be the same. The bill does not call for an examination of the irrelevant matters which have been investigated before the master, nor does the answer even require it to any such extent. If the estate has claims against the complainant not exactly such as may be in payment or satisfaction of her claim against the estate, they may be enforced by actions of law. Our jurisdiction under this bill is special and limited, extending only to the single question whether anything is due on the complainant's account. The bill can be maintained only upon several specific conditions. But the master's report on the only question to be decided renders any consideration of other questions unnecessary.

Bill dismissed with costs for respondent.

JOHN WATSON *vs.* GEORGE A. PERRIGO.

Aroostook. Opinion January 26, 1895.

Action. Stat. of Frauds. R. S., c. 111, § 1.

Where a debtor delivers current funds to a third party to enable him to pay the creditor the debt, and such third party in consideration thereof, promises to pay the debt, he is liable in a proper action directly to the creditor, if he afterward upon demand refuses to pay.

The statute of frauds requiring a promise to pay the debt of another to be in writing does not apply to such a case. By taking the debtor's money he makes the debt his own.

ON EXCEPTIONS.

This was an action of assumpsit referred to the presiding justice with the right to except. Judgment was rendered in favor of the plaintiff and the defendant excepted.

The case is stated in the opinion.

V. B. Wilson and G. A. Gorham, Jr., for plaintiff.

G. A. Perrigo, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

EMERY, J. The ultimate facts found by the presiding justice are these: A debtor of the plaintiff promised him to place the amount of his debt in the hands of the defendant to be by him paid to the plaintiff. Afterwards this debtor did place in the defendant's hands the requisite sum, and requested him to pay it to the plaintiff which the defendant promised to do. Later still the defendant informed the plaintiff that he had received that sum of the debtor for him, and would soon pay it over. He did not pay it over however, and the plaintiff after a demand for the money, brought this action of assumpsit to recover it from the defendant.

The defendant contends that his promise was without consideration, and further that it was a promise to pay the debt of another, and hence invalid by the statute of frauds.

It is evident that he received a consideration for his promise, and that his promise was to pay his own obligation.

Exceptions overruled.

WILLIAM S. THOMAS

vs.

WILLIAM H. PARSONS, and IRESON BRIGGS, and another, TRUSTEES.

GEORGE B. OLIN, and another, CLAIMANTS.

Piscataquis. Opinion January 26, 1895.

Sales. Stat. of Frauds. R. S., c. 111, § 5.

A principal who intrusts his goods to an agent for sale and expressly reserves title to them and their proceeds until paid for, may hold the same although attached by trustee process in the hands of the agent's vendee.

Section 5, of the Statute of Frauds (R. S., Chap. 111) requiring a record of written agreements that declare the title to property bargained and delivered to the bargainee shall remain in the bargainor until payment, does not apply to agreements in which the right to purchase is not given.

ON EXCEPTIONS.

This was an action upon a promissory note given by the defendant, William H. Parsons, to the plaintiff. Ireson Briggs and John E. French, were summoned as trustees. The trustees disclosed that they were indebted to the said William H. Parsons for certain Perry Spring-tooth harrows, sold by said Parsons to said trustees. They further disclosed that the firm of G. B. Olin & Co., had notified them that they claimed the proceeds of said sale, in the hands of said trustees.

The principal defendant was defaulted, and the question at issue was between the plaintiff as attaching creditor of the funds in the hands of the trustees, and G. B. Olin & Co., as claimants. The case was submitted to the presiding justice who found, as a matter of fact, that the harrows sold by William H. Parsons to the trustees, were the harrows named in the contract between G. B. Olin & Co., and said Parsons.

The plaintiff contended that by the sale from Parsons to the trustees, the said Olin & Co., lost all claim to the harrows or the proceeds thereof, by the terms of said contract. But the presiding justice ruled that said Olin & Co., had a right to the proceeds of the sale of said harrows, under their said contract, in the hands of the trustees.

The plaintiff also claimed that the contract between Olin & Co., and Parsons, as against him as an attaching creditor, should have been recorded. But the presiding justice ruled that the contract without being recorded was a good contract against an attaching creditor, and that without such a record G. B. Olin & Co., were legally entitled to the proceeds from the sale from Parsons to the trustees.

The plaintiff thereupon took exceptions.

The case is stated in the opinion.

J. B. Peaks, for plaintiff.

Parsons was not the agent of Olin & Co., but their vendee. They lost title to the harrows and their proceeds when the sale to Briggs & French was made.

The agreement between Olin & Co., and Parsons was not valid, even between the parties, without being recorded. Stat. 1870, c. 143; 1874, c. 181; R. S., 1883, c. 111, § 5

J. and J. W. Crosby, for claimants.

SITTING: EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

EMERY, J. G. B. Olin & Co. of Canandaigua, N. Y., admittedly once owned certain harrows, called "Perry Spring-tooth harrows." They intrusted these harrows to William H. Parsons of Foxcroft, Maine, under a written contract in which it was stipulated that Parsons was to sell these and other harrows within a certain territory in Piscataquis County as the agent of Olin & Co.; and that the title to the harrows was to remain in Olin & Co., until it passed to purchasers from Parsons; and that the proceeds of harrows sold, whether in cash, notes or accounts, should be the property of Olin & Co. Parsons sold these harrows to Briggs & French partially, at least, upon credit.

The title of Briggs & French to the harrows under this sale is not questioned. They acquired title by a purchase from one authorized by the owners to sell and pass title. The title to the proceeds of this sale, however, is questioned. Whom do Briggs & French owe for these harrows? The consideration for their indebtedness was the harrows. Their indebtedness is presumably, therefore, to the party from whom the consideration moved, the owner of the harrows, at the time of their purchase. Olin & Co., once owned them. Did the title pass from them to Parsons, so that Parsons, had the title at the time of the purchase? Title to personal property passes only when the parties intend it to pass. Whatever the language, or conduct of the parties, the question remains,—did they intend the title to pass?

In this case the plaintiff contends that the indebtedness of Briggs & French is to Parsons. The burden then is upon him to show an intent of the parties that the title in the harrows should pass from Olin & Co., to Parsons. The only evidence introduced is the written contract above mentioned. That contract, however, instead of indicating an intention that the title should pass to Parsons, expressly negatives any such intention. It is expressly stipulated in it that the title shall remain in Olin & Co., and further that the debts due for harrows sold shall be due to Olin & Co.

The plaintiff, however, invokes R. S., ch. 111, § 5. That statute clearly contemplates a case of delivery with a bargain or agreement to sell to the bailee on the part of the vendor, and a written obligation for the price given by the bailee or vendee. If in the written obligation for the price, there is a stipulation that the property so bargained and delivered shall remain the property of the vendor, until payment of the agreed price, then the writing must be recorded. But these harrows were not "bargained," or agreed to be sold to Parsons. He acquired no right to purchase. The harrows were not delivered to him as vendee. He gave no note as the consideration of a sale to him. The statute does not apply.

Briggs & French do not owe Parsons for these harrows, and cannot be held as his trustees upon trustee process. They were rightfully discharged.

Exceptions overruled.

THOMAS F. ALLEN *vs.* GEORGE W. LEIGHTON.

Penobscot. Opinion January 26, 1895.

Game. Partners. Caribou. Stat. 1891, c. 95, § 4; c. 126, § 2.

Where a firm of partners in the course of the partnership business unlawfully has in possession three caribou, each partner has them in possession, and either partner may be held liable for the penalty.

ON REPORT.

This was a *qui tam* action brought under Stat. 1891, c. 126, § 2, by the plaintiff, a game warden, to recover the penalty provided in the act of 1891, chap. 95, § 4, for having in one's possession more than two caribou. After the evidence was out, the parties agreed to report the case to the law court.

(Declaration.) In a plea of debt, for that the said Leighton at said Bangor on the twenty-ninth day of December, A. D., 1892, did have in his possession more than two caribou and parts thereof at one time, to wit: three caribou and parts thereof at one time, to wit: on said 29th day of said December,

1892, contrary to section four (4) of chapter 95 of the public laws of Maine, approved March 25, 1891. Whereby an action hath accrued to the plaintiff who sues as aforesaid to have, demand and recover of the said George W. Leighton the sum of forty dollars for each caribou or parts thereof in excess of two caribou and parts thereof, to wit, the sum of one hundred dollars to the use of the State of Maine.

Plea, general issue, and the following brief statement: That the defendant, and Chas. S. Leighton were market men and provisions dealers on said 29th of December, 1892; having an established place of business in Pickering Square, and if this defendant was in any wise connected with the possession or custody of any caribou on said date, it was by virtue of his business in connection with the above named parties and not individually.

Second. That if any caribou was seized by the plaintiff on said 29th day of December, 1892, in which this defendant had any interest at the time of seizure, it was a part of a carcass lying upon the sidewalk in front of the market, at the place of business occupied by the defendant and the party named, called Leighton's Market, which had been left there by other parties and had not been moved or interfered with by this defendant; that as market-men and provision dealers, having an established place of business in this state, this defendant and each of the parties connected with the market for the sale of provisions as aforesaid, had a right to the possession of two caribou each, at said place of business.

Third. That each and every caribou, lying in front of this market occupied by the defendant and the party named, on the 29th of December, 1892, were lawfully killed and transported and were not subject to seizure at the time named.

The case appears in the opinion.

T. W. Vose, for plaintiff.

H. L. Mitchell, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

EMERY, J. On the 29th day of December, 1892, George W. Leighton and Charles S. Leighton were partners under the firm name of "G. W. & C. S. Leighton," in the market and meat business, having an established place of business at No. 69, Pickering square, Bangor. On that day they had in possession at their place of business *three* caribou, with intent to sell the same at retail to their local customers.

The statute, however, (1891 ch. 95, § 4,) declares that no person shall have in possession between the first days of October and January more than *two* caribou. George W. Leighton, the defendant here, was sued for the penalty. He contends in substance, that inasmuch as there were two members in the firm, each member only had in possession one-half of the three caribou, or one caribou and a half, and hence each had no more than the statute permitted.

It is a familiar principle in partnership law that the control and possession of the partnership goods are presumably in all the partners alike. All three of these caribou appear to have been in the possession of each and both partners as partnership goods to be sold in the partnership business. Each partner therefore had them in possession.

Perhaps only one penalty can be collected, but the plaintiff was not required to sue both partners for the violation of the statute. It can be recovered of either partner.

Judgment for the plaintiff.

CHARLES R. HILL, in equity,

vs.

ANDREW J. CROCKER, and others.

Penobscot. Opinion January 26, 1895.

Shipping. Agency.

A managing part owner of a vessel employed in foreign commerce has authority to advance money for immediate necessary repairs in a foreign port, and can afterward maintain a bill in equity against the other part owners for contribution.

It is no defense to such a bill that the respondent obtained a nonsuit in an action at law brought against him by the holder of the note, other than the complainant, given by all the part owners to raise funds for the repairs, but signed without the respondent's authority.

ON REPORT.

This was a bill in equity heard on bill, answer and testimony. The case is stated in the opinion.

T. W. Vose, for plaintiff.

P. H. Gillin, for defendant, Littlefield.

A ship's husband or agent may contract bills against a vessel, but he cannot by virtue of his office borrow money on the credit of the owners to pay them. *Arey* v. *Hall*, 81 Maine, 17.

Counsel cited: *Hazeltine v. Miller*, 44 Maine, p. 177, and cases.

If the plaintiff could not prevail against the defendant in an action at law to make him pay his pro rata share of this note, he cannot prevail against him in this action in equity. It would be a peculiar rule of law that would allow an agent who had exceeded the scope of his authority in law to bind his principal in equity. *Batchelder* v. *Bean*, 76 Maine, 370.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

EMERY, J. The brig James Miller of Bangor, in September, 1887, was in the port of Key West, Florida, in distress, and needing repairs to continue her voyage. The master sent notice of the circumstances to Charles R. Hill, the complainant, who was part owner and agent for all the owners of the brig. The master also requested that the sum of $2500, be sent him to enable him to make the necessary repairs. Mr. Hill thereupon called together such owners as were within call to make provision for the repairs. Several of the owners met and arranged that the necessary money should be raised by a note. Mr. Hill, therefore, prepared a note payable to his own order to be indorsed by him and discounted at the bank. This note was signed by the owners present, and the names of the absent owners were affixed by Mr. Hill, assuming to act as their agent.

The note was renewed in the same way three times and was finally paid with interest, each of the owners contributing his share, except the respondent, Freeman Littlefield, who has paid nothing. The proceeds of the note were sent to the master and applied to the repairs of the brig.

Mr. Littlefield was notified of the proposed meeting and of its purpose. He said he might not be able to attend, but if he did not he would be satisfied with whatever the meeting should resolve to do. He did not attend the meeting. Several other owners, who were absent at sea, were not notified of the meeting but have since paid their share of the money.

This bill in equity is now brought to compel Mr. Littlefield to contribute his share, which is agreed to be one hundred and ninety-six dollars, June 1, 1894, if he is bound to make contribution.

It is a general and necessary rule in maritime law that the managing owner, or ship's husband, has authority to bind all the owners for necessary repairs to the ship in a foreign port. Without such a rule foreign commerce by sea could not be carried on. *Benson* v. *Thompson*, 27 Maine, 474; *Hardy* v. *Sprowl*, 29 Maine, 258; *Chapman* v. *Durant*, 10 Mass. 51. It follows that, if such owner advances his money for such purpose, he may have contribution from the other owners. *Benson* v. *Thompson*, *supra*. In this case the recusant owner, Littlefield, was aware of the necessity of the repairs and of the proposed meeting of the owners to devise ways and means. He practically promised to acquiesce in the action of the meeting and contribute his share of the sum that should be raised for the repairs. It is equitable that he should contribute.

He claims, however, that it has already been adjudicated that he is not liable to contribute. The holder of the note brought an action on the note against Littlefield as a signer. It was ruled by the presiding justice that no evidence was then before the court that Littlefield had signed the note or authorized any one to sign for him. The plaintiff in that action thereupon became nonsuit. That judgment, however, is no bar to this equity suit. The parties are not the same. The cause of action is not the

same. It has never been adjudicated that Littlefield should not contribute his share of the money advanced for these repairs.

There should be a decree against Littlefield for the sum of one hundred and ninety-six dollars with interest from June 1, 1894, and costs, and a further decree for the distribution of the proceeds among the other owners.

Case remanded for decrees in accordance with this opinion.

INHABITANTS OF WALDOBOROUGH.

vs.

INHABITANTS OF FRIENDSHIP.

Lincoln. Opinion January 26, 1895.

Pauper. Adoption. R. S., 1871, c. 67, § 31.

A minor, who in February, 1871, was legally adopted under our statutes by a man and his wife as their child, thereupon took the legal settlement of those persons instead of longer following the settlement of his natural parents; the effect of the decree of adoption being to transfer the settlement of the child from the settlement of his parents to that of his adopters.

ON REPORT.

The case appears in the opinion.

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

W. H. Fogler, for defendants.

Counsel argued the following points:

By a decree of adoption the relations thereby created between the child and the adopters are not, and from the nature of things cannot be, absolutely the same as those theretofore existing between the child and its natural parents.

The adoption proceedings being provided and controlled by statute, the relations thereby created between the child and the adopters, and the legal consequences arising therefrom, should be limited to the purposes defined by statute.

The rights created by the adoption proceedings are only those of obedience to the adopters on the part of the child and of maintenance on the part of the adopters.

The statute authorizing adoptions contains nothing from which it may be inferred that it was the intention of the legislature that the rule of settlement of a child should be changed or affected by adoption.

The statute providing that legitimate children have the settlement of their father, refers to and means that such children have the settlement of their natural father, such being the ordinary acceptation of the word "father."

Such rule being expressly statutory, as are all the rules of governing pauper settlements, it should not be changed, extended or controlled by implication merely, but only by express statutory enactments.

To hold that an adopted child takes the settlement of the father by adoption would give to the statute authorizing adoptions a construction which is radically opposed to the rule of settlement above referred to, and which may lead to anomalous and absurd results.

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

PETERS, C. J. This is an action by the plaintiff town to recover of the defendant town a bill of pauper supplies furnished to one Isley Davis upon the ground that at the time the supplies were furnished, the pauper had his legal settlement in the town of Friendship.

It appears, from the facts agreed, that the natural parents of Isley Davis were residents of Cushing, and, if he at that time followed their settlement he would be a charge upon that town, and this action would not be sustainable against the defendants.

The case shows, however, that in 1871, Isley Davis was legally adopted by David Davis and his wife, and that they had their settlement at the time of the adoption and ever since in the town of Friendship. If, after the adoption of Isley Davis by David Davis, Isley took the settlement of David, then the town of Friendship is liable for the supplies sued for in this action. The question, therefore, for determination is whether this act of adoption transfers the settlement of the pauper from Cushing to Friendship or not.

The decree of adoption took effect in February, 1871, after the Revised Statutes of 1871 were passed, and therefore the question pending here is to be governed by section 31 of chapter 67 of those statutes, which reads as follows: "By such decree the natural parents shall be divested of all legal rights in respect to such child, and he shall be free from all legal obligations of obedience and maintenance in respect to them; and he shall be, for the custody of the person and right of obedience and maintenance, to all intents and purposes, the child of his adopters, as if they had been his natural parents. But such adoption shall not affect any rights of inheritance, either of the child adopted, or of the children or heirs of his adopters."

We deem it not a stretch of construction to decide that the adopted child took the settlement of the party adopting him, though there may be reasonable argument on either side of the question. We are unable to find that any such case has ever arisen before this in any court excepting in Massachustts, in the case of *Washburn* v. *White*, 140 Mass. 568, where the doctrine was held as we are disposed to declare it in the case before us. The language of the statute before quoted is clear and positive. The common law established certain legal relations between a father and his child, and the statute substitutes the same legal relations between the father and his adopted child. The latter are as legal as the former,—both are legal, the latter superseding the former.

It is just as reasonable a policy to allow the adopted son to take the settlement of the father as it is to allow the natural son to do so. Said DANFORTH, J., in *Lowell* v. *Newport*, 66 Maine, 78: "What reason can be given why the child should follow the father, except the policy of keeping families together? When there is no longer any occasion for that, or when for any reason the child has ceased to be a member of the family and is no longer dependent on the parent, then the reason for the law has ceased and ordinarily the law, in such cases, ceases also." Says WALTON, J., in *Warren* v. *Prescott*, 84 Maine, 483: "It is as competent for the legislature to place a child by adoption in the direct line of descent as for the common law to place a

child by birth there." The reasoning in both the cases we have quoted from goes to sustain the policy of our decision here.

Defendants defaulted.

STATE *vs.* PROSPER C. BEAUMIER.

Androscoggin. Opinion January 26, 1895.

Liquor Nuisance. Evidence.

If a respondent occupied a store, artfully contrived for the sale and concealment of liquors, in 1892 in apparently the same manner as in 1894, and he is on trial for maintaining a liquor nuisance therein in 1894, it is admissible, in corroboration of other evidence, to prove that liquors were found there upon search in 1892. The evidence alone could not possibly establish guilt. It would indicate intention rather than fact, preparation rather than act.

The records of the assessors of taxes showing that the tenement was assessed to another person as owner or proprietor, were not admissible in behalf of the defendant. They would have no tendency to disprove that the defendant was occupying the building or maintaining a business there.

ON EXCEPTIONS.

The case appears in the opinion.

H. W. Oakes, county attorney, for State.

D. J. McGillicuddy and F. A. Morey, for defendant.

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

PETERS, C. J. The defendant, being on trial on an indictment against him for maintaining a liquor nuisance in a tenement in Lewiston, offered in evidence the records of the assessors of that city, showing that the tenement was assessed to another person as owner or proprietor and not to him. Such evidence would have been hearsay merely and was inadmissible. And, if admitted, it would have no tendency towards disproving that the defendant was occupying the building or maintaining a business therein.

At the trial in January, 1894, witnesses were allowed, against the objection of the defendant, to testify to a description of the

tenement as they saw it during a search for liquors in January, 1892, on which occasion they found liquors in a "strong room" in the rear of the store, which room was so barred and fortified against any entrance thereto by officers as to require extraordinary use of force to break into it. The same witnesses testified that the rooms were in the same condition in 1894 as they were in 1892, and that the defendant was apparently in possession of the premises in the same manner as before.

We think this evidence was not of matters too remote or immaterial to be admissible. If the defendant had a "strong room" or any kind of a place on his premises for the safe concealment of illegal liquors, and it was especially fitted and arranged for that purpose in 1892, and he kept and maintained the same also in 1894, there would be some presumption of fact that the maintenance in 1894 was for the same purpose as it was in 1892. If such room served illegal purposes in 1892 it might also serve such purposes in 1894. The presumption of continuance applies. The evidence alone would not be sufficient to establish guilt. It would indicate intention rather than fact, preparation rather than act. But in connection with other circumstances it might have much probative force.

Exceptions overruled.

NAPOLEON PAQUET, and another,
vs.
EDWARD H. EMERY, and others.

York. Opinion January 26, 1895.

Intox. Liquors. Search and Seizure. Constable. Officer. Warrant. R. S., c. 80, § 54.

A search and seizure warrant issued by the municipal court of Biddeford may be served by any constable in York county, being so authorized by R. S., c. 80, § 54.

An officer holding a warrant to search for and seize liquors "in dwelling-house number eight on the easterly side of Franklin street in Biddeford, occupied by Fabian Provencher," is not liable as a trespasser to other tenants of portions of the same house for searching their premises before

reaching the rooms within which Provencher kept liquors for illegal sale; he having possession of a part of the ell of the house accessible either through a side door in the ell or by the front door and through the house, and there being nothing to indicate to the officers where the liquors kept by Provencher were until they discovered them.

ON REPORT.

The case is stated in the opinion.

Max. L. Lizotte, and B. F. Cleaves, for plaintiffs.

The case shows that Fogg, who makes return on the warrant, was at the time of the service, a duly elected and qualified constable of the town of Sanford, in the county of York; Emery and Parker acted as his aids, and not in any official capacity. So if, by the warrant, no authority was conferred upon Fogg, he could confer none on his aids.

A constable of the town of Sanford (or of any other town in the county) had no jurisdiction or authority to serve a warrant, issued by the municipal court of the city of Biddeford for an offense alleged to have been committed in Biddeford, by a citizen thereof. A constable has jurisdiction, in criminal matters only over offenses committed in the town in which he is elected; but he may pursue and bring back to his town any person who is accused of the commission of a crime in that town, whether the person be a citizen of that town or not. For this purpose, and this purpose alone, a constable may go out of his own town with a warrant into other towns in the same county, or even into another county.

The warrant did not authorize the search of plaintiffs' tenement, there being no inside connection between their tenement and the "L." *Flaherty* v. *Longley*, 62 Maine, 421.

The door from plaintiffs' kitchen opened into an entry-way or corridor, which corridor opened into the open air; this corridor was used in common with the tenants of the "L" up-stairs and with the tenant of the shop, the door to whose shop opened from this corridor, opposite plaintiffs' kitchen door. And the door from plaintiffs' kitchen to this corridor was an outer door, so that there was no interior connection between their tenement and this shop. All doors leading from an entry or corridor,

used in common with other tenants, are outer doors, within the meaning of the law. *Swain* v. *Mizner*, 8 Gray, 184.

The shop was no part of plaintiffs' dwelling-house. They had no use of it, no control over it. They hired their tenement of a landlord, and hired only certain rooms; another person used the shop, and these plaintiffs never had any actual or constructive connection with the shop. *State* v. *Kelleher*, 81 Maine, 347.

Provencher, the person named in the warrant, did not live in any portion of this block. And a warrant to search the dwelling-house of a person only authorizes the officer to search the house in which such person lives; and if he searches a house hired and occupied by another, though owned by such person, he will be guilty of trespass. *McGlinchy* v. *Barrows*, 41 Maine, p. 77.

The description of the premises was insufficient. The description of the place to be searched should be as certain in a warrant as would be required in a deed to convey the same premises. *State* v. *Robinson*, 33 Maine, 564; *Jones* v. *Fletcher*, 41 Maine, 256.

That cannot be considered as a special designation which, if used in a conveyance, would not convey it, and would not confine the search to one place. *State* v. *Robinson*, *supra*.

G. F. Haley, for defendants.

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

PETERS, C. J. This is an action of trespass against an officer and his aids for forcibly entering a dwelling-house and there searching for intoxicating liquors. The plaintiffs were, at the time the acts complained of were done, tenants of the rooms in the front part of the house, which was numbered eight on the easterly side of Franklin street in Biddeford. The warrant run against the house, describing it as number eight on the easterly side of Franklin street and also further describing it as "occupied by Fabian Provencher." Provencher was the respondent in the prosecution which followed the service of the warrant.

The officers being refused an entrance through any door in the house, they forced their way through the front door and passed through the hall and thence through the kitchen into the ell in the back part of which they found and seized the liquors of Provencher which they were searching for.

It turned out that the suspected seller was not the occupant of the whole house, but by some arrangement of sub-tenancy was occupying and using the rear of the ell for his illegal purposes. His section of the ell was partitioned off from the other part of it, a door connecting the two parts. The place where the liquors were kept was accessible either through an outside door into the ell or through the front door of the house and thence through passages and rooms into the ell.

The plaintiffs contend that, on these facts, the warrant did not authorize the searching of the whole house, but only such portion of it as was occupied by Provencher, and therefore that it was not a protection to the officer and aids for trespassing upon other portions of the tenement. We think on the contrary that the warrant covers the whole house, whether the allegation that it was occupied by Provencher be true or not. It was at any rate partly so occupied. It was occupied by him and others. The principal description of the tenement was number eight, and that fact the officers could appreciate. The less essential description to their minds would be the occupation by Provencher.

The case of *Flaherty* v. *Longley*, 62 Maine, 420, relied upon by the counsel for plaintiffs as sustaining their contention, itself a very close case, differs from the present case in essential particulars. In that case the warrant to the officer first described two separate tenements and then by an after-description became limited to one of them. Here one tenement only is described and the ell where the liquors were found was not only apparently but really and unquestionably a part of such tenement.

A warrant issued by the municipal court in Biddeford may be served in Biddeford by any constable in York county. R. S., c. 80, § 54. *Judgment for defendants.*

SAMUEL B. GERRY *vs.* REUBEN G. HERRICK.

Piscataquis. Opinion January 29, 1895.

Town Meeting. Warrant. Elections. Taxes. Distraint. R. S., c. 6, §§ 102, 149.

A warrant for a town meeting to be held on March 10, omitting the year, but in other respects regular, and dated February 26, 1890, and duly posted more than seven days before March 10, 1890, is not so defective as to invalidate the doings of the town at a meeting actually held on March 10, 1890.

A person liable to taxation in a town, who neglects to pay his tax, as contained in the assessment regularly committed to the collector by the assessors under a legal warrant, and in consequence of such failure the collector distrains such person's personalty, and sells it in accordance with the law, cannot on replevin of the property so distrained from the purchaser defeat the title of the purchaser by showing irregularities on the part of the assessors before the commitment to the collector.

When the warrant annexed to the commitment to the collector has been torn from the book, its contents may be shown by parol.

The record of a town meeting that the town "voted and chose by ballot" three persons as selectmen, implies an election by major vote.

The title of a purchaser at a sale by the collector, legally conducted, cannot be defeated by any neglect of the collector after the sale. His return that he sold the property for cash, is conclusive of that fact between the original owner and the purchaser of the property distrained and sold.

ON REPORT.

This was an action of replevin of one cow. After the testimony had been introduced, the case was reported to the law court to determine all questions of fact and law involved upon so much of the evidence as was legally admissible.

The case appears in the opinion.

C. W. Brown, for plaintiff.

J. B. Peaks and G. W. Howe, for defendants.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

STROUT, J. Plaintiff's cow was distrained and sold for taxes, assessed in 1890, in Orneville. In this action of replevin, he claims that the sale was void, and that the property in the cow still remains in him. Numerous objections to the legality of the assessment, and the authority of the collector, are made.

It is objected that the annual town meeting in Orneville, on March 10, 1890, was not a legal meeting, because the warrant for it called a meeting for the tenth of March, and omitted the year. The warrant was dated, February 26, 1890, and duly posted by the constable to whom it was directed, on the first day of March, 1890, and the meeting was in fact held on the tenth day of March, 1890, at which the town acted upon the articles in that warrant. The warrant purported to be signed by the selectmen then in office.

The law requires the annual meeting in towns to be held in March, and makes it the duty of the selectmen to issue their warrant therefor. A warrant issued in February, designating a meeting in March, and regularly posted more than seven days before the appointed day for the meeting, must have been understood by the voters of the town as meaning the March following the date of the warrant. In that March the law required a meeting, at which officers for the ensuing municipal year should be chosen. The selectmen signing the warrant were then in office, and might not be in office the next year. It would be absurd to suppose the selectmen intended in February, 1890, to call a meeting for March, 1891. No one could be misled by the omission of the year in this warrant. The fact that the meeting was actually held on the tenth of March, 1890, and all town officers elected, and the other usual town business transacted, in pursuance of the articles in this warrant, conclusively shows that the citizens of the town perfectly understood the warrant to call a meeting on the tenth day of March, 1890.

In the strictness of the law as to indictments, this court has held, that an erroneous date in the caption of an indictment, showing it to have been found in January, 1891, instead of January, 1892, for an offense charged to have been committed in November, 1891, is not fatal. *State* v. *Robinson*, 85 Maine, 147.

No reason is perceived, why an omission of the year in this warrant, under the circumstances of this case, should vitiate all the proceedings of the town at its March meeting. The objection to the warrant cannot be sustained.

It is asserted that the names of the selectmen appearing upon the warrant, were all signed by Charles Hoxie, one of the board, but the evidence fails to support this objection. There was some evidence that the paper introduced as the original warrant bore the signatures of the seclectmen, all in the hand writing of Hoxie; but Mr. Sanborn, one of the selectmen, testified that that paper was not the original warrant, and that he did sign the original warrant; and Mr. Cochran, another selectman, testified that he thinks he signed the original, and that the paper shown was not the original. The town clerk says that he cannot say whether the paper produced was the original warrant or not.

This case being on report, we are to determine the facts as well as the law; and, upon the evidence, we are satisfied that the original warrant was duly signed by the three selectmen.

The annual meeting on March 10, 1890, must be regarded as a legal meeting. The record of that meeting shows that Charles Hoxie, F. W. Canney and V. Fabian, were elected selectmen, by ballot, and by majority vote; and that the town voted that the selectmen be overseers of the poor and assessors of taxes, and that they were sworn as such.

If this vote may not be regarded as fulfilling the requirement of the statute to elect the assessors, and that therefore no assessors were elected, then by R. S., c. 6, § 102, the selectmen became assessors; and as they were sworn as assessors, as shown by the record, their acts as such were legal. *Gould* v. *Monroe*, 61 Maine, 546.

Objections to the assessment of taxes, and the regularity of the certificate to the assessment, are made; but we do not regard them as material to the decision of this case, even if the criticism upon them might be of moment in an action by the town to recover the tax. If the commitment to the collector who made the distress was in due form, by a sufficient warrant issued to him by the assessors, and he proceeded according to law in obedience to the mandate of his warrant, the distraint of plaintiff's property and its sale were legal, and the purchaser acquired a good title to the property, notwithstanding there might have

been irregularities on the part of the assessors, prior to the commitment. *Caldwell* v. *Hawkins*, 40 Maine, 526; *Nowell* v. *Tripp*, 61 Maine, 428; *Norridgewock* v. *Walker*, 71 Maine, 184; *May* v. *Thomas*, 48 Maine, 400.

It appears that at the annual town meeting in March, 1890, John Brown was elected collector of taxes, and to him the taxes for that year were committed, October 10, 1890. No objection is made to his qualification as collector, but it is objected that the evidence fails to show a sufficient warrant of commitment. The tax book shown contains a portion of a warrant, the remaining portion having been torn off and lost. Elmer E. Brown, to whom the tax bills were committed after the death of John Brown, testified that when the book was delivered to him, it contained a complete warrant, signed by the assessors; that a portion of that warrant was afterwards lost. The contents of the lost portion are sufficiently shown by the evidence; and it appears that the commitment to John Brown was in due form, under a legal warrant.

John Brown died before completion of collection of taxes committed to him in 1890; and, on October 12, 1891, the assessors for that year appointed Elmer E. Brown to perfect the collection for 1890, in accordance with R. S., c. 6, § 149, who, it is admitted, duly qualified as such collector. The assessors committed to him the unpaid tax lists for 1890, by a regular warrant, duly signed, and delivered to him the original tax lists and warrant that had been committed to John Brown.

But it is objected that the commitment to Elmer E. Brown was invalid, because the record of the town meeting in March, 1891, does not show that the assessors for that year were elected by a major vote. The record states that the town "voted and chose by ballot," M. W. Morgan, J. H. Cochran and F. W. Canney, as selectmen, and also voted that the selectmen be assessors, and that these gentlemen qualified as assessors. It is common knowledge that the law requires town officers to be elected by a major vote; and, in the absence of evidence to the contrary, the record of "voted and chose" must be deemed to imply an election by major vote. *P. & O. R. R.* v. *Standish*, 65 Maine, 68.

Elmer E. Brown, as such collector, distrained and sold the plaintiff's cow for his unpaid taxes. The warrant of commitment to him justified this action, even if the commitment to John Brown had been defective. His return of the sale shows full compliance with all of the statute requirements; and from it, it appears that the defendant, Herrick, was the purchaser of the cow at that sale.

The return of the collector is conclusive between these parties. *Huntress* v. *Tiney*, 39 Maine, 237. The fact that the return was not actually written out and signed by the collector, nor a written account of the sale furnished the plaintiff for a considerable time thereafter, cannot invalidate the title to the cow acquired by the defendant at the sale. Any neglect of duty by the collector, after the sale, cannot be permitted to affect the title of the purchaser, whatever might be its effect in a suit against the collector. The sale was by virtue of a legal warrant, issued by the proper authorities, and this protects the purchaser. *Sanfason* v. *Martin*, 55 Maine, 110; *Judkins* v. *Reed*, 48 Maine, 386; *Seekins* v. *Goodale*, 61 Maine, 400.

It is said that the collector charged illegal fees. If so, it cannot affect the purchaser.

It is also claimed that the collector sold the cow upon credit. His return is otherwise, and that cannot be contradicted in this suit, between these parties.

Judgment for defendant.

SAMUEL G. DONNELL, petitioner for *Certiorari*,

vs.

COUNTY COMMISSIONERS OF YORK COUNTY.

York. Opinion February 11, 1895.

Way. County Commissioners. Jurisdiction. R. S., c. 18, § 19.

Jurisdictional facts which empower county commissioners, as an appellate tribunal to act, must not be left to inference. They must be averred directly and positively.

The unreasonableness of the neglect or refusal of selectmen to lay out a town way must on appeal be adjudged by the commissioners, or their proceedings

will be quashed on *certiorari*. Their adjudication that a way is of common convenience and necessity is not sufficient. The same principle equally applied when selectmen act unreasonably in laying out a town way. The commissioners as an appellate court must adjudge the action of the town to have been unreasonable if they would reverse its action. It is the determination of that question which gives the appellate court jurisdiction. If it fails to so determine, then it is without jurisdiction.

On an appeal to the county commissioners from the laying out a town way by the selectmen and accepted by the town, they considered the same and reported: "We are of opinion and adjudged, and do hereby adjudge and determine that common convenience and necessity do require that we reverse said action and decision of the municipal officers and inhabitants, and discontinue said way." *Held;* that the county commissioners acted without jurisdiction in the premises, and that their record be quashed.

State v. *Pownal*, 10 Maine, 24, reaffirmed.

ON REPORT.

The case is stated in the opinion.

J. T. Davidson, for petitioner.

G. C. Yeaton, for respondents.

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

HASKELL, J. The selectmen of the town of York, on the application of thirty petitioners, by regular procedure, located a town way and reported their action to a town meeting, legally called and warned, to consider the matter; and at such meeting the inhabitants voted to accept the report of the selectmen and lay out the way.

The York Harbor and Beach Railroad Company regularly took an appeal to the County Commissioners, who considered the same and reported: "We are of opinion and adjudged, and do hereby adjudge and determine, that common convenience and necessity do require that we reverse said action and decision of the municipal officers and inhabitants, and discontinue said way."

The commissioners do not adjudge that common convenience and necessity did not require the location of the way by the town; but that common convenience and necessity do require a reversal of such action of the town. That is, now, at the time

of our report, the necessity is so, inferably from causes that may have intervened since the location of the way by the town.

Now the jurisdiction of the commissioners was appellate only. They could reverse the action of the town only for causes that existed at the time the action was taken, not for causes since arising. That was decided by this court more than half a century ago and has not been questioned since. *State* v. *Pownal*, 10 Maine, 24, a case directly in point. There the judgment was, on appeal from refusal of the town to locate: "It is of common convenience and necessity that the town road described in the application be opened and made by said town of Pownal;" and the court quashed the record on *certiorari* for the reason above stated. "Being an inferior tribunal, nothing is presumed in favor of the commissioners' jurisdiction; but it must appear by their record." *Hayford* v. *Commissioners*, 78 Maine, 155, citing, with approval, *State* v. *Pownal*, *supra*, and other cases.

In *Goodwin* v. *Commissioners*, 60 Maine, 328, the town refused to lay out a way, but recommended a petition to the county commissioners. Such petition was filed, and they adjudged: "That common convenience and necessity do not require the establishing of the road prayed for in the foregoing petition." An appeal was taken to this court. The committee appointed in the case reported: "That the judgment of the county commissioners, in refusing to lay out the way as prayed for, ought to be reversed in whole; that public convenience and necessity do require that a town way, as prayed for, be laid out by the county commissioners over the route viewed by the committee, three rods wide." To the acceptance of this report objection was made that the commissioners had no jurisdiction; and it was so held upon the doctrine of *State* v. *Pownal*, *supra*, the court saying: "The adjudication of the county commissioners is that common convenience and necessity do not require the way prayed for in the petition. The adjudication of a majority of the appeal committee appointed by this court is in favor of the road prayed for; but they do not adjudge that the selectmen of the town had unreasonably neglected or refused to lay it out. . . . Jurisdictional facts must not be left to

inference. They must be averred directly and positively," citing *Bethel* v. *Commissioners*, 42 Maine, 478. Again the court says: "The unreasonableness of the neglect or refusal [of the selectmen] must be adjudged by the commissioners, or their proceedings will be quashed on *certiorari*. An adjudication that a way is of common convenience and necessity is not sufficient." *Pownal* v. *Commissioners*, 63 Maine, 102.

True, these cases are the reverse of the one at the bar. They are appeals from a refusal to locate by the town. This one from locating. But the principle is the same; the appellate court must adjudge the action of the town to have been unreasonable if it would reverse its action, whether it be in locating, or refusing to locate; and the warrant for action by the town must be the case of common convenience and necessity then; and the determination of that question gives the appellate court jurisdiction. If it does not determine that, it cannot determine anything else, for it is then without jurisdiction in the premises.

In *Eden* v. *Commissioners*, 84 Maine, 52, the adjudication was, "do confirm the action of the selectmen in laying out said way," and it was held sufficient. Certainly. There had been a valid location by the town, and the commissioners might well confirm it, in the simplest language possible. It was valid before their action; and if they had no jurisdiction, it remained valid; if they had jurisdiction, they still left it valid. But had they reversed the location, using the same phrase, it would not have been open to the objections raised here. The language here is: "We do hereby adjudge and determine that common convenience and necessity do require that we reverse said action and decision of the municipal officers and inhabitants and discontinue said way." Not that the location by the town was unauthorized, but that we now see it should be reversed. New reasons and conditions require it. These should have been given on petition to the selectmen for a discontinuance of the road, not on appeal.

On petitions of this sort, appropriate evidence may be received in aid of a defective record that would authorize amendments according to the fact. No such evidence is offered or suggested

in this case. Indeed, the defendants answer that the commissioners made "due returns of all their doings," and made and filed their report and caused it to be made of record "in accordance with all the requirements of law." *White* v. *Commissioners*, 70 Maine, 317; *Hewett* v. *Commissioners*, 85 Maine, 308, and cases cited.

The result is the county commissioners must be held to have acted without jurisdiction in the premises. Their record must be quashed, and the town left to construct its own way as it has decided common convenience and necessity required, although against the protest of the petitioning railroad company. Being willing to pay the expense, why should not a town be allowed to lay and build its own roads?

Writ to issue. Record to be quashed.

INHABITANTS OF NEWCASTLE, petitioners for *Certiorari*,

vs.

COUNTY COMMISSIONERS OF LINCOLN COUNTY.

Lincoln. Opinion February 15, 1895.

Way. County Commissioners. Defective Petition. Amendment. R. S., c. 18, § 19.

A petition to county commissioners, asking them to reverse the decision of municipal officers of a town refusing to locate or alter a town way, must state clearly and directly every fact necessary to give the commissioners jurisdiction.

A petition *was held* defective for the following reasons:

(1.) It failed to show that the petitioners were parties who have a right to complain of the refusal of the selectmen.

(2.) It did not state that the petitioners were land owners or inhabitants of the town in which the way was located, or that any of them signed the petition to the selectmen asking for the proposed alteration.

(3.) The prayer of the petition did not ask for the proposed alteration, but simply asked the commissioners to take such action as the law required.

(4.) It did not show when the petition was presented to the selectmen, or that their refusal to make the alteration was within a year.

(5.) It did not correctly describe the alteration which the selectmen were asked to make.

Upon a petition for *certiorari* to quash the proceedings taken by the county commissioners under such a defective petition, the commissioners in their answer replied that they permitted the two last named errors to be corrected.

Held; that the commissioners did not have the right to amend a petition, signed by others, after it had been acted upon by them, and thus confer a jurisdiction upon themselves which they did not possess when the petition was presented.

ON REPORT.

This was a petition for *certiorari*. The parties agreed to report the case upon the petition and answer to the law court for such order thereon as the legal rights of the parties might require.

The case is stated in the opinion.

W. H. Hilton and G. B. Sawyer, for petitioners.

T. P. Pierce and H. E. Hall, for respondents.

Counsel cited: *Frankfort* v. *Co. Com.* 40 Maine, 391; *Bath Bridge* v. *Magoun*, 8 Maine, 293; *Lewiston* v. *Co. Com.* 30 Maine, 19; *Levant* v. *Co. Com.* 67 Maine, 429; *Farmington River Co.* v. *Co. Com.* 112 Mass. 212; *Lees* v. *Childs*, 17 Mass. 351; *Emery* v. *Brann*, 67 Maine, 39; *Mendon* v. *Co. Com.* 5 Allen, 13; *Lisbon* v. *Merrill*, 12 Maine, 210; *Pike* v. *Herriman*, 39 Maine, 52; *Tewksbury* v. *Co. Com.* 117 Mass. 565; *Rutland* v. *Co. Com.* 20 Pick. 71; *R. R. Co.* v. *R. R. Com.* 118 Mass. 564; *Great Barrington* v. *Co. Com.* 112 Mass. 218; *Hewett* v. *Co. Com.* 85 Maine, 308; *People* v. *Van Alstyne*, 32 Barb. 131; *Derry Overseers* v. *Brown*, 13 Penn. St. 386.

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

WALTON, J. It appears that the county commissioners for the county of Lincoln undertook to alter one of the town ways in the town of Newcastle, and the process now before the court is a petition for a writ of *certiorari* to quash their proceedings.

We think the writ prayed for must be granted. The petition to the county commissioners was too defective in its statements to give them jurisdiction. It is settled law that a petition to county commissioners, asking them to reverse the decision of the municipal officers of a town refusing to locate or alter a

town way, must state clearly and directly every fact necessary to give the commissioners jurisdiction. *Goodwin* v. *Co. Com.* 60 Maine, 328; *Brown* v. *Co. Com.* 68 Maine, 537.

The petition to the county commissioners in the case now under consideration fails to state many of the facts essential to give them jurisdiction. Among other omissions, it fails to show that the petitioners are parties who have a right to complain of the refusal of the selectmen.

No one has a right to appeal from the refusal of the municipal officers of a town to alter a town way unless he is one of the petitioners who asked for the alteration. No one else can rightfully claim to have been aggrieved by the refusal. If A petitions for an alteration, and it is refused, B can not legally apply to the county commissioners for a reversal of the decision. In contemplation of law no one but A can be aggrieved by the refusal. The court so held in the case last cited, *Brown* v. *Co. Com.* 68 Maine, 537.

Again, no one but an inhabitant of the town, or an owner of land therein, has a right to ask for such an alteration, and, of course, no one but such inhabitant or owner can rightfully become an appellant from the refusal of the selectmen to make the alteration. R. S., c. 18, § 19.

The petition to the county commissioners, in the case now before us, is defective in not stating that the petitioners are inhabitants of the town of Newcastle, or that they are owners of land therein, or that they, or some one of them, was a signer of the petition to the selectmen asking for the proposed alteration. Confessedly, many of them were not inhabitants of Newcastle, and, so far as appears, no one of them was an owner of land therein or a signer of the petition to the selectmen asking for the alteration of the road.

And the prayer of the petition to the county commissioners is peculiar. They were not asked to make the proposed alteration. They were simply asked to take such action as the law required. The county commissioners ought to have known that, upon a petition so defective, the only action which the law required or would permit was a rejection or dismissal of it.

Other defects existed in the petition when it was presented to the county commissioners. It did not show when the petition to the selectmen asking for an alteration of the road was presented to them, or that it was within a year, or that the refusal of the selectmen to make the alteration was within a year. This was held to be a fatal omission in *Bethel* v. *Co. Com.* 42 Maine, 478. And it appears that it did not correctly describe the alteration which the selectmen were asked to make. But the county commissioners, in their answer to this petition for a writ of *certiorari*, say that before making their report they permitted these two errors to be corrected. In other words, that, after having taken jurisdiction and acted upon the petition, they allowed it to be altered in two essential particulars. It has been held that such an alteration makes a new petition of the instrument, and exonerates such of the signers as do not consent to the alteration from all liability for costs. *Jewett* v. *Hodgdon*, 3 Maine, 103. We do not doubt the authority of county commissioners to amend the record of their own doings. Nor do we doubt that such an amendment, when made, is conclusive, and that oral evidence is inadmissible to impeach or contradict the record so amended. *Levant* v. *Co. Com.* 67 Maine, 429. But they have no right to amend a petition, signed by others, after it has been acted upon by them, and thus confer upon themselves a jurisdiction which they did not possess when the petition was presented. It is perfectly well settled that, in a case like the one now under consideration, the original petition, when presented, must contain such a statement of facts as will give the county commissioners jurisdiction, or they will have no right to accept it, or to take any action upon it whatever. The cases already cited fully support this proposition. In the present case, the petition, when presented to the county commissioners, did not contain such a statement. It was then defective in many particulars. It is still defective in several particulars. The county commissioners had no authority to accept and act upon such a petition, and it is the right of the town of Newcastle to have their proceedings quashed.

Writ to issue, as prayed for.

ALBERT H. LORD *vs.* CITY OF SACO.

York. Opinion February 19, 1895.

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

To maintain an action against a town for injuries to one's person or property caused by a defective highway, it is a statute requirement that the person sustaining such injury must give written notice within fourteen days thereafter to the municipal officers, setting forth his claim for damages, and specifying his injury and the nature and location of the defect which caused such injury. R. S., c. 18, § 80. *Held;* that a notice is defective which fails to sufficiently describe the defect, or the nature of the injury received, or does not state the amount of the plaintiff's claim.

ON REPORT.

This was an action on the case to recover for injuries to the plaintiff's horse, caused as alleged by a defective highway.

B. F. Hamilton and B. F. Cleaves, for plaintiff.

Claim for damages: *Sawyer* v. *Naples*, 66 Maine, 455. Nature of injuries: *Blackington* v. *Rockland*, 66 Maine, 233; *Goodwin* v. *Gardiner*, 84 Maine, 280. Location of defect: *Blackington* v. *Rockland*, *supra*; *Bradbury* v. *Benton*, 69 Maine, 194; *Hubbard v. Fayette*, 70 Maine, 121; *Chapman* v. *Nobleboro*, 76 Maine, 430; *Goodwin* v. *Gardiner*, *supra*. Nature of defect: *Holmes* v. *Paris*, 75 Maine, 559; *Buck* v. *Biddeford*, 82 Maine, 437.

G. C. Yeaton and G. C. Emery, for defendant.

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

WALTON, J. The question is whether the following notice is sufficient to answer the requirements of the Revised Statutes, chap. 18, § 80.

"To the Municipal officers and Inhabitants of the City of Saco in the County of York and State of Maine:

"You are hereby notified that on Saturday, January 18, 1893, an accident occurred on Main street in said Saco, by which a horse owned by Albert H. Lord of said Saco, was greatly injured

by reason of a defect in the planking between the tracks of the Boston and Maine Railroad on said Main street, for which said owner claims damages for the same. Henry I. Lord, attorney for claimant."

We think the foregoing notice is not sufficient. The statute cited requires that the "nature" of the defect should be described. The "nature and location of the defect which caused the injury," is the language of the statute. The language of the notice is "a defect in the planking between the tracks of the Boston and Maine Railroad on Main street." The notice fails to state the nature of the defect. For aught that appears, it may have been a displaced plank, or a rotten plank, or a broken plank; or it may have been a hole in the planking or a projecting splinter or knot, or any other of the numerous defects that may exist in the plank crossing of a railroad.

Again, the statute cited requires, not only a specification of the nature and location of the defect which caused the injury, but it also requires a specification of the "nature of the injuries." Here again the notice is defective. It states that a horse owned by Albert H. Lord was greatly injured, but it fails utterly to state the nature of his injuries.

Again, the statute requires the sufferer to "set forth his claim for damages." We think this fairly implies that the amount of his claim should be stated. If it is small, the municipal officers may prefer to pay it rather than to have a contest. If it is extravagantly large they may want to investigate the facts bearing upon it at once, and before the lapse of time has rendered such an investigation practically impossible. We think the notice should contain a statement of the amount of damages claimed. We think the language of the statute fairly implies this.

The notice under consideration is defective in all these particulars: first, in not sufficiently describing the nature of the defect; secondly, in not sufficiently describing the nature of the injuries to the horse; and, thirdly, in not stating the amount of the plaintiff's claim.

Plaintiff nonsuit.

GEORGE HAZEN *vs.* ELBRIDGE WIGHT.

Cumberland. Opinion February 19, 1895.

Tenants in Common. Trespass. Servant. R. S., c. 95, § 5.

It is no defense to an action of trespass, *q. c.*, for cutting and carrying away wood and timber from land held in common and undivided, that the defendant was the servant or agent of the tenant occupying the premises, it appearing that the notice provided in R. S., c. 95, § 5, had not been given.

Whether a mere servant in such case, who acts in good faith and without knowledge of the illegality of his act, is liable for treble damages under the statute, *quære.*

ON REPORT.

The case appears in the opinion.

George Hazen, for plaintiff.

J. C. Cobb, for defendant.

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

WALTON, J. This is an action of trespass *quare clausum fregit* for cutting and carrying away wood and timber. The defendant justifies under the authority of one Sarah P. Wight. He says that she owned an undivided half of the land on which the wood and timber were cut, as a tenant in common with the plaintiff; and that, at the time of the cutting, she was living on the premises; and that he cut the wood and timber under her authority and direction, and as her agent or servant; and he claims that these facts constitute a defense to the action,— that if the plaintiff has a cause of action against Mrs. Wight, he has none against him.

We do not think these facts constitute a defense to the action. It is agreed that the notice provided for in the R. S., c. 95, § 5, was not given; and, without such a notice, Mrs. Wight had no authority to cut wood or timber upon the premises, and was herself a trespasser if she directed it to be cut, and an action of trespass *quare clausum fregit* would lie against her for so doing,

notwithstanding she was living upon the premises at the time, and was a tenant thereof in common with the plaintiff. *Maxwell* v. *Maxwell*, 31 Maine, 184, and *Mills* v. *Richardson*, 44 Maine, 79.

And, surely, if Mrs. Wight had no authority to cut wood or timber upon the premises, she could confer none upon her servant. A stream can never rise higher than its fountain; and a servant, as such, can never have greater authority than his employer. And if Mrs. Wight was a trespasser (as she undoubtedly was) in directing the wood and timber to be cut, clearly the defendant was also a trespasser in executing her command. And, as an action of trespass *quare clausum fregit* would lie against her, we fail to perceive any reason why a similar action will not lie against him. We think it will.

In an action against Mrs. Wight, the plaintiff would be entitled to recover treble damages. The statute cited so provides. But whether a mere servant, who acts in good faith, and without any knowledge of the illegality of his act, should be held liable for the penal portion of such damages, is a question which we do not find it necessary to decide; for, in this suit, only single damages are claimed. And, as the case is made up, we fail to find any proof or admissions of the extent of the plaintiff's injury. Under these circumstances, we think he must be content with nominal damages.

Judgment for plaintiff. Damages assessed at one dollar.

BRYANT'S POND STEAM MILL COMPANY

vs.

JOHN G. FELT.

Oxford. Opinion February 23, 1895.

Corporation. Subscription to Stock. Withdrawal.

A subscriber to the capital stock of an unorganized business corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. Such a subscription is not a completed contract.

Such rule, however, does not apply to voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding; nor to subscription papers so worded as to become binding contracts between the subscribers themselves.

ON REPORT.

This was an action of assumpsit brought to recover of the defendant the sum of two hundred dollars as appeared by his alleged subscription upon an original subscription book, and upon the outer cover of which was the following writing, "Subscription for a steam mill to be erected at or near Bryant's Pond." The original agreement was as follows:

"We, the undersigned, hereby agree to pay for the number of shares set opposite our names, said shares to be ten dollars each, and non-assessable, for the purpose of erecting suitable buildings, with steam power, for the manufacturing of the various kinds of wood to be used in the contract of one C. H. Adams, he paying three per cent annually as rent on all money so paid, said monies to be paid when needed for the purpose above named, providing the town will abate taxes on said buildings and stock for the term of ten years."

Plea, general issue and the following brief statement:—

And for a brief statement of special matter of defense, to be used under the general issue pleaded, the defendant further says: that said defendant never subscribed for nor promised to pay for any shares in the said Bryant's Pond Steam Mill Company; that the signature of said defendant was procured and affixed to said paper declared on, if at all, on Sunday, and whatever contract was made, if any, was made on Sunday, and therefore void; that subsequent to the time his said name was affixed to said paper and prior to the commencement of this suit and prior to the organization of this company this defendant revoked said subscription and notified the plaintiff and the solicitors for said stock that he should not accept the same, and requested his name stricken from the list of subscribers; that no person is named in said subscription paper as payee, and no contract was ever entered into with any person or persons; that no sum is named in said paper declared upon as a limit to the amount to be raised and is indefinite and uncertain; that a

sufficient sum was not raised or subscribed for erecting buildings with steam power for the manufacturing of the various kinds of wood, as alleged, and plaintiff was obliged to and did mortagage the property to complete the amount; that at the time the plaintiff company pretended to organize, this defendant was not recognized as a subscriber, did not participate in the organization, and is not named therein as one of the subscribers to the stock of the same; that there were conditions attached to said subscription paper which are essential to be performed, and which have never been performed on the part of this plaintiff or any other parties interested in said subscription, or on the part of the town of Woodstock; that said paper, purporting to be a subscription of shares of stock is without consideration and void.

J. P. Swasey, for plaintiff.

An agreement whereby the signers, for a purpose of forming a corporation and providing it with funds, declared that they subscribed for stock to the amount set opposite their names, is valid; and upon the formation of the corporation, and its acceptance of the agreement, each of the subscribers becomes bound to pay for the number of shares subscribed by him.

A corporation may sustain an action for subscriptions made to its stock before it was formed, though it is not named as a promisee in the agreement to subscribe. *Swain* v. *Hill*, 30 Mo. App. 436; *Comstock* v. *Howard*, 15 Mich. 237; *Marysville Electric Light & Power Co.* v. *Johnson*, 27 Am. State Rep. p. 215; *Griswold v. Trustees*, 26 Ill. 41; *Fulton* v. *Sterling Land Investment Co.* 47 Kansas, 621.

Subscriptions by a number of persons to stock of a corporation to be thereafter formed by them is, first: a contract between the subscribers themselves, to become stockholders without further act on their part immediately upon the formation of the corporation, and as such is binding and irrevocable from the date of the subscription, unless cancelled by consent of all the subscribers before acceptance by the corporation, and second: it is in the nature of a continuing offer to the proposed corporation, which upon acceptance by it after its formation, becomes as to each subscriber, a contract between him and the corporation.

Minneapolis Threshing Machine Co. v. *Davis*, 27 Am. State Rep. p. 701; *Hudson Real Est. Co.* v. *Tower*, 156 Mass. p. 82.

In the last case cited, the corporation itself had notice upon which the defendant claimed to withdraw, and after notice by direct vote violated the condition upon which his subscription was made.

A subscriber to the stock of a corporation in process of organization can neither withdraw nor be released by directors without consent of all the subscribers. *Hughes* v. *Antietam Mfg. Co.* 34 Md. p. 316.

A subscription of money to be paid to a corporation not yet existing, is enforceable by it after it comes into existence. Such a subscription is in the nature of a continuing offer, which ripens into a binding obligation when the corporation, being fully organized, accepts such offer.

Notice of the acceptance by a corporation of a subscription for its benefit, made before it was organized, is not necessary. Such acceptance may be inferred from the conduct of the corporation in retaining the subscription paper in its possession, and expending large sums of money on the face of it.

When money is expended, labor bestowed, and materials furnished on the faith of a subscription paper, a consideration sufficient to sustain it, exists, and it becomes irrevocable. *Richelieu Hotel Co.* v. *International Military Encampment Co.* 33 Am. Rep. 234.

The agreement was for a certain number of shares. *Skowhegan, &c. R. R. Co. v. Kinsman*, 77 Maine, 370, and cases cited.

J. S. Wright, for defendant.

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

WALTON, J. The only question we find it necessary to consider is whether a subscriber to the capital stock of an unorganized corporation has a right to withdraw from the enterprise, provided he exercises the right before the corporation is organized and his subscription is accepted. We think he has. Such a subscription is not a completed contract. It takes two

parties to make a contract. A non-existing corporation can no more make a contract for the sale of its stock than an unbegotten child can make a contract for the purchase of it.

The right of subscribers to the capital stock of a proposed corporation to withdraw their subscriptions at any time before the organization of the corporation is completed has been affirmed in several recent and well considered opinions. The right rests upon the impregnable ground of the legal impossibility of completing a contract between two parties only one of which is in existence. There can be no meeting of the minds of the parties. There can be no acceptance of the subscriber's proposition to become a stockholder. There can be no mutuality of rights or obligations. There can be no consideration for the subscriber's promise. As said in one of our own decisions, it is a mere *nudum pactum*,—a promise without a promisee,—a contractor without a contractee. In fact, every element of a binding contract is wanting. If the subscriber's promise to take and pay for shares remains unrevoked till the organization of the proposed corporation is effected, and his promise has been accepted, then we have all the elements of a valid contract. Competent parties. Mutuality of duties and obligations. A valid consideration, the promise of one party being a sufficient consideration for the promise of the other. A promisee as well as a promisor. A contractee as well as a contractor. In fact, all the elements of a valid contract are present, and the subscription has become binding upon both of the parties. But, till the corporation has come into existence, all these elements are necessarily wanting, and the subscriber's promise amounts to no more than an offer, which, like all mere offers, may be withdrawn at any time before acceptance. When accepted, it becomes binding. Till accepted, it remains revocable. This conclusion is sustained by reason and authority.

In *Starrett* v. *Rockland Co.* 65 Maine, 374, the plaintiff sought to recover a portion of the dividends of a successful insurance company. He had subscribed for five shares of the stock before the organization of the company was effected; but the evidence of acceptance of his subscription by the corporation after its organization was not satisfactory; and the court held

that without such acceptance there was no completed or binding contract; that the minds of the parties never met; that the plaintiff's subscription, being made before the corporation came into existence, amounted to no more than a proposal to take so many shares,—a mere *nudum pactum*,—imposing no obligations and securing no rights.

And in *Carr* v. *Bartlett*, 72 Maine, 120, the right of subscribers to withdraw from such undertakings while they remain inchoate and incomplete is recognized and affirmed.

In *Muncy Traction Engine Co.* v. *Green*, 143 Pa. St., 269; 13 At. Rep. 747, decided in 1888, the defendant had been active in procuring subscribers to the capital stock of a proposed corporation, and had himself subscribed for twenty shares: but he wrote to the chairman of the meeting for the organization of the corporation that, for reasons satisfactory to himself, he withdrew his subscription. The court ruled that the defendant had a right to withdraw his subscription at any time before the organization of the corporation was completed; and the jury having found as a matter of fact that the withdrawal was before the organization of the corporation was completed, a verdict for the defendant was affirmed, and judgment rendered thereon.

In *Hudson Real Estate Co.* v. *Tower*, 156 Mass. 82 (1892), the action was founded on a subscription to the capital stock of an unorganized corporation, and the defense was based on an alleged withdrawal of the subscription. The right to withdraw was controverted. The court held that at the time when the defendant signed the subscription paper declared on, it was not a contract, for want of a contracting party on the other side; that while such a subscription may become a contract after the corporation has been organized, still, until the organization is effected, and the subscription is accepted, it is a mere proposition or offer, which may be withdrawn, like any other unaccepted proposition or offer.

It is urged by the counsel for the plaintiff corporation that such subscriptions create binding and enforceable contracts between the subscribers themselves, and are therefore irrevocable,

except with the consent of all the subscribers; and some of the authorities cited by him seem to sustain that view. But we find, on examination, that such views, when expressed, are in most cases mere dicta, and that the cases are very few in which such a doctrine has been acted upon. Reason and the weight of authority are opposed to such a view. Of course, subscription papers may be so worded as to create binding contracts between the subscribers themselves. But we are not now speaking of such subscriptions; or of voluntary and gratuitous subscriptions to public or charitable objects, which, when accepted and acted upon, become binding. We are now speaking only of subscriptions to the capital stock of proposed business corporations. With regard to such subscriptions, we regard it as settled law that they do not become binding upon the subscribers till the corporations have been organized and the subscriptions accepted; and that, till then, the subscribers have a right to revoke their subscriptions. And, in view of the fact that such subscriptions are often obtained by over persuasion, and upon sudden and hasty impulses, we are not prepared to say that the rule of law which allows such a revocation is not founded in wisdom. We think it is.

In the present case, an old man, upwards of eighty years of age, and now dead, was induced to subscribe for twenty shares of stock in a proposed, but not then organized, manufacturing corporation; but after a little reflection, he determined to revoke his subscription and withdraw from the enterprise. He notified the agent of the promoters, through whom his subscription had been obtained, of his determination to withdraw, and requested him to take his name off the subscription paper. And he again sent word by his son to have his name taken off. And notice of his withdrawal, and of his request to have his name taken off of the subscription paper, was given to the other subscribers at one of their meetings, and before the corporation was organized. We think his withdrawal was legal and complete, and that no action to recover the amount of his subscription is maintainable.

Other grounds are urged in defense of the action, but it is unnecessary to consider them.

Judgment for defendant.

CHARLES E. BLANCHARD

vs.

PORTLAND AND RUMFORD FALLS RAILWAY.

Cumberland. Opinion February 25, 1895.

Railroads. Lien. Laborer. R. S., c. 51, § 141.

Railroads are made liable by statute (R. S., c. 52, § 141) for the wages of laborers employed by contractors for labor actually performed on the road.

Held; that the statute is not strictly remedial and is not to be extended or restricted in its operation beyond the fair meaning of its words.

Held; that one who superintends the building of bridges at an agreed compensation of seven dollars per day, keeps an account of the men's time, and makes out their pay-rolls, is not a "laborer" within the meaning of this statute.

ON EXCEPTIONS.

This was an action of assumpsit, tried by the presiding justice of the Superior Court, for Cumberland county, without the intervention of a jury, at the April Term, 1894, subject to exceptions in matters of law.

The action was brought by the plaintiff against the defendant company to recover for work done as a laborer in the construction of defendant's railroad, under R. S., c. 51, § 141.

It appeared from the bill of exceptions that the Portland and Rumford Falls Railway contracted with one Berry, to construct an extension of its line from Mechanic Falls to a connection with the Maine Central Railroad near Danville Junction. Berry made a contract with one William Hogan to build the bridges on the line, and Hogan contracted with one Fred Blanchard to build two of the bridges. The plaintiff was employed by Fred Blanchard to superintend the work on the two bridges. He had charge of the stone cutters and masons, kept the time and made out the pay-rolls. The plaintiff worked as above for eighty-nine days.

It was admitted by the defendant that the plaintiff seasonably gave the notice in writing required by the statute.

Upon the foregoing matter the presiding justice ruled as matter of law:

1st. That the plaintiff was a laborer within the meaning of the statute.

2nd. That he was entitled to recover against the defendant though he was employed by a sub-contractor.

The defendant took exceptions.

The statute on which the action was brought is as follows:

"Every railroad company, in making contracts for the building of its road, shall require sufficient security from the contractors for the payment of all labor thereafter performed in constructing the road by persons in their employment; and such company is liable to the laborers employed, for labor actually performed on the road, if they, within twenty days after the completion of such labor, in writing, notify its treasurer that they have not been paid by the contractors. But such liability terminates unless the laborer commences an action against the company, within six months after giving such notice."

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

The statute by its terms protects the services of all men who actually labor on the road, whose daily toil helps build the road, whose physical efforts contribute to its physical construction. Such were the services of the plaintiff who had charge of the stone cutters and masons. An architect who makes plans and specifications, and also directs and oversees the work, is a "laborer." *Bank of Pa.* v. *Gries*, 35 Pa. St. 42; *Stryker* v. *Cassidy*, 76 N. Y. 50.

There is no distinction between skilled and unskilled labor, or between mere manual labor of one who supervises, directs and applies the labor of others.

The statute line seems to be drawn between "contractors" and "laborers," between employers and employed, between those who can look out for themselves and those who cannot look out for themselves.

There is no question but that the boss of a crew of stone masons would be regarded, in common parlance, as belonging

to the "laboring classes." *Balch* v. *New York & Oswego Midland Railway Co.* 46 N. Y. 520, where a laborer is characterized as "one who earns his daily bread by his toil." *Mulligan* v. *Mulligan*, 18 La. An. 20 (the case of a supervising architect); *Arnoldi* v. *Gouin*, 22 Grant's Ch. 314 (Can.); *Knight* v. *Norris*, 13 Minn. 473; *Mutual Ben. Life Ins. Co.* v. *Rowland*, 26 N. J. Eq. 389; *Capron* v. *Strout*, 11 Nev. 304 (holding that a foreman or boss of a mining gang is a laborer); 2 Jones on Liens, p. 321; *Foerder* v. *Wesner*, 56 Iowa, 157; 2 Wood's Ry. Law, § 295; *Mining Co.* v. *Cullins*, 104 U. S. 176.

Second. The plaintiff is entitled to recover against the defendant, although he was employed by a sub-contractor. The statute should be considered liberally. *Mining Co.* v. *Cullins*, *supra*.

It requires the railroad company to require sufficient security from the contractors. The term "contractors" is used in a broad and generic sense, embracing all who do work in the construction of the railroad by contract which requires the employment of laborers.

The Kansas statute provides for taking a bond conditioned that the contractor shall pay "all laborers, mechanics and material men, and persons who supply such contractor with provisions or goods of any kind."

Under this statute it is held that the laborers are protected whether they are employed by the contractor or by a sub-contractor or by a sub sub-contractor. *Mann* v. *Corrigan*, 28 Kan. 194; *Missouri, &c. Railway Co.* v. *Brown*, 14 Kan. 557.

The object of the statute is to protect the men who labor on the railroad. And in a legal sense, all men at work either for a contractor or for a sub-contractor, are in the employment of the contractor. They are at work performing his contract.

J. W. Symonds, *D. W. Snow*, *and C. S. Cook*, for defendant.

Laborer: *Wakefield* v. *Fargo*, 90 N. Y. 213; *Rogers* v. *R. R. Co.* 85 Maine, 372; *Ames* v. *Dyer*, 41 Maine, 397; *Wilson* v. *Whitcomb*, 100 Pa. St. 547; *Missouri, &c. R. R. Co.* v. *Baker*, 14 Kans. 173; *Same* v. *Brown*, 14 *Id.* 557.

The kind of labor to be performed must be considered. It is not work "for" the road but it is labor "on" the road to which our statute has reference. Under the former a civil engineer or a superintendent might possibly claim a lien but never under the latter. In one case the work is preparatory and non-constructive. In the other the labor is expended on, and forms the very thing to which the lien is to attach.

The interpretation of the statute claimed by the plaintiff would give a lien to the civil engineer who located the road, and prepared the specifications, and to the draughtsmen who drew the plans and profiles, a contention which is not to be considered for an instant. "Contracts" for the construction of a railroad are not made until location, specifications and plans are fully determined upon.

Second. Defendant denies that the plaintiff "is entitled to recover though he was employed by a sub-contractor."

The question here is not the doubtful one as to whether a sub-contractor has a lien, but it is the much more doubtful one as to whether the employee of a sub-contractor of a sub-contractor can recover under a statute which in terms makes no reference to sub-contractors or to the persons employed by them. Under such a statute the plaintiff must bring himself not only clearly within the spirit of the words used but technically within the exact phraseology. As in *McGugin* v. *Ohio River R. Co.* 10 S. E. Rep. 36, where it was held that under a statute giving a sub-contractor a lien, a sub-contractor of a sub-contractor had no lien. The right claimed is wholly contrary to ordinary business transactions, is not known to the common law, is entirely the creation of legislative enactment, and is limited and controlled by the words of the statute as used in their ordinary acceptation.

What the legislature did was to provide that contractors should furnish sufficient security "for the payment of all labor thereafter performed in constructing the road by persons in their employment." The contractor is the person to whom the railroad must look for protection, not the sub-contractor, and the security furnished by the contractor is for the payment of

the laborer employed by the contractor. The railroad can require no security from a sub-contractor, it makes no contract with him and it has nothing to do with, and is in no way responsible to, the persons employed by him.

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

WALTON, J. The decision of this cause depends upon the meaning of the word "laborers," as used in the Revised Statutes, c. 51, § 141.

That section provides, among other things, that railroad companies shall be liable to the "laborers," employed by contractors. What is the meaning of the word "laborers," as here used? Does it include one who at an agreed compensation of seven dollars a day superintends the building of bridges, keeps an account of the men's time, and makes out the pay-rolls?

We think not. A laborer, says Webster, is one who labors in a toilsome occupation; a person that does work that requires strength rather than skill, as distinguished from that of an artisan. And in the construction of statutes similar to our own, it has been held that the word "laborer" does not include a bookkeeper or a superintendent. *Wakefield* v. *Fargo*, 90 N. Y. 213. Nor a civil engineer. *Penn. & Del. Railroad Co.* v. *Leuffer*, 84 Penn. St. 168 (24 Am. Rep. 189). Nor an assistant engineer. *Brockway* v. *Innes*, 39 Mich. 47 (33 Am. Rep. 348). Nor an overseer, *Whitaker* v. *Smith*, 81 N. C. 340 (31 Am. Rep. 503). Nor one who has contracted to do a certain amount of grubbing, notwithstanding he labors with the men employed by him to do the work. *Rogers* v. *Railroad Co.* 85 Maine, 372. In the language of the business world, says Mr. Chief Justice PETERS, a laborer is one who labors with his physical powers in the service and under the direction of another for fixed wages; that this is the common meaning of the word, and hence its meaning in the statute; that while etymologically the word "laborer" may include any person who performs physical or mental labor under any circumstances, its popular meaning is much more limited.

Similar expressions are used in several of the cases cited. In Leuffer's case it is said that when we speak of laboring men, we certainly do not intend to include bookkeepers, or engineers, the value of whose services rests rather in their scientific than their physical ability; that we intend those who are engaged, not in head, but in hand work; that while in one sense an engineer is a laborer, so is a lawyer, or a doctor, or a banker, or a corporation officer, and yet no statistician ever classed them as such.

Again, it has been said that such and similar statutes are presumptively intended to protect a class of men who are ill-fitted to protect themselves,—men who are dependent upon the fruits of their daily toil for the daily subsistence of themselves and their families,—and that they should not be extended, by a forced construction, so as to include a class of men who are competent to take care of themselves, and need no such protection.

There is force in these suggestions. And it may not be out of place to add that the statute under consideration is not strictly remedial; that while it confers benefits, it also imposes burdens; that while it gives protection to one of the parties it compels the other party to pay a debt which he had no voice in contracting. The correct rule for the interpretation of such a statute is to neither extend nor restrict its operation beyond the fair meaning of the words used. To forcibly extend its operation would be unfair to one of the parties. To forcibly restrict its operation would be unfair to the other party. It is not easy to draw the line. But, taking this rule for our guide, our conclusion is that the services sued for are not within the protection of the statute. The exceptions state that the plaintiff was employed by a contractor; that he superintended the work on two bridges; that he had charge of the stone cutters and the masons; and that he kept the time and made out the pay-rolls. It is immaterial whether we call him a bookkeeper, or a superintendent, or both; for in neither capacity are his services within the protection of the statute.

Exceptions sustained.

In re RAILROAD COMMISSIONERS' decision, relative to grade crossing of a proposed highway with the CANADIAN PACIFIC RAILWAY, at Lakeview, in Piscataquis County.

Piscataquis. Opinion March 1, 1895.

Railroads. Grade Crossings. Railroad Commissioners. R. S., c. 18, § 27; Stats. 1853, c. 41, § 3; 1874, c. 214; 1878, c. 43; 1883, c. 167, §§ 1, 2; 1885, c. 310, 312; 1889, c. 282.

It has been the paramount intent of the Legislature, since the statute of 1878, to place all railroad crossings in the State under the control of the railroad commissioners.

The several statutory provisions in regard to the right of application and the apportionment of the expense, enacted in different years, are of a subordinate character and secondary importance. They are not all conditions precedent to the jurisdiction of the railroad commissioners in unincorporated places. The fact that all the provisions of the statute respecting the right of application and the adjustment of the expense in the case of cities and towns, are not also applicable to unincorporated places, cannot take away the jurisdiction of the railroad commissioners over the latter while there is an express provision applicable to all crossings authorizing an application by the railroad company, and also placing upon the company the burden of the expense.

In the case of cities and towns, either the municipal officers or the railroad company may invoke the jurisdiction of the railroad commissioners; and thereupon the expense of building the way within the limits of the railroad may all be imposed on the railroad company, or be apportioned between the railroad company and the town, as the commissioners may determine. But with respect to ways in unincorporated places, where there are no municipal officers, the application can only be made by the parties owning or operating the railroad; and inasmuch as there is no provision for the payment or apportionment of the expense applicable to such a case, except that which places this burden on the railroad company, the expense must be borne by the railroad company. *Held;* That railroad commissioners have jurisdiction of railroad crossings in unincorporated places.

ON EXCEPTIONS.

These proceedings began with a petition of the Canadian Pacific Railway to the Railroad Commissioners, the material parts of which are as follows:

The Canadian Pacific Railway Company, a corporation duly established by law, and operating and maintaining a line of railway across said State from Mattawamkeag to the western boundary of the State, respectfully represents that the county

commissioners of Piscataquis county have laid out a highway in township four (4), range eight (8), north of Waldo Patent, an unincorporated town in said Piscataquis county, which crosses said company's railway at grade, said highway having been located and established by metes and bounds as follows, viz:

(Description of highway.) And said company further represents that said highway is laid out through and across the land and right of way of said company used for station purposes at its station called Lakeview in said township No. 4, range 8, as it is so near the switch controlling the union of the main line of railway with the principal siding there, that said switch may not be safely used; and so said company may not be able to set off or take on cars there, or cross trains, and thus be unable to do its business at said station. From the center of the head block of the switch to the southerly line of said highway, the distance is only one foot ten and one half inches and the throw of the swing rail connected with said switch is five inches, so that a crossing there could not be safely planked if said switch is to be maintained.

Wherefore, said company requests your honorable board to give notice and hearing, and determine whether said highway shall be permitted to cross at grade said company's railway, and the land and right of way of said company used for station purposes as aforesaid or not; and if it shall be permitted to cross, to determine the manner and condition of crossing, and how the expense of building and maintaining so much of said highway as is within the limits of said company's railway location shall be borne.

November 10th, 1893.

After a hearing on the petition, the railroad commissioners declined to take jurisdiction of the matters, and in their report to the court, made under the statute, assigned the following, among others, as the reasons for not taking jurisdiction:

"The board of railroad commissioners was created by statute to do and perform certain specific duties. Its jurisdiction extends just so far as the statute specifically conferred the same. It is endued with no general powers of supervision of railroads.

"Formerly town-ways and highways were located and constructed across railroads wherever and whenever the county commissioners or municipal officers of towns determined to do so, and too, without any limitations or restrictions. The power of the county commissioners to locate and cause to be constructed ways across railroads in unincorporated townships, without limitations or restrictions still exists, unless that power has been taken away by some subsequent statute enactment. Has that been done?" Quoting R. S., c. 18, § 27, as amended by Stat. 1889, c. 282, the commissioners continue:

"It will be noticed that by the provisions, above quoted, that an application to the board of railroad commissioners, relative to such crossings, can be made only by the 'municipal officers of the city or town wherein such way is located or by the parties owning or operating the railroad.' Under its provisions the board has power to determine whether the expense of building and maintaining such crossing, as may be within the limits of the railroad, 'shall be borne by such railroad company or by the city or town' wherein such way is located. The provisions of the statute relate wholly to ways in incorporated cities and towns. The right to petition is by its provisions limited to the municipal officers of such cities or towns and the railroad company.

"The able counsel for the petitioners contend that the intent of the statute was to give the railroad commissioners jurisdiction of railroad crossings wherever situated; that if the crossing is in an unincorporated township, the county commissioners would, under the provisions of this statute, have the right to petition the board, as municipal officers of cities or towns have.

"We cannot believe the court would sanction such a liberal construction of this statute. 'Courts of justice can give effect to legislative enactment only to the extent to which they may be made operative by a fair and liberal construction of the language used. It is not their province to supply defective enactments by an attempt to carry out fully the purposes which may be supposed to have occasioned those enactments.' *Swift* v. *Luce*, 27 Maine, 286.

"If the board of railroad commissioners has jurisdiction of cases of this kind at all, it has power to exercise it to its full extent. Suppose that in the exercise of that jurisdiction they should determine that the way should be constructed over or under the railroad, and that the plantation or unincorporated township should bear the expense of constructing and maintaining such crossing, would the county be chargeable with such expenses, or could the county commissioners under the provisions of section 41, chapter 18 of Revised Statutes, assess upon the owners of the land over which the way was located and compel them to pay such expenses? Can the right of eminent domain be thus indirectly exercised and the right of the citizen to hold and enjoy his property be thus interfered with and encumbered? We think it cannot be. Therefore, we must hold that the statute above quoted, gives to this board no authority to determine the manner and conditions in which highways may cross a railroad in unincorporated townships or unorganized plantations." . . .

Upon the coming in of the report of the railroad commissioners, the presiding justice ruled *pro forma* to accept it; thereupon the petitioner took exceptions.

C. F. Woodard, for petitioner.

J. B. Peaks, for county commissioners.

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

WHITEHOUSE, J. In a petition filed November 10, 1893, the Canadian Pacific Railway Company asked the railroad commissioners of Maine to determine whether a highway laid out by the county commissioners in an unincorporated town in Piscataquis county should be permitted to cross its railway at grade near its station called Lakeview; and also to determine the manner and condition of crossing and how the expense of building and maintaining that part of the highway within the limits of the railway, should be borne. In their decision reported to the February term, 1894, of the Supreme Judicial Court in that county, the railroad commissioners held that their only authority

in the premises was derived from Revised Statutes, c. 18, § 27, as amended by the acts of 1885, and 1889; that the statutes thus amended have no application to such crossings by highways laid out in unincorporated towns, and therefore declined to take jurisdiction of the subject matter. The presiding judge affirmed this decision in a *pro forma* ruling to which the petitioner has exceptions.

The question now to be considered, therefore, is whether such jurisdiction of railroad crossings in unincorporated places is conferred upon the railroad commissioners by existing statutes. We think it is. An analytical and historical review of the legislation on this subject from 1853 to 1889, clearly shows the progressive tendency of legislative opinion to have been in harmony with the judgment of this court as expressed *in re Railroad Commissioners*, 83 Maine, 273, that, "public safety requires the intersection of railroad tracks and roads to be under the control of the railroad commissioners;" and when the last enactment (c. 282, laws of 1889) is construed in the light of all preceding enactments on the same subject, it satisfactorily appears that their authority over such crossings in unincorporated places is unquestionably within both the literal terms and the true scope and purpose of the law.

It was provided by the Act of 1853 (c. 41, § 3) that the conditions and manner of locating railroads across highways should be determined in writing by the county commissioners, and this provision appears in the Revised Statutes of 1857 and of 1871.

Chapter 214 of the public laws of 1874 allowed town ways and highways to be laid out across, over or under any railroad track, and imposed upon the railroad company the expense of building and maintaining that part of the way within the limits of the railroad.

Chapter 43 of the laws of 1878 provided that when such crossing was at grade such expense should be borne by the railroad, and when not at grade the railroad commissioners should determine whether such expense should be borne by the railroad company or by the town, or be apportioned between the railroad and the town.

Section 2 of chapter 167 of the laws of 1883, provided that "when any way is laid out across a railroad, the railroad commissioners, upon application of the parties owning or operating such railroad, shall . . . determine the manner and conditions of crossing such railroad." But this act was not deemed a repeal by implication of the provision in the preceding act of 1878 that when the crossing was at a grade, the expense should be borne by the railroad; for in the revision of 1883 it is still provided that when town ways and highways are laid out across, over or under any railroad track, the railroad commissioners, on application of the parties owning or operating the railroad, shall upon notice and hearing determine the number and conditions of crossing the same; and when such way crosses such track at grade, the expense of building and maintaining so much of such way as is within the limits of such railroad shall be borne by the railroad company. R. S., c. 18, § 27.

Chapter 310 of the laws of 1885, provides that the railroad commissioners should thus determine the manner and conditions of crossing "on application of the municipal officers of the city or town wherein such crossing is situated, or of parties owning or operating the railroad."

Although not directly related to the point under discussion, section 1 of the Act of 1883 above named, and chapter 312 of the laws of 1885, are further illustrations of the manifest intention of the legislature to place all railroad crossings under the supervision of the railroad commissioners. The former prohibited the laying out of any way across land of a railroad company used for station purposes except upon the adjudication of the railroad commissioners that common convenience and necessity require it; and the latter authorized railroad commissioners to determine the manner and conditions of locating railroads across highways and town ways.

We come now to the latest expression of legislative will upon this subject, found in chapter 282 of the laws of 1889. Section 1 of this act, amends section 27 of chapter 18, R. S., so as to read as follows: "Town ways and highways may be laid out across, over, or under any railroad track . . . except that before such way

shall be constructed, the railroad commissioners, on application of the municipal officers of the city or town wherein such way is located, or of the parties owning or operating the railroad, shall . . . determine whether the way shall be permitted to cross such track at grade or not, and the manner and condition of crossing the same, and the expense of building and maintaining so much thereof as is within the limits of such railroad shall be borne by such railroad company, or by the city or town in which such way is located, or shall be apportioned between such company and city or town, as may be determined by said railroad commissioners." . . . Section 2 of the act prohibits the crossing of a public way by a railroad unless authorized by the railroad commissioners; and section 3 gives these officers jurisdiction over the change of grade, or of the course of public ways to facilitate the crossing of a railroad, or to permit a railroad to pass at the side of the same.

This chapter is only a revision of prior enactments with a modification of the authority of the railroad commissioners in regard to the assessment of the expense. It contains no suggestion of a purpose to deviate from the uniform tendency of previous legislation to place all intersections of railroads and public ways under the control of the railroad commissioners. On the contrary, their authority over all such crossings is here reaffirmed and enlarged. In its literal terms the statute confers jurisdiction over all such crossings wherever situated. Unincorporated places are not expressly excepted from its operation; and no reason has been or can be assigned why the railroad commissioners should not have control of such crossings in unincorporated places as well as in cities and towns.

But it is suggested that unincorporated places must be held to be excepted by implication because in case of cities and towns, there is express authority for the municipal officers to make the application and for the railroad commissioners to apportion the expense between the railroad company and the city or town; while no provision is made for such application by the county commissioners, who have analogous powers and duties relative to ways in unincorporated places, and no authority expressly

given to the railroad commissioners to apportion the expense between the railroad on the one hand and the county, or the county and land owners on the other.

If it were quite certain that the legislature intended no distinction between incorporated and unincorporated places with respect to the right of application and the payment of the expense and that the failure to make express provision therefor in the case of the latter was purely accidental; and it should further appear that the leading purpose of the legislature would be otherwise defeated, there would be much force in the argument that such omission ought to be supplied by judicial construction,—on the authority of numerous cases holding that the "meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded from the end in view or the purpose which was designed." *U. S.* v. *Freeman*, 3 How. 556; *Murray* v. *Baker*, 3 Wheat. 541; *Gray* v. *Co. Com.* 83 Maine, 436; Endlich on Int. of Statutes, § 108. But as there may be a doubt whether the legislature did not intend to make a distinction in the particulars mentioned, and as the general purpose of the legislature in this case may be otherwise attained, such a liberal construction of the statute might be deemed an assumption of legislative functions.

To place all railroad crossings, within the limits of the state, under the control of the railroad commissioners has manifestly been the paramount object of the legislation on this subject since the enactment of 1878. The several provisions in regard to the right of application and the apportionment of the expense, enacted in different years, are of a subordinate character and of secondary importance. They are not all conditions precedent to the jurisdiction of the railroad commissioners in unincorporated places. The fact that all the provisions of the statute respecting the right of application and the adjustment of the expense in the case of cities and towns, are not also applicable to unincorporated places cannot take away the jurisdiction of the railroad commissioners over the latter while there is an express provision applicable to all crossings, authorizing an application

by the railroad company and also placing upon the company the burden of the expense. In the case of cities or towns, either the municipal officers or the railroad company may invoke the jurisdiction of the railroad commissioners, and thereupon the expense of building the way within the limits of the railroad, may all be imposed on the railroad company, or be apportioned between the railroad company and the town as the commissioners may determine. But with respect to ways in unincorporated places where there are no municipal officers, the application can only be made by the parties owning or operating the railroad; and inasmuch as there is no provision for the payment or apportionment of the expense applicable to such a case, except that which places this burden on the railroad company, "the expense of building and maintaining so much thereof as is within the limits of such railroad shall be borne by such railroad company." And we have seen that prior to 1885, such was the law relative to all grade crossings under the respective provisions of the acts of 1878 and 1883 above mentioned.

In this case the application appears to have been duly made by the Canadian Pacific Railway Company, and the railroad commissioners should have taken jurisdiction of the subject matter by virtue of chap. 18, sect. 27, R. S., as amended by the acts of 1885 and 1889 above specified, and after due notice should have heard and determined the questions presented.

Exceptions sustained.

GEORGE BLANCHARD *vs.* GILMAN BLOOD, and others.

Piscataquis. Opinion March 1, 1895.

Poor Debtor. Bond. Action. R. S., c. 113, §§ 24, 72.

In an action on a poor debtor's bond the defendants' plea of performance is sustained, if it is shown that one of the alternative conditions of the bond has been fulfilled.

Within six months from the execution of the bond, a debtor surrendered himself into jail, delivered to the jailer copies of the execution and bond, and remained in his custody for more than four weeks. He was then released by reason of the failure of the creditor to advance money or furnish security for the support of the debtor in jail.

The creditor claimed that the debtor's release was irregular and unauthorized because his complaint in writing, that he was unable to support himself in jail, was fatally defective in omitting to state the name of the creditor and the amount of the judgment. *Held;* that this inquiry is immaterial to the decision of the question in this action. It cannot affect the rights of the sureties on the bond, the penalty of which was saved by the debtor's voluntary surrender to the jailer and his actual confinement in jail.

ON REPORT.

The case appears in the opinion.

J. B. Peaks, for plaintiff.

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

SITTING: PETERS, C. J., FOSTER, EMERY, WHITEHOUSE, WISWELL, STROUT, JJ.

WHITEHOUSE, J. This is an action against the principal and sureties on a bond given to release a poor debtor from arrest on execution. The bond appears to be in the form prescribed by section 24 of chapter 113 of the Revised Statutes, one of the alternative conditions being that the debtor will, "within six months thereafter," . . . . "deliver himself into the custody of the keeper of the jail to which he is liable to be committed under the execution." The defendants assuming the burden of proof, contended that there had been full performance on the part of the debtor of this condition of the bond. The evidence was uncontroverted that within six months after the date of the bond the execution debtor did surrender himself into the custody of the keeper of the jail to which he was liable to be committed on the execution, delivering to the jailer at the same time a duly certified copy of the execution on which he was arrested and of the bond by virtue of which he was released from arrest; that he was received by the jailer and duly committed to jail and remained in confinement there for a period of four weeks and two days, and that he was then released by the jailer by reason of the failure of the creditor to advance money or furnish security for the debtor's support in jail.

But the plaintiff contends that there was a failure on the part of the debtor to comply with the requirements of the statute

respecting the "support of debtors in jail," and that the debtor was improperly released by the jailer. Section 72 of chapter 113 of the Revised Statutes provides that: "When a person . . . . . delivers himself into the custody of the jailer to save the conditions of a bond given on execution, and makes a written complaint by him signed and sworn to, stating that he is unable to support himself in jail and has not sufficient property to furnish security for his support, the jailer may require any one of the creditors, their agent or attorney, security for his support; and unless it is satisfactorily furnished within eight days after the request, or money is paid in advance therefor from time to time, he may release him."

It appears that in pursuance of an obvious purpose to comply with this statute, the debtor delivered to the jailer, on the day of his surrender a "written complaint signed and sworn to by him," reciting the fact and date of his arrest, the date of the execution and the term of the court at which the judgment was rendered; and stating that he gave the bond provided for in the 24th section of the 113th chapter of the Revised Statutes; that in accordance with one of the conditions of the bond he that day delivered himself into the custody of the jailer; and that he was "unable to support himself in jail and had not sufficient property to furnish security for his support therein;" and that the jailer thereupon duly notified the plaintiff's attorney that he had received such a complaint, stating the name of the creditor in whose favor the execution was issued, and formally required him to furnish security or advance money for the debtor's support in jail as provided by the statute. The plaintiff insists, however, that the debtor's complaint in writing was fatally defective because of the omission to state the name of the creditor and the amount of the judgment.

With reference to this objection it is a satisfaction to remark that, in view of the purpose to be accomplished, the "complaint in writing" contemplated by the statute is obviously not expected to possess the strict formality and technical precision of special pleading; and when it is considered that this provision is primarily for the information of the jailer, who in this in-

stance already had in his possession a copy of the execution itself on which the debtor was arrested and of the bond in suit, given thereon, the "complaint in writing" made by this debtor might reasonably be deemed a substantial compliance with this section of the statute.

But in the view here taken of the law it is unnecessary to pass upon the sufficiency of the debtor's "complaint" to the jailer, or of the jailer's notice to the creditor. It is not material to the decision of the question here presented. The defendants' plea of performance is sustained if it is shown that one of the alternative conditions of the bond has been performed. It was one of the conditions of the bond that within six months thereafter he would deliver himself into the custody of the jailer. He fully performed that condition of the bond. He surrendered himself into jail and delivered to the jailer copies of the execution and bond. The jailer accepted the papers and committed the debtor into the jail where he remained *in arcta et salva costodia* for more than four weeks. This is all the bond required him to do and his defense is made out. He did not obligate himself to make a written complaint that he was unable to support himself in jail according to the provisions of section 72, chapter 113. But he did, in fact, make a complaint in writing on the day of his surrender and therein expressly state that he delivered himself into the custody of the jailer in accordance with one of the conditions of the bond. Whether or not his liberation by the jailer was irregular and unauthorized, is an inquiry which does not affect the rights of the sureties on this bond. The penalty of the bond was saved by the debtor's voluntary surrender to the jailer and his actual confinement in jail. *Hussey* v. *Danforth*, 77 Maine, 17; *Rollins* v. *Dow*, 24 Maine, 123; *White* v. *Estes*, 44 Maine, 21.

Judgment for the defendants.

LENA T. CLEVELAND *vs.* CITY OF BANGOR.

Penobscot. Opinion March 1, 1895.

Way. Defect. Street Railway. Judgment. Sunday Law. New Trial. R. S., c. 18, § 80; c. 124, § 20; Stat. 1885, c. 378, § 8.

The mere recovery of judgment without satisfaction against a street railway for personal injuries received by reason of an obstruction, which rendered the way defective and unsafe for public travel, is not a bar to a suit against the city for the same cause of action.

Held, in this case, that whether the pole in the street supporting the trolley wire constituted a defect, and whether the misconduct of the horse was one of the proximate causes of the accident, were questions submitted to the jury under appropriate instructions. The court is unable to say that these findings in favor of the plaintiff were not authorized by the evidence.

The primary object of Sunday legislation has been to secure to private citizens the quiet enjoyment of Sunday as a day of rest, and to encourage the observance of moral duties on that day, but not to authorize any arbitrary or vexatious interference with the private habits and comfort of individuals. It is not every act of walking or riding on Sunday that constitutes "traveling" within the meaning of the statute.

Walking or riding in the open air in a quiet and civil manner with no object of business or pleasure except the enjoyment of the open air and gentle exercise and the consequent promotion of the health, is not in violation of the Sunday law.

See *Cleveland* v. *Bangor Street Railway*, 86 Maine, 232. *White* v. *Philbrick*, 5 Maine, 147, overruled.

ON MOTION AND EXCEPTIONS.

This was an action to recover for personal injuries which the plaintiff received by reason of a trolley-wire pole erected and maintained on Exchange street, Bangor, which she claimed was an obstruction in the street, and such a defect as rendered the street unsafe for public travel.

The only question raised by the exceptions, was to the ruling of the presiding justice upon the plea of defendant, setting up as a bar and defense to this action, that the plaintiff had recovered a judgment against the Bangor Street Railway, by which the pole was erected and maintained, for the same injuries, on which judgment and execution issued; there has been no satisfaction of that judgment.

The case is stated in the opinion.

C. P. Stetson and P. H. Gillin, for plaintiff.

H. L. Mitchell, city solicitor, for defendant.

Sunday law: *Tillock* v. *Webb*, 56 Maine, 100; *Cratty* v. *Bangor*, 57 Maine, 423.

When a horse takes fright at some object, for which the municipality is not responsible, runs away and gets beyond control and an injury is received because of a defect in the street, the municipality is not liable as the defect is not the sole producing cause of the accident. *Davis* v. *Dudley*, 4 Allen, 557; *Palmer* v. *Andover*, 2 Cush. 600; *Fogg* v. *Nahant*, 98 Mass. 578; *Fogg* v. *Nahant*, 106 Mass. 278; *Perkins* v. *Fayette*, 68 Maine, 152.

There is no evidence in the case upon which to warrant a finding that this horse was frightened by the pole complained of. He was frightened at some other object and became unmanageable because of such fright, and the giving away of the vehicle to which he was attached, and this was the proximate cause of the injury. *Spaulding* v. *Winslow*, 74 Maine, 528; *Aldrich* v. *Gorham*, 77 Maine, 287.

The charter of the Bangor Street Railway gives the municipal officers other and different powers and duties than are prescribed in the city charter. In the performance of all powers and duties authorized by the street railway charter, the municipal officers and city government do not alone represent the city of Bangor, and by the performance of such duties and powers make the people of Bangor liable for their acts. In the performance of such powers and duties they represent the whole people in acting under a separate and distinct charter from the one granted to the city of Bangor. *Young* v. *Yarmouth*, 9 Gray, 386. The principle contended for is recognized in *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, 416; *Bulger* v. *Eden*, 82 Maine, 352; *Goddard* v. *Harpswell*, 84 Maine, 499; *Bryant* v. *Westbrook*, 86 Maine, 450.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

WHITEHOUSE, J. The plaintiff recovered a verdict for $1100 against the city of Bangor for personal injuries received on Exchange street by reason of an obstruction which she claimed rendered the way defective and unsafe for public travel. The defect alleged was one of the poles erected and maintained by the Bangor Street Railway for the support of the trolley wire used in the operation of that company's road.

The pole in question was located on the westerly side of Exchange street twenty-seven feet northerly from the extension of Washington street. It was set in the street with its outer face eighteen inches, and its inner face nine inches from the curbstone of the sidewalk, the pole being nine inches in diameter at its base. At the time of the accident it "leaned over considerably" into the street. Exchange street is forty-six feet wide between the curbstones, and the distance from the curb, near the location of the pole, to the westerly rail of the track is twenty-one feet.

On Sunday, September 18, 1892, the plaintiff with her husband and two others was riding on Exchange street in a two-seated covered carriage drawn by one horse, the team being in the control of her husband as driver. As they drew near Washington street the horse became frightened at the appearance of one of the electric cars approaching around the corner, and suddenly shied to the right and at the same time sprang forward and brought the carriage in contact with the pole in question, throwing the plaintiff out and causing the injury of which she complains.

The case comes to this court on exceptions and a motion to set aside the verdict as against evidence.

1. The Exceptions.

Prior to the commencement of this action against the city of Bangor, the plaintiff had brought suit against the Bangor Street Railway for the same injuries described in the declaration in this case, and recovered judgment for the sum of $914.57, on which execution was duly issued; but there has been no satisfaction

of that judgment for want of property belonging to that company which the plaintiff could make available for the purpose.

That judgment was duly pleaded by the defendant's counsel in defense of this action; but the presiding judge ruled that the mere recovery of judgment against the street railway without satisfaction was no bar to a suit against the city. An exception was taken to this ruling, and it appears in the printed case duly allowed by the presiding justice; but it is evidently not relied upon, as no allusion whatever is made to it in the elaborate argument submitted by the learned counsel for the defense.

The instruction upon this point was undoubtedly correct. As every wrongdoer is responsible for his own act, it is a general rule that when two or more participate in the commission of a wrong, the injured party may proceed against them either jointly or severally; and if severally, whether the separate actions are brought at the same time or successively, each may be prosecuted to final judgment. But the sufferer is obviously entitled to only one full indemnity for the same injury. If, however, the several judgments differ in amount he may elect to take his satisfaction *de melioribus damnis*; or if the defendants are not all solvent he may elect to proceed against the solvent party. But with respect to several judgments recovered at the same time, no such choice "of the better damages" or larger judgment, and no such election to proceed against a party supposed to be solvent, unless followed by actual satisfaction, will prevent the plaintiff from enforcing a judgment against another defendant; nor will an unsuccessful attempt to enforce a judgment against one wrongdoer, be a bar to a subsequent action against another who is liable for the same wrong. And it is entirely immaterial whether execution was issued on the prior judgment or not. An unsatisfied judgment against one tort-feasor is no bar to a suit against a joint tort-feasor. It is not the formal adjudication of a right or the legal precept for its enforcement, but the substantial fact of compensation or its equivalent, which constitutes the bar.

This doctrine not only rests upon principles of sound reason, and manifest justice, but is supported by an overwhelming

weight of authority. It prevails in a great majority of the American states, and has received the unqualified approval of the Supreme Court of the United States. In *Lovejoy* v. *Murray*, 3 Wallace, 1, it was held that judgment in a former suit, with part payment, constituted no bar to the action against the defendant. In the opinion by Miller, J., it is said: "But in all such cases what has the defendant in such second suit done to discharge himself from the obligations which the law imposes upon him to make compensation? His liability must remain in morals and on principle until he does this. The judgment against his co-trespassers does not affect him so as to release him on any equitable consideration." . . . "But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or what the law must consider as such.

"We are therefore of the opinion that nothing short of satisfaction or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment." In *Sheldon* v. *Kibbe*, 3 Conn. 214, there had been judgment against a co-trespasser who was committed to jail by force of an execution which issued thereon, but the court held these facts to be no bar to the suit against the defendant. In the opinion, Hosmer, C. J., says: "The common law, founded as it is upon reason, and allowing nothing that is nugatory, much less that is pernicious, will sanction no inutility or absurdity. Now what can be more absurd than to authorize the pendency and proceeding of twenty separate actions against persons concerned in a joint trespass, and after the accumulation of vast expense, to hold that the first judgment bars the other suits." See also *Ayer* v. *Ashmead*, 31 Conn. 447; *Osterhout* v. *Roberts*, 8 Cowen, 43; *Elliott* v. *Hayden*, 104 Mass. 180; *Knight* v. *Nelson*, 117 Mass. 458; *Savage* v. *Stevens*, 128 Mass. 254; *Sanderson* v. *Caldwell*, 2 Aik. (Vt.) 195; *Elliot* v. *Porter*, 5

Dana, 299 (30 Am. Dec. 688); *Society* v. *Underwood*, 11 Bush. 265 (21 Am. Rep. 214); *Wyman* v. *Bowman*, 71 Maine, 123; Bigelow on Estoppel, 57, 128; Cooley on Torts, (2d Ed.) 158. In Freeman on Judgments, § 236, the author says: "A few cases . . . decide that the mere issuing of an execution is a conclusive election to consider the defendant as exclusively responsible. But a majority of the American cases discountenances this manifest absurdity. . . . How vain and delusive that law must be which declares the right of an injured party to proceed severally against every person concerned in committing an injury; which sustains him until the liability of every wrongdoer is severally determined and evidenced by a final judgment; and which, after thus 'holding the word of promise to his ear, breaks it to his hope' by forbidding him to attempt the execution of either judgment, upon penalty of releasing all the others."

White v. *Philbrick*, 5 Maine, 147, is one of the "few cases" that may be cited in support of the doctrine thus characterized by Mr. Freeman as a "manifest absurdity." It appears to have been decided on the authority of the early case of *Brown* v. *Wooton*, Yelverton, 67, and a qualified *dictum* in *Livingstone* v. *Bishop*, 1 Johns. 290; but it stands upon indefensible ground. As stated by the court in *Murray* v. *Lovejoy*, 2 Clifford, 191, "it does not seem to rest upon any substantial basis," and should no longer be followed. In the later case of *Hopkins* v. *Hersey*, 20 Maine, 449, it is held that a collateral concurrent remedy against one not a joint trespasser, is not barred by anything short of actual satisfaction, and the case of *White* v. *Philbrick*, *supra*, is distinguished as a "decision limited to co-trespassers." This technical refinement was obviously suggested to prevent a conflict and avoid the necessity of overruling *White* v. *Philbrick*. But with regard to the point under consideration, no sound reason has been given, and it is believed that none can be assigned for such a distinction between the case of wrongdoers who are jointly and severally liable and of those who are only severally liable for the same injury. In either case the sufferer is entitled to but one compensation for the same injury, and full

satisfaction from one will operate as a discharge of the others. In neither case will anything short of satisfaction from one bar a suit against another. A master for instance is liable for the tort of his servant and a satisfaction from one will discharge both, but they cannot be sued and declared against jointly. So in *Brown* v. *Cambridge*, 3 Allen, 474, the plaintiff brought suit against the Water Company for an injury sustained on account of a trench left in the highway, and, by way of compromise, accepted a small sum in "payment and satisfaction" of all damages in that suit. It was held that he was thereby precluded from maintaining a subsequent action against the city for the same injury. Conversely in *Bennett* v. *Fifield*, 13 R. I. 139 (43 Am. Rep. 17), it was held that judgment with execution against an individual for leaving in the highway an object calculated to frighten horses was no bar to a subsequent suit against the town for permitting it to remain, although the defendant in the former suit had been committed to jail on the execution, and the claim subsequently proved against his estate in bankruptcy. But as Rhode Island was one of the three states in which the error of *Brown* v. *Wooten*, *supra*, had been followed (see *Hunt* v. *Bates*, 7 R. I. 217; S. C. 82 Am. Dec. 592), the court limited the latter case to joint wrongdoers, and distinguished it from *Bennett* v. *Fifield*, *supra*, on the ground that the individual and the town in the latter case could not be regarded as joint tort-feasors. "They were not jointly, but collaterally liable for the same injury," said the court, "by reason of distinct though related torts, and therefore the injured parties until indemnified are entitled to look to either of them remaining undischarged for their damages."

In the case at bar, the liability of the street railway for negligence respecting the location of its posts existed at common law, while the liability of the city for permitting the obstruction to remain is created by general statute. (R. S., c. 18, § 80.) And although the liability of both is reaffirmed in sect. 8, c. 378 of the laws of 1885, for obvious reasons, they cannot be deemed joint tort-feasors with respect to the mode of redress. But it is immaterial. Concurrent remedies exist against them severally for

the same cause. The plaintiff is entitled to indemnity for the injury, but only one indemnity. Satisfaction from the railway company would have been a bar to this suit; but judgment and execution against the company without satisfaction cannot be a bar. Having a judgment against each she will be entitled to choose the larger sum and the solvent party.

II. The Motion.

In the report of the plaintiff's case against the street railway, (86 Maine, 232,) the court say respecting the motion for a new trial: "A careful examination of the evidence reported satisfies us that it was sufficient to authorize the verdict." A careful review of the evidence reported in this case against the city leads us to the same conclusion. True, the ground of liability is essentially different. In the action against the railway the defendant would not have been exempt from liability for the consequences of its own negligence if some other cause for which the plaintiff was not responsible had contributed to the accident. *Lake* v. *Milliken*, 62 Maine, 240. But in this action against the city, it must appear that the defect in the street was the sole cause of the injury. If any other cause for which the plaintiff was responsible, or any other independent cause for which neither the plaintiff nor the city was responsible, proximately contributed to the injury, she cannot recover.

But unlawful traveling on Sunday would bar recovery in either case, and the defendant contends that the verdict was not authorized by the evidence on this point. We are unable to concur in this view. It involves an interpretation of the statute at variance with its true spirit and purpose. It is not every act of walking or riding on Sunday that constitutes "traveling" within the meaning of R. S., c. 124, § 20. It is only unnecessary traveling which is prohibited. Works of necessity and charity are expressly excepted from the prohibition; and "a moral fitness of propriety of traveling under the circumstances of any particular case may be deemed necessary within this section." Parsons, C. J., in *Com.* v. *Knox*, 6 Mass. 76; *Sullivan* v. *M. C. R. R.* 82 Maine, 196. The primary object of such legislation has been to secure to private

citizens the quiet enjoyment of Sunday as a day of rest, and to encourage the observance of moral duties on that day, but not to authorize any arbitrary or vexatious interference with the private habits and comfort of individuals. *Hamilton* v. *Boston*, 14 Allen, 475. In accordance with these views was the decision of the court in *McClary* v. *Lowell*, 44 Vt. 117, holding that it was not unlawful for a father to ride eight miles on Sunday to visit his minor sons and attend to their welfare in another town. And it has been repeatedly held in this State and Massachusetts that walking or riding in the open air in a quiet and civil manner with no object of business or pleasure except the enjoyment of the air and gentle exercise and the consequent promotion of the health, is not in violation of the Sunday law. *O'Connell* v. *Lewiston*, 65 Maine, 34; *Davidson* v. *Portland*, 69 Maine, 116; *Sullivan* v. *M. C. R. R.* 82 Maine, 196, *supra*: *Barker* v. *Worcester*, 139 Mass. 74.

In the case at bar, the plaintiff was in feeble health, and being unable to walk with comfort had accepted her husband's invitation to ride into the country for the enjoyment of the open air and the benefit of her health. The fact that the companionship of her husband and friends may have enhanced the pleasure of the drive did not render it unlawful. The jury found in favor of the plaintiff under proper instructions and we see no justification for disturbing the verdict on this ground.

But the defendant finally contends that the uncontrollable conduct of the horse and not the obstruction in the street, was the proximate cause or one of the proximate causes of the accident.

The law of causal connection in this class of cases has been maturely considered and critically analyzed in the recent decisions of this court. *Spaulding* v. *Winslow*, 74 Maine, 528; *Aldrich* v. *Gorham*, 77 Maine, 287; *Perkins* v. *Fayette*, 68 Maine, 152; *Moulton* v. *Sanford*, 51 Maine, 127. These authorities all agree that the contributory fault which will bar a recovery against a town for a defective highway must be one of the efficient and proximate causes of the accident, and not a mere condition or occasion of it. But it has been found

impracticable to prescribe by abstract definition, applicable to all possible states of facts, what is a proximate and what a remote cause; what is a true and efficient cause of a given result, and what is a mere "occasion" or "opportunity" for the operation of the true cause. "Everything which induces or influences an accident, does not necessarily and legally cause it. It might be the agency, or medium, or opportunity, or occasion, or situation, or condition, as it is variously styled, through or by which the accident happened; but no part of its real and controlling cause. . . . Much must depend upon the circumstances of each particular case, and upon the common sense of the thing." *Spaulding* v. *Winslow*, *supra*.

Whether the fright of the horse at the electric car shall be deemed the true and real cause of the accident, or only a circumstance which permitted it to happen, must depend upon the character of the horse and the extent of his misconduct. If the horse was not reasonably gentle and safe and became entirely unmanageable from fright, substantially freeing himself from the control of the driver, and the accident resulted from such a want of control, then the fright of the horse might be regarded as one of the proximate causes of the accident. If, however, the horse was ordinarily safe and reasonably suitable for use on the public street, and while being properly driven, started and shied at the sudden appearance of the electric car around the curve, swerving but a few feet from the line of travel, and through only a momentary loss of control by the driver brought the carriage in contact with the pole in the street, in such case the conduct of the horse could not in reason and justice be considered as causing the accident. *Spaulding* v. *Winslow* and *Aldrich* v. *Gorham*, *supra*.

This test of a town's liability in such a case has also been applied in Massachusetts. In *Titus* v. *Northbridge*, 97 Mass. 258, it is said: "The court are of opinion that when a horse by reason of fright, disease or viciousness becomes actually uncontrollable so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway . . . by which

an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts or is momentarily not controlled by the driver." As stated by PETERS, C. J., in *Spaulding* v. *Winslow*, *supra*, "It is not a fault in a horse to be spirited, or to start up quickly or to shy and shear from objects to a certain extent. Such things are very common occurrences and cannot be prevented or effectually guarded against by the owners or drivers of horses. It is not unreasonable to drive horses of such description upon our public roads. Therefore, it would not be reasonable to say that the fright of the horse, under such circumstances . . . was a proximate cause of the plaintiff's injury."

This doctrine is not in conflict with the rule applied in *Moulton* v. *Sanford*, and *Perkins* v. *Fayette*, *supra*. In each of those cases it was evidently found that the horse had passed entirely beyond the control of the driver, and that his misconduct was one of the proximate causes of the accident.

In the case at bar, whether the pole in the street constituted a defect, and whether the misconduct of the horse was one of the proximate causes of the accident, were questions submitted to the jury with appropriate instructions to which no exceptions were taken. They found in favor of the plaintiff, and we are unable to say that the contrary inference is the only reasonable inference. The horse had been driven by the plaintiff's husband prior to that time and he had been considered gentle and safe. The motor-man on the car says the horse was "scared of the car the same as other horses are." The horse was within ten or fifteen feet of the pole when he took fright at the car, and shied a few feet to the right. The driver was holding the reins with both hands, and only momentarily lost control of the horse. In all probability he would have regained control of him and avoided an accident if the pole had not obstructed the traveled way. Under these circumstances it is not unreasonable to say that the fright of the horse was not the real cause of the accident. On the other hand, it might reasonably have been

anticipated that such a contingency would arise and that a pole thus located in the street would be a source of danger to public travel and cause an accident either in the precise manner in which it did cause it or in some similar way.

Motion and exceptions overruled.

DANIEL P. HARRIS *vs.* JAMES BARKER.

Aroostook. Opinion March 1, 1895.

Writ. Alteration. Practice.

The plaintiff's writ was originally dated April 18th and made returnable on the first Tuesday of March, 1892. It was duly served on the defendant on the day of its date. But the writ was not returned to court on the first Tuesday of May; but without the consent of the defendant and without leave of court, it was materially altered so as to bear date April 20th, and be returnable on the first Tuesday of November. It was also converted from a writ of attachment into a capias writ, and thus changed, was again served on the defendant by an arrest of the body, and entered in court. The defendant seasonably filed a plea in abatement to the writ, duly setting forth the facts above stated, to which the plaintiff filed a demurrer.

Held; that it is settled law in this State that such a change in *mesne* process after service, without leave of court, is irregular and unauthorized.

ON EXCEPTIONS.

The case appears in the opinion.

G. A. Perrigo, for plaintiff.

Ira G. Hersey, for defendant.

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

WHITEHOUSE, J. The plaintiff procured a writ of attachment to be issued from the office of the clerk of the Superior Court of Aroostook county, bearing date April 18, 1892, and returnable to that court at Caribou on the first Tuesday of May, 1892, and on the same day caused personal service thereof to be duly made on the defendant. The writ, however, was not returned to court, but without the consent of the defendant and without leave of court, was materially altered so as to bear date April 20, 1892,

and be returnable at Houlton on the first Tuesday of November, 1892. It was also converted from a writ of attachment into a capias writ, with an affidavit indorsed thereon as required by statute, and, thus changed, the writ was again duly served on the defendant by an arrest of the body and entered in court.

The defendant seasonably filed a plea in abatement to the writ, duly setting forth the facts above stated, to which the plaintiff filed a general demurrer.

It is settled law that such a change in *mesne* process after personal service on the defendant, without leave of court, is irregular and unauthorized. *Bray* v. *Libby*, 71 Maine, 276; *Brown* v. *Neale*, 3 Allen, 74; *Simeon* v. *Cramm*, 121 Mass. 492. Even greater strictness prevails in New Hampshire. *Parsons* v. *Shorey*, 48 N. H. 550.

The plea in abatement must accordingly be sustained, and the entry be,

Exceptions overruled.

EDWIN F. SHAW, and another,

vs.

EDGAR E. YOUNG, and others, and WINDSOR HOTEL.

GEORGE W. GETCHELL, and another, *vs.* SAME.

Penobscot. Opinion March 4, 1895.

Lien. Owner. Tenant. Consent. R. S., c. 91, § 30; Stats. 1868, c. 207; 1876, c. 1840.

Courts will now construe statutes liberally that create a lien for repairs of buildings, when it is clear that the lien has been honestly earned and the lien claimant is within the statute.

The consent of the owner may be inferred for ordinary preservative repairs of buildings in possession of a tenant when it would not be inferred in cases of alterations, remodelings, additions, or extensive repairs.

The statute lien for labor and materials furnished for the repairs of a building is not limited to the estate of the tenant making the repairs, but attaches to the fee, the *res*, if the consent of the owner is shown.

The consent of the owner may be shown by circumstances. When the owners of a hotel lease it to a tenant to be used as a hotel, and make no objection to necessary preservative repairs put on by him, their consent thereto may be inferred.

ON REPORT.

These were two actions to enforce lien claims upon the Windsor Hotel, in Bangor, and were tried together. The law court was to render such judgment, upon so much of the evidence as was admissible and competent, as the legal rights of the parties required.

The necessary facts are stated in the opinion.

T. W. Vose, for plaintiffs.

The defendants in their brief statement admit that Chase assigned to Pickard without the consent of the owners, and that Pickard assigned to the Youngs without the owners' consent. This leaves the Youngs in possession, so far as these plaintiffs are concerned, as agents of Chase and not lessees.

In *Morse* v. *Dole*, 73 Maine, 351, this court held that a lien would attach as against a mortgagee if the labor was performed or materials were furnished by his consent.

Counsel cited: *Parker* v. *Bell*, 7 Gray, 429; *Nellis* v. *Bellinger*, 13 N. Y. 560; *Otis* v. *Dodd*, 90 N. Y. 336, and cases there cited; *Paine* v. *Tillinghast*, 52 Conn. 532; also cases cited in Phillips on Mechanics' Liens, page 134, 3rd Ed.

Jasper Hutchings, for devisees of Brown, and *C. P. Stetson*, for Chase.

The "owner" within the meaning of the statute is a lessee, or sub-lessee in this case, and not the owners of the fee. *Francis* v. *Sayles*, 101 Mass. 435. The statute means by "consent" something more than knowledge. The two words are by no means necessarily or usually synonymous. A man may know without consenting. Consent ordinarily, in business and law, implies that the person giving it has some power of control over the thing consented to. How can a man be said to give consent in matters of business who has no power of dissent? Brown could not prevent these repairs if he would. He has received no benefit from them.

If it be claimed that joining in a lease to Chase, which empowered and required him to make repairs, or anything that Brown said or did, was a consenting within the meaning of the statute, it is well answered by the case of *Hayes* v. *Fessenden*,

106 Mass. 228. Counsel also cited: *Bliss* v. *Patten*, 5 R. I. 376, 380; *Conant* v. *Brackett*, 112 Mass. 18. It is a general rule that a person who has received the benefit of the money or property of another is not liable to such person therefor, in the absence of a contract between the parties, if there be any ground upon which the money, or property or its benefit, may be rightfully retained by the possessor without accounting to the owner. *Arey* v. *Hall*, 81 Maine, 20, 21.

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

EMERY, J. The property in Bangor known as the "Windsor Hotel" consists of a lot of land and buildings thereon constructed and fitted for the hotel business. It has been used exclusively for that business for many years. The owners all lived in Bangor at the beginning of the repairs which are the subject matter of these suits. Horace W. Chase owned one-half of the property, and seems to have been the managing owner. He leased the property to Asa R. Pickard for the term of seven years from December 1, 1887. In the lease it was provided that the lessor should make the necessary outside repairs and the lessee the necessary inside repairs.

Ricker and Brown owning three-tenths of the property leased their interest to Chase for the term of five years from March 31, 1891. In this lease it was provided that Chase should make all the repairs at his own cost. No other lease of any part of the property is in evidence.

Pickard assigned his lease to Mr. Young, July 3, 1891, with the consent of Mr. Chase. At this time the hotel building needed repairs inside and out, repairs necessary for the preservation of the building and repairs necessary to keep up its earning powers as a hotel, and keep it up to the essential modern conditions. The matter of these repairs was talked over between Chase and Young at the time of the transfer of the lease, and it was understood that Young was to have the necessary repairs made inside and out. Mr. Young at once set about the repairs and employed among others these plaintiffs to furnish labor and materials therefor.

During part of the time while these repairs were being made, and the labor and materials therefor were being furnished by these plaintiffs, Mr. Chase and Mr. Brown were boarding at the hotel and saw much of what was being done. They made inquiries, and advised more or less with the workmen about the work. They made no objection to anything. The other owners (Chase and Brown owning seven-tenths) do not appear to have seen or known of the repairs except so far as can be inferred from their residence in Bangor. That the repairs, so far as these plaintiffs made them, were reasonably necessary for the buildings and the business, is not questioned.

Mr. Young becoming insolvent these plaintiffs naturally claim liens on the property for their labor and materials furnished as above. The owners of the fee appear and make two contentions. 1st, that the liens, if any, do not attach to the fee, but only to the estate of Mr. Young, the tenant in possession; 2nd, that the "consent" of such owners does not appear. If either contention is sustained, the owners of the fee escape the liens.

In determining the proper interpretation of lien statutes at this time, courts need not feel hampered by the earlier decisions. These statutes were such an innovation upon the common law of real property that for some time the courts construed them most strictly. To this day there are no such statutes in England. In this country, however, they are now general and familiar and their equity and beneficence are conceded even by land owners. Courts will now construe them liberally to further their equity and efficacy when it is clear that the lien has been honestly earned, and the lien claimant is within the statute.

I. Our statute (R. S., c. 91, § 30) expressly declares that the lien is on the building and on the land on which it stands, and on any interest which the owner of the building has in the land. Nothing is said of the owner's interest in the building. The building itself is declared to be the basis of the lien. In this case the owners of the building are the owners in fee of the land; so that the building and the land are united in ownership.

We think it was the intent to attach the lien to the building, and to the land united to the building, to the *res*, rather than to any particular estate in the building. Assuming that the legislature intended to make the lien effectual when earned, this construction is natural. The particular estate of the tenant in possession may be small and worth much less than the labor and materials put upon the building. The benefit to that estate may be trifling. The benefit to the building itself, the fee, may be large. The statute should be construed as making the lien co-extensive with the benefit. Its equity is thus given scope. The rules and principles of equity are now to prevail. Statutes 1893, c. 217, § 8.

This interpretation of the lien statute does not conflict with the rule that the lien does not attach to a prior mortgagee's interest. The claim of one who furnishes labor and materials is a lien only, but it fastens to the property and may be inferior or superior to the mortgagee's lien according to circumstances. *Morse* v. *Dole*, 73 Maine, 357.

Counsel have cited decisions of courts of other states in which the word "owner" in similar statutes is held to be limited to the tenant in possession, having an estate. For reasons above given we do not think such a limitation exists in our statute.

II. But no owner's estate in the property, whether in fee, for life, or for a term of years, can be affected by the statute lien unless the labor and material were furnished "by the consent of the owner." Does the "consent" of the owners of the fee in this case sufficiently appear?

The owners fitted the property for the hotel business. Their revenue from it had come and was to come from its use as a hotel. It could not be used for any other business without radical and expensive alterations. Its revenues as a hotel could not be kept up without such frequent repairs and improvements as would attract and retain custom. Its proper preservation as a going hotel required that it be kept in good and modern repair and efficiency. Its owners intrusted the hotel to one of their number, Chase, (who was also the largest owner) as managing owner presumably with the knowledge that

repairs must often be made. Chase placed the hotel in the possession of Young with the understanding that he should make repairs. Did not the owners thereby "consent" that repairs should be made?

Chase and Brown, the majority owners (and one of them the managing owner,) saw the repairs going on, and more or less directed and approved them. The other owners seem to have left the whole care of the property to Chase. Did not the owners thereby "consent" that these particular repairs should be made and their labor and materials furnished?

The meaning of the word "consent" in the statute is now modified by other parts of the statute enacted since that word was first used. Prior to 1868 a lien would attach only when the labor and material were furnished "by virtue of a contract with the owner." In the statute of 1868, (ch. 207,) it was enacted that a lien should attach if the labor or materials were furnished "by the consent of the owner." It was provided in section 2 of that statute that such consent should not be inferred unless notice was first given to the owner that a lien would be claimed. This was to give the owner an opportunity to express in writing his dissent. If, upon being notified of the intent to claim a lien, the owner did not express his dissent in writing, his consent could be inferred.

In the statute of 1876, c. 140, (now R. S., c. 91, § 31,) the requirement of notice to the owner was stricken out, but the provision of written notice of dissent by the owner was retained. The "consent" can now be inferred without any notice to the owner.

We think this change in the statute materially modifies the meaning of the word "consent" in favor of the lien claimant. It seems to be assumed by the legislature that the owner of real estate will be vigilant in caring for it either in person, or by agents;—that if he leaves it in the possession of agents, or tenants, knowing that repairs are necessary to be made from time to time, and makes no provision for them, but leaves them to be made by agents or tenants, and gives no notice of dissent, his consent may be inferred so far as the lien claimants are concerned.

We are satisfied from the facts in this case that the statute consent of the owners sufficiently appears.

This decision, however, should not be extended beyond the facts in this particular case. Consent may be inferred for ordinary preservative repairs, when it would not be inferred for alterations, remodelings, additions, or even more extensive repairs. The consent must be shown, and whether it appears in any given case will depend wholly upon the facts in that case.

Defendants to be defaulted. Judgment against the property in favor of the plaintiffs with interest from date of writs, and costs from the time of the appearance of the owners.

CYRUS A. CASWELL *vs.* JEROME B. HUNTON.

Androscoggin. Opinion March 4, 1895.

Deceit. Sales. Law and Fact.

The materiality of a false representation, relied upon to support an action for deceit, is a question of law for the court.

Held; that is error to submit to the jury the question of the materiality in such case, although proper instructions to the jury are given as to what constitutes materiality and to which no exceptions are taken.

ON EXCEPTIONS.

This was an action for false and fraudulent representations in the sale of personal property. Verdict for the defendant.

The declaration alleged that the defendant, in order to induce the plaintiff to buy of him twenty-five shares in the capital stock of a corporation known as the "National Carving Company," and pay him therefor the sum of five hundred dollars, falsely and fraudulently represented to the plaintiff "that said National Carving Company was just starting into business, and needed a little more money to get the business well started: that the company then and there had large orders to fill, and that he (the defendant) was then selling treasury stock to raise money to do business to fill said orders; that the stock he (the defendant) was then selling was treasury stock of said corpora-

tion; that one F. W. Parker, one Frank R. Conant, one J. L. H. Cobb, and one C. I. Barker, were then owners of similar treasury stock purchased by them respectively of the corporation, at the same price he was paying; that he was and had been since the company came to Maine, about a year before, the agent of said corporation to sell its treasury stock for the purposes aforesaid; and that as such agent, he (the defendant) had sold to one P. M. Thurlow two hundred and fifty shares of like treasury stock at the same price he was to pay."

The declaration contained all other necessary and material elements to state in legal form the alleged cause of action. The plaintiff contended, and introduced evidence tending to show that the defendant, as an inducement to the sale, made each and all the representations above set forth. There was also evidence tending to show that the stock in question was sold by the defendant to the plaintiff for the sum of five hundred dollars; that the stock so sold was not treasury stock, but the defendant's own stock; that the defendant at the time of the sale, and for some time prior thereto, was the duly authorized agent of the corporation to sell its treasury stock; that neither Parker, Conant, Cobb nor Barker were, or ever had been, owners of similar treasury stock purchased by them respectively of the corporation at the price he was paying; that as such agent (to sell stock) the defendant had never sold P. M. Thurlow two hundred and fifty shares of like treasury stock at the same price he (the plaintiff) was to pay; and that the defendant had the option to sell, and the right to sell the plaintiff treasury stock instead of his own stock.

The plaintiff introduced evidence tending to show that, at the time of the purchase and sale of the stock in question, said corporation had outstanding six thousand three hundred and ninety-nine shares of its capital stock, the par value of which amounted to one hundred and fifty-nine thousand nine hundred and seventy-five dollars; that it owed on notes the sum of nine thousand two hundred dollars, and that it had other outstanding obligations against it amounting to about five hundred dollars; that its entire property consisted of three machines worth from

forty-five hundred dollars to forty-eight hundred dollars; tools appraised at two thousand dollars; accounts appraised at three hundred dollars; cash, seven hundred sixty-nine dollars and forty-four cents; and owned certain letters patent, under which the said machines were made and operated; and that the corporation was organized in December, 1890, and, up to the time of said sale, had sold only ten shares of its treasury stock through the defendant as its agent, for the sum of two hundred dollars; and that about a year after said sale, the entire property of said corporation was sold, on sheriff's sale, for less than five thousand dollars.

The plaintiff requested the presiding justice to instruct the jury that the alleged false representation that, "the stock he [the defendant] was then selling to the plaintiff was treasury stock of said corporation," was a material one, and that if the jury should find the other elements of the action present, then they must find the defendant guilty. The defendant's counsel in his argument to the jury admitted the above representation to be material.

The plaintiff, in like manner, requested a similar instruction concerning the alleged false and fraudulent representation, that "one F. W. Parker, one Frank R. Conant, one J. L. H. Cobb and one C. I. Barker were then owners of similar treasury stock of said corporation, purchased by them respectively of the corporation at the same price he [the plaintiff] was paying."

The plaintiff, in like manner, requested a similar instruction concerning the alleged false and fraudulent representation, "that as the agent of the corporation he [the defendant] had sold to one P. M. Thurlow two hundred and fifty shares of like treasury stock at the same price he was to pay."

The presiding justice declined to rule, as matter of law, that any one of the foregoing alleged false and fraudulent representations were material, as requested, but left the question of materiality of each representation to the jury, with proper instructions as to what constituted materiality, to which no exceptions were taken.

W. H. Judkins, for plaintiff.

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

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

WALTON, J. The question is whether the materiality of a false representation, relied upon to support an action for deceit, is a question of law for the court, or a question of fact for the jury.

We think it is a question of law for the court. Most of the questions involved in an action for deceit are questions of fact for the jury. Whether the defendant made the alleged false representation, and whether, if he made it, he knew it to be false, and whether the plaintiff was ignorant of its falsity, and whether he relied upon it, and was thereby damaged, are undoubtedly questions of fact for the jury. But, assuming all these facts to be proved, the materiality of the representation is a question of law for the court. *Penn. Ins. Co.* v. *Crane*, 134 Mass. 56. Bigelow on Fraud, vol. 1, p. 139, and cases there cited.

In the present case, the presiding justice declined to instruct the jury as to whether any one of the alleged false representations was or was not material, but left the question of materiality to the jury. We think this was erroneous. We think it was the right of the parties to have the jury instructed specifically respecting each of the alleged false representations, and to have them told whether or not, if all the other elements of fraud were proved, it was legally sufficient to maintain the action.

The action is for alleged false representations made by the defendant while selling to the plaintiff twenty-five shares of corporation stock. The exceptions state that there was evidence tending to show that the defendant represented that he was selling the stock as agent for the corporation, and at the same price at which similar stock had been sold to other parties. We think these representations were clearly material; that the plaintiff had a right to know with whom he was dealing, and

whether the money which he was paying for the stock was going into the treasury of the corporation to increase its working capital, or into the pocket of a stranger, where it would have no such effect. And we think the plaintiff also had the right to know whether others had paid into the treasury of the corporation for their shares the same amount which he was paying. Not because it was important or material for him to know what others had paid for their stock, but because it was material for him to know how much the corporation had received for its stock; for the value of his own stock would depend largely upon the amount of paid-up capital possessed by the corporation. Consequently, the jury should have been instructed that, if they found the other elements of fraud proved, these representations were material and legally sufficient to maintain the suit. *Coolidge* v. *Goddard*, 77 Maine, 578; *Hoxie* v. *Small*, 86 Maine, 26.

Exceptions sustained.

JOHN W. EMERY, and others, *vs.* MARY A. EMERY.

Kennebec. Opinion March 7, 1895.

Widow. Quarantine. Rent. Assumpsit. R. S., c. 64, § 57.

A widow, left in possession of the homestead, when allowed by the heir to continue in possession thereof beyond the time allotted to her by statutes cannot be subjected to assumpsit for rent by the heir.

AGREED STATEMENT.

W. C. Philbrook, for plaintiffs.
J. O. Bradbury, for defendant.

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

HASKELL, J. Assumpsit by the heirs of an intestate against his widow and administratrix for rent of the homestead after the expiration of the ninety days allowed her by statute to occupy the same. The agreed statement is that the widow continued

to occupy the homestead after her husband's decease, "having made no agreement of any name or nature with the plaintiffs for the occupancy of the same."

"Assumpsit for use and occupation of land will not lie, unless upon some contract between the plaintiff, and defendant, express or implied." *Howe* v. *Russell*, 41 Maine, 446. The defendant, upon the death of her husband came to possession of the homestead by force of statute that made her occupation lawful for the period of ninety days. When that time elapsed she became a disseizor as against the heirs, and by the common law they might have ejected her, but they did not. There was no privity of contract between her and them. She had not been their tenant, and they could not compel her to so be. There was no relation from which an implied contract to pay rent can be inferred. She was not even their tenant at sufferance.

Moreover, "If any part of the real estate is used or occupied by the executor, or administrator, he shall account for the income thereof to the devisees or heirs in the manner ordered by the judge [of Probate] with the assent of the accountant and of other parties present at the settlement of his account; and, if the parties do not agree on the sum to be allowed, it shall be determined by three disinterested persons appointed for that purpose by the judge, whose award, accepted by the judge, shall be final." R. S., c. 64, § 57.

A widow, left in possession of the homestead, when allowed by the heir to continue in possession thereof beyond the time attached to her by statute, cannot, either upon principle or authority, be subjected to assumpsit for rent by the heir. It is his duty to assign her dower therein; and whether equitable estoppel would now bar his ejecting her until he shall have done so, it is unnecessary to consider. Certainly he cannot make her his tenant without her consent.

Plaintiffs nonsuit.

LOTTIE CONWAY
vs.
LEWISTON AND AUBURN HORSE RAILROAD COMPANY.

Androscoggin. Opinion March 13, 1895.

Street Railroad. Way. Passenger.

A street railroad company, having no control over the street, is not an insurer of the safety of any place at which it stops a car for passengers to alight. If the company exercises proper care in its selection of a place, it is not in legal fault if the place proves to be in fact unsafe.

ON MOTION AND EXCEPTIONS.

This was an action on the case upon which the plaintiff recovered a verdict of $347.17, for injuries received by her in alighting from the defendant's horse car, on the evening of August 27, 1892, on Skinner street in Lewiston, her ankle being broken. The plaintiff claimed that at the point where she alighted, close by the car, was a ditch at the side of the road, and that the conductor came along when he stopped the car and helped her off at this point; that in the dark, not knowing anything about the ditch, and supposing it to be a safe place to alight, she stepped down and received the injury.

The case is sufficiently stated in the opinion. The disposition of the exceptions made by the court renders any further notice of the motion for a new trial unnecessary.

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

While common carriers of passengers are not insurers, they are bound to exercise the highest degree of care and caution, and a failure to exercise this is negligence for which the carrier is liable. *Brown* v. *N. Y. Central R. R.* 34 N. Y. 404; *Deyo* v. *N. Y. Cen. R. R.* 34 N. Y. 9; *Maverick* v. *8th Ave. R. R. Co.* 36 N. Y. 380; Sto. Bail. § 601; *McElroy* v. *N. & L. R. Co.* 4 Cush. 400. No difference in this duty between steam and horse railroads. *Wynn* v. *Cen. Park, &c. R. R. Co.* 33 N. Y. S. R. 181; *Citizens St. R. Co.* v. *Twiname*, 111 Ind. 587; *Topeka* v. *Higgs*, 38 Kans. 375; *Smith* v. *St. Paul*, 32

Minn. 1; *Citz. &c. R. Co.* v. *Findley*, 76 Ga. 311; *Barrett* v. *3d Ave. R. R.* 45 N. Y. 628; *Hill* v. *9th Ave. R. R.* 109 N. Y. 239.

Carriers are bound to provide safe alighting places, and are bound by the direction of employees representing them to be safe. *Cincinnati H. and I. R. Co.* v. *Carper*, 112 Ind. 26.

The application of this principle has been stated by the various courts in different language, but emphatically recognizing the correctness of the doctrine.

Richmond v. *Scott*, 86 Va. 902, is a case almost exactly parallel with the one before us. Hunton, J., says: "The action . . . arises out of the duty which every carrier of passengers is under, not to expose his passengers to any danger in alighting which can be avoided by the exercise of extreme care and caution. The implied contract to carry safely includes the duty of giving passengers reasonable opportunity to alight in safety from the train, and a violation of this part of the company's duty is culpable negligence for which action will lie." Whart. Neg. § 649. In *Cartwright* v. *Chicago*, 52 Mich. 606, Cooley, C. J., thus states the law: "If a car in which there were passengers was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance or give warning or move the car to a more suitable place." *R. R. Co.* v. *Whitfield*, 44 Miss. 466; *R. R. Co.* v. *Buck*, 96 Ind. 346; *McGee* v. *R. R. Co.* 92 Mo. 208; *Maverick* v. *8th Ave. R. R.* 36 N. Y. 378; *Cockle* v. *London and S. E. Ry. Co.* L. R. 5 C. P. 457; *Nicholson* v. *Lancashire R. R. Co.*, 3 H. and C. 534; *Fay* v. *London R. Co.* 18 C. B. (N. S.) 225; *Brassell* v. *N. Y. Central R. R. Co.* 84 N. Y. 241; *Penn. R. R. Co.* v. *White*, 88 Penn. St. 327; *Balt. and O. R. R.* v. *State*, 60 Md. 449.

F. W. Dana and W. F. Estey, for defendants.

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

EMERY, J. The defendant company was operating a street railway through various streets in Lewiston. The plaintiff was

being transported along the street as a passenger on one of the company's open cars. Upon her signifying a desire to alight, the car was stopped to enable her to do so, though at some distance beyond the place where she gave the signal. It chanced that, at the place where the car stopped, the side of the street sloped away into a ditch, so that the step down from the car to the surface of the ground was longer than usual, or than she anticipated, and consequently she lost her balance, fell and was injured. She claimed at the trial that the company was bound to stop the car at a place safe for alighting, and this place proving to be unsafe, the company was responsible for her injury.

Thereupon, the presiding justice ruled and instructed the jury in part as follows: "I instruct you, as matter of law, that it is a duty incumbent upon the common carrier, it is a duty upon this defendant corporation, carrying passengers for hire, to give them a suitable place of ingress or opportunity to enter upon the car; and to give them a place of safety for exit or egress from the car. It is a question of fact for you, from the evidence in this case, to decide whether or not, at the point where this car stopped, there was a suitable or safe place for this plaintiff to alight from that car.

"If it was not a safe place, under all the circumstances of the case, and an injury was received by her, and she herself was in the exercise of due care at that time and place, then she is entitled to recover."

The correctness of this statement of the law, applicable to street railways, is the question presented by the defendant's exceptions.

Upon a careful reading of the language of the ruling, it will be seen that the question of care or negligence on the part of the defendant was entirely eliminated. No matter how great and painstaking the care and foresight of the defendant in this very matter of finding a safe place for alighting, the ruling rendered them of no avail. No matter how safe the place may have appeared; no matter that there was nothing to indicate to the most prudent and vigilant man a lack of safety, the ruling held the

defendant in fault. The only question left to the jury was whether the place was in fact safe or unsafe. The jury were in effect told, that if the place was in fact unsafe, the plaintiff was entitled to recover notwithstanding the most extreme care on the part of the defendant company.

Whether the ruling is a correct statement of the law applicable to common carriers of passengers, which have the power of constructing, and exclusively controlling, places for passengers to alight, is not the question here. This defendant company, so far as the case shows, had no such power. It had, so far as appears, no control whatever over the ditches, or the streets outside, or even inside its rails. It could not select the places in the streets where its track should be laid, or its cars run. It could not construct nor control any places at which passengers were to step on or off its cars. It had to locate its track and run its cars where the public authority directed. It had to leave the centre, sides and surface of the streets and ditches to the same authority. Passengers entering or leaving the cars had to use the streets in the condition they were left by the authority in control of them. Such passengers were not in the care of the company till they got on the car. They were no longer in its care when they stepped off the car. The company's care and duty began when its control began, and ceased when its control ceased.

In the absence of any authority given the street railway company over the streets, it must be evident that it cannot be held as an insurer of their safety for passengers to alight upon.

It is urged, however, that the ruling does not require a street railway company to provide a safe place, but only to find a safe place on the street before inviting passengers to alight. But, with this interpretation, the ruling still throws out the element of possible great and anxious care on the part of the company. If, after the highest degree of care in the selection, the place stopped at proves unsafe in fact, however safe in appearance, the company is allowed no defense. The surface may appear hard, flat and smooth, and the best possible place for alighting, and yet a hidden defect, not known to nor ascertainable by the

company after careful inspection, may cause an injury to the alighting passenger. The fault, if any, in such case would be in fact upon the party charged with the duty of keeping the street in repair; but the ruling would place it on a party having no such duty, nor any control over the street. We think the ruling is erroneous, with whatever interpretation it is fairly susceptible of. *Middlesex R. R. Co.* v. *Wakefield*, 103 Mass. 261; *Creamer* v. *West End Railway*, 156 Mass. 320.

In the case, *Richmond* v. *Scott*, 86 Va. 902, and in the other cases cited by the plaintiff, in which the street railway company was held liable, it will be found that the question of the care or negligence of the company was not eliminated; hence they are not authorities in support of this ruling.

Exceptions sustained.

JAMES WOOD, in equity, *vs.* CITY OF AUBURN.

Androscoggin. Opinion March 13, 1895.

Equity. Water Company. Regulations. Waiver.

A water company cannot shut off water from a water taker for non-payment of an old, overdue and disputed installment of water rates, after having accepted payment for a subsequent installment.

Held; that the acceptance of payment for a subsequent installment is a waiver of the disputed claim.

The water taker may prevent such action by injunction in equity; nor can the court in such proceeding be required to investigate and determine the merits of the unpaid, and disputed installment. The water company must resort to the court, if it would enforce its claim.

ON REPORT.

This was bill in equity, brought by the complainant against the city of Auburn and its board of Water Commissioners, praying for an injunction to restrain the city from shutting off the complainant's water supply to his several tenement houses.

A brief summary of the bill is as follows:

The complainant alleges that he is the owner of tenement buildings in Auburn, which have been a source of great revenue to him; and that the city of Auburn is the owner and possessor

of the public water supply, and owns and controls the only water supply which can be used by the owners of real estate in the city; that the city is bound and obliged by law to supply water in reasonable quantities upon payment or tender of reasonable compensation; that the city water supply is connected with the complainant's tenements, all of which have been supplied by water from the city system; that the defendants, other than the city, are the board of Water Commissioners, who have the general control and direction of the water system; that the complainant paid water rents for the six months beginning May first, 1893, and ending November first, 1893; that he offered and tendered to the city for use of water from the first day of November, 1893, to the first day of May, 1894, the amount charged by the city; that the city refused to receive the money unless the complainant also paid certain sums of money claimed to be due for the use of water from November first, 1892, to May first, 1893, before the city became the owner and possessor of the water system, which he declined to pay; that thereupon the city and board of Water Commissioners shut off his supply; that he has a claim against the Auburn Aqueduct Company for loss and damage occasioned by short water supply before the city became the owner of its system, which he has a right to set off or recoup against the water rents accruing from the November first, 1892, to May first, 1893; that by the shutting off of water from his tenements he has been greatly injured, etc. He offers to pay the sum of money charged against his tenements for the term beginning November first, 1893, and ending May first, 1894. The above tenders were filed in court. A temporary injunction was issued, and the case came on for a hearing on the question of making the temporary injunction permanent.

After the hearing upon bill, answer, and testimony, the case was reported by agreement of the parties to the law court.

The testimony disclosed that during the winter of 1892-3, by reason of short supply, or from other causes, the Auburn Aqueduct Company were unable to supply the complainant's tenements with water, that thereby, the complainant was put to great loss and expense. He had to abate rents in order to

keep his tenants; and by reason of the want of pressure in the pipes the water froze, and he was put to great expense in repairing pipes and keeping up the water supply, as well as he could; that he communicated his complaints to the Aqueduct Company, who told him to go ahead and do the best he could; that no adjustment was had between him and the Aqueduct Company while they owned the system.

When the city became the owner, the Aqueduct Company turned over to the city the unpaid water bills, including those against the complainant, with the statement that the complainant would make a claim.

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

The city assumes the right to shut off a citizen's water after offer of payment and tender, not for the purpose enforcing payment of the current water rates, but to collect an old bill, a bill, too, which was not contracted with the city itself, but with its predecessor in title, and to which it has no claim except by assignment; a bill, also, to which the complainant claims to have a fair offset. *Stock* v. *Boston*, 149 Mass. 410.

The rule of the city authorizing the shutting off the water for non-payment clearly means current and not past rents. *Merrimac River Savings Bank* v. *City of Lowell*, 152 Mass. 556.

The city, by becoming owner of this water system, has engaged in the exercise of a public trust, &c. *Lumbard v. Stearns*, 4 Cush. 60.

J. A. Pulsifer, city solicitor, for defendant.

The city claims, first, that the contracts to supply water to each of the complainant's buildings are separate and distinct, and for that reason claims the right to shut off the water only from those buildings of the complainant where the water rents are in arrears.

Second, that each of these contracts are continuing ones with rent falling due on them at stated intervals in a manner analogous to interest on a note.

Third, that these contracts can be modified under their terms from time to time by such ordinances, rules and regulations as the city and its board of Water Commissioners may legally enact.

Fourth, that there has been no waiver by the city or any of its agents in its behalf at any time either by its ordinances, rules and regulations, expressly or impliedly, of its right under the original contracts to shut off water for a violation of that same contract by a water taker.

Summing it all up, even if there were any justice in this claim for set off, there would be no statute or rule of law to support this unliquidated claim for damages as a set off against these water bills. *Hall* v. *Glidden*, 39 Maine, 445; *Smith* v. *Ellis*, 29 Maine, 422.

Why should this temporary injunction be made permanent or why should it have been granted at all? The court says in *Russ* v. *Wilson*, 22 Maine, 207: "It is, however, only when the plaintiff has exercised due precaution to prevent an injury that he can be relieved by an injunction." . . . . . "It is only to prevent mischief, otherwise in a manner irreparable, that this mode of redress can be resorted to." The complainant in this case could have prevented all injury and trouble by paying his water bills; nor do we see any legal impediment in the way of his having his rights in his claim for damages fully determined in an action at law.

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

EMERY, J. Mr. Wood, the complainant, has been for sometime the owner of dwelling-houses in Auburn connected with the system of water works formerly owned by the Auburn Aqueduct Company, but now owned by the city of Auburn. For sometime, prior to November 1, 1892, the aqueduct company had supplied water to these houses, and had been paid the regular rates therefor six months in advance on May and November first of each year, agreeably to the regulations of the company. When November 1, 1892, came round, Mr. Wood did not pay or tender the water rates for the ensuing six months as usual. He claimed that water was not being sufficiently supplied, and that in other respects the company was not fulfilling

its duty to him. The company did not shut off the water, but allowed it to run into the complainant's houses during the whole period of that six months ending May 1, 1893.

In May, 1893, the aqueduct company transferred this system of water works, and all its bills against the water takers, to the city of Auburn. Immediately after the transfer, and in the same May, the complainant, Wood, tendered to the proper officer the regular water rates for the then ensuing six months to end November 1, 1893. The city accepted the money and supplied the water for that six months as usual. In November, 1893, Mr. Wood tendered, as before, the water rates for the then next ensuing six months. This time the city refused to receive the money, and notified Mr. Wood that the water would be shut off from his property, unless he also paid the water bills of the old company for the six months between November 1, 1892, and May 1, 1893, which had not been paid, and which had been assigned to the city as above stated. Mr. Wood remonstrated, claiming that nothing was due from him on old bills; but the city insisted, and thereupon he filed this bill to restrain the city from shutting off the water from him.

The complainant concedes that the rules of the old aqueduct company, and of the present city water board, are reasonable, so far as they require him to pay six months in advance. He contends, however, that when the city has taken his money for one six months, paid according to its rules, it has waived any right to use the summary remedy of shutting off water to collect a disputed bill for any prior six months;—that the city has thereby elected to continue him as a water taker, and resort to the usual legal remedies for settling the prior dispute;—that any rule of the water board of Auburn which assumes the power to receive the water taker's money from six months to six months, and then at any time deprive him of water because of an old and disputed bill, is unreasonable and therefore void.

We think this contention must be sustained.

Water companies and municipalities undertaking to supply water to the people have an undeniable right (when not affected by legislation) to impose such reasonable rules as will husband

the supply and economize the use of the water; as will protect the plant and keep up its efficiency; and as will insure a reasonable revenue and its prompt receipt. On the other hand, such companies and municipalities are bound to supply water at reasonable rates to every person within the range of the system of works. Their rules must be reasonable and not oppressive or vexatious. The citizen should not be subject to any whims of the officials. He should have a secure right to the water so long as he promptly pays the current installments, and makes no waste or misuse of the water. So far as appears, Mr. Wood has fully complied with these conditions.

The only trouble is over an old and disputed bill. The aqueduct company could have insisted on payment of this bill in advance, but did not. It could have shut off the water during the time covered by the bill, but did not. It preferred to let the bill and the dispute stand. Its successors, the city, with presumed knowledge of all the facts, did not shut off the water. It accepted Mr. Wood's money for the next installment; furnished water for that six months to him as one within his rights and its rules; allowed him to suppose that the old bill in dispute would be ignored, or would be adjusted as are disputes between other parties. After having resumed these relations with Mr. Wood and taken his money therefor, the city now insists that he shall now be summarily deprived of an instant and constant necessity in order to coerce him into a surrender of his position of defense against the old bill. Assuming that the rules of the old company and of the city contemplate this course, we think they are to that extent unreasonable, and therefore without legal force.

The parties are not upon equal ground. The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water, in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender and swallow his choking sense of

injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money; yet the consumer must pay it again and perhaps still again. He cannot resist lest he lose the water.

It is said, however, that the consumer can apply to the courts to recover back any sum he is thus compelled to pay, if it was not justly due from him; or, if he can show affirmatively that it is not a just claim against him, he can by judicial process restrain the company or municipality from shutting off the water. To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure. That principle is, that the claimant, not the defendant, shall resort to judicial process;—that he who asserts something to be due him, not he who denies a debt, shall have the burden of judicial action and proof. It is only in the case of dues to the State that this principle is suspended.

It is said again, that Mr. Wood having resorted to this judicial proceeding, the city may now, in this same proceeding, show that there is no defense to the old bill, and thus justify its action and have the prayer of Mr. Wood denied. The court cannot be required in this proceeding to investigate and determine whether there is anything due on that old water bill. The city, or its predecessor, at one time had the right to insist on its payment before furnishing water. That right as to that bill was waived fully and effectually. It cannot be resumed at the pleasure of the respondent. The water must be supplied to the complainant, so long as he will promptly pay current installments and otherwise conform to the reasonable rules governing the supply of water. The respondent must now in its turn resort to judicial process, if it desires to enforce any further payment.

Bill sustained with costs. Injunction made permanent.

CITY OF BANGOR, petitioner for *Mandamus*,

vs.

COUNTY COMMISSIONERS.

Penobscot. Opinion March 15, 1895.

Mandamus. County Commissioners. Patrol Wagon. R. S., c. 116, § 5.

1. It does not follow because an officer deems a conveyance necessary for persons arrested for offenses, and makes a charge therefor, that it is the duty of the county commissioners to pass upon it, notwithstanding the court issuing the warrant certifies to the same.

It is only in certain classes of cases passing through such courts that the costs under any circumstances are to be passed upon by the commissioners.

2. In *mandamus* proceedings no relief can be granted except as prayed for, and the mandate must be certain in relation to the duty required of the defendant.

A petition that asks for a mandate, which the respondents have no power fully to comply with, will be denied when it is apparent that a portion of the matter upon which the respondents are to be required to act is not within the scope of their authority.

3. *Mandamus* is strictly a legal remedy, and not equitable, and the petitioner must show a legal right to have the act done which is sought by the writ.

Held; if the officers are entitled to the fees which are required as "reasonable expenses incurred in the conveyance of any prisoners" (R. S., c. 116, § 5), certainly the city has no claim for such fees, and there is nothing in the petition which shows that any such "reasonable expenses incurred" have ever become vested in the city.

4. Even if the city were to be regarded as standing in the same relation to these matters as the officers who made the arrests and if the commissioners have power to act on all of them, it would be a matter for their determination upon all the facts in the case; and in this they would be acting in a judicial function, and the power would be discretionary with them; and as there is no pretense that they have refused to act at all, but that they have considered the matter and rendered judgment thereon, their decision is not to be called in question, for this court, even though it possesses the power to require their action, has no power to direct what judgment shall be given by them.

ON REPORT.

The case appears in the opinion.

H. L. Mitchell, city solicitor, for petitioners.

Mandamus was introduced to prevent disorders from a failure of justice; therefore it ought to be used upon all occasions where the law has established no specific remedy and where in justice

and good government there ought to be one. *Springfield* v. *C. C. of Hampden*, 4 Pick. 68; *Com.* v. *Sessions of Hampden*, 2 Pick. 414; *Mendon* v. *Worcester*, 10 Pick. 235. *Mandamus* lies: To compel a court to accept a verdict improperly rejected. *Com.* v. *Norfolk*, 5 Mass. 437; *Com.* v. *Middlesex*, 9 Mass. 388. To compel a court to certify recognizances to another court. *Johnson* v. *Randall*, 7 Mass. 340. To correct decision of examiners as to county commissioners. *Ex parte Strong*, 20 Pick. 484. In all cases of neglect of judicial or ministerial duty. *Carpenter* v. *Bristol*, 21 Pick. 258. To compel county commissioners to pay damages. *Harrington* v. *Berkshire*, 22 Pick. 263. To compel county commissioners to assess damages. *Dodge* v. *Essex Com.* 3 Met. 380. To compel county commissioners to certify petitioner's election. *Ellis* v. *Bristol*, 2 Gray, 370.

The statute in this case provides that for a service of a warrant the officer is allowed fifty cents and fifty cents for service of a mittimus, usual travel, with reasonable expenses incurred in the conveyance of such prisoner. Therefore, the county commissioners would have just as great a right to disallow the fifty cents for the service of a warrant and mittimus and the travel on the same, as they would to disallow a reasonable charge for the conveyance of prisoners. Should they disallow these items, it would not be in the exercise of a discretion, but it would be in the nature of an arbitrary assumption of authority; it would be an illegal act; it would be a proceeding on their part which would give the officer a right to come before this court and ask for a writ to compel them to audit and allow their fees as provided by statute.

If the court should come to the conclusion that the question of allowance for conveyance of prisoner, as asked in this petition, was a matter of discretion upon the part of the county commissioners, then we submit that this discretion has been exercised with manifest injustice towards the petitioners: therefore, this court should intervene and see that equity is done. *Davis* v. *York*, 63 Maine, 397; *Belcher* v. *Treat*, 61 Maine, 577.

C. A. Bailey, county attorney, for respondents.

SITTING: EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

PETERS, C. J., being interested did not sit.

FOSTER, J. Petition for *mandamus* to compel the county commissioners of Penobscot county to allow and order paid from the county treasury a particular charge returned by the police officers of Bangor on sundry criminal processes served by them during the six months next preceding the first day of October, 1893.

The petition sets forth in substance that the city of Bangor keeps a patrol wagon for the use of its police department; that when making arrests of offenders its police officers use this patrol wagon to transport such offenders to the police station; that they return upon the warrants, upon which these arrests are made, fifty cents for the use of the wagon in each case where it is used; that this fifty cents belongs to the city of Bangor; that this charge is allowed by the municipal court of said city and certified by the clerk of that court to the county commissioners in all cases where the same is not paid in said court, and specifies three hundred and forty-six cases which were so certified during the six months mentioned, and that the same has been disallowed by the said commissioners. The petition further states that, in all of these cases, the officer making the arrest certified that a conveyance was necessary, and that the charge for this patrol wagon is a reasonable and proper charge, and that the same should be allowed by the commissioners as a reasonable expense incurred in the conveyance of prisoners, and prays that the commissioners shall be commanded to allow the city a reasonable sum for the conveyance of the prisoners, named in the list which is annexed, and that the sum be placed at fifty cents each.

There are several objections why this petition should not be granted. It is sufficient to mention a few only.

I. It does not follow because an officer deems a conveyance necessary and makes a charge therefor, that it is the duty of the county commissioners to pass upon it, notwithstanding the court issuing the warrant certifies to the same. It is only in

certain classes of cases, passing through such courts, that the costs under any circumstances are to be passed upon by the commissioners. This is plain from an examination of the statute in relation to such matters. R. S., c. 132, §§ 19, 20. But regardless of the limitation provided in the statute, the petition states that in all cases where the patrol wagon was used, and the costs, including this charge, were not paid to the municipal court, they were certified to the commissioners. In this list of three hundred and forty-six cases no discrimination has been made between those in relation to which the commissioners have a duty and those wherein they have none as declared in the sections of the statute referred to.

II. In *mandamus* proceedings it is a general rule that no specific relief can be granted except as prayed for, and that the mandate must be certain in relation to the duty required of the defendant. *Hartshorn* v. *Assessors of Ellsworth*, 60 Maine, 276; 2 Spelling Ex. Rem. § 1653.

This petition calls for a mandate which the respondents have no power fully to comply with, for it is apparent that a portion of the matters upon which the respondents, by the petition, are to be required to act, are not within the scope of their authority.

III. *Mandamus* is strictly a legal remedy, and not equitable, and the petitioner must show a legal right to have the act done which is sought by the writ.

What right, then, does the petitioner show to entitle it to this process?

Admitting that police officers within the city of Bangor have all the powers in criminal matters which deputy sheriffs have, and are entitled to the same fees, the statute expressly provides who is entitled not only to the fees, but "reasonable expenses incurred in the conveyance of any prisoner." This is the statute: "For the service of a warrant, the officer is entitled to fifty cents . . . and usual travel, with reasonable expenses incurred in the conveyance of each prisoner." R. S., c. 111, § 5.

It is the officer who serves the warrant who has a claim for the conveyance of prisoners. He alone by statute is the person legally entitled to any claim for "reasonable expenses incurred

in the conveyance" of prisoners. There is nothing in the petition to indicate in what way or manner the title to the fees and "reasonable expenses incurred" become vested in the city. But in this matter it nowhere appears that the officers, making the arrests specified, incurred any expense for which they are entitled to reimbursement.

IV. Even if the city were to be regarded as standing in the same relation to these matters as the officers who made the arrests, and if, furthermore, the respondents have power to act on all of them, the only claim set up is for "reasonable expenses incurred in the conveyance of prisoners," then this would be a matter for determination by the respondents upon all the facts in the case, by virtue of that provision of the statute already cited, which commits such matters to them for revision and correction. In that they would be acting in a judicial function. They are made the judges of what the reasonable expenses of conveying prisoners are, and the legislature has not seen fit to provide any appeal from their determination in such cases. It is a discretionary power.

The petition does not allege that the respondents refuse to act on the matters complained of, but expressly affirms that they have considered them and rendered judgment thereon. This court has power, in proper cases, to require an inferior tribunal to act,—to exercise its judgment and discretion,—but it has no power to direct what judgment it shall give. The application here is to overrule the action already taken and direct just what judgment these respondents shall enter in the premises in lieu of their own.

In *State* v. *Commissioners of Hamilton Co.* 26 Ohio St. 364, it was held that a mere averment that the commissioners refused to order a claim paid, does not sustain an application for *mandamus* to compel them to act, for if they had power to act, the presumption is they considered and rejected the claim. *A fortiori*, should this application be disallowed when it is affirmatively stated that they acted upon the claims and disallowed them.

Writ denied. Judgment for the respondents with costs.

ALDEN C. TAYLOR, and another,

vs.

MAINE CENTRAL RAILROAD COMPANY.

Kennebec. Opinion March 15, 1895.

Railroad. Common Carrier. Forwarder.

A railroad company, as common carrier, may contract to carry goods beyond as well as within the limits of its own line of road.

But where it is sought to extend the liability of the company beyond its own line, the burden is upon the party seeking to establish such liability to show an express contract by which the company became liable as common carrier beyond its own route.

Such contract must be shown by clear and satisfactory evidence.

It will not be inferred from loose language, or where the meaning of the contract is doubtful or uncertain.

The fact that the railroad company connects with other independent roads, and receives goods for transportation beyond the termination of its own line, will render it liable as a forwarder by the connecting line, but not as common carrier beyond its termination, in the absence of any special contract.

Nor will the mere receipt of freight charges over its own line, and also over the lines of connecting but independent roads to the place of destination of the goods shipped, establish a through contract rendering the company liable as common carrier beyond its own route.

ON REPORT.

The case is stated in the opinion.

S. S. Brown, for plaintiff.

The whole conduct of the defendant in its various officers shows that it was then understood that the defendant was responsible for the safe arrival of the apples. The New Hampshire court in the case of *Nashua Lock Co.* v. *Worcester & N. R. R. Co.* 48 N. H. 339, has stated the law applicable to this case with clearness and great force. The court say: "In the agreed case it is said the goods were received to be forwarded to the place of their destination, and from that phrase an argument is drawn that the agreement of the defendant was to forward to the next party in the line and not to carry through; but there was no express agreement in any particular terms and we are not called

upon to interpret the language used in any contract. The nature of the undertaking must be inferred from the facts stated in the agreed case. Even in a written contract where the term 'forwarded' is used, if the thing to be done belongs to the business of a carrier, he will be charged as such."

In *Wilcox* v. *Parnell*, 3 Sandf. 610, the court say: "The criticism of the defendant is not just. It applies to the whole distance as well as to the portions of the route where he employed his own means of transportation. He was to forward the goods to New York and not to Buffalo, which he now says was the terminus of his own immediate route. The words used by him can only mean that he was to carry or transport the goods; whether in his own vessels or by using those of others was perfectly immaterial. Defendant gave receipt saying goods should be forwarded per freight train to Chicago."

The testimony indicates that the transaction between the station agent and Taylor was in no way different from an ordinary instance of a party taking goods to a carrier and paying the carrier full rates over the entire route and taking a bill of lading or some document to show the receipt of the goods and the payment of the freight from the point of shipment to the point of destination.

Edmund F. Webb and Appleton Webb, for defendant.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. In December, 1892, the plaintiffs at Oakland shipped four carloads of apples on four different days, consigned to parties in Cincinnati, Ohio.

This action is brought to recover damages against the defendant as common carrier, occasioned by the apples freezing while in the course of their transportation from Oakland to Cincinnati.

The plaintiffs base their claim upon the ground that the defendant contracted to transport the apples from the place of shipment to Cincinnati. The defendant, however, claims that

while the apples were to be carried to Cincinnati, the contract was to carry them only over their own route to Portland and there deliver them to the Boston & Maine Railroad, and that having done that safely and in the usual time, their responsibility then and there terminated.

The defendant was an insurer over its own route. But it is agreed that the freezing did not occur on the defendant's line of road, but on some of the connecting lines.

Undoubtedly, a railway company may contract to carry goods beyond as well as within the limits of its own line of road. *Perkins* v. *P. S. & P. R. R. Co.* 47 Maine, 573. But where the liability of the company is sought to be extended beyond its own line, the burden is upon the party seeking to establish such liability, to show that there was an express contract by which the company became liable as common carrier beyond the limits of its own route. Otherwise the common carrier is liable as such only over the extent of its own route, and for safe storage and delivery to the next carrier. There being other independent connecting lines, each road is bound only, in the absence of any special contract, to carry safely over its own route, and safely deliver to the next connecting carrier. In the absence of a special contract to that effect, no such liability will attach. Nor will such agreement or contract be inferred from loose language, or where the meaning of the contract is doubtful or uncertain, but only from clear and satisfactory evidence. *Myrick* v. *Mich. Cent. R. R. Co.* 107 U. S. 102; *Burroughs* v. *Norwich & Worcester R. R. Co.* 100 Mass. 26.

In the case of *Myrick* v. *Mich. Cent. R. R. Co. supra*, the principle of law applicable in the conveyance of goods by successive carriers over connecting but independent lines of transportation, has been so clearly stated that it may well be repeated in this connection. The court say: "If the road of the company connects with other roads, and the goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, the next carrier on the route beyond.

This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it."

The plaintiffs seek to hold the defendant as a common carrier beyond the terminus of its line by virtue of the receipts or waybills given by the defendant to the plaintiffs at the time of shipment. These receipts contain charges for transportion from Oakland to Portland, and from Portland to Cincinnati. These charges are entered separately. Do these papers prove an express contract or undertaking on the part of the defendant to carry the property from Oakland to Cincinnati? That is the contention of the plaintiffs. The defendant claims otherwise.

We think these receipts do not constitute a special contract, rendering the defendant liable as common carrier of the goods beyond the limits of its own route. They are mere receipts in common use by all railroads. They contain no element of contract whatever, and impose upon the defendant no further obligation than the law itself imposed without them. There is no element in them rendering the defendant specially liable further than it would have been if no such receipts had been given. *Myrick* v. *Mich. Cent. R. R. Co.* 107 U. S. 102; *Nutting* v. *Connecticut River R. R. Co.* 1 Gray, 502. They are an acknowledgment by the defendant that it had received the apples, and pay for transportation to the end of its own line, and also from there to Cincinnati. The defendant's line was but one link in the chain of successive carriers over connecting but independent roads. The apples being "perishable" property, the rule of the company required the station agent to collect the freight from Portland to Cincinnati in advance. This fact of itself does not establish a through contract whereby the defendant would be liable as common carrier beyond its own route. *Myrick* v. *Mich. Cent. R. R. Co. supra*; *Washburn & Moen Mf'g Co.* v. *Prov. & Worcester R. R. Co.* 113 Mass. 490.

In the case last cited, the goods were delivered to the defendant at Worcester for transportion to New York, the defendant at the time of shipment receiving pay for transportation for the entire distance which covered connecting but independent lines. In an action to recover damages against the railroad company it was held that it was not liable as a common carrier beyond the end of its road, and the court say: "If the entire freight money were paid in advance, yet in the absence of any contract by the first carrier to be responsible for the entire distance, he would be considered as receiving it, in part for his own share of the service, and as agent for the next carrier in the series for the residue."

With this view of the case, it becomes unnecessary to consider the further ground of defense set up, and concerning which the evidence is more or less conflicting, viz.: That at the time of delivery and shipment there was a special contract in the form of what is denominated a "release," executed by the defendant and accepted by the plaintiffs, in which it was expressly provided that the defendant was to be bound as common carrier only over its own line, and that it was not to be held liable for any damages arising to the property after the same should have left its possession.

In accordance with the stipulation in the report of this case, the entry must be,

Plaintiffs nonsuit.

FRED W. OSBORNE

vs.

CANADIAN PACIFIC RAILWAY COMPANY.

Aroostook. Opinion March 15, 1895.

Railroads. Fences. Improved Lands. R. S., c. 51, § 36.

By R. S., c. 51, § 36, railroads are required to make legal sufficient fences along the line of their location, where the road passes through "inclosed or improved land."

The plaintiff's house lot is situated in the village of Fort Fairfield where the railroad runs along between and parallel with Main street and the river, in the rear of the plaintiff's buildings. The lot extends back about nine rods to the river, and is not inclosed on either side, and no part of it is cultivated as a garden, but was a village residence-lot occupied by the plaintiff with dwelling-house and appurtenances, with a barn on that part between the street and the railroad. A portion of the barn was within the railroad location.

Held; that this was "improved land" within the meaning of R. S., c. 51, § 36, and the railroad company was bound to fence along the line of the road passing through the same.

On exceptions.

This was an action to recover the value of two swine of the plaintiff, killed by the train of the defendant company on its railroad track in Fort Fairfield. In one count, the plaintiff alleged the want of a fence on the line of the location of the defendant's railroad across the plaintiff's land; and it was a material question at the trial, whether the defendant company was bound to maintain a fence there. The jury returned a verdict for the plaintiff.

The place was in a thickly-settled part of the village of Fort Fairfield, where the railroad runs along for some distance between and parallel with Main street and Aroostook river. The distance from the street to the river is about nine rods, and from the street to the railroad track is about six rods. The plaintiff's lot extended from the street to the river, subject to the location of the defendant's railroad across the lot. The lot from the street to the railroad track was forty-six feet wide between the side lines. The track of the railroad was several feet above the natural surface of the land. The lot was not inclosed on either side, and no part of it was cultivated as a garden or farm, but was a village residence-lot occupied by the plaintiff with dwelling-house and appurtenances, including a barn on that part between the street and the railroad. The barn, under which the plaintiff's swine were kept, was eight feet from one side line of the lot, and two feet from the other. One corner of the barn was seven feet, and the other corner ten feet, from the nearest rail of the track.

There were other similar uninclosed residence lots, with similar buildings on the same side of the street, above and below the plaintiff's lot. The railroad crossed these other lots. There were also several ways or paths in the near neighborhood leading from the street to the railroad track and, about ten rods above the plaintiff's lot, was a cross-street crossing the railroad and the river.

The section foreman of defendant testified that he notified the plaintiff at the time of building the barn, that it was within the railroad location. The foreman also testified that a fence across the plaintiff's lot would impede the operation of snow-plows in clearing the track.

The swine were found by the jury to have passed directly from the barn across the line of the railroad location to the track.

Upon the foregoing evidence, the presiding justice ruled, as matter of law, that the plaintiff's land between the street and the railroad was "improved land" within the meaning of the statute, and that the defendant company was bound to maintain a fence across it, upon the line of the location. To this ruling the defendant seasonably excepted. The verdict being for the plaintiff the defendant took exceptions.

J. B. Trafton and H. W. Trafton, for plaintiff.

Louis C. Stearns, for defendant.

Railroads are not responsible for damages to domestic animals arising from want of a fence at points which do not admit of being properly fenced. 1 Redf. Rys. p. 515; *Tol. & Wabash Ry Co.* v. *Daniels*, 21 Ind. 256; *I. P. & C. Ry. Co.* v. *Truitt*, 24 Ind. 162; *Ill. Cent. Ry. Co.* v. *Williams*, 27 Ill. 48; *Perkins* v. *East. R. R. Co.* 29 Maine, 307.

The statute cannot require an impracticability. There must be exceptions to its application, if its application would prevent the proper and convenient discharge of the railway's public obligations and the exercise of its chartered and legal rights.

It cannot be required to fence out the public, to serve which is the purpose and object of its creation. Its depot grounds and sidings cannot be fenced and yet the statute contains no

exceptions as to them. It cannot be required to fence so as to impede the running of trains.

If the plaintiff's land be considered improved within the statute's meaning, it must fall within the exception, if there be an exception, because fencing against it would have been useless, for defendant could not fence across the highway and different roads and passageways contiguous to it, because it would have interfered with the discharge of defendant's functions as appears from the testimony of a witness that the fence would impede the running of a snow-plow necessary to clear the track of winters' snows.

SITTING: PETERS, C. J., FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. The statute (R. S., c. 51, § 36,) is explicit, requiring railroad corporations to make legal and sufficient fences, and to maintain and keep them in good repair, along the line of their location, where the road passes through "inclosed or improved land."

The only question presented by the exceptions is whether the plaintiff's land between the street and the railroad is "improved land" within the meaning of the statute. If it is, the defendant is bound to fence it, and the defense fails. *Norris* v. *Androscoggin R. R. Co.* 39 Maine, 273.

The plaintiff's house lot is situated in the thickly-settled part of the village of Fort Fairfield where the railroad runs along between and parallel with Main street and the river, and in the rear of the plaintiff's buildings. The lot is forty-six feet wide on the street, and extends back to the river, a distance of about nine rods. The lot was not inclosed on either side, and no part of it cultivated as a garden, but was a village residence-lot occupied by the plaintiff with dwelling-house and appurtenances, and a barn on that part between the street and the railroad. The barn under which the plaintiff's swine were kept, and for the killing which this action was brought, was eight feet from one side line of the lot, and two feet from the other. A portion of the barn, as the case discloses, was within the railroad location.

We have no doubt that this was "improved land" within the meaning of the statute.

"Improved" is not a technical word having a precise legal meaning, when applied to real estate, but may mean land that is occupied. Bouvier, "Improve." As generally understood, "improved land" is that which is occupied, or made better by care or cultivation, or which is employed for advantage. Webster, "Improve." *Wilder* v. *M. C. R. R. Co.* 65 Maine, 332, 339.

Land uninclosed and used as a mill-yard was held, in the case last cited, to be "improved land." *A fortiori*, the land in question, appurtenant to a dwelling-house and barn, is improved land within the meaning of the statute. *Exceptions overruled.*

THOMAS JENNESS, and another, *vs.* J. HENRY WHARFF, CITY OF BANGOR, Trustee, and F. O. BEAL, Claimant.

Penobscot. Opinion, March 15, 1895.

Trustee Process. Order. Attachment. Assignment. R. S., c. 32, § 10.

A trustee process is in substance an equitable proceeding for the settlement of the ownership of a fund, especially when a claimant appears and becomes a party to the proceeding, although arising in an action at law.

The principal defendant gave an order of the following tenor to the claimant in this trustee suit: "Bangor, June 29, 1893. City Treasurer of Bangor, Maine. Please pay to F. O. Beal $73 and charge the same to my account. J. Henry Wharff." This order was carried directly to the city treasurer who was asked if he would accept it. The treasurer replied that he would when it was allowed by the city government. Subsequently this suit was brought.

The disclosure of the city treasurer shows that he delivered the order to the claimant after the commencement of this suit, and the day after it was allowed by the city council; and at that time he wrote upon the back thereof the following acceptance: "Bangor, August 9, 1893. Accepted for balance of money due on the within order after paying the amount of trustee suit in favor of T. Jenness & Son."

Held; that the fund belonged to the claimant by the order and acceptance, as against a subsequent attaching creditor.

ON EXCEPTIONS.

The case is stated in the opinion.

A. J. Merrill, for plaintiffs.

There was no written acceptance. R. S., c. 32, § 10.

An unaccepted bill or draft payable generally, and not drawn upon a particular fund, is not a valid assignment of the fund, and creates no liability upon the drawee and no lien in favor of the payee. Am. and Eng. Ency. of Law. (Assign.) An unaccepted order for part of a fund alleged to be due the drawer does not operate as a legal or equitable transfer of the amount therein called for, nor does it constitute a lien on such fund, and hence it is unavailing against a subsequent garnishment of the fund by a creditor of the drawer. *Missouri Pacific R. R. Co.* v. *Wright*, 38 Mo. 142; Am. & Eng. Ency. of Law. (Orders.) To constitute an assignment the order must be drawn upon a particular fund. It is not enough that it is drawn upon a debtor by a creditor in general terms. *Exchange Bank* v. *McLoon*, 73 Maine, 511; *Gibson* v. *Cooke*, 20 Pick. 15; *Kingman* v. *Perkins*, 105 Mass. 111; *Whitney* v. *Eliot Nat. Bank*, 137 Mass. 351; *Hall* v. *Flanders*, 83 Maine, 243.

A general order cannot operate as an assignment. Even a check drawn against a fund deposited in a bank is not deemed an assignment in an action at law. *Hall* v. *Flanders*, 83 Maine, 243, and cases cited.

In order to constitute an assignment, the particular fund from which the order is to be paid, must be specified. If the order is general in form, it will not make it an assignment that there was but one fund in hands of debtor, or that there were circumstances showing intent to charge that fund. Story's Equity Juris. § 1047, note (a); *Hatter* v. *Ellwanger*, 4 Lans. (N. Y.) 8; *Lunt* v. *Bank of N. America*, 49 Barb. 221.

The burden rests upon the claimant to establish his claim. *Thompson* v. *Reed*, 77 Maine, 425; *Haynes* v. *Thompson*, 80 Maine, 128.

H. L. Mitchell, for claimant.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. This is a trustee suit. The real question is whether the funds disclosed belong to the claimant, who has become a party to the suit for the purpose of asserting his claim, or to the plaintiff who has attached them in the hands of the trustee. Our conclusion is that they belong to the claimant.

While it is true that the burden rests upon the claimant to establish his claim to the funds, and that the assertion of his claim is an equitable interference to defeat a right which the plaintiff might otherwise have, yet as between these parties we think the claimant is entitled to the funds upon legal as well as upon equitable grounds.

The city of Bangor, the trustee, owed the principal defendant for services, the sum of seventy-two dollars. After the services had been performed, the defendant went to the claimant and stated that he was in need of money, and requested him to let him have the money for his bill against the city. Thereupon the claimant let him have seventy-three dollars, and, as he says, "bought the claim against this city," receiving from the defendant the following order:

"Bangor, June 29, 1893.

City Treasurer of Bangor, Maine.

Please pay F. O. Beal seventy-three dollars and charge the same to my account. J. Henry Wharff."

The claimant carried this order directly to the city treasurer and handed it to him and asked him if he would accept it. The treasurer took it, read it and said he would, and would pay it when it was allowed by the city government.

Subsequently this suit was brought, and the money has not been paid.

The treasurer in his disclosure agrees in reference to the material facts with the claimant, but says in addition that he delivered the order to Mr. Beal after the commencement of this suit, and the day after it was allowed by the city council, and at that time wrote his acceptance upon the order in these words: "Bangor, August 9, 1893. Accepted for balance of money due on the within order after paying the amount of trustee suit in favor of T. Jenness & Son."

This suit is not against the treasurer, or the city, as acceptor of the order, and therefore the rule in relation to what is necessary in order to charge one as an acceptor of a draft, or written order, as stated in *Hall* v. *Flanders*, 83 Maine, 242, does not apply. The suit is in substance an equitable proceeding for the settlement of the ownership of a fund, especially since a claimant to the fund has appeared and become party to the proceeding, though arising in an action at law. *White* v. *Kilgore*, 77 Maine, 571; *Exchange Bank* v. *McLoon*, 73 Maine, 498. "As between the plaintiff and claimant, equitable considerations must prevail so far as the nature of the process will admit." *Haynes* v. *Thompson*, 80 Maine, 125, 129.

It does not appear that the city was owing the defendant any other bill. The order which the defendant gave to the claimant was not for a portion, but really for a slight amount more than was due him. It could relate to no other bill than that due from the city to the defendant. The claimant paid full consideration for the same, and at the same time took the order of the defendant authorizing and directing the payment of the money to the claimant. This may properly be regarded as a sufficient assignment of the fund; and when the claimant carried it and delivered it to the treasurer he did all that was necessary to protect his rights as against a subsequent attaching creditor. *Kingman* v. *Perkins*, 105 Mass. 111. *Exceptions overruled.*

ELIZA G. HAMLIN, and another, *vs.* CHARLES P. TREAT.

Piscataquis. Opinion March 15, 1895.

Exceptions. Charge to Jury. Expression of opinion. R. S., c. 82, § 83.

A bill of exceptions, comprising five printed pages, and embracing more than one-half the entire charge of the presiding justice, is irregular, and will not be sanctioned by this court.

Nor is it any infringement of the statute (R. S., c. 82, § 83) which prohibits the expression of opinion by the presiding justice upon issues of fact, because he calls the attention of the jury to the different positions and contentions of the parties.

It is proper for him to state, analyze, compare and explain the evidence in a case.

ON EXCEPTIONS.

This was an action of assumpsit upon account annexed to recover $890.60, alleged to be the aggregate of certain bills for boarding certain railroad men, and certain supplies delivered the same men, while boarding and working upon the railroad.

The plaintiffs claimed that the defendant came to the tent or camp of the plaintiffs and made there with the plaintiffs an express contract that the plaintiffs should furnish board and supplies to men working for certain contractors, called Tucker Brothers, and keep certain accounts or records of said board and supplies, and he, the defendant, would pay the amount so furnished. The defendant denied the contract. The plea was the general issue and a brief statement, pleading the statute of frauds. The verdict was for the plaintiffs for the full amount claimed.

The presiding justice, beside other instructions to the jury, gave instructions and rulings, which the defendant claims were expressions of opinion.

The view taken by the law court renders a full report of the exceptions unnecessary. A few sentences are, however, subjoined.

"Now, both sides rely upon circumstances which, they contend corroborate the positions respectively taken by the one side and the other."

"The plaintiffs say: 'There are certain circumstances that corroborate us, leading you to believe that our main statements are true.' On the other hand, the defendants say that the circumstances must show you that the main statements are not true. I shall not go minutely into these specifications, but shall allude to several salient things most relied upon, and I will reverse the order. I will speak of the contentions of the defense first, as perhaps coming in more naturally in the argumentation.

"The defense contends, in the first place, that the idea of such a bargain as the plaintiffs claim and rely upon is inconsistent with the situation of the parties, and the situation of things at the time when it was alleged that this contract was verbally entered into. It is contended by the defense that these plaintiffs when they went upon the ground, when they arranged for

their structures and conveniences for boarding-house keeping, had no knowledge that the defendant was coming there upon the ground; that they were there not communicating with him in the first place, but with the sub-contractors under the defendant, the Tucker Brothers; and that the plaintiffs went there with the idea of boarding men for the Tucker Brothers, who were to have a contract with the defendant, entertained for a time even before the contract was signed.

"And the defense thinks there is more force in this thing from the fact that the plaintiffs were related to one of the sub-contractors, and that the plaintiffs must have gone there with different expectations than to secure a contract with the defendant, or to attempt to hold him for these bills.

"In answer to that, the position of the plaintiffs is,—if not by themselves so said, by their counsel argued,—that they went there under general expectations, under hope of expectations, under some uncertainties, seeking to make the uncertainties certain, and when the defendant appeared there they struck a contract with him in clear terms; and, though there could be no question from that time onward under that promise and contract, there might be a question as to how far the defendant would be liable for bills, already made, for credits already given, for boarding already had. But it does not occur on this bill, because that would be applicable to July and this bill is only for August. Still the condition of things there and the situation of the parties are serviceable, as to the conduct and situation of the parties, in what you believe finally occurred and took place.

"Now, the defense says it is unnatural and inconsistent, in the condition of things, to believe that this alleged contract was made. That is, that the position of things there is an argument against it, and the plaintiffs argued that it is not, and that if there is any force in that fact, it is fully overpowered by the strong testimony of the witnesses on the direct question of the contract between the parties. The plaintiffs rely upon the fact that the defendant through his paymaster and private clerk or secretary, paid the July bill or bills to the plaintiffs, arguing that you may infer that if they were to pay or even did pay

the July bills, that they were to pay and should pay the August bills. But the defense turns the same circumstances, as they contend, to their account even more strongly than the plaintiffs assert it in their behalf, in this way. They say: 'We paid the bills to you,—the July bills,—but we paid it on an order or orders from the Tucker Brothers. We did not pay it to you because we owed it to you, but we paid it because the Tucker Brothers, for whom you were really boarding these men, upon written orders requested us to do so,' the defendant presenting two orders with her indorsements being on the back of the instruments then in the possession of the defendant, who filed them away. Now, the defense says: 'You can see by this the logical meaning of this transaction, that these women were supplying this board to the men for the Tucker Brothers, expecting the Tucker Brothers to pay; giving the credit to the Tucker Brothers, but with the hope of, and expecting to get their pay from us in our paying the Tucker Brothers.' But the plaintiffs, on the other hand, contend that that was a mere piece of machinery got up by the defendants themselves, to keep satisfactory records of the transaction between the defendant and the Tucker Brothers, and that it cannot be regarded as an admission or confession on the part of the plaintiffs in the direction as contended by the defense. In furtherance of that view, they rely upon the evidence of the witnesses, that there was really a receipt taken directly to the defendant from these plaintiffs. The defendant knows nothing about it, and the other witness, his paymaster, says he knew nothing about it and he took no such receipt; but, the plaintiff says he did, and counsel for the plaintiff relies upon the evidence about it and contends that the circumstance does not amount to much, and whatever it amounts to, it has not force enough to stand up against the direct evidence in the case.

"Now, the defense, in their arguments to you, contend that the defendant had no motive to make this contract with the plaintiffs; that there was no purpose and object in his doing so; that there was no reason why he should do so, because his contract was with his sub-contractors. He was to pay them so much money for so much work and it would not be material to him

and it would not be reasonable to expect him to make any promise to pay the bills contracted by such sub-contractors. Give that such force as it strikes upon your minds." . . .

Henry Hudson, for plaintiffs.

M. W. McIntosh and Ira G. Hersey, for defendant.

Counsel cited: R. S., c. 82, § 83; *Clough* v. *Whitcomb*, 105 Mass. 482; *Dodge* v. *Emerson*, 131 Mass. 467.

The only question properly to be submitted to the jury was the question whether or not there was an original promise and undertaking on the part of the defendant to pay the claim of the plaintiffs.

If the jury found that there was not an original promise on the part of the defendant, that would be the end of the plaintiffs' case, and the jury should have been so instructed.

If the jury found that there was an original promise, then the defendant must pay the plaintiffs and that sum so paid could not be recovered from the Tucker Brothers, as it would not be an indebtedness growing out of the contract. Tucker Brothers not being liable for the board and supply bill, the defendant, Treat, could not make the Tucker Brothers pay the bill to him if he paid the bill to the plaintiffs, and the jury should have been so instructed.

Tucker Brothers were sub-contractors of the defendant and not defendant's agents. The defendant under his contract with Tucker Brothers never undertook to pay the entire labor bill or any part of it; his contract with Tucker Brothers was to pay them a certain sum of money for certain work performed and not a single laborer could maintain an action for his labor against the defendant.

Neither under any other right did defendant undertake to pay the labor of the men hired by Tucker Brothers, and there is no evidence in the case that he so made himself liable at any time.

By paying the claim of the plaintiffs without an order from Tucker Brothers the defendant would not have less to pay Tucker Brothers, as Tucker Brothers were not liable for the board of the men; and they being not liable the defendant could

not recover the amount paid plaintiffs from Tucker Brothers, as it was not an indebtedness growing out of contract.

The jury must have understood from the rulings, instructions and opinions of the presiding judge as set forth in the bill of exceptions, that the defendant was liable to pay the wages of the men; that he had undertaken to pay the entire labor bill; that by paying the claim of the plaintiffs he would be paying his own indebtedness; that he had received the benefit of all the labor, of all the board and supplies furnished by the plaintiffs and that having had the benefit, he should pay. Such instructions, rulings and opinions were a wrong to the defendant.

SITTING: EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. The defendant presents a general bill of exceptions, comprising five printed pages, and embracing more than one half the entire charge, and claims that there was an expression of opinion by the presiding justice upon issues of fact in violation of R. S., c. 82, § 83.

This is the only point raised by the exceptions.

It is unnecessary to say that this method of spreading out a whole charge, or even to the extent as disclosed in this case, is not countenanced by the court, and were we to consider the exceptions in reference to this mode of practice they would fall within that class of cases which characterize such a bill of exceptions as irregular. *Harriman* v. *Sanger*, 67 Maine, 442, 445; *Webber* v. *Dunn*, 71 Maine, 331, 339; *Mackintosh* v. *Bartlett*, 67 Maine, 130; *McKown* v. *Powers*, 86 Maine, 291.

But passing over the irregularity of the exceptions, there is nothing contained in the charge of the presiding justice that infringes upon the statute in question. The justice called the attention of the jury to the different positions and contentions of the parties, as it was his duty to do; but that he expressed, or even intimated, any opinion in relation to the facts or issues involved, has no foundation in fact. He might properly state, analyze, compare and explain the evidence, and there is nothing

which shows that he did more than that. This court in recent decisions has had occasion to define the limits of the official power and duty of the judge presiding in calling the attention of the jury to the evidence before them, and in analyzing, comparing and explaining it. *State* v. *Day*, 79 Maine, 120, 124; *York* v. *Maine Central Railroad Co.* 84 Maine, 117, 128.

Exceptions overruled.

SPRAGUE ADAMS, and others, *vs.* ISAAC CLAPP.

Piscataquis. Opinion March 15, 1895.

Real Action. Disseizin. Adverse Use. R. S., c. 105, § 10.

The object of the statute in relation to what may be considered sufficient evidence of disseizin (R. S., c. 105, § 10) was to modify the strict rules of the common law in relation to disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, by dispensing with the necessity of fences or other obstructions, and rendering possession and occupancy sufficient evidence of an adverse intent of a party holding it, in the absence of other testimony controlling its true nature if the possession, occupation and improvement are open, notorious, and comporting with the ordinary management of a farm, "although that part of the same which composes the wood-land, belonging to such farm and used herewith as a wood-lot, is not so inclosed."

The final clause of this statute was intended to apply to a case where the disseizor is occupying and using a wood-lot in connection with land on a farm which he is also occupying and using adversely.

It was not intended to apply to a case where a person enters upon land of which he holds title, and all his visible acts of ownership are done upon that land, and thereby acquire title to a tract of wood-land, although it may lie contiguous to such land.

It must be a part of the farm adversely occupied in order for the statute to apply.

ON MOTION AND EXCEPTIONS.

This was a real action to recover a small piece of land situate on the western shore of Schoodic lake in Piscataquis county. The plaintiffs derived their title from the Commonwealth of Massachusetts through *mesne* conveyances. The *locus* is a part of township four, range eight, north of Waldo patent. The defendant claimed title by adverse possession.

The jury returned a verdict for the defendant, and the plaintiffs filed a general motion for a new trial and also took exceptions to a part of the charge given to the jury by the presiding justice.

The material facts will be found in the opinion. The law court did not consider the motion, and arguments of counsel on the motion are, for that reason, omitted.

Henry Hudson and C. A. Bailey, for plaintiffs.

J. B. Peaks and M. W. McIntosh, for defendant.

When Howard took this deed running to the shore of the lake, and went into possession of that portion west of the town line. it could not be construed as adverse possession of that portion east of the town line, owned by other parties. But if he occupied any portion of the part east of the town line, that occupation would be construed as occupation of all that portion east of the town line, embraced in the deed.

And the jury have found under the instruction of the court, that Howard occupied this piece of land east of the town line, and between that and the lake, for more than twenty years, as a part of his farm, or as a wood lot connected with the farm. The evidence was for the jury, and the court will not set aside a verdict in favor of adverse possession, where there was evidence on both sides to be submitted to the jury.

The court held in *Otis* v. *Moulton*, 20 Maine, 205, that it was not necessary that he should be occupying the whole farm adversely, if he owned it all except this small strip, and he occupied that adversely because he was occupying it as a part of the farm which he owned.

If a man can occupy adversely, a two-rod strip of land on the back end of his farm, which he does not own, and connected with the farm which he does own, so as to obtain a title to the two-rod strip, as was held in *Otis* v. *Moulton*, why can he not occupy adversely. a two-rod strip of wood-land, connected with a wood-lot which he does own and occupy, connected with his farms?

The case at bar is the same in all its aspects as the case of *Otis* v. *Moulton*. In each case the party with a recorded title was occupying land outside of the limits of the township, under a deed from the grantor who owned a township, and had conveyed land beyond the limits.

And in both cases the parties were occupying the land outside of the limits of the township by adverse possession. And the only possible difference in the two cases is that, in the case at bar, the defendant was occupying adversely a portion of the wood-lot connected with the farm; and in *Otis* v. *Moulton*, it is assumed that the defendant was occupying a portion of the cultivated land.

Howard's deed of land went to the shore of the lake; and there are cases which hold that where a man enters into possession of a parcel of land, under a recorded deed, and occupies any portion of the land described in the deed, that occupation is evidence of disseizin of all the land described in the deed. *Props. &c.* v. *Laboree*, 2 Maine, 286; *Foxcroft* v. *Barnes*, 29 Maine, 128; *Putnam School* v. *Fisher*, 34 Maine, 172.

SITTING: EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. Fifty years ago, a predecessor in title to the defendant purchased a tract of land containing about sixty acres, described as lying in the town of Brownville, in the county of Piscataquis, and bounded on the east by the shore of Schoodic Lake. Instead of the east line of Brownville being on the shore of the lake, it was in fact three or four rods west of the shore of Schoodic Lake, thereby leaving a strip of land along the westerly shore about three rods in width by eighteen in length, lying in another township. That is the subject of this controversy.

The title to this small strip was not in the grantor at the time of the conveyance, and consequently did not pass to the defendant's predecessor although embraced within the boundaries of his deed.

The plaintiffs have a record title to this strip of land which is described in their writ, and lying between the east line of the

town of Brownville and the shore of the lake. The defendant has a record title to all of the sixty acre purchase which lies within the town of Brownville.

The defendant claims title to the strip in controversy by disseizin.

The jury found for the defendant, and the case comes to this court on exceptions and a motion to set aside the verdict.

For a clearer understanding of the position which the parties assume upon the questions involved, it may be stated in general terms, that Daniel Howard, whom we have mentioned as the defendant's predecessor in title, cleared and cultivated the westerly half part of this sixty acre purchase, and built a barn on the west side of the lot which was occupied by him while he lived in Brownville, and that he built a log house on the same side of the lot and lived in it for some years, and after that in a house built on a lot just west of and adjacent to his lot; that the cleared land, consisting of field and pasture, extended about one half the distance from his west line to the shore of the lake; then there was a strip of wood-land of about sixty to one hundred rods in width between the cleared land and the town line of Brownville; then adjoining that came the strip in controversy of about three rods in width which was also woods.

At the trial, the plaintiffs contended that as the defendant's predecessors in title occupied and were in possession of the land west of and adjacent to the piece of wood-land in dispute as owners thereof under a good title, they could not acquire title to a piece of wood-land by disseizin even by actual occupation of cleared land and wood-land adjacent thereto, unless the land so actually occupied was occupied adversely, and that § 10, c. 105, R. S., does not apply to this piece of land in question.

That statute reads thus: "To constitute a disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences or rendered inaccessible by water; but it is sufficent, if the possession, occupation, and improvement are open, notorious, and comporting with the ordinary management of a farm; although that part of the same, which

composes the wood-land belonging to such farm and used therewith as a wood-lot, is not so inclosed."

The court ruled otherwise than as claimed by the plaintiffs, saying: "If I should give the ruling which the plaintiffs desire, it would take the case away from you, therefore I am going to rule the other way, and I am going to say and rule that the defendant, if the facts justify it, may come within the principle of that exception read to you from the statute, although he himself owned his field, and owned his pasture, and owned wood-land in connection with it, providing this land in dispute, being also a wood-lot, he also held and used, occupied as a wood-lot, in connection with his other property. I am not sure, at all, that I am right in my ruling, but you are to take it and accept it as right."

We feel that, by this instruction, too broad a construction was given to the terms of a statute which was enacted for the purpose of extending the doctrine of constructive disseizin by a disseizor in possession without claim of title. We think that the final clause of the section referred to was made and intended to apply to a case where the disseizor was occupying and using a wood-lot in connection with land or a farm which he was also occupying and using adversely; and that it was not intended to apply to a case where a person enters upon land of which he holds title, and all his visible acts of ownership are done upon that land, and thereby acquire title to a tract of wood-land although it may be contiguous to such land. It could not have been the intention of this statute to extend the doctrine of constructive disseizin thus far so as to acquire title to wood-land, or such as may be used as a wood-lot, unless it be a part of the farm which is occupied and used adversely. The language of the statute is not to be extended beyond its plain and obvious meaning. The object of this statute was to modify the strict rules of the common law in relation to disseizin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, by dispensing with the necessity of fences, or other obstructions, and rendering possession and occupancy sufficient evidence of an adverse

intent of the party holding it, (in the absence of other testimony establishing its true nature) if the possession, occupation and improvement are open, notorious, and comporting with the ordinary management of a farm," although that *part of the same*, which composes the woodland *belonging to such farm* and used therewith as a wood-lot, is not so inclosed."

While the statute in question in terms obviates the necessity of fences, and provides what shall be deemed sufficient evidence of the adverse intent of the party holding it, it also extends this constructive disseizin or adverse character of the possession to that part of the land or farm which is a "part of the same" and which "composes the wood-land belonging to such farm and used therewith as a wood-lot." So that if a person is occupying a farm and in connection with it a wood-lot, used as such, although not inclosed with fences, it being an appendage to the farm, the benefit of this principle is extended to him.

But the statute does not, either in express terms or by implication, extend this doctrine of constructive disseizin to wood-land unless it is a part of the farm thus adversely occupied and used in connection with it as a wood-lot.

Where it is no part of the farm adversely occupied,— where the title to the farm is in the person occupying and in possession of it,—then, although such wood-land may lie contiguous to it, in order to acquire title to such wood-land, there must be such actual use and occupation of it, and of such unequivocal character, as will reasonably indicate to the owner visiting the premises during the statutory period, that instead of such use and occupation suggesting only occasional trespasses, they unmistakably indicate an asserted exclusive appropriation and ownership. The acts must be such as to leave no reason to inquire about intention, so notorious that the owner may be presumed to have knowledge that the occupancy is adverse. This is the common-law doctrine in relation to disseizin as settled by numerous decisions. *Worcester* v. *Lord*, 56 Maine, 265, 269; *Roberts* v. *Richards*, 84 Maine, 1, 10; *Morse* v. *Williams*, 62 Maine, 446; *Tilton* v. *Hunter*, 24 Maine, 29, 32; *Prop. Ken. Purchase* v. *Laboree*, 2 Maine, 275, 286, 287, 288.

The law does not to undertake to determine what particular acts of occupation are necessary in order to acquire a title by adverse possession. *Eastern R. R.* v. *Allen*, 135 Mass. 13, 16. Every case must be decided by its own peculiar circumstances.

This land in controversy was wild and uncultivated, and although it lay contiguous to the defendant's farm, it was not a "part of the same."

The error in the ruling consisted in applying the statute where the common-law doctrine of adverse possession should have been given. The jury might well find that there had been a possession sufficient to vest a title in the defendant, and his predecessors in title, under the statute, while insufficient by the doctrine of the common law. See *Brackett* v. *Persons Unknown*, 53 Maine, 228, 232; *Prop. Ken. Pur.* v. *Laboree*, *supra*.

As this question becomes vital to the decision of the case, it is unnecessary to consider the other positions of counsel, or the motion to set aside the verdict. *Exceptions sustained.*

COLIN MCKENZIE *vs.* JOHN B. REDMAN.

Hancock. Opinion March 15, 1895.

Insolvent. Exemptions. Waiver. Estoppel.

Where an insolvent debtor pointed out to the assignee two wagons as a part of his estate and refused upon request of his assignee to select which one he would retain, but claimed to be entitled to both, and the assignee relied upon his acts and representations, and from them understood that the two wagons were the property of the estate, and thereupon took the wagon in suit, leaving the other as exempt, then the debtor would be estopped by his acts and representations from maintaining a suit for the wagon taken by the assignee.

ON MOTION.

The case appears in the opinion.

Hale and Hamlin, for plaintiff.

A. W. King, for defendant.

SITTING: PETERS, C. J., FOSTER, WHITEHOUSE, STROUT, JJ. EMERY, and WISWELL, JJ., being interested, did not sit.

FOSTER, J. Replevin by an insolvent against his assignee for a double two-horse team wagon. The wagon was owned by the plaintiff when he went into insolvency. He claims it as exempt under the statute.

There was evidence tending to prove that the plaintiff had two wagons and pointed both out to the assignee as belonging to him. The assignee testified that he told the plaintiff he could keep one, and requested him to make his selection, but that he refused so to do, saying that he thought he was entitled to both. On this point the evidence is conflicting, but the jury by their verdict have found in accordance with the defendant's position.

If the plaintiff pointed out these wagons to the assignee as a part of his estate, as claimed in defense, and refused, upon request by the assignee, to select which one he would retain, but claimed to be entitled to both, and the assignee relied upon his acts and representations, and from them understood that the two wagons were the property of the estate, and thereupon took the wagon in suit, leaving the other as exempt, then the plaintiff would be estopped by his acts and representations from maintaining this suit. The exemption provided by statute is for the benefit of the insolvent, and the right of election is in him. But if he would avail himself of this right, it is his duty to signify his election when requested by the assignee so to do; otherwise he will be deemed to have waived his right, and the law through the acts of the assignee, makes it for him. A party may waive a statute made for his benefit. It is analogous in principle to cases where there has been an attachment of property which a debtor has a right to claim as exempt, but which, either by his consent or a waiver of his privilege, he has allowed to be applied to the payment of his debts.

This principle is fully illustrated in the following cases, a reference to which is all that is necessary: *Smith* v. *Chadwick*, 51 Maine, 515; *Smith* v. *Morrill*, 56 Maine 566; *Colson* v.

Wilson, 58 Maine, 416; *Shumway* v. *Rutter*, 8 Pick. 447; *Dow* v. *Cheney*, 103 Mass. 181.

There was evidence upon which the jury were warranted in the conclusion reached by them. They were the judges of the facts, and we perceive no reason for disturbing the verdict.

Motion overruled.

THOMAS R. PHILLIPS, administrator,

vs.

PERLEY J. PHILLIPS, and another.

Hancock. Opinion March 15, 1895.

Prom. Note. Payment. Funeral Expenses. R. S., c. 64, § 37.

Where suit is brought by an administrator upon a promissory note given to the deceased intestate, and the defense set up is, that nothing is due upon the note,— that sums of money had been paid amounting to more than the note since the death of the intestate, under such circumstances that the estate was liable to reimburse them,— a direction by the court for judgment for the full amount of the note will not be sustained, if any one of the items set up in defense should have been allowed in reduction of the note.

The law pledges the credit of the estate of the deceased for a decent burial immediately after the decease, and for such reasonable sums as may be necessary for that purpose, even though such expenses may have been incurred after the death and before the appointment of an administrator.

ON EXCEPTIONS.

The case appears in the opinion.

A. W. King, for plaintiff.

F. L. Mason, for defendants.

SITTING: PETERS, C. J., FOSTER, WHITEHOUSE, STROUT, JJ.

FOSTER, J. Suit by an administrator on a promissory note for two hundred dollars, dated November 21, 1889, signed by the defendants and running to the plaintiff's intestate.

The defense claimed there was nothing due upon the note — that certain sums of money, amounting to two hundred and eighty-seven dollars, had been paid since the death of the intestate under such circumstances that the estate was liable to reimburse them therefor.

At the conclusion of the evidence, the presiding justice ruled that the evidence for the defendants did not establish a defense, and directed a verdict for the amount of the note.

If there was any one of the items for which the defendants were legally entitled to be reimbursed, the ruling cannot be sustained.

Most of the items going to make up the two hundred and eighty-seven dollars were never paid, or if paid, were paid since the appointment of the plaintiff as administrator, and therefore, in the absence of any request on the part of the plaintiff for such payment, cannot be allowed in reduction of the note in suit. But we think the item of nineteen dollars paid to Arno Hooper for grave, singers, box for casket, and six dollars paid to Edward Saunders for carrying the corpse to Dedham for interment, must be regarded as a legal and just claim against the estate, and therefore should have been allowed upon the note. The evidence shows that they were paid before the appointment of an administrator, and that they were part of the necessary funeral expenses of plaintiff's intestate. The necessity of a decent burial arises immediately after the decease, and the law, both ancient and modern, pledges the credit of the estate for the payment of such reasonable sums as may be necessary for that purpose, even though such expenses may have been incurred after the death and before the appointment of an administrator. R. S., c. 64, § 37; *Hapgood* v. *Houghton*, 10 Pick. 154; *Adams* v. *Butts*, 16 Pick. 343; *Sweeney* v. *Muldoon*, 139 Mass. 304; *Trueman* v. *Tilden*, 6 N. H. 201; *Rogers* v. *Price*, 3 Young & Jervis (Exch.), 28; 3 Wm. Ex. *1789; *Tobey* v. *Miller*, 54 Maine, 480, 482.

None of the other items can be allowed upon the note.

If the plaintiff will remit the amount of the two items mentioned, amounting to twenty-five dollars with interest from the death of his intestate, the verdict is to stand for the remainder, otherwise the exceptions must be sustained.

FRANK C. ALLEN *vs.* BOSTON AND MAINE RAILROAD.

York. Opinion March 16, 1895.

Railroads. Fences. R. S., c. 51, § 36.

The obligation imposed by R. S., c. 51, § 36, upon a railroad company to fence its road, where it passes through certain lands, is limited to the owners of such animals as are rightfully upon such lands.

When a horse has escaped from its owner's inclosure and control, and has then run at large through the streets, and into a public park, it is not rightfully in the park, even though its owner exercised great care to prevent the escape.

ON REPORT.

The case is stated in the opinion.

J. O. Bradbury, for plaintiff.

G. C. Yeaton for defendant.

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

EMERY, J. The Boston and Maine Railroad, in passing through the city of Saco, passes through a public park, called Pepperell Park. The plaintiff had a horse harnessed to a wagon and standing in his door yard in Saco. While he was putting some articles in the wagon, the horse suddenly started, and, escaping from control, ran out of the yard into the public street, then along the street and from the street into Pepperell Park, then through the park to the railroad track, and then several hundred feet along and upon the track until it came into fatal collision with a locomotive running in the opposite direction.

The plaintiff contends that the railroad company is responsible for this collision. The only fault alleged, or sought to be proved, against the company is that it did not fence out its railroad from the park at the point where the horse passed from the park to the track.

At the common law no person was obliged to maintain a fence to keep other persons' animals from his premises, and was not in legal fault if such animals came upon his premises. Every person was obliged to keep continual guard over his own

animals, by surrounding them with inclosures, or by having a keeper with them when in public places. A railroad company having purchased or condemned land upon which to construct and maintain its track, was, at common law, under no more obligation than any other person to fence such lands against animals. It was the duty of the owners of animals to keep them under control, and keep them off the railroad company's land. *Eames* v. *Salem and Lowell Railroad Co.* 98 Mass. 560; *B. & A. R. R. Co.* v. *Briggs*, 132 Mass. 24; *Perkins* v. *Railroad Co.* 29 Maine, 307.

The plaintiff, however, invokes the statute, R. S., c. 51, § 36. That statute does not require the railroad company to fence generally, but only in particular places, viz.: where the railroad passes through "inclosed or improved land, or woodlots belonging to a farm." The plaintiff contends that the statute obligation to fence at those places extends to all owners of animals which may chance to be rightfully or wrongfully upon such adjoining land. The railroad company contends that the obligation is limited to the owners of animals rightfully there, or there through the company's own fault.

Under our statute, and similar statutes, we find no decided case in which the owner of animals wrongfully upon the adjoining land, without fault of the railroad company, was held entitled to recover damages for their escape therefrom upon the track. In *Gilman* v. *E. & N. A. R. Co.* 60 Maine, 235, the animal was upon the adjoining land through the fault of the railroad company. On the other hand there are authorities to the contrary. In *Perkins* v. *Railroad Co.* 29 Maine, 310, it was said by the court, that if required to fence the entire track, the railroad company would not be responsible for killing the plaintiff's cow, if she were wrongfully upon the adjoining close. In *Eames* v. *Railroad Co.* 98 Mass. 560, the plaintiff's sheep, being wrongfully upon land which the railroad was required by statute to fence, passed therefrom upon the railroad track through a defect in the fence, and were killed by a locomotive. *Held*, that the plaintiff could not recover. In *Chaplin* v. *Sullivan Railroad Co.* 39 N. H. 53, it was held that the statute obligation to fence against a highway is only against animals

rightfully upon the highway. In *Lord* v. *Wormwood*, 29 Maine, 282, it was held that the statute obligation upon adjoining proprietors to fence is only against animals rightfully upon the adjoining close.

In this case, if the horse had kept to the public street until it reached the railroad track, and had then turned direct from the street upon the track, (assuming there was no statute obligation upon the railroad company to fence out animals on the street) it would be conceded that the railroad company was not responsible for the accident. If the horse, instead of running from the street across the park, had run through waste, uninclosed land (not being "wood-lots attached to a farm"), to and upon the track, the event could not be attributed to any fault of the railroad company. It would be a reproach to the law, if the duties of the railroad company were left to be measured and defined by the vagaries of an escaped, frightened horse, for whose original escape or fright it was in no way responsible.

Assuming (what it is not admitted nor decided) that Pepperell Park is "improved land" within the meaning of the statute, the test of the railroad company's liability is whether the plaintiff's horse was rightfully in the park. The plaintiff fails to show that the horse was there rightfully. No statute or city ordinance is cited permitting horses to be in the park. He suffered his horse to escape out of his own inclosure, and to run at large without a keeper in the public streets and parks. He urges in extenuation that he exercised ordinary care in guarding the horse, and that it escaped in spite of such care. But the exercise of ordinary care was not the extent of his duty. The obligation of the owner of animals to keep them on his own land, or within his control (except where modified by statute), is imperative. The question of care or negligence does not arise in actions of trespass for injury done by escaped animals. If the plaintiff's horse, after its escape to the street, had invaded private grounds, such an invasion would have constituted a trespass, for which the plaintiff would have been answerable, however great his care. Its invasion of the park was not more lawful. *Judgment for defendant.*

DARIUS J. RAYMOND *vs.* JOSEPH B. LOWE.

Kennebec. Opinion March 19, 1895.

Trial Justice. Appeal. Assumpsit. Case.

Assumpsit for money had and received will not lie against a trial justice, to recover fine and costs paid to him upon a decision in a case where he had jurisdiction of the person and offense, even if the justice wrongfully refused to allow an appeal from his decision.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

A. M. Goddard, for plaintiff.

Fred Emery Beane, for defendant.

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

STROUT, J. The plaintiff was arrested upon a warrant issued by defendant, a trial justice, for an assault and threatened breach of the peace, and brought before the defendant for trial. As such justice, defendant then had jurisdiction over that offense and the person of the plaintiff. Upon the hearing, the judgment was that plaintiff was guilty as charged in the complaint, and he was ordered to recognize, with sureties, in the sum of one hundred dollars to keep the peace for one year, and to pay the costs of prosecution, taxed at thirteen dollars and seventy-six cents, and stand committed till the costs were paid and the recognizance furnished. This judgment and sentence were within the jurisdiction of the justice. In all this proceeding the trial justice was acting judicially, and he is protected from suit for any injury resulting to plaintiff from any honest error of judgment. *Williamson* v. *Lacy*, 86 Maine, 86.

It appears that the plaintiff was arrested in the early morning, and brought before the justice at about eight o'clock the same morning. The plaintiff having no counsel or witnesses in attendance, asked time to consult counsel and obtain witnesses,

which request was refused, and the trial proceeded. It is claimed that the refusal was unreasonable and corrupt. The magistrate should have granted reasonable time to the plaintiff to prepare and make his defense, but the evidence fails to satisfy us that he acted wantonly or corruptly. Apparently it was an honest error in judgment. The justice probably thought, that as the main purpose of the proceeding was to require plaintiff to recognize to keep the peace, no useful purpose would be subserved by granting delay. No action lies for such error of judgment.

After the decision, it appears that plaintiff claimed an appeal, but he did not furnish sureties to perfect his appeal. He claims that this failure resulted from the refusal of the justice to give him time, within twenty-four hours, to obtain sureties. Upon this point the testimony is conflicting. It appears that plaintiff did obtain from the bystanders sureties to keep the peace, but these sureties would not become such on the appeal, but advised plaintiff to pay the costs. The result was that plaintiff paid the costs, and was released. He then brought this action of assumpsit for money had and received, and claims to recover of defendant the money paid upon the judgment for costs.

He insists that the magistrate wrongfully and corruptly refused to allow an appeal, and wrongfully and corruptly prevented an appeal by his refusal to allow the plaintiff reasonable opportunity to obtain sureties to prosecute his appeal; that the granting an appeal was a ministerial act and not judicial, and that in consequence of such refusal, he paid the money under duress, *per minas*, the alternative being imprisonment; and that for such wrongful ministerial acts, defendant is liable to suit.

It is true that the acts of a magistrate in a matter of appeal are ministerial; and it may be true, that if a magistrate wantonly and corruptly refuses to allow an appeal, rightfully claimed and seasonably offered to be perfected, or if he corruptly and oppressively prevents the party from obtaining sureties, he may be liable to a suit for damages; but it by no means follows that assumpsit for money had and received can be maintained for the money paid to satisfy the judgment.

The judgment was in behalf of the State. When paid, the money, in the hands of the justice, was money of the State, and in no sense belonged to the magistrate, or was held by him in his personal character; but it was in his hands as a State officer, for which he was accountable to the State, and to no other party.

But if the plaintiff had perfected his appeal, so far as devolved upon him, and the magistrate had corruptly refused to allow it, or had corruptly and oppressively prevented the plaintiff from obtaining sureties to prosecute his appeal, for the purpose of coercing him to pay the judgment for costs, the plaintiff's remedy was by an action of tort for damages, and not in assumpsit for the money paid.

It is claimed that the tort may be waived, and assumpsit maintained. This is true in cases of tortious taking of personal property, which the tort-feasor has converted into money; but until conversion into money, assumpsit cannot be maintained. This principle does not apply to damages for personal injuries.

The learned judge who tried this case, instructed the jury, in substance, that if the defendant corruptly refused to allow plaintiff opportunity to procure sureties to prosecute his appeal, then he would be liable in this action for the amount of the costs which he thus obliged the plaintiff to pay.

In the opinion of the court this instruction was erroneous. If the facts were as claimed by plaintiff this action cannot be maintained, the remedy being in tort. *Exceptions sustained.*

NATHAN A. KNOWLES *vs.* MADISON BEAN, and another.

Kennebec. Opinion March 19, 1895.

Deed. Description.

A description in a deed, of "all of a certain tract or parcel of land lying in Belgrade, being part of lot numbered 192, being part of the southerly quarter, supposed to be five acres, more or less, and all the land which I own to the west of Clark's pond, so-called, being the same pond that James Katon dug a drain to," conveys only that part of the southerly quarter of lot 192, which lies in Belgrade, although the Belgrade line is some distance westerly of the west line of Clark's pond and the grantor owned land between the Belgrade line and Clark's pond, which was in another town.

ON REPORT.

This was an action of trespass *quare clausum fregit* for entering land, to which the plaintiff claims title, situate partly in the town of Belgrade and partly in Sidney, Kennebec county, and there cutting down and carrying off a number of pine trees thereon growing.

The defendants pleaded the general issue, and Madison Bean, one of the defendants, in addition, by way of brief statement, pleaded title in himself to the land on which said trees were growing.

It was admitted by the plaintiff that the acts complained of, as constituting the trespass, were committed on that portion of the land claimed by the plaintiff which lies in Sidney and which is so described in the writ.

On the other hand, it was admitted by the defendants that they cut the trees upon that portion of the land described in the writ, and claimed by the plaintiff, which lies in the town of Sidney; and they seek to justify their acts under claim of title in Madison Bean (one of the defendants) to that portion of the land described in the writ which lies in the town of Sidney.

The case is stated in the opinion.

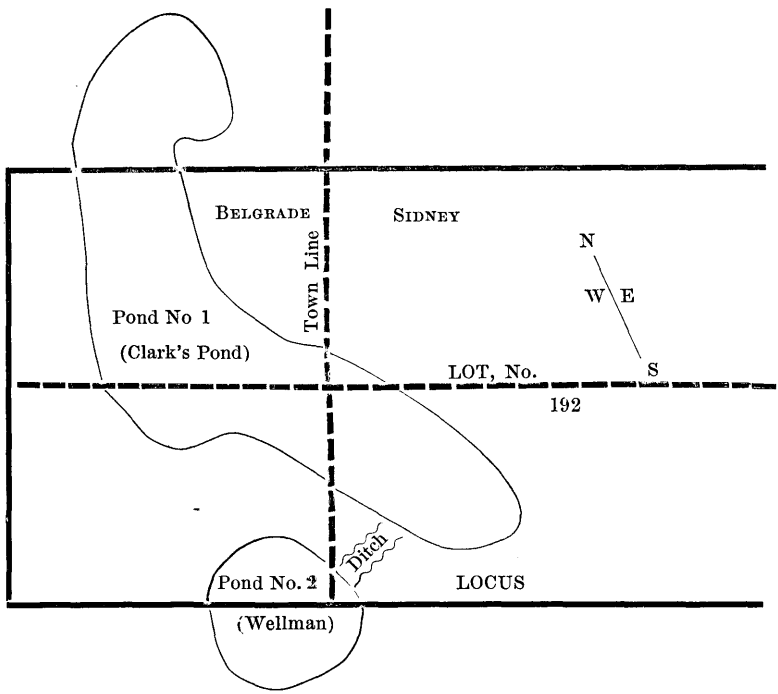
A chalk plan showing the locus and surroundings is appended.

Anson M. Goddard, for plaintiff.

The plaintiff stands in shoes of Braley as grantee, and defendant in place of Crosby as grantor. The deed of Crosby to Braley must be construed most strongly against the grantor and against the defendant. It does not state that the land is wholly in Belgrade, nor mention the town of Sidney, nor refer to the town line, a monument. No intention is expressed to exclude land in Sidney. Town line not intended as a boundary, its location not then known. Call, in deed, names Clark's pond as eastern boundary, which is inconsistent with town line being intended. The failure to mention the fact that part of the land is in Sidney will be treated as an omission or mistake. *Tenney* v. *Beard*, 5 N. H. 58; *Wilt* v. *Cutler*, 38 Mich. 189. Where the calls are inconsistent, the construction favorable to grantee will prevail. *Foster* v. *Foss*, 77 Maine, 279; *Vance* v. *Fore*, 24 Cal. 435; *Hall* v. *Gittings*, 2 Har. & J. 112; *Piper* v. *True*,

36 Cal. 606; *Bonney* v. *Miller*, 18 Iowa, 460; *Nutting* v. *Herbert*, 35 N. H. 121; *Miller* v. *Cherry*, 3 Jones Eq. (N. C.) 24. The words "all land, &c., to the west of Clark's pond" makes that pond a monument.

Counsel also cited: *Tyler* v. *Fickett*, 73 Maine, 410; *Esty* v. *Baker*, 50 Maine, 325; *Knowles* v. *Toothaker*, 58 Maine, 172; *Ames* v. *Hilton*, 70 Maine, 36; *Pierce* v. *Faunce*, 37 Maine, 63; *Williams* v. *Western R. R.* 50 Wis. 71; *Harlow* v. *Fisk*, 12 Cush. 302; *Friedman* v. *Nelson*, 53 Cal. 589.



The plaintiff has shown by a fair preponderance of evidence that he owns and is entitled to hold to the southern extremity of Pond No. 1, from which point it is immaterial by what course the line is drawn to the south line of the lot, because even a due

west course from the south extremity of the pond will give plaintiff the land on which most if not quite all the disputed trees were cut, and therefore entitles him to recover in this action.

Emery O. Beane and Fred Emery Beane, for defendants.

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

STROUT, J. This is an action of trespass for cutting trees on land claimed by plaintiff. Defendants admit the cutting, but justify under claim of title to the land, where they were cut, in Madison Bean, one of defendants. The disputed premises are a part of lot numbered 192, lying partly in Belgrade and partly in Sidney. After the testimony was all in, the presiding judge ordered a nonsuit, and thereupon the parties reported the case for the decision of the law court, with the agreement that if that court should hold the order of nonsuit to be improper, judgment should be rendered for plaintiff for eighty dollars.

It appears that prior to February 26, 1813, lot 192 had been divided longitudinally, and on that day that William Crosby owned the whole of the southerly quarter of the lot. The line between Belgrade and Sidney crossed the premises in a northeasterly and south-westerly direction, leaving about one-third in Belgrade and about two-thirds in Sidney. There is a pond of considerable size extending from a point some distance north of the north line of lot 192, across the northerly half of the lot, and about one-half across the quarter next northerly of the Crosby quarter of the lot, the west shore of which lies approximately north and south, and being in Belgrade. The pond then narrows and continues in a southeasterly direction across the town line into Sidney, and approximately one-third across the width of the Crosby quarter. This pond is called by some of the witnesses Clark's pond, and by others Penny pond. Southerly of this narrowed extension of the large pond, is a small pond, called by some Wellman pond and by others Chamberlain pond, connected with the large pond by an artificial ditch. Wellman pond is mainly in Belgrade, but a small part of it is

in Sidney. The ditch between them is all in Sidney. The cutting complained of was in Sidney, east of the ditch, and westerly of the southeasterly end of the large pond.

Plaintiff derives his title through various *mesne* conveyances from William Crosby under his deed to Ephraim Braley, dated February 26, 1813. On January 15, 1815, William Crosby conveyed to Pitt Dillingham, under whom defendant Bean claims, all of the southerly quarter of lot 192 "save and except a small parcel off the west end of the same which I conveyed to Ephraim Braley." It follows that plaintiff owns all of the southerly quarter of the lot which Crosby conveyed to Braley, and defendant Bean owns all of that quarter except what was conveyed to Braley. The description in the Braley deed, under which plaintiff claims, is "all of a certain tract or parcel of land lying in Belgrade, being part lot numbered 192, being part the southerly quarter, supposed to be five acres, more or less, and all the land which I own to the west of Clark's pond, so-called, being the same pond that James Katon dug a drain to."

Of the many rules suggested by courts for the construction of deeds, the most important and controlling one, when it can be satisfactorily applied, was well stated by LIBBEY, J., in *Ames* v. *Hilton*, 70 Maine, 36: "The great rule for the interpretation of written contracts is that the intention of the parties must govern. This intention must be ascertained from the contract itself, unless there is an ambiguity. . . . In ascertaining the meaning of the parties as expressed in the contract, all of its parts and clauses must be considered together, that it may be seen how far one clause is explained, modified, limited or controlled by the others."

Applying this rule to the deed from Crosby to Braley, very little difficulty is experienced in ascertaining the intention of the parties. Crosby knew his land was in the two towns of Belgrade and Sidney, much the larger portion being in the the latter town. He contemplated selling a small portion, estimated to be about five acres, but which proves to be about fifteen acres, from the west end of his land. His grant was all of a parcel of land lying in Belgrade. What follows in the deed is matter of description and identification :—"being part of

lot 192, being part the southerly quarter." The description thus far clearly is limited to that part of the lot which is in Belgrade. The concluding sentence, added as farther description and identification, "and all the land which I own to the west of Clark's pond," was not intended to enlarge the grant, but to make it more definite. The whole description very clearly indicates the intention to convey all that part of lot 192, which was in Belgrade. The reference to Clark's pond, which we are satisfied from the evidence was the large pond, marked No. 1 on the plan, did not make or intend to make the pond a boundary of the land conveyed, but was used in connection with other parts of the description to indicate more fully where the land in Belgrade, which was conveyed, was situated. It was part of the southern quarter of a certain lot; it was west of the pond, and was all in Belgrade. *Carville* v. *Hutchins*, 73 Maine, 229; *King* v. *Little*, 1 Cush. 443. This construction meets all the calls in the deed, and best comports with the intent of the parties. *Erksine* v. *Moulton*, 66 Maine, 281.

The plaintiff's claim, that his easterly line goes to the pond which is easterly of the Belgrade line, is attended with insurmountable difficulties. It ignores the terms of the grant of land in Belgrade. As the pond does not extend across the southerly quarter, how shall the line run from the pond to the southerly line of the quarter of lot 192? Shall it be an arbitrary line running southerly from the pond, or southwesterly to Wellman pond, or westerly to Belgrade line? The construction claimed by plaintiff fails to answer these questions, and leaves them all open to mere guess. Such construction is too loose and too hazardous to be adopted. No rule of law requires it. This is not a case like *Esty* v. *Baker*, 50 Maine, 330, where it is held that "if there be two descriptions of the land conveyed which do not coincide, the grantee is entitled to hold that which will be most beneficial to him;" but falls rather within the rule approved in that case, that "if some of the particulars of the description of the estate conveyed do not agree, those which are uncertain and liable to errors and mistakes, must be governed by those which are more certain." The town line is a very certain boundary.

It is the opinion of the court that the deed from Crosby to Braley conveyed only so much of the southerly quarter of lot 192 as was within the town of Belgrade. It is not disputed that all the residue of the southern quarter was conveyed by Crosby to Dillingham, through whom, by *mesne* conveyances, defendant Bean claims. The cutting was in Sidney, and not upon plaintiff's land, unless he acquired title to the lands in some other way than from the conveyance to Braley. His counsel ably argues that in the deed from Bachelder to the plaintiff, given in 1890, the second parcel therein described, purports to convey the disputed premises. The boundaries given are the lands of various owners, and on one side by the pond. There is no evidence in the case to indicate on the face of the earth where the lines of the various owners referred to are, and it is impossible from the deed itself to determine where the land in fact is. Besides, there is no evidence that Bachelder had acquired title to any land except that conveyed by Crosby to Braley. The evidence fails to show that plaintiff was ever in actual possession of any part of the lot east of the Belgrade line.

Whether, if it had been proved that the description in the Bachelder deed, which was a deed of warranty, covered the land where the trees were cut, the plaintiff could have maintained trespass against a wrong-doer, without title, it is not necessary to decide, as defendant Bean shows full title in himself to all of the southerly quarter of lot 192, which was that conveyed by Crosby to Braley.

It follows that the nonsuit was rightly ordered, and the entry must be, *Nonsuit to stand.*

NATIONAL SHOE AND LEATHER BANK OF AUBURN

vs.

JOHN M. GOODING.

Androscoggin. Opinion March 20, 1895.

Order. Demand and Notice. Assignment. Pleading. R. S., c. 82, § 130.

In order to maintain an action in his own name by the assignee of a non-negotiable chose in action, the statute requires the assignee to file the assignment,

or a copy thereof, with his writ. The assignment not so filed is not admissible in evidence at the trial. The declaration should aver the assignment in such case.

In an action against the drawer of an order it must be shown that a demand was made on the drawee, that he refused to pay it and due notice was given to the drawer, or some excuse for want of such demand and notice.

ON EXCEPTIONS.

The case appears in the opinion.

George C. Wing, for plaintiff.

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

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

WHITEHOUSE, J. The plaintiff bank seeks to recover against the defendant, as surviving partner of Merry & Gooding, on a writing of the following tenor, to wit:

"To Manufacturers' National Bank of Lewiston.

Pay to M. C. Percival ninety-four 12-100 dollars.

Merry & Gooding.

[Indorsed] M. C. Percival."

The writ contains a declaration on the ordinary money count, specifying this order as the groundwork of the suit.

The only evidence introduced by the plaintiff was the order above set forth, and an assignment in writing given by M. C. Percival to Benjamin F. Briggs, which included among other items, a paper designated as "a check of Merry & Gooding, $94." Both of these papers were admitted subject to the defendant's objection. Upon this evidence, thus received, the presiding judge ordered a nonsuit, and the plaintiff took exceptions.

The nonsuit was properly directed. The order which forms the basis of the suit was not negotiable, and the plaintiff's right to maintain an action upon it in its own name, by virtue of an assignment, is conferred by R. S., c. 82, § 130, which requires the assignee "to file with his writ the assignment or a copy thereof." The plaintiff not only failed to do this, but the declaration in the writ contains no averment of such an assignment. The assignment offered in evidence was, therefore, not legally admissible against the defendant's objection.

But there is another objection which invalidates the plaintiff's cause of action. It is a suit against the drawers of an order. Their contract was only to pay the amount of the bill in case the drawee refused to pay it. But there is no evidence that any demand was made on the drawee, that he ever refused to pay, or that due notice was given to the defendants of the non-payment of the order. The plaintiff must either prove demand and notice, or show some excuse for the want of them. *Townsend* v. *Wells*, 32 Maine, 416.

Exceptions overruled.

WALTER C. SMITH.

vs.

MAINE CENTRAL RAILROAD COMPANY.

Piscataquis. Opinion March 20, 1895.

Railroads. Highway Crossings. Negligence.

It is the established law in this State, and of courts generally, that persons attempting to cross a railroad track without stopping to look or listen are presumed to be guilty of negligence.

In backing cars over highway crossings, a railroad company is only required to provide signals and safeguards so timely and abundant that they may reasonably be expected to prove effectual in warning travelers who are themselves in the exercise of due care and vigilance; it is not bound to adopt such extraordinary measures as might be needful to warn travelers who are thoughtless and inattentive or reckless and venturesome.

Where the plaintiff assumed the duties of a look-out, in attempting to pass over a railroad crossing and saw the head-light of the engine but made no mention of it to his companion, who was driving the team, and neither asked the driver to stop nor to hurry forward, *held;* that it is the duty of the passenger when he has opportunity to do so, as well as the driver, to learn of danger and avoid it if practicable.

In this case the verdict was set aside, it appearing that they both saw and heard the approaching train but rashly undertook to cross the track instead of waiting for the train to pass.

Held; that if the noise of their carriage and of the pattering rain upon its top rendered it difficult to distinguish the sounds, it was their plain duty to stop the team and obtain a better opportunity to hear.

ON MOTION.

This was an action on the case in which the plaintiff recovered a verdict for personal injuries received in a collision of his carriage with the defendant's freight train, consisting of four freight cars and one saloon car, while making a flying switch after dark at the Summer street crossing, near defendant's station in Foxcroft, Piscataquis county, in the evening of November 23, 1891.

The principal allegations of negligence charged in the plaintiff's declaration were the running the train in this way with the locomotive behind, and without either a gate, or a flagman, or any person at the crossing to give signals, as follows: "When said plaintiff was crossing the said side-track of said railroad, which said side-track crossed the highway aforesaid, near said station and yard, said four cars, without any engine attached thereto or any signal or warning given of their approach, which said cars belonged to and were under the management, direction and control of said defendant corporation, and were run by said defendant corporation, ran into and over the carriage in which said plaintiff was then and there riding and threw the plaintiff with great violence and force upon the ground and ran over him. . . .

"And the plaintiff says that the defendant corporation was guilty of great negligence and carelessness, and that in consequence of said negligence and carelessness he, said plaintiff, was run over and injured as aforesaid. And the plaintiff further says that said corporation gave no proper and legal notice or warning of the approach and passing of said cars across said highway at the time of said injuries, nor did they in any manner give any legal and proper caution to travelers of the existence of said railroad crossing, and took no proper precaution to warn travelers of the approach of said cars and to protect them from harm and injury, as was their duty to do, and that said defendant corporation were guilty of great carelessness and negligence in the management of said railroad, and the trains run upon the same, in running said train into said station in the manner aforesaid, and in not giving notice and warning as aforesaid, and in not guarding properly against collision with those who

were crossing said railroad over said highway, whereby said plaintiff was injured as aforesaid."

The case is stated in the opinion.

Henry Hudson and Frank E. Guernsey, for plaintiff.

Reasonable care and prudence and a just regard to the rights of the traveler required that a gateman, or flagman, should have been maintained by said defendant. On account of the peculiar method and manner of running its train that night, a high measure of duty on the part of the railroad company was incumbent. It was not sufficient simply to establish sign boards at their street crossings, ringing the bell, or blowing the whistle, or the placing of a man upon the front end of the head car with a lantern. If the company saw fit to exercise the right to run its train in the way in which it did, it must take extraordinary means and measures to protect the traveler. The statute requirements had they all been complied with, except the single requirement of a gateman or flagman on the crossing, would not be a sufficient compliance with the law. The law itself is just as stringent and inflexible, founded upon the common law and the plainest right and duty, that such precaution must be taken and exercised by the defendant notwithstanding the existing statute in this state. *Grippen* v. *N. Y. C. R. R.* 40 N. Y. p. 42.

The law contemplates that such engine is to be attached to the train, and so attached as to give reasonable warning of the approach of such train. The peculiar manner in which this train was allowed to pass into the station that night, with the engine in the rear and detached,—the ringing of the bell not only did not serve as a warning to the traveler, but tended to deceive. A traveler in passing over the highway upon a night as dark as this night was, had he heard the bell rung two hundred feet or more distant from the crossing, would have been deceived thereby. *State* v. *B. & M. R. R.* 80 Maine, 440.

Counsel also cited: *French* v. *Taunton Branch R. R.* 116 Mass. 537; 1 Thomp. Neg. 424, and cases; *Brown* v. *N. Y. C. R. R.* 32 N. Y. 596, 601; *Eaton* v. *Erie Ry. Co.* 51 N. Y. 544; *Del. R. R. Co.* v. *Converse*, 139 U. S. 467; *York* v. *M. C. R. R. Co.* 84 Maine, p. 123; *Bonnell* v. *D. L. & W. R. R.*

39 N. J. L. 189; *Robinson* v. *N. Y. C. & H. R. R. R. Co.* 66 N. Y. 12; Same, 84 N. Y. 247; *Maginnis* v. *Same*, 52 N. Y. 215; *Ernst* v. *H. R. R. R.* 35 N. Y. 37.

C. F. Woodard and J. B. Peaks, for defendant.

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

WHITEHOUSE, J. The plaintiff recovered a verdict of $4,191, for a personal injury received in a collision of the defendant's cars with the carriage in which the plaintiff was riding at the Summer street crossing, near the defendant's station in Foxcroft, on the 23rd day of November, 1891, and the case comes to the law court on a motion to set aside this verdict as against evidence, and for newly-discovered evidence.

It is the opinion of the court that, under the settled law of this state, the verdict was not justified by the evidence introduced at the trial and cannot be permitted to stand.

The accident occurred on the arrival of the defendant's mixed train, at its terminal station in Foxcroft, a few minutes past six o'clock in the evening. The plaintiff, a resident of Brownville, had accepted an invitation from Louis H. Ryder of that place, to ride with him to Monson by way of Foxcroft and Dover. They had for a team a pair of heavy, old work-horses and a top buggy. The plaintiff was twenty-seven years of age, and after his return from Massachusetts, in September, had been working for his father trucking about the depot at Brownville. Ryder was a stable keeper, thirty-one years of age, who was seeking an opportunity to exchange the two old horses for a driving horse. They started about two o'clock in the afternoon, but called at the Brownville station and obtained a box containing a two-quart jug of Tarragona port wine and a bottle containing from a pint and a half to a quart of Irish whiskey. This box was opened about a mile and a half from Brownville. They drove to Milo a distance of four miles in about an hour, from Milo to South Sebec, five miles, in about an hour and a quarter, and from South Sebec to Foxcroft, seven miles, in about an hour, having made

three stops on the way of about fifteen minutes each. They approached Foxcroft in a southerly direction along the thoroughfare there known as Summer street. This highway passes by the westerly end of the Maine Central station grounds and there intersects four railroad tracks: first, the main track of the Bangor & Aroostook railroad; second, forty-three feet southerly therefrom, the main track of the defendant company; third, fifty-three feet from its main track, the defendant's side-track, and three and one-half feet farther south the defendant's second side-track. The collision took place on the defendant's side-track fifty-three feet southerly from its main line, on Summer street as stated. This street as it approaches and crosses these several railroad tracks, is practically level.

The next street westerly from Summer street is Spring street, which is three hundred and twenty-five feet distant from Summer street, measured on the defendant's main line, or two hundred and forty-five feet measured along the side-track. The next street westerly is called North street which is five hundred and seven feet distant from Spring street. Mechanic street is next westerly from North street, eight hundred and seventy feet distant from it, and the Spool factory is five hundred and seventeen feet westerly of Mechanic street.

The railroad track is on a down grade from the Spool factory to North street with a descent of little more than a foot in a hundred, while from North street to Summer street the grade falls only four and four-fifths inches.

The defendant's railroad is plainly visible from the scene of the accident up to the Spool factory a distance of two thousand one hundred and thirty-nine feet. The entire line back to the Spool factory may also be plainly seen from a point in Summer street one hundred and eighty feet northerly from the place of collision and all the way, along which the plaintiff was approaching, from that point to the place of the collision. From a point in Summer street, two hundred and sixty feet northerly from the place of the accident and all the way from that point to the scene of the accident, there is an unobstructed view of the track as far west as Spring street.

Such being the situation on the evening of the accident, the defendant's mixed train, consisting of an engine with four freight cars, and one combination car with a passenger compartment containing six or eight passengers, arrived at the outer limits of the railroad yard, some thirty rods west of the Spool factory, about six o'clock, being substantially on schedule time. The whistle was sounded as usual at the Spool factory, and thereafter the bell on the engine was continuously rung until the time of the accident. The train came to a full stop at Mechanic street and there in accordance with an established usage, in order that the cars might be run down across Summer street into the station grounds in advance of the engine and thus be left in a situation convenient and available for use thereafter, the engine was detached and run on to a long siding, while the five cars, the brakes being relieved, ran down on the main track by force of their own gravity, the engine following along on the siding and thence on to the main track again in the rear of the cars. The train then proceeded down the main line across North street and Spring street until it came to the switch fifty feet easterly from Spring street, which controls the junction of the side-track with the main line, where it went on to the side-track towards the place of the accident, the engine being from one hundred to two hundred feet in the rear of the cars, with the bell continually ringing. On the top of the head car at the front, as the train proceeded, a brakeman with a lantern was stationed by the brake. There was another brakeman at the brake on the front end of the combination car; and the conductor was also in that car.

The combination car had twelve windows on each side and the interior was lighted by six large lamps. It was also provided with two large rear-lamps on the outside, set in brackets five or six inches from the car, with reflectors showing red light from the rear and white from the front. The engine showed its headlight as it followed along behind the cars.

The speed of this train on the comparatively level grade east of Spring street does not appear to have exceeded four miles an hour.

In the meantime the plaintiff and Ryder were approaching on the highway leading into Summer street. It was cloudy and dark with an occasional light fall of rain, and the curtains of the top buggy were closed at the back and on the sides; but the occupants of the carriage were so boisterous as to attract the special attention of three witnesses who saw the team at points from three to four miles north of the railroad station, and heard the men "hollering and singing and whipping up the horses." One of these witnesses says when he saw them they were driving "very reckless and fast." Two other witnesses saw the team and heard similar noises only a mile and a half distant from the station. But the plaintiff and Ryan say they drank but twice of the whiskey and only once of the wine, and deny that they were at all under the influence of liquor when they arrived at the station. According to their testimony they were driving very slowly as they drew near the defendant's station, and when within one hundred and fifty feet or less of the Bangor and Aroostook track, they saw the lights in and about the station buildings and on the covered platform and recognized the Maine Central station. They were familiar with the location of the Bangor and Aroostook railroad, but drove across that track without stopping to look or listen. Immediately after crossing, however, they say they "pulled up" and stopped the team, and both "looked up and down the track." They were then within one hundred feet of the point of collision, and it is shown by the data already presented that the train of cars was at that moment coming slowly down the side-track, the head of it probably within one hundred and twenty-five feet and the rear within three hundred feet from Summer street, where it crosses this side-track at nearly right angles. The hypothenuse of each triangle being found, the team appears to have been about one hundred and sixty feet from the head of the train, and three hundred and sixteen from the rear of it. At these distances there was then presented to the view of the plaintiff and his companion, not simply the lighted lantern of the brakeman of the forward car, but the whole side of the combination car lighted from within by lamps, and by a large rear light on the outside. The head-

light of the engine some two hundred feet farther back, was also plainly visible. Besides, there were two switch-lights at this crossing, one above and one below the street. The ringing of the engine bell, which still continued, and the rumbling of the moving train, could be distinctly heard in that vicinity. But although the carriage was not then in motion, and the plaintiff and Ryder were both young men of unimpaired sight and hearing, they say they neither saw nor heard anything to indicate the approach of an engine or cars. They both "guessed that everything was all right" and Ryder who held the reins, drove along across the main track at a pace "between a walk and a trot." The team and train were thus moving towards the place of collision at substantially the same moderate rate of speed. When the team had passed the main track, the plaintiff, who was sitting on the left side, says he leaned forward and looked up the track and saw the headlight of the engine, but said nothing to Ryder about it.

An examination of the plans in connection with the measurements in evidence, shows that the line of vision between the plaintiff at that point and the point where the engine was, must have been obstructed by the cars moving around the curve of the side-track; and it is therefore much more probable that the plaintiff saw the headlight before he crossed the main track, when there was still more time to weigh its significance. But assuming that he was looking out and saw it after crossing the main track, he was then within fifty or sixty feet of the train of cars, and the lantern held by the brakeman on the front car and the lighted combination car were still more clearly exposed to his view. The brakeman saw the team as it passed over the main track in the light from the defendant's station buildings, and repeatedly shouted a warning for it to stop. At the same instant, by swinging his lantern he gave to the brakeman on the rear car the conventional signal to set the brake, which was promptly obeyed, and thereupon immediately set his own brake. But it was too late to stop the train in season to avoid a collision with the team. The plaintiff and Ryder say they heard no warning and saw no signals. But the lights of the approaching train, either before or after it reached the side-track, were

plainly seen by eight witnesses, four called by the plaintiff, and four by the defendant, and by every witness who was in a position where he could be expected to see them. The ringing of the bell and the rumbling of the cars were heard by five witnesses, some of them less favorably situated than the plaintiff. The warning shouted from the top of the forward car was distinctly heard by eight witnesses, three called by the plaintiff and five by the defendant. But the plaintiff and Ryder attempted to cross the side-track without stopping to look or to listen, and say they heard neither the ringing of the bell, the rumbling of the cars, nor the shouts of the brakeman.

When a railroad track crosses or is crossed by a highway, the traveler with a team and the railroad company have concurrent rights and mutual obligations with respect to the use of the way at the place of intersection. But inasmuch as a railroad train runs on a fixed track, and readily acquires a peculiar momentum, it cannot be expected that when once in motion, it will stop and give precedence to a team approaching on the highway. It cannot be required to do so, except in cases of manifest danger where it is apparent that a collision could not be otherwise avoided. It is the duty of the traveler on the highway to wait for the train. The train has the preference and the right of way. *Continental Improvement Co.* v. *Stead*, 95 U. S. 161; 2 Wood on Rail. 1510; Pierce on Rail. 342; *Lesan* v. *M. C. Railroad*, 77 Maine, 84.

It follows that a collision at a railroad crossing on the highway raises no presumption of actionable negligence on the part of the railroad company or its servants. It is rather *prima facie* evidence of negligence on the part of the traveler. *Hooper* v. *B. & M. Railroad*, 81 Maine, 260. "One in the full possession of his faculties who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but in fact is struck by it, is *prima facie* guilty of negligence, and in the absence of a satisfactory excuse, his negligence must be regarded as established." *State* v. *M. C. Railroad*, 76 Maine, 358; *State* v. *Same*, 77 Maine, 538.

The burden was, therefore, on the plaintiff to establish by affirmative evidence, not only the negligence of the defendant company but his own freedom from contributory negligence. It was incumbent upon him to show that, with respect to some of the charges specified in his writ, the defendant's servants had omitted to do something which an ordinarily prudent person in the same relation would have done, or did something at that time which a reasonably prudent person, under similar circumstances, having due regard to the rights and interests of others, would not have done. It was also incumbent upon him to show that he himself approached the crossing with due care and caution, alert to discover the first sign of coming danger.

It is not contended that there was any failure on the part of the defendant to observe the requirements of the statute respecting the signals and safeguards designed to warn and protect the traveler. As the rate of speed at which the train was moving did not reach six miles an hour, the defendant was not required by statute to have gates maintained or a flagman stationed at Summer street crossing; and it is conceded that the whistle was sounded and the bell rung in substantial compliance with the statute.

But the statutes prescribing these special duties are little more than an affirmation of the rules of the common law. They do not constitute the sole measure of duty. The common law still requires the exercise of care and prudence commensurate with the degree of danger incurred. The statutes represent the minimum degree of care to be observed, and do not release the company from the obligations to take such additional precautions as the peculiar circumstances of the case may demand. 2 Wood on Rail. 1513, and cases cited. *Lesan* v. *M. C. R. supra.*

The plaintiff accordingly claims that the dangers incurred by the defendant's peculiar manner of running its train into the Foxcroft station, with the engine detached from the cars and far in the rear, were such as to require a flagman or gates to protect travelers at the Summer street crossing; and that in the absence of these safeguards, the operation of the defendant's

train on the evening in question, was not conducted with due regard to the safety of travelers on the crossing. He insists that the defendant's premises in that vicinity were inadequately lighted; that the head-light on the engine and the ringing of the bell so far in the rear were calculated rather to mislead than to direct, and that the lantern held by the brakeman on the forward car and the lighted combination car were insufficient on so dark an evening to give notice that a train of cars was approaching the crossing.

The comprehensive rule, applicable to this class of questions, is well stated in 2 Wood on Railroads, 1517, as deducible from all the authorities: "It is not necessarily negligence on the part of railroad company to back and switch cars over a highway crossing, nor to make "flying switches" there; it has a perfect right to make such a use of that part of the track, provided proper precautions are taken for the safety of travelers using the crossing. But as a matter of common knowledge such a practice is peculiarly dangerous, and therefore creates a duty of unusual care on the part of the company. There should be abundant warning, not only by the usual signals of bell and whistle, but there should be a flagman near the track, or a watchman on the nearest approaching car to warn travelers who are near." See also *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469; *York* v. *M. C. R.* 84 Maine, 123. But in such case the railroad company is only required to provide signals and safegards so timely and abundant that they may reasonably be expected to prove effectual in warning travelers who are themselves in the exercise of due care and vigilance; it is not bound to adopt such extraordinary measures as might be needful to warn travelers who are thoughtless and inattentive or reckless and venturesome. The defendant earnestly contends that the signals and safeguards provided in this case ought to be deemed ample and effectual to give notice of the approach of the train to all travelers who were looking and listening for it as they were required by law to do.

Assuming that there was a greater weight of evidence in favor of the defendant on that proposition, we should hesitate

to declare that the finding of the jury with respect to it was so manifestly wrong as to justify us in setting aside the verdict on that ground. But we are satisfied that the accident was not the result of any neglect on the part of the defendant or its servants to provide suitable safeguards, or of any failure to give timely and sufficient warning by signals or otherwise, of the approach of the train. It was undoubtedly caused, directly and proximately, by a want of due care and prudence on the part of the plaintiff himself. True, the plaintiff was not in control of the team as driver, but was riding by a friendly invitation from Ryder and without other compensation than his companionship. But the rule that the negligence of the driver is not to be imputed to his companion under such circumstances has very little application to the facts of this case. The plaintiff was occupying the same seat with Ryder and had the same opportunity, and after they reached the defendant's main track,— probably a better opportunity, for discovering dangers. Before reaching the Bangor & Aroostook track they conversed about the lights of the defendant's station, and after crossing stopped and had the further conference at which they agreed in "guessing that everything was all right." It is obvious that the driver was ready and willing to act upon any information or suggestion from his companion. It is clear also that the plaintiff instinctively felt that there was a responsibility resting upon him as well as upon the driver. He knew that they were crossing railroad tracks, and was bound to know that a railroad track is itself a warning, and a crossing a place of danger. He admits that when within fifty feet of the collision he voluntarily assumed the duties of a lookout. He saw the head-light, which Ryder does not appear to have seen, but did not mention the fact to Ryder. The horses were steady and well trained and would have promptly heeded the word to stop either from the plaintiff or the driver. But the plaintiff neither asked the driver to stop the horses nor to hurry them forward. His conduct was not that of a reasonably prudent man. It is the duty of the passenger, when he has the opportunity to do so, as well as of the driver, to learn of danger, and avoid it if practicable.

Brickell v. *N. Y. C. & H. R. R. Co.* 120 N. Y. 290; *State* v. *B. & M. R.* 80 Maine, 445.

They attempted to cross the defendant's side-track without stopping to look or listen. But "the rule is now firmly established in this state, as well as by courts generally, that it is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. If his view is unobstructed he may have no occasion to listen. But if his view is obstructed, it is his duty to listen and listen carefully. And if one is injured at a railroad crossing by a passing train or locomotive which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence; and if this presumption is not repelled, a recovery for the injury cannot be had." *Chase* v. *M. C. R. R. Co.* 78 Maine, 353. "No neglect of duty on the part of a railroad company will excuse anyone approaching such a crossing from using the senses of sight and hearing where those may be available." 1 Thomp. Neg. 426.

It is inconceivable, indeed, that if they had looked attentively, without stopping, after crossing the main track, they should not have seen the lights of the approaching train, which so many others in the vicinity clearly saw. It is almost incredible that if they had listened carefully they should not have heard the rumbling and jolting of the approaching cars which so many others distinctly heard. If the noise of their carriage and of the pattering rain upon its top, rendered it difficult to distinguish the sounds, it was their plain duty to stop the team and obtain a better opportunity to hear. If they had done so, they must have seen and heard the trains, and avoided the collision. No reasonably prudent man under such circumstances, would have neglected so to do.

But the inference from all the evidence is almost irresistible that they did both see and hear the approaching train, but with an absence of caution and freedom from anxiety resulting in some degree from the effect of intoxicating liquors, rashly undertook to cross the track instead of waiting for the train to pass. If so, "the consequences of such mistake and temerity

cannot be cast upon the company. No railroad company can be held for a failure of experiments of that kind; and if one chooses, in such a position to take risks, he must bear the consequences of failure." *Chicago, &c., R. R. Co.* v. *Houston*, 95 U. S. 697.

In either view the contributory negligence of the plaintiff is clearly established.

Motion sustained. Verdict set aside.

MATTHEW J. CONLEY *vs.* AMERICAN EXPRESS COMPANY.

Cumberland. Opinion March 29, 1895.

Master and Servant. Risks. Negligence.

If a servant continues in the service of his employer after he has knowledge of any unsuitable appliances in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger, he will be deemed to have assumed all risks incident to the service under such circumstances.

No action against the master is maintainable when there is no causal connection between the defective condition of the appliances and the plaintiff's injury. In such case the defect is not the real or proximate cause of the injury. In legal contemplation it is simply the opportunity for the operation of the true cause, the servant's own want of proper care; or the occasion for a purely accidental occurrence causing damage without legal fault on the part of any one.

ON EXCEPTIONS.

This was an action on the case in which it was alleged that the injuries, received by the plaintiff while in the defendant's employ, were caused by its negligence in not furnishing a safe and suitable door, with its machinery or mechanism, which the plaintiff was required to use in his business, by reason whereof he received the injuries complained of.

At the conclusion of the plaintiff's evidence, the defendant moved a nonsuit for the following reasons, viz.:

1. Because of contributory negligence on the part of the plaintiff.

2. Because the plaintiff, at the time of the injury, had knowledge of the defective machinery or mechanism connected with the door.

3. Because the plaintiff, at the time of the accident, was voluntarily engaged in work outside the scope of his employment.

4. Because the defective door was not the cause of the accident.

5. Because the evidence does not show a cause of action.

The court thereupon ordered that the plaintiff become nonsuit and he took exceptions.

A. W. Bradbury and G. F. McQuillan, for plaintiff.

1. Counsel cited on the question of contributory negligence: *Guthrie* v. *Me. Cent. R. R. Co.* 81 Maine, 580; *Nugent* v. *B. C. & M. R. R.* 80 Maine, 62-70; *Plummer* v. *Eastern R. R. Co.* 73 Maine, 591; *Wormell* v. *Railroad Co.* 79 Maine, 397; *Hobbs* v. *Eastern R. R. Co.* 66 Maine, 575; *Lesan* v. *M. C. R. R. Co.* 77 Maine, 85; *O'Brien* v. *McGlinchy*, 68 Maine, 555; *Gaynor* v. *Old Colony R. R. Co.* 100 Mass. 208; *Chaffee* v. *B. & L. R. R. Co.* 104 Mass. 108; *Thomas* v. *Western Union Tel. Co.* 100 Mass. 156; *Mahoney* v. *Metropolitan R. R. Co.* 104 Mass. 75; *Lund* v. *Tyngsboro*, 11 Cush. 563; *C. B. & Q. R. R. Co.* v. *Stumpfs*, 55 Ill. 367.

2. Knowledge of defect: Beach on Contrib. Neg. § 346; *Nason* v. *West*, 78 Maine, 253; *Hull* v. *Hall*, 78 Maine, 114; *Buzzell* v. *Laconia Manf. Co.* 48 Maine, 113; *Holden* v. *Fitchburg R. Co.* 129 Mass. 268; *Ford* v. *Fitchburg R. Co.* 110 Mass. 240; *Mundle* v. *Hill Mfg. Co.* 86 Maine, 400; *Lee* v. *South. Pac. R. Co.* 35 Pac. Rep. (Cal.) 572; *Shanny* v. *Androscoggin Mills*, 66 Maine, 427; Shear. & Redf. Neg. §§ 100, 108.

3. Outside of scope of employment: *Theisen* v. *Porter*, (Minn.) 58 N. W. Rep. 265.

4. Door the cause of the accident: Black on Proof and Pleadings in Accident Cases, § 26; 7 Am. & Eng. R. Cas. 414; 29 *Ib.* 309; 19 *Ib.* 400; 5 *Ib.* 628; 11 *Ib.* 115; 18 *Ib.* 130; 2 *Ib.* 85; *Com.* v. *Hackett*, 2 Allen, 136.

5. Cause of action shown: 31 Am. & Eng. R. Cas. 176; *Laning* v. *N. Y. C. R. R. Co.* 49 N. Y. 521; *Shanny* v. *Androscoggin Mills*, 66 Maine, 427; 4 Am. & Eng. R. Cas. 637; 15 *Ib.* 214, 218; *Snow* v. *Housatonic R. Co.* 8 Allen,

441; *Whittaker* v. *Boylston*, 97 Mass. 273; *Parody* v. *Chic. &c. R. Co.* 15 Fed. Rep. 205; Shear. & Redf. Neg. § 96; Beach Contrib. Neg. 2d Ed. § 349, and cases cited.

An involuntary nonsuit, after evidence has been given by the plaintiff, is not looked upon favorably by the courts, the Supreme Court of the United States and the courts of many of the states going so far as to hold that a nonsuit on trial cannot be granted against the will of the plaintiff. *Elmore* v. *Grymes*, 1 Pet. 469.

While in this state it has been the practice to grant involuntary nonsuits, yet the right of the court to order them in the course of a trial to the jury has been exercised with a great deal of care. APPLETON, C. J., in the *Union Slate Company* v. *Tilton*, 69 Maine, 244, says: "A motion for a nonsuit will not be granted when there is any evidence in the case competent to be submitted to the jury, tending to show the liability of the defendant."

The same justice in *Lake* v. *Milliken*, 62 Maine, 240, says: "In determining whether the nonsuit was rightly ordered or not, we must assume the truth of the proof offered, and regard it in the light most favorable to him [the plaintiff]; for the jury might have so regarded it."

LIBBEY, J., in *Eaton* v. *Lancaster*, 79 Maine, 477, says: "If there was any evidence which, if believed by the jury, would authorize a verdict for the plaintiff, a nonsuit should not have been ordered."

A motion for a nonsuit at law is analogous to a demurrer in equity; and if, admitting all the facts proved, and all reasonable deductions from them, the plaintiff, on all the proof regarding it in the light most favorable to him, ought to recover, the nonsuit ought not to have been granted.

Charles F. Libby, for defendant.

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

WHITEHOUSE, J. This is an action brought by an employee of the defendant company to recover damages for a fracture of his knee-pan, alleged to have been sustained by reason of the

defective condition of the iron track on which the wheels at the top of a sliding door, in the defendant's warehouse in Portland were made to run, as the door was opened and closed. At the conclusion of the plaintiff's evidence, the presiding judge ordered a nonsuit and the case comes to this court on exceptions to this ruling.

It is the opinion of the court that a verdict for the plaintiff could not properly have been allowed to stand on the evidence reported and that the nonsuit was therefore rightly ordered.

The plaintiff was twenty-five years of age and had been in the service of the defendant company some two years at the time of the accident. On the night of February 8, 1893, he had completed his task of transferring the express matter from the cars to the warehouse, and attempted to close one of the sliding doors, eight feet high and seven feet wide, on the front side of the building. According to his own testimony he had experienced difficulty in closing this door several days prior to this time, and on examination found that by reason of the absence of two screws, the rear end of the iron track on which the wheels ran, had sprung out an inch and a half or more. Thus when the door was rolled back as far as it could go, "it would stick," and he had found it difficult to move it. He explained the defect to the agent, Mr. Durgin, at that time and Durgin promised to repair it. The plaintiff says that on the evening in question he supposed it had been repaired, but finding that it stuck again, he stepped up on a box to find out what the trouble was. Thereupon a fellow-servant by the name of Sparrow came along and he asked him to assist in closing the door, saying to him: "When I tell you to pull, you pull it." Sparrow pulled when the word was given and the plaintiff, standing on the box and pushing in the same direction, lost his balance when the door moved, and fell forward on the floor, receiving the injury of which he complains. He also testifies that, after the accident, he discovered that the trouble with the door was caused by the same defective condition of the track which he had explained to Mr. Durgin.

This statement of the facts discloses at least two fatal objections to the maintenance of the plaintiff's action.

In the first place he was entirely familiar with the condition of the hanging apparatus of the door, as well as of the effect upon the movements of it; and if a sliding door to a warehouse can reasonably be deemed a dangerous piece of mechanism because it binds and sticks when pushed back to the extreme limit, the plaintiff must have known and fully appreciated all such perils as might ordinarily be connected with the use of it. And it is now settled law in this state that if a servant continues in the service of his employer after he has knowledge of any unsuitable appliances, in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under these circumstances. Such an assumption of the risks of an employment by a servant will bar recovery independently of the principle of contributory negligence. *Mundle* v. *Mf'g Co.* 86 Maine, 400, and cases cited; *Miner* v. *Railroad*, 153 Mass. 398.

But the more radical and fundamental objection is that there was no causal connection between the defective condition of the door-hanger and the plaintiff's injury. The injury was not the ordinary or probable result of the defect in the hanging of the door, but was due to a wholly unlooked for and unexpected event which could not reasonably have been anticipated or regarded as likely to occur. The defect was not the real or proximate cause of the injury. It was not a cause from which a man of ordinary experience and sagacity could foresee that such a result might probably ensue. It was simply the opportunity for the operation of the true cause,—his own want of proper care; or the occasion for a purely accidental occurrence causing damage without legal fault on the part of anyone; for pure accidents have not yet been eliminated from the facts of human experience.

The evidence fails to establish any liability on the part of the defendant company.

Exceptions overruled.

CITY OF ROCKLAND *vs.* FRED T. ULMER, and RALPH R. ULMER.
SAME *vs.* SAME.
SAME *vs.* NELLIE G. ULMER.

Knox. Opinion April 1, 1895.

Taxes. Actions. Assessments. Interest. Demand.

The rules applied in testing the validity of arrests and sales of property, in the collection of taxes, do not prevail in suits at law to recover unpaid taxes.

Where it appears that a tax was lawfully imposed, that the assessors were legally chosen and qualified, that they had jurisdiction of the person and estate assessed, irregularities or omissions in the procedure will not constitute a defense to an action for the tax, unless they increased the defendant's rightful proportion of the general burden.

In an action for a tax, the defendant cannot be heard to complain of any irregularities occasioned by his own conduct.

In an action for a tax, a formal admission that "a demand [for the tax] was made at the date of the writ," is sufficient evidence of a demand "before suit."

Taxes do not bear interest, unless the vote imposing interest is passed at the time the taxes were imposed.

An order of the mayor and treasurer of a city to the city solicitor to begin an action of debt in the name of the city "against the devisees of J. U., deceased,"— is sufficiently definite to authorize such a suit against those devisees by name.

ON REPORT.

The cases appears in the opinion.

W. R. Prescott, city solicitor, for plaintiff.

A. A. Beaton and R. R. Ulmer, for defendants.

Counsel argued that there was no power to lay a supplemental tax, as no polls or estate were omitted by mistake from the first assessment.

That it is not shown when the supplemental tax was laid, and only a tax laid on the date declared on in the writs can be collected in these suits.

That it is not shown to have been laid during the term of office of the old assessors.

That the difference between the first tax assessed and the supplemental tax, shows the rate or valuation to have been changed.

That the supplemental tax is not shown to be assessed on undivided real estate belonging to the James Ulmer devisees, and the written authority to sue the said devisees does not apply to the suit at bar.

Counsel cited: R. S., c. 6, §§ 24, 35, 125, 130, 149, 175; *Ingle* v. *Bosworth*, 5 Pick. 498; *Oakham* v. *Hall*, 112 Mass. 535; *Deane* v. *Hathaway*, 136 Mass. 129; 8 Am. & Eng. Corp. Cases, p. 500, and cases; *Snow* v. *Weeks*, 77 Maine, 429; *Rockland* v. *Rockland Water Co.* 82 Maine, 188; *Parks* v. *Cressey*, 77 Maine, 54; *Gould* v. *Monroe*, 61 Maine, 544.

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

EMERY, J. These are three suits by the city of Rockland to recover the taxes for 1889, assessed by its assessors against the respective defendants, who were all inhabitants of Rockland, and subject to taxation therein at the time of the assessments. The defendants in either suit do not deny that they should have been assessed, and should have paid the taxes on the property assessed to them that year in Rockland. They insist, however, that there were in the procedure of assessment omissions and irregularities, which excuse them entirely from payment. They did not seek to have these omissions or irregularities corrected by appeal, *certiorari*, prohibition or other appropriate process, but now seek to make use of them to avoid paying any taxes.

In considering the objections made by the defendants to these assessments, it should be borne in mind that the strict rules heretofore applied in testing the validity of arrests and sales of property for unpaid taxes, are not applicable to these milder remedies by suits in the ordinary course of legal procedure. When the liability of the defendant to taxation, and the jurisdiction of the assessors over him and the subject matter appear, then the general question is whether the omissions or irregularities pointed out in the proceedings, have occasioned the defendant any loss or other injustice. If they have not, they will not be allowed to exempt him from bearing his proper share of the tax burden. *Rockland* v. *Ulmer*, 84 Maine, 503.

I. Fred T. Ulmer and Ralph R. Ulmer, the defendants in the first suit, were heirs and also devisees of James Ulmer, deceased, and succeeded to his real estate in Rockland. The assessors, in making the regular assessment for 1889, assessed this real estate to the "James Ulmer Heirs," under section 24 of the Tax Act. (R. S., c. 6.) Later, they learned of the will, and undertook to make a supplementary assessment of the same real estate under section 35, and this time to "James Ulmer's Devisees." The defendants, Fred and Ralph, admit that they are the sole owners of this real estate as devisees, and hence are the persons who should pay the tax upon it; but they claim that the supplementary assessment to them as devisees was invalid, inasmuch as the estate was not omitted in the original assessment, but was there assessed to the "James Ulmer Heirs."

The assessors originally assessed this real estate of the deceased James Ulmer to his heirs, without naming them, as provided in section 24—no notice having then been given them of any will or division of the estate. If, by that action, this real estate was assessed and included in the original assessment, then, by the same section 24, Fred and Ralph are each liable for the whole tax. If, on the other hand, that action of the assessors was totally void, then the real estate thus sought to be assessed, was not assessed, but was omitted from the original assessment by mistake. This omission, by mistake, gave the assessors authority to include the estate in a supplementary assessment, as provided in section 35, and the defendants are each liable for the tax as devisees (§ 24). The assessors had jurisdiction to assess the James Ulmer real estate to the owners,—these defendants,—either on the original or supplementary assessment. It is immaterial in this case which was the proper assessment, for in its declaration the city has counted on both, and hence can recover on either. If the defendants escape one, they come under the other.

These defendants complain that the supplementary assessment did not follow the original. The changes, if any, did not increase the valuation or the tax, and hence the defendants were not injured by them.

The defendants, again, complain that personal property of the James Ulmer estate was also included in the original assessment to them as heirs, which inclusion they say was unauthorized by section 24. The tax on this personal property was abated at the request of the defendants and is not now sued for. The defendants, therefore, are not injured by that irregularity, if it be one.

II. Fred T. Ulmer, the defendant in the second suit, was assessed in the original assessment for various items of real estate and personal property, including money. He complained of errors in the assessment, and, in consequence of his complaint, the assessors assumed to abate the whole tax and make a new assessment of his estate in the supplementary assessment, by which they reduced somewhat his valuation and his tax. He now seeks to wholly avoid this lessened tax, on the ground that the assessors had no authority to include his estate in a supplementary assessment, it having been once included in the original assessment. This effort to wholly avoid his share of the public burden cannot be considered with favor. He was liable to be taxed for this estate. The assessors had jurisdiction to assess his estate and fix his share of the tax. They undertook to do so. The irregularities now complained of were committed to oblige him. If the city waives them and only asks for the lower tax, the defendant cannot be heard to complain of them.

The city in this suit also has counted on both assessments, and it is the good fortune of the defendant that the city does not insist on the continued vitality of the original assessment, and on the futility of the supposed abatement, there having been no written application for an abatement, as provided in section 95 of the Tax Act.

III. Nellie G. Ulmer, the defendant in the third suit, was the owner, on April 1, 1889, of a parcel of real estate in Rockland, which was not assessed to her in the original assessment, as the assessors were not then aware of her ownership. Being afterward informed of her ownership, they included it in the supplementary assessment, and assessed it to her. She is the person to whom it should have been assessed and who should pay the tax. No one else has paid it or has been asked to pay

it. The city in this suit is only asking for the tax on that estate from the person owning it and to whom it was assessed. The assessors had jurisdiction for taxing purposes over the estate and over the defendant. We fail to see any injury to the defendant in any irregularity that she complains of.

IV. All the defendants say that the person, to whom these various assessments were committed as collector, was not legally appointed collector. This is evidently immaterial in these suits. That person is not now undertaking to execute the warrants given him. The city is proceeding independently of him.

V. The defendants made at the trial a formal admission, "that a demand was made on all the defendants [for these taxes] at the date of the writ," but they now claim that this admission is not sufficient evidence of a demand "before suit," as required by section 175. The admission having been made by the defendants, presumably to further the proceedings with saving of expense and delay, it should be construed liberally for that purpose. The plaintiff evidently regarded the admission as made for that purpose, since he offered no other evidence of demand. We can and do assume that the defendants made the admission in good faith, and were not setting a trap for the plaintiff by their use of one tense rather than another in the verb. Read in the light of all the circumstances, the language of the admission fairly imports that the demand had been made and completed when the writs were made.

VI. The defendants contend that no interest can be recovered, since the resolve imposing interest was not passed by the city council at the time of imposing the tax. This contention must be sustained. The resolve imposing interest was not passed till August 5, 1889. *Rockland* v. *Water Co.* 82 Maine, 188.

VII. The defendants in the first suit contend, that the order of the mayor and treasurer is not sufficiently definite to authorize a suit against them. The order was to begin an action of debt in the name of the city against "the devisees of James Ulmer, deceased," to recover the tax of 1889. This order shows that the mayor and treasurer considered this particular tax against these two defendants, and adjudged an action of

debt expedient. This is sufficient to remove the objection sustained in *Cape Elizabeth* v. *Boyd*, 86 Maine, 317.

There are other minor objections made by the defendants, but they are practically answered by what has already been said. It sufficiently appears in the case that the tax was lawfully imposed; that the assessors were lawfully appointed and qualified; that they had jurisdiction for purposes of assessment over the persons and estates of the defendants; that they made assessments and determined the defendant's share of the taxes imposed; and that the defendants are asked to pay only their share thus determined. It does not appear in the case that any omission or irregularity, pointed out in the proceedings, has occasioned either defendant any hardship, loss or other injury. Whatever might have been the effect of these upon an appeal, *certiorari*, or other suitable and timely process for the correction of errors, they do not now avail to wholly discharge the defendants from their taxes.

Judgment must be awarded to the city against the several defendants for the tax sued for, without interest, but with costs.

Judgments for the plaintiff.

JAMES B. DINGLEY, and others, *vs.* CHARLES GIFFORD.

Kennebec. Opinion April 1, 1895.

Set-off. Judgment. Merger. Evidence.

When the defendant in an action by the assignee of an over-due note claims that items of his account against the assignor should be allowed upon the the note, the plaintiff may show that the items were originally appropriated to or allowed upon some other claim of the assignor.

The fact that the assignor's other claim has been merged in a judgment does not preclude the assignee of the note from showing that the defendant's account against the assignor was appropriated to or allowed upon the claim thus merged.

ON EXCEPTIONS.

The plaintiffs having obtained a verdict upon the note in suit, in the Superior Court, for Kennebec county, the defendant took exceptions.

The case is stated in the opinion.

A. C. Stilphen, for plaintiffs.

A. M. Spear and C. L. Andrews, for defendant.

The plaintiffs can claim no rights superior to those of Burnham. If Burnham is estopped, they are estopped.

Defendant claims that Burnham is estopped, since the identical claim upon which Burnham was permitted to offer testimony had been merged in the judgment. This judgment, as the case shows was general; therefore, swallowed up every item in Burnham's account, that is, every item lost its identity.

Judgment is conclusive upon all matters in issue, by which is meant, that matter upon which plaintiff proceeds by his action and which the defendant controverts by his pleadings. Freeman Judg. p. 222, ch. 257; *King* v. *Chase*, 15 N. H. 9, 14; 2 Whart. Ev. c. 759.

The judgment cannot be impeached, directly, indirectly or collaterally. While it remains unreversed it is conclusive. *Blodgett* v. *Dow*, 81 Maine, p. 197.

When it appears by the pleadings that the subject matter in controversy was directly and necessarily in issue, in the action and general judgment either on a general verdict of the jury, or a general award of referees, while it stands unreversed, is a bar to the action for the same cause. The parties are estopped by it. *Blodgett* v. *Dow*, *supra*.

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

EMERY, J. Arthur M. Burnham had an account against Charles Gifford, amounting to $2145. He also held Gifford's over-due promissory note for $200. Gifford, in turn, had an account against Burnham amounting to $1085.50. Burnham assigned his account against Gifford to M. S. Holway, who brought suit upon it and took judgment for the sum of $142.51. Burnham assigned the over-due note to R. T. Burnham, and the latter assigned it to Dingley & Co., the plaintiffs, who have

brought this suit upon the note against Gifford, the maker. The defendant, Gifford, has filed in set-off against this over-due note his account of $1085.50 against Burnham, the original payee, as by law he can.

The question presented by the defendant's bill of exceptions, is whether the plaintiffs in this suit upon the note can lawfully avoid all or any part of Gifford's account against Burnham, (filed in set-off) by showing that all or any of the items in the account were furnished by Gifford to Burnham in payment *pro tanto* of Burnham's larger account against Gifford, which had been sued by Holway.

The case does not show how a judgment for only $142.51 came to be rendered on an account for $2145, whether by evidence of payments, or by the allowance of items in set-off, or in any other way. The defendant, Gifford, claims that this is all immaterial, that however it was reduced, the account of Burnham against him was merged in the judgment, and was thereby extinguished, leaving his own account against Burnham in full force and unaffected by Burnham's account against him. It may be conceded for the purpose of the argument, that Burnham's account against Gifford was so far extinguished by the judgment, that no item in it would sustain a suit against Gifford, or sustain a plea of set-off in a suit by Gifford; but this concession does not conclude the plaintiff in this suit, which is not upon Burnham's account, but is upon a note not included in the judgment invoked.

In this suit upon the note, the defendant, Gifford, in support of his plea of set-off, was bound to show that some of the items of his account were, at the time of the suit, subsisting, unsatisfied items of charge against Burnham, which should now be applied in reduction or payment of the note. The plaintiffs, on the other hand, were entitled to rebut this evidence, and show that these items had already been satisfied in some way, or had already been applied by Gifford to reduce some other claim of Burnham against him. They undertook and were permitted to show that the items of set-off against their note had been furnished by Gifford to Burnham in payment and reduction of

Burnham's account against him, and hence could not be again used to reduce the note. The ruling admitting such evidence and giving it the effect stated was clearly right. The judgment in the suit on the account does not exclude an inquiry into the merits of the set-off against the note.

Exceptions overruled.

SUMNER SOULE *vs.* HOWARD S. DEERING.

Kennebec. Opinion April 2, 1895.

Broker. Commissions. Knowledge.

Where a selling broker is aware that a customer is resolved and prepared to pay the price asked, he should not send the customer to his principal to negotiate directly, without communicating to the principal his knowledge of the customer's resolution.

A selling broker withholding such information from his principal forfeits any claim for commissions, even though the principal obtained from the customer the full price originally asked.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit, and the case was tried to a jury in the Superior Court, for Kennebec county, where a verdict of $372.80 was returned for the plaintiff.

The declaration in the writ was upon the following account annexed:

" Sept. 3, 1892, H. S. Deering To Sumner Soule, Dr.

To 5 per cent commission for selling 5523 tons of ice at $1.25 per ton $6903.75 to Morse Co. New York,	$345.19
Interest from Nov. 21, 1892,	18.23
	$363.42"

The defendant pleaded the general issue.

The defendant asked the court to charge the jury as follows:

1. If Mr. Soule was under contract with Mr. Deering to procure a purchaser and did not have the exclusive sale, even then he cannot recover unless he himself effected the sale or procured and introduced a purchaser to whom Mr. Deering did sell.

2. If Soule did not have exclusive sale, it is not sufficient, if he sends a purchaser to Mr. Deering and fails to make known in some way to Mr. Deering that the purchaser was sent by him.

3. If Mr. Soule did not make known to Mr. Deering that Morse & Co. were sent by him, he cannot recover.

The court refused to so instruct the jury but did instruct them as follows:

"It is claimed by the defendant that the plaintiff did not procure the purchaser and introduce him to the defendant. The plaintiff, on the other hand, claims that he did procure him and introduce the defendant to the purchaser Morse, and here the testimony is in conflict between the deponent Morse and the defendant. It is not claimed by plaintiff that the contract, which he sets up as having been made with the defendant, gave the plaintiff the exclusive right to sell the ice. The defendant might still have sold it himself and if he did so, the purchaser not having been sent to the defendant or put in communication with him by the plaintiff, the plaintiff would not be entitled to recover. But if you shall find that Morse informed the defendant before the sale was completed that he was sent to him by Soule, as stated in Morse's deposition, I instruct you that that would be a sufficient introduction to entitle the plaintiff to his commissions, if you find there was a contract such as the plaintiff claims and it had not been forfeited under the rule which I have given you."

There were also exceptions by the defendant to the exclusion and admission of testimony. The case is sufficiently stated in the opinion.

A. M. Spear and C. L. Andrews, for plaintiff.

H. Fairfield and L. R. Moore, for defendant.

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

EMERY, J. The jury has found that the defendant (living in Boston, but owning ice on the Kennebec river) employed the plaintiff, an ice broker at Gardiner, to sell his ice, 5,000 tons

more or less, for one dollar and twenty-five cents per ton, at a five per cent commission; and that the plaintiff sent to the defendant a customer, who bought the ice directly from the defendant at that price. Nothing more appearing, the plaintiff would be entitled to retain the verdict in his favor for the amount of his commissions. But the defendant contends that the evidence also shows that the plaintiff failed in one important particular to fulfill the obligations due from a broker to his principal. If any such omission of his duty as a broker does appear, then he is not entitled to any commissions, however much he may have labored in the premises.

The evidence, especially the plaintiff's testimony, letters and telegrams, establish the following facts, even against the verdict of a jury. The employment was August 19, 1892. The minimum price fixed by the principal was one dollar and twenty-five cents per ton. The plaintiff, as broker, undertook to sell the ice at that, or a better price. August 23rd, four days after his employment, he wrote to his principal that he did not know of any ice being sold for more than one dollar per ton,—that it would be hard to get more than one dollar, that the principal would lose a sale if he asked more. August 29, he wired his principal offering one dollar per ton, and advised him to sell at that price. August 30, he wrote a letter to the same effect. August 31, having received from his principal a telegram declining to sell at one dollar, he wrote that he had just bought four thousand tons at one dollar, and asked for defendant's lowest price. In the meantime, he had been buying ice for Morse & Co., ice dealers, and expected they would eventually take this ice. September 2, he ascertained definitely that Morse & Co. wanted and would take the ice at one dollar and twenty-five cents per ton, if they could not get it for less. On that day, with his knowledge and concurrence, Morse & Co. wired their Boston partner to get from the defendant a refusal of this ice for twenty-four hours, at the lowest possible price. This Boston partner of Morse & Co. interviewed the defendant in Boston, and, after vainly trying to get the ice at a less price, finally bought it at the original price, one dollar a nd twenty-five cents. The plaintiff,

in sending Morse & Co. to his principal, did not apprise his principal of what he knew, viz: that Morse & Co. were going to the principal direct, resolved and prepared to pay the one dollar and twenty-five cents if they could not get it for less.

To leave his principal in ignorance of this important fact, after so persistently assuring him that the ice would not sell for over a dollar, was the patent omission of a plain duty. It was a manifest breach of that entire good faith and loyalty due from a broker to his principal, and by that breach the plaintiff has forfeited all right to any commissions. It does not relieve the plaintiff that the defendant finally got his price. He got it by his own persistence and in spite of the disloyalty of his broker. That the plaintiff has forfeited his commissions needs no argument. The mere statement of the facts should be enough. If authorities are desired, see *Pratt* v. *Patterson*, 112 Pa. St. 475; *Martin* v. *Bliss*, 57 Hun, 157; *Henderson* v. *Vincent*, 84 Ala. 99.

Motion sustained. Verdict set aside.

ALBERT C. WADE, Administrator, *vs.* HENRY RIDLEY.

Somerset. Opinion April 4, 1895.

Client and Attorney. Evidence.

Statements of fact made in good faith to an attorney at law for the purpose of obtaining his professional guidance or opinion are privileged communications. It is not necessary that the relation of attorney and client should exist.

This rule should be construed liberally in favor of the person seeking legal advice in order to encourage a full statement of all the facts.

Upon an issue as to the ownership of certain live stock and farm movables, it was a material question whether the defendant, who once owned them, had not permitted them to go into the control of the plaintiff's intestate. The plaintiff, in order to prove such fact, called an attorney to whom the defendant had applied for advice as to his rights and to whom he had communicated the disposition made of the property. *Held;* that the admissions thus made to the attorney were privileged.

ON EXCEPTIONS.

This was an action of replevin for certain live stock and farming utensils alleged to belong to the estate of Horace D. Ridley, the plaintiff's intestate.

The plaintiff claimed, and introduced testimony tending to show, that in 1884 the defendant conveyed to said Horace D. Ridley his farm in Athens, and that the said Horace D. Ridley mortgaged back the same farm on the same day, the condition of the mortgage being that the said Horace D. Ridley should support the said Henry Ridley and his wife during their life-time; and that as a part of the same trade, Henry Ridley sold all his personal property to the said Horace D. Ridley.

The defendant claimed, and offered testimony tending to show, that the said personal property was not sold to the said Horace D. Ridley, but that the said Horace, by agreement, took the said property, and agreed to keep up the stock to its value at the time of said trade and to pay taxes on it for the use of it, the title in said personal property and in the various substitutions of it to remain in the said Henry Ridley; and that part of the property replevied was either the same property referred to in their trade in 1884, or substitutions which had been made by the said Horace Ridley in accordance with their trade.

An attorney at law, called for the plaintiff, testified that he made the writings between Henry and Horace Ridley; that after making the deed and mortgage, he got ready to make the writings about the personal property and a discussion ensued between the two as to the changes that would have to be made, and how the writings should be made that would cover and hold when all these changes had been made; and that it was agreed that the personal property should go to Horace, and that there should be no claim given back upon it; that there should be given to Henry Ridley a two hundred dollar note; which was done; that no bill of sale of the personal property was made; that it was the expectations of the parties, as stated when they went to his office, that Henry should in some way retain a claim on the stock.

The attorney then testified as follows :—

"Q. (By plaintiff's attorney.) I want to inquire of you if you had an interview with Henry Ridley at some time within two or three years in relation to this same property — this two hundred dollar note and the personal property?

"A. Yes, sir, I think about two years ago, Henry Ridley came to me and showed me the note and asked me—"

Mr. Savage, for defendant: "I suppose that communications which Henry Ridley made to Mr. Holman are not admissible.

"Court. You made the note?

"A. Yes.

"Court. It was delivered at that time?

"A. It was."

Against the objection of the defendant, the attorney was permitted to testify further as follows:

"Q. State what was said between you and Mr. Ridley.

"A. I think it was two years ago [1891] this last summer that he came to me and showed me the note and asked me about collecting it. I told him it was then barred by the statute of limitations so it could not be collected. He then asked me if he could not hold some of the stock, I said to him: 'You know what the trade was?' He said: 'Yes, but I have never delivered the stock over to Horace.' Then I asked him if it had not passed into Horace's hands so there wasn't any of the original stock left, and I think he was able to name one or two animals that had not passed over into Horace's hands. I think that was the substance of the conversation that I remember."

The defendant was not permitted to testify, in contradiction to the attorney. The court found the title to the property to be in the plaintiff as administrator of said Horace D. Ridley, and ordered judgment accordingly.

To the ruling of the presiding justice permitting the attorney to testify to the conversation between him and Henry Ridley in 1891, and communications made to him at that time by Henry Ridley, the defendant was allowed his exceptions.

D. D. Stewart, for plaintiff.

In a late case the Supreme Court of Missouri say: "The relations of attorney and client do not exist so as to render communications or statements privileged, until a proposal has been made to engage the services of the attorney, and the latter's acceptance of the employment." *Hickman* v. *Green*, 22 S. W. Rep. 455; S. C. 7 General Digest, 933-4, § 2250. No such proposal or acceptance, is shown in the case at bar.

Testimony of an attorney is not to be excluded unless it extends to material information derived at the time from the client as such. *Crosby* v. *Berger*, 11 Paige, 378; *Arbuckle* v. *Templeton*, 65 Vt. 209; *Hoy* v. *Morris*, 13 Gray, 520; *Patten* v. *Moor*, 29 N. H. 168; *Day* v. *Moor*, 13 Gray, 522-523.

This evidence added nothing new to the plaintiff's side, and whether in, or out, would not affect the result. If it had any effect it was to help the defense by showing no delivery intended as such to Horace. *Bales* v. *Horner*, 65 Vt. 471.

The interview with the attorney gives no idea that it was the purpose of Ridley to employ him in any legal capacity. It was about seven years after the transaction took place, and knowing that he was aware of what took place at that time, and that he wrote the two hundred dollar note, he asks certain questions for his own information, without, so far as the case discloses, any purpose of retaining the witness as counsel. It was a casual conversation, apparently, which might have occurred in the street, or post office, or town meeting, and related to a previous transaction of years before, about which each party knew.

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

The defendant went to his attorney to consult him in a professional capacity. "He showed me the note, and asked me about collecting it." He then asked him about his rights in the stock, still seeking legal information from a lawyer.

As the witness put it, the original trade was that the property should go to Horace. The defendant before this had introduced testimony to the contrary. So that was the issue in the case.

The inference to be drawn from the witness' testimony then is that, in the conversation which is objected to, the defendant admitted that the witness' version was correct, but sought to

avoid the force of it by claiming a non-delivery. Then the witness testified that they had a further conversation, the substance of which was that all the stock had been delivered over into Horace's hands except one or two animals.

All communications made by a client to his counsel for the purpose of obtaining professional advice or assistance are privileged. *Higbee* v. *Dresser*, 103 Mass. 523; *Bacon* v. *Frisbie*, 80 N. Y. 394; *Sleeper* v. *Abbott*, 60 N. H. 162; *Maxham* v. *Place*, 46 Vt. 434; *Snow* v. *Gould*, 74 Maine, 540.

They are entitled to protection whether they relate to a suit pending or contemplated, or to any other matter. The communication need not relate to litigation. *McLellan* v. *Longfellow*, 32 Maine, 494; *Sargent* v. *Hampden*, 38 Maine, 581; *Root* v. *Wright*, 84 N. Y. 72.

The attorney was permitted to testify to matters which happened afterwards, and to disclose what he claims the defendant said to him about whether the trade, made between the father and the son in the first place, had been carried into execution.

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

EMERY, J. When are statements of facts made to an attorney at law privileged communications, and when are they not privileged? On the one hand, if made to the attorney as an individual merely, and not to him in his professional capacity, they are not privileged. Neither are they privileged if made to him in his professional capacity, in giving him directions to do some particular thing. *Hatton* v. *Robinson*, 14 Pick. 416. On the other hand, it is not essential that the relation of attorney and client exist, for the statements may be privileged when the attorney refuses to accept any employment or give any advice. *Sargent* v. *Hampden*, 38 Maine, 581.

The test or rule deducible from the authorities seems to be this: If the statements of fact were made to an attorney at law in good faith, for the purpose of obtaining his professional

guidance or opinion, they are privileged; otherwise they are not privileged. *McLellan* v. *Longfellow*, 32 Maine, 494; *Higbee* v. *Dresser*, 103 Mass. 523; *Britton* v. *Lorenz*, 45 N. Y. 57; *Bacon* v. *Frisbie*, 80 N. Y. 394; *Crisler* v. *Garland*, 11 Smed. & M. (49 Am. Dec. 49); *Beltzhoover* v. *Blackstock*, 3 Watts, 20 (27 Am. Dec. 330).

An order of men, honorable, enlightened, learned in the law and skilled in legal procedure, is essential to the beneficent administration of justice. The aid of such men is now practically indispensable to the orderly, accurate and equitable determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged, in early seeking the assistance or advice of a good lawyer upon any question of legal right. In order that the lawyer may properly perform his important function, he should be fully informed of all facts possibly bearing upon the question. The person consulting a lawyer should be encouraged to communicate all such facts, without fear that his statements may be possibly used against him. For these reasons, the rule above stated should be construed liberally in favor of those seeking legal advice. It does not apply, of course, where it is sought to find a way to violate some law.

Measuring the statements made in this case by this rule thus liberally construed, they may come near the line, but we think they are fairly within the rule. The defendant was evidently desirous of obtaining the attorney's opinion as to his rights and the best mode of enforcing them. For that purpose, he told the attorney of some of his transactions with the plaintiff's intestate. It is these statements thus made, which his antagonist now seeks to use against him.

The plaintiff now insists, however, that the communications disclosed by the attorney were all immaterial to the issue being tried. The issue was as to the ownership of certain live stock and farm movables, which once belonged to the defendant. One material question was, whether he had permitted them, or any of them, to go into the control of the plaintiff's intestate.

He practically admitted to the attorney that most of the stock, at least, had so gone. As the case is presented to us, this admission seems material.

Exceptions sustained.

ADOLPHIS MAILHOIT

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Androscoggin. Opinion April 8, 1895.

Life Insurance. Premium. Agent. Fraud. Rescission. Waiver. R. S., c. 49, § 90; Stat. 1870, c. 156, § 15.

The liability of an insurance company for a return of premiums is by no means absolute, but depends upon the question whether the policy has ever become a binding contract between the parties.

If it has, and the risk has once commenced, then there can be no apportionment, nor will an action lie for the recovery of the premiums paid.

The application and medical examination are preliminaries for the protection of the company in issuing its policy, and solely for its benefit, and the company may dispense with them entirely if it sees fit so to do.

Where the fraud alleged is that committed by the company's agent in not having the application signed, and representing that it was not necessary that it should be, and that no medical examination was necessary, the policy issued by the company upon the life insured is not absolutely void, but voidable.

In such case, it is not a fraud upon the insured, or a fraud in relation to provisions of the policy that were for his benefit, and of which he could take advantage.

When the company has treated the contract as valid and subsisting, the insured has no legal grounds of complaint.

If a person is induced by false representations to take out a policy of insurance, he can avoid it and recover the premiums paid upon it; but the representations must be material as to him, such as work an injury to him.

And moreover it should be shown in such case that there was a rescission, or that it was unnecessary by reason of the policy being entirely worthless.

AGREED STATEMENT.

In addition to the facts stated in the opinion, the parties also agreed that with said policy there was delivered to the plaintiff a book called "Premium Receipt Book," for recording the weekly premiums paid on said policy, which book contained

among other printed matter, "Extracts from the rules, regulations, &c., of said company," among which was the following:

"Under no circumstances can an application be written upon the life of a husband for the benefit of his wife, or upon a wife for her husband or (a legal insurable interest existing) upon the life of any person for another's benefit (children excepted), unless the life on which the policy is applied for fully understands and consents to the insurance, is examined by a physician of the company if the amount is over two hundred dollars, or by an agent if under that sum, and unless the proposed insured personally signs the examination form on the back of the application after the answers in said application are all recorded, and not otherwise. Any policy obtained in violation of these rules will be null and void. Adult applications must be signed on their face (directly under the warranty) by the applicant personally, and on the back (at the foot of the examination form) by the life proposed for insurance."

It was agreed that the plaintiff first learned the contents of said extracts November 21, 1892, and that the plaintiff will testify, if admissible, that his attention was first called to said extract by a report that said defendant company had refused to pay its policies issued under like circumstances as the policy in this case.

The plaintiff thereupon refused to make further payments of premiums after said November 21, 1892, and demanded of the agent of said defendant company the return of the premiums paid by him on said policy, upon the claim that the said representations of the agent of defendant company, at the time said plaintiff agreed to take said policy, were false; that he was induced to take said policy upon said representations; and that by said rules and regulations said policy was void.

It was further agreed that, if admissible, defendant can show that on the twenty-sixth day of December, 1892, said policy was entered on the books of the company at the home office, in New York, as lapsed for the non-payment of premiums.

F. M. Drew and L. G. Roberts, for plaintiff.

1. Policy void because it was issued in violation of the rules of the company, which by the application are made a part of the contract of insurance. Every rule of the company, every condition of the contract of insurance is broken. Nothing that the defendant stipulated as necessary to obtain insurance in the company was done. There was not the necessary knowledge and consent of the insured. There was no application for insurance; there was no medical examination.

Counsel cited on this point: *Gould* v. *York Co. Mut. Fire Ins. Co.* 47 Maine, 409; *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *Ryan* v. *World Mut. Life Ins. Co.* 41 Conn. 168; *Philbrook* v. *N. E. Mut. Fire Ins. Co.* 37 Maine, 137; *Battles* v. *York Co. Mut. Fire Ins. Co.* 41 Maine, 208; *Lovejoy* v. *Augusta Mut. Fire Ins. Co.* 45 Maine, 472; *Richardson* v. *Maine Ins. Co.* 46 Maine, 394; *Day* v. *Charter Oak F. & M. Ins. Co.* 51 Maine, 91; *Lindley* v. *Union Farmers' Mut. Fire Ins. Co.* 65 Maine, 368; *Swett* v. *Citizens' Mut. Relief Society*, 78 Maine, 541; *Edmands* v. *Mut. Safety Fire Ins. Co.* 1 Allen, 311; *Kimball* v. *Etna Ins. Co.* 9 Allen, 540, p. 542; *Brown* v. *Mass. Mut. Life Ins. Co.* 59 N. H. 298.

2. The policy was void by reason of the fraud of defendant's agent. His acts were a fraud on the insured and insurer. All the statements made in the application and medical examination are forgeries and false representations. They go to the essence of the contract. *Clark* v. *N. E. Mut. Fire Ins. Co.* 6 Cush. p. 352.

A policy obtained by misrepresentation is in legal intendment no insurance at all; it has no legal effect. *Clark* v. *N. E. Mut. Fire Ins. Co. supra.*

Fraud will vitiate any, even the most solemn transactions, and any asserted title to property founded upon it is utterly void. *United States* v. *The Amistad*, 15 Peters, 518.

Whether both plaintiff and defendant, or the plaintiff alone was deceived by the fraud of the agent, still the policy is void and the premiums should be returned. *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *Ryan* v. *World Mut. Ins. Co.* 41 Conn. 168; Bacon on Benefit Societies & Life Insurance, § 428,

p. 640; *Tebbetts* v. *The Hamilton Mut. Ins. Co.* 3 Allen, 569: *McCoy* v. *Metropolitan Life Ins. Co.* 133 Mass. 82; *Kyte* v. *Commercial Union Assurance Co.* 149 Mass. 116; *Brown* v. *Mass. Mut. Life Ins. Co.* 59 N. H. 298; *Hartwell* v. *Alabama Gold Life Ins. Co.* 33 La. Ann. 1353; S. C. 39 Am. Rep. 294.

3. The contract of insurance never took effect for want of a proper application and examination. The condition precedent was entirely wanting. The policy had no foundation to rest upon. The minds of the parties never met in any contract agreement. *Kimball* v. *Etna Ins. Co.* 9 Allen, 540; *Goddard* v. *Monitor Ins. Co.* 108 Mass. 56, p. 59; *Sanders* v. *Cooper*, 115 N. Y. 279.

Plaintiff not estopped: *Trambly* v. *Ricard*, 130 Mass. 259.

J. H. Drummond and J. H. Drummond, Jr., for defendant.

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

FOSTER, J. The plaintiff seeks to recover the amount paid in premiums on a policy of insurance on the life of his wife.

The case comes before this court upon an agreed statement, and the facts briefly stated are these: On September 6, 1890, plaintiff was induced by defendant's agent to take a policy of insurance on the life of his wife in the defendant company, payable at her death to himself, upon the representations that the wife need not sign any application therefor or know or consent to the same; that she need not be examined by a physician of the company, and that the company permitted applications to be made in such way and issued policies thereon.

Upon these representations the plaintiff consented to take a policy in the defendant company on the life of his wife without her knowledge or consent. Thereupon the defendant's agent filled out the application and affixed her signature to the same. The plaintiff then paid the agent the advance premium of thirty-one cents. The wife was not examined by a physician of the company, although what purports to be a certificate of medical examination of the wife, signed by a physician of the company,

is attached to the application, the alleged certificate having been filled out and signed by the defendant's physician without any examination or the knowledge or consent of the wife.

September 15, 1890, on this application and examination the company issued its policy for five hundred dollars on the life of the wife, payable to the plaintiff at her death. The wife had no knowledge that an application for insurance on her life had been made until about four weeks afterwards, all the negotiations having been carried on with the plaintiff by defendant's agent. Neither he nor his wife are able to read or write in the English language, and all negotiations were carried on in the French language.

Pursuant to the conditions of the policy, plaintiff continued to pay the weekly premiums of the thirty-one cents thereon (amounting in all to thirty-six dollars and twenty-seven cents,) until November 21, 1892, when he refused to make further payments of premiums, and demanded of the agent of the company a return of the premiums paid by him, upon the ground that the representations of the agent at the time the plaintiff agreed to take the policy were false; that he was induced to take the policy by these representations, and that he had learned that by the rules and regulations of the company the policy was void.

Upon the foregoing facts the plaintiff claims that the policy was void, and that he is entitled to recover in this action the amount paid in premiums on the policy.

The liability of an insurance company for a return of premiums is by no means absolute, but depends upon the question whether the policy has ever become a binding contract between the parties. If it has, and the risk has once commenced, then there can be no apportionment, nor will an action lie for the recovery of the premiums paid.

This principle is thus laid down by the text writers: "Where the contract has once taken effect, there is ordinarily no rule of law to sustain the recovery back of premiums paid, even though the insurer attempted to declare a forfeiture. On the other hand, where the contract has never taken effect, the premiums may

be recovered back, in accordance with the general rules governing the recovery back of money paid." Cook Life Ins. 193, 194. Bliss Life Ins. § 423. *Leonard* v. *Washburne*, 100 Mass. 251.

Applying these principles to the case at bar, we must ascertain whether this policy had ever become effectual as a contract and the risk had ever commenced. If so this action cannot be maintained.

The application was in the usual form, regular upon its face, and came into the defendant's possession through the regular channels and in the usual course of its business. The fraud relied upon by the plaintiff was the fraud of the defendant's agent, and the company relying upon what purported to be the application of plaintiff's wife for a policy upon her life for the benefit of her husband, issued its policy in accordance with the proposals contained in that application. The plaintiff received a policy which insured the life of his wife for his benefit in the exact terms and under the precise conditions which he applied for, provided the policy was valid and binding upon the company. He makes no complaint that this is not true. But the gist of his complaint is that his policy is not binding upon the company, but is void because of the acts of its agent.

But the fraud which was committed was not a fraud upon the plaintiff. He was in no wise injured or damaged by it. It was a fraud upon the defendant, and nobody but the defendant could be injured or damaged by it.

The fraudulent acts consisted in sending an application and certificate of medical examination, fraudulent in whole or in part, to the defendant, upon which it would act in issuing its policy. The application and medical examination were solely for the purpose of giving the defendant an opportunity to decide whether to issue its policy on the life of the plaintiff's wife or not. All the provisions of the application, policy and rules of the company which were violated by the defendant's agent and physician, were provisions for the sole benefit of the defendant. They were not for the benefit of the plaintiff or his wife. The purpose of these provisions was to satisfy the defendant that it

was safe in issuing the policy. They furnished the information upon which the defendant acted in issuing the policy, and so far as the plaintiff was concerned it mattered not to him whether there was an actual application and medical examination or not, so long as the policy issued was, in its terms and conditions, such as he wanted. There is no pretense that it was not. He complains concerning the fraud committed upon the defendant. If that fraud did not render the policy absolutely void, then he has no cause for complaint.

If the risk commenced to run, the policy was not void.

The application and medical examination being preliminaries for the protection of the defendant in issuing its policy, and solely for its benefit and advantage, could have been entirely dispensed with, if the defendant had seen fit so to do. The defendant could have waived them entirely and issued a policy which would have been valid and binding upon it. *North Berwick Co. N. E. F. & M. Ins. Co.* 52 Maine, 336, 341; *Allen* v. *Vt. Mut. Fire Ins. Co.* 12 Vt. 366.

This case does not present to the court the question of fraud upon the insured or a fraud in relation to provisions of the policy that were for his benefit, and of which he could take advantage; but the sole question is, whether the fraud upon the defendant committed by its own agents, rendered the policy absolutely void, so that no risk was ever assumed under it.

The application in form was regular in every respect, and, so far as the plaintiff was concerned, it stated the exact terms and conditions of the insurance he desired. There is no pretense that the plaintiff's wife was not a proper subject of insurance, nor that, so far as her health was concerned, she was not a good risk, nor that the answers and statements in the application and certificate of medical examination were false and not true in fact.

The insurance was regular in every respect with the exception that there had been no medical examination of the life proposed for insurance, and the application was not signed by her although it purported to be, and the whole transaction took place without her knowledge and consent.

The effect of these acts might render the policy voidable so far as the defendant was concerned, but would not make it absolutely void.

The courts in different jurisdictions have held that policies issued under circumstances similar to these shown to have existed in this case are either valid, or voidable only, but never absolutely void. Bliss Life Ins. §§ 82, 83, 294.

In Massachusetts, the court in recent decisions has held the policy voidable. *Leonard* v. *Washburn*, 100 Mass. 251; *Plympton* v. *Dunn*, 148 Mass. 523.

The Supreme Court of the United States hold such acts to be the acts of the company and bind it. *Ins. Co.* v. *Wilkinson*, 13 Wall. 222; *Ins. Co.* v. *Mahone*, 21 Wall. 152; *Ins. Co.* v. *Baker*, 94 U. S. 610.

In New York, the policy is held to be binding upon the company. *Baker* v. *Ins. Co.* 64 N. Y. 648; *Miller* v. *Phoenix Life Ins. Co.* 107 N. Y. 292; *O'Brien* v. *Home Benefit Soc.* 117 N. Y. 310.

In Connecticut, the policy is held to be voidable. *Ryan* v. *World Mut. Ins. Co.* 41 Conn. 168.

In Ohio, the policy is held to be valid. *Mass. Mutual Life Ins. Co.* v. *Eshelman*, 30 Ohio, 647.

In Iowa, the policy is held valid. *McArthur* v. *Home Life Ass.* 17 Ins. L. J. 129. In this case the agent inserted without the knowledge of the assured false answers in the application, and forged the certificate of medical examination.

In Michigan, the policy is held to be valid and binding on the company. *Brown* v. *Metropolitan Life Ins. Co*, 65 Mich. 306; *Temmink* v. *Same*, 72 Mich. 388.

So in Colorado, *State Ins. Co.* v. *Taylor*, 19 Ins. L. J. 966.

While in different jurisdictions there is a contrariety of opinion as to the effect of the acts of an agent which are a fraud upon the company,—they are held either to have estopped the company from taking advantage of them, or to have rendered the policy voidable only. While the courts in some of the cases have spoken of the policies as "void," it will be found upon examination that the word was used in the sense of voidable only,

as the questions of waiver or affirmance of such acts were discussed. *Atlantic Ins. Co.* v. *Goodall*, 35 N. H. 328, 332. In that case the court say: "But the term void is equivocal. It may import absolutely null, or merely voidable, as it is often used where the contract to which it applies has a capacity to be affirmed, and thus rendered effectual from the first, the affirmance operating as a waiver of the right to avoid."

In some of the cases, the courts have intimated that the premiums might be recovered, but it was upon the ground that the policy was voidable and that the company had avoided it, thus rendering itself liable to an action for the premiums. It was so held in *Conn. Mut. Ins. Co.* v. *Pyle*, 44 Ohio, 19, and in *N. Y. Life Ins. Co.* v. *Fletcher*, 117 U. S. 519. But that question does not arise in this case. It is not claimed that this policy was voidable on account of the fraudulent acts of the agent and had been avoided, either before or since the commencement of this suit, by the defendant upon that ground. The facts stated show that the defendant has always treated this policy as a valid policy, and that it was in fact in force at the time this suit was brought. It was lapsed by the defendant only after the refusal of the plaintiff to pay the premiums in accordance with its terms and conditions, and in fact not till after this suit was commenced. The defendant has never attempted to take advantage of the fraud, but on the contrary has recognized and treated the policy as a valid and existing contract up to and even after suit was brought by the plaintiff to recover the premiums.

Whatever the effect of such fraudulent acts of the agent, as shown in this case, might have upon the policy in other jurisdictions, there can be no doubt that since the act of 1870, c. 156, (incorporated into and a part of R. S., c. 49, § 90) in this state it must be held to be a binding and subsisting contract. That statute provides that "such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misde-

scriptions known to the agent shall be regarded as known by the company and waived by it as if noted in the policy."

In *Farrow* v. *Cochran*, 72 Maine, 309, the action was for the recovery of premiums paid on a life insurance policy, on the ground that the policy was void, because the agent without authority changed the terms of the policy. The policy did not conform to the application and the desires of the insured in reference to the beneficiary. The agent changed its terms so as to conform to his wishes without the knowledge and consent of the company, and the court held that his act was the act of the company, and that the policy was binding upon it.

Notwithstanding the rules and regulations of the company provide that any policy issued upon the life of a wife for the benefit of her husband without her knowledge and consent and examination by the company's physician, and unless she personally signs the application, is null and void, and this is held to be a part of the contract and binding upon the company, it does not render the contract void *ab initio*, but only voidable. Bliss Life Ins. § 260; *Atlantic Ins. Co.* v. *Goodall*, 35 N. H. 328, 332. In this latter case the question turned upon the expression "null and void" in the policy, and the court held that it meant voidable only and that the policy was capable of confirmation.

These rules and regulations were inserted for the benefit of the defendant, and it had the right to waive them and affirm the policy if it saw fit so to do. *Atlantic Ins. Co.* v. *Goodall*, *supra*; *Pierce* v. *The Nashua Fire Ins. Co.* 50 N. H. 297; *North Berwick Co.* v. *N. E. F. & M. Ins. Co.* 52 Maine, 336, 341; *Day* v. *Ins. Co.* 81 Maine, 244.

It is undoubtedly true that if a person is induced by false representations to take out a policy of insurance, he can avoid it and recover the premiums paid upon it. But the representations must be material as to him, such as work an injury to him. In the present case the representations were of facts that were of interest to the defendant alone, and their truth or falsity could be of moment and importance to the defendant only. Assuming they were the inducement upon which the plaintiff relied in entering into the contract, they did not render the

contract absolutely void but only voidable. *United States Co.* v. *Wright*, 33 Ohio, 533.

In the last cited case the agent of the insurance company made false representations to the insured as to the payment of premiums and as to the terms of the policy by which he was induced to take out the policy and pay the premiums. Upon learning the falsity of the representations, he repudiated the contract and commenced suit for the return of the premiums. It was held that he could not recover upon the ground that the contract was absolutely void, but upon the ground that he could rescind. *Penn. Ins. Co.* v. *Crane*, 134 Mass. 56; *Heddin* v. *Griffin*, 136 Mass. 229.

The right of recovery in these cases is based upon the ground that the contract is voidable by the insured and that he has properly rescinded it.

In the present case there has been no rescission, nor facts showing that it was unnecessary by reason of the policy being worthless. *Farrow* v. *Cochran*, 72 Maine, 309; *Cutler* v. *Gilbreth*, 53 Maine, 176.

In any view that can be taken of this case, the policy was not void absolutely.

Nor can the plaintiff recover upon the ground that the policy was voidable and has been rescinded. The defendant has never attempted to take advantage of the fraud to annul the contract. If the defendant had avoided the contract upon this ground instead of treating it as a subsisting contract, it might be that the plaintiff could properly treat the contract as rescinded and be entitled to a return of the premiums paid upon it. The courts have so held,—but no court has held that the premiums could be recovered in a voidable policy simply because it was voidable. This policy at the time the plaintiff attempted to rescind was not void *ab initio*;—at most it was only voidable, and the risk under it had been assumed by the defendant. It had commenced to run. The life of the plaintiff's wife was insured from the delivery of the policy till it lapsed by reason of non-payment of the premiums, and was in force at the time this suit was instituted, and if it had become due it cannot be

said in law that it would not have been paid. *Plympton* v. *Dunn*, 148 Mass. 523, 527.

It will be noticed that the class of cases cited by the learned counsel for the plaintiff are those where there were misrepresentations made by the insured in obtaining the policy, or a breach of warranty on his part.

In those cases the courts have held that the misrepresentations, whether intentional or otherwise, and the breach of warranties, have rendered the policies void, so that there could be no recovery upon them. In the case at bar the fraud was that of the agent of the defendant, but the defendant has treated the policy as a valid, subsisting contract, and never sought to annul it on the ground of fraud. The plaintiff has never rescinded it, even if it were in his power so to do. The result is that the action can not be maintained.

Judgment for defendant.

EDWARD F. SHANAHAN

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

Androscoggin. Opinion April 8, 1895.

The rule in preceding case applied.

The facts are stated in the opinion.

F. M. Drew and L. G. Roberts, for plaintiff.

J. H. Drummond and J. H. Drummond, Jr., for defendant.

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

FOSTER, J. This is an action for money had and received to recover the amount of premiums paid to the defendant upon a policy of life insurance on plaintiff's life for his own benefit.

January 25, 1889, the plaintiff was induced by the defendant's agent to take a policy of insurance on his own life in the defen-

dant company, payable at death to his executor, administrator or assigns, the agent of the company representing that it was not necessary that he should be examined by a physician of the company, and that the defendant would issue its policy on his life although there was no medical examination of the plaintiff, which representations were false and known to the defendant's agent to be so.

The plaintiff, induced by these representations, took out a policy in the defendant company on his own life, and the defendant's agent filled the application and the plaintiff signed it.

The plaintiff was not examined by a physician of the company, although what purports to be a certificate of medical examination of the plaintiff signed by a physician of the company is attached to the application, it having been signed by the company's agent or physician without any examination, or the knowledge or consent of the plaintiff.

February 11, 1889, upon this application and examination the company issued its policy for the sum of five hundred dollars on his life.

The plaintiff is unable to read in the English language, and all the negotiations for the insurance were carried on in the French language.

Pursuant to the conditions of the policy the plaintiff continued to pay the weekly premiums of twenty-seven cents thereon, amounting in the whole to forty-nine dollars and ninety-five cents, until August 22, 1892, when he refused to make further payments of premiums and demanded a return of the premiums paid, upon the ground that the representations of the agent of the company at the time the plaintiff agreed to take the policy were false, and that he was induced to take the policy through said representations.

Upon the foregoing facts the plaintiff claims the policy was void, and that he is, therefore, entitled to recover back in this action the premiums paid upon the policy.

The case shows an insurance regular in every respect with the exception that there was no medical examination, although there was attached to the application a certificate of medical

examination regular in form and purporting to be signed by the company's physician.

The company treated the policy as valid and binding upon the company, and never sought to repudiate it or treat it as anything but a valid contract between it and the plaintiff till long after the 22nd of August, 1892, when the plaintiff himself refused to pay the premiums.

Whatever representations were made, they were those of the company's agents, and the company was bound by them. The company would be estopped from asserting that they were not binding on the company. *Grattan* v. *Met. Life Ins. Co.* 80 N. Y. 281; *Mowry* v. *Rosendale*, 74 N. Y. 360.

The facts in the case at bar are so similar to those in the case of *Mailhoit* v. *Met. Life Ins. Co.* ante, p. 374, that any exposition of the law in this case is unnecessary, as the principles governing the decision in this case are stated fully in that, and must be decisive in this. No rescission is set up, or proved by the facts stated. The policy was not void absolutely, but voidable. The risk had begun to run as in the case named. The same consequences follow as in that, and the entry must be,

Judgment for defendant.

CLARENCE L. ROBINSON

vs.

ROCKLAND, THOMASTON AND CAMDEN STREET RAILWAY.

Knox. Opinion April 9, 1895.

Railroads. Passengers. Removal. Breach of Peace. R. S., c. 51, § 73. Stat. 1889, c. 261.

In this State, the use of indecent or profane language in a street railroad car is a breach of the peace, and the conductor of the car may immediately arrest any person guilty of such breach of the peace and hold him till a warrant can be obtained, or he can be placed in custody of the proper officers of the law. Or the conductor may remove a person guilty of such breach of the peace from the car.

If, in a car filled with passengers, nearly one half of whom are ladies, a man in earnest conversation undertakes to emphasize his statements, as some men are apt to do, by saying: "By God," it is so, or: "By God," it is not so, the law makes it the duty of the conductor to check him; and if the latter denies his guilt, and upon being assured by the conductor that he was guilty, flies into a passion and calls the conductor a "damned liar," he may rightfully be removed from the car. Not as a punishment for his insult to the conductor as an individual; but to vindicate the authority of the law, which forbids the use of such language in a street car, or any other public place, where women and children have a right to be.

The fact, that the offender was innocent of the misconduct with which he was at first charged can be no excuse for his subsequent offense. He can not excuse the use of indecent or profane language in a street railway car by proof that he was first falsely charged with the use of similar language.

ON MOTION.

This was an action of trespass for ejecting and removing the plaintiff from the defendant's street car by its servants. The plaintiff recovered a verdict for $1187.27, and the defendant brought the case to the law court on a general motion, besides alleging that the damages were excessive.

The defendant justified the acts of its servants under R. S., c. 51, § 73, which reads as follows:

"Whoever behaves in a disorderly or riotous manner while on any train of railroad cars or street railroad car, or uses indecent or profane language in such car, is guilty of a breach of the peace, and shall be fined not less than five nor more than five hundred dollars, or imprisoned in jail not less than thirty days nor more than one year; in addition to any other penalty provided by law."

The car from which the plaintiff was ejected was filled with passengers, twenty-eight to thirty, about half of whom were ladies. Among the number was a drunken man who had twice used profane language for which he was each time reproved by the conductor. The defendant's testimony, adduced by eight witnesses, was to the effect that, immediately after the conductor last spoke to the drunken man in relation to his profanity, the plaintiff said, "By God, you didn't see him." The conductor stepped along to the plaintiff and asked him to stop swearing. The plaintiff denied that he had sworn. A conversation occurred between the conductor and the plaintiff in which the plaintiff used the words "damned liar." The conductor asked the

plaintiff if he wasn't swearing then and the plaintiff replied that he was aud he would swear as much as he "damn please." The conductor then told the plaintiff he would have to stop swearing or get off the car, and the plaintiff answered, "I won't get off and I'll be God damned if you can put me off." The conductor then stopped the car and with the aid of the motor-man put the plaintiff off.

The plaintiff denied that he used the profane language testified to by the defendant's witnesses.

J. E. Moore, for plaintiff.

I. The principles upon which such actions are based were thoroughly discussed and definitely settled in this State in *Goddard* v. *Grand Trunk Railway*, 57 Maine, 202. Reaffirmed in *Hanson* v. *E. & N. R. R. Co.* 62 Maine, 84.

When a *prima facie* case of assault and battery is sought to be justified, it is incumbent upon the one who justifies, to show that no more force was used than the exigence of the case called for.

In *Vinton* v. *Middlesex R. R. Co.* 11 Allen, 304, which holds that a conductor may expel a person who, by reason of intoxication or otherwise, may disturb passengers, the court say (p. 307): "The safeguard against an unjust or unauthorized use of the power is to be found in the consideration that it can never be properly exercised except in cases when it can be satisfactorily proved that the condition or conduct of a person was such as to render it reasonably certain that he would occasion discomfort or annoyance to other passengers, if he was admitted into a public vehicle or allowed longer to remain within it."

A corporation cannot escape liability because its servants acted in good faith, if they failed to exercise good judgment. Booth on St. Ry's, § 327, last clause. *Haman* v. *Omaha Horse Ry. Co.* 52 N. W. Rep. 830. (Neb.)

In *Putnam* v. *Broadway & 7th Ave. R. R. Co.* 55 N. Y. 108, it was held that the manifest intoxication of a passenger does not in every case warrant his expulsion, and that the conductor has no right to remove him unless he is dangerous or annoying to others.

There is no pretense in this case that the plaintiff was intoxicated, or would disturb or annoy others. His offense was in denying the conductor's charge, and calling him a liar after continuous prodding, and very great provocation by the conductor. If provocation excuses a conductor, it certainly should doubly so the passenger, when provoked by the conductor whose duty is to exercise great care to treat him well.

The contract on the part of the company is to safely carry its passengers and to compensate them for all unlawful and tortious injuries inflicted by its servants. It calls for safe carriage, for safe and respectful treatment from the carrier's servants, and for immunity from assaults by them, or by other persons if it can be prevented by them. No matter what the motive is which incited the servant of the carrier to commit an improper act towards the passenger during the existence of the relation, the master is liable for the act, and its natural and legitimate consequences. Hence it is responsible for the insulting conduct of its servants, which stops short of actual violence, and for wanton or negligent conduct. Booth on Street Railways, § 372, and cases cited in note.

II. The weight of evidence, especially when conflicting is for the jury. In the case at bar, the evidence was submitted to the jury under a clear and impartial charge. They saw the witnesses and how they appeared, and were the proper judges where the truth lay. The law imposes the duty of determining the facts upon the jury and not upon the court. *Elliott* v. *Grant*, 59 Maine, 418; *Tower* v. *Haslam*, 84 Maine, 86-91.

It is a rule that a new trial will not be granted when the evidence is conflicting and the case has been left to the determination of the jury under a clear and impartial charge. In this case the charge of the presiding justice seems to have been satisfactory to both parties. No exceptions are taken. *Smith* v. *Brunswick*, 80 Maine, 189, 192; *Hunter* v. *Heath*, 67 Maine, 507.

Even though the facts are undisputed, if they are of such a nature or pertain to such a matter that different minds might reasonably exercise different judgments upon them, the question

to be decided belongs to the jury. *Shannon* v. *B. & A. R. R. Co.* 78 Maine, 52, 60; *Lesan* v. *M. C. Railroad Co.* 77 Maine, 85, 91.

III. The same rules govern, and the same authorities are applicable, under the motion to set the verdict aside for excessive damages.

"The question of damages is one which the law submits to the jury. No imputation is made upon their integrity of action. Parties litigant must bow to their decision as to that of the ultimate tribunal for the determination of facts." *Powers* v. *Cary*, 64 Maine, 9, 22.

The defendant asks for a new trial on account of excessive damages being allowed, that he may experiment, and hope to get them reduced, putting the plaintiff to great expense and trouble for that purpose. It is a sort of a gamble. If the damages are likely to be increased he does not want the verdict set aside. They must be very extravagant to justify setting the verdict aside. The court in *Portland & Rochester R. R. Co.* v. *Deering*, 78 Maine, p. 61, say: "The damages were assessed by the jury with rather a liberal hand, but not at such an extravagant amount as to justify us in granting another trial that they may be reduced."

The right of the jury to give exemplary damages for injuries wantonly, recklessly or maliciously inflicted is as old as the right of trial by jury itself. *Goddard* v. *Grand Trunk Ry.* 58 Maine, 202, 218; *Pike* v. *Dilling*, 48 Maine, 539; *Hanson* v. *E. & N. A. R. R.* 62 Maine, 84, 90.

The jury may consider not only the mental suffering which accompanies and is a part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows, or for assault alone, when maliciously done, though no actual personal injury be inflicted. So in various other torts to property alone when the tort feasor is actuated by wantonness or malice or a wilful disregard of other's rights therein, injury to the feelings of the plaintiff, resulting from such conduct of the defendant, may

properly be considered by the jury in fixing the amount of the verdict. *Wyman* v. *Leavitt*, 71 Maine, 227, 229, 230; *Prentiss* v. *Shaw*, 56 Maine, 427.

The body of a man is of little moment compared with the life that temporarily abides in it. Mental suffering may not result from bodily harm alone, but most keenly may flow from causes tending to degrade and humiliate the spirit and self-respect of a man. *Webb* v. *Gilman*, 80 Maine, 177, 188; *Johnson* v. *Smith*, 64 Maine, 553, 554.

One jury might fix the damages at one sum, and another jury at a different sum and yet both act honestly. If, in such a case, the verdict is not so clearly excessive as to create a belief that the jury was influenced by improper motives, or fell into some mistake in making the computation, the court has no right to set the verdict aside and put the parties to the trouble and expense of another trial. *Field* v. *Plaisted*, 75 Maine, 476, 477.

I refer also to cases stated on pp. 218, 219, 220 and 221, 57 Maine, *Goddard* v. *Grand Trunk*, for examples where verdicts have not been set aside for being excessive, though the damages allowed were large, for instance, five hundred pounds for knocking a man's hat off,—a thousand pounds for nominal imprisonment.

W. H. Fogler, for defendant, cited: R. S., c. 51, § 73; Booth St. Rys. § 369; Am. & Eng. Encl. 1016; *Murphy* v. *W. & A. R. R.* 23 Fed. Rep. 637; *Putnam* v. *Broadway, &c. R. R.* 55 N. Y. 108; *Vinton* v. *Middlesex R. R. Co.* 11 Allen, 304, affirmed in *Murphy* v. *Union Ry. Co.* 118 Mass. 228; *C. B. & Q. R. R.* v. *Griffin*, 68 Ill. 499; *C. & N. W. R. R.* v. *Williams*, 56 Ill. 115. Damages: *Webb* v. *Gilman*, 80 Maine, 188; *Goddard* v. *Grand Trunk Ry.* 57 Maine, 223; *Ames* v. *Hilton*, 70 Maine, 48; *Pierce* v. *Getchell*, 76 Maine, 219; *Sanders* v. *Getchell*, *Ib.* 158.

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

WALTON, J. We think the verdict in this case is clearly wrong. It is an action to recover damages for being removed from a street railway car, and the plaintiff has obtained a verdict for $1187.27. We think the removal was justifiable, and that the verdict is clearly erroneous, and must be set aside.

In this State, the use of indecent or profane language in a street railroad car is a breach of the peace. It is a crime for which a person may be punished by fine or imprisonment. And the conductor of the car may immediately arrest any person guilty of such a breach of the peace and hold him till a warrant can be obtained, or he can be placed in custody of the proper officers of the law. R. S., c. 51, § 73, as amended by Act 1889, c. 261. Or the conductor may remove a person guilty of such a breach of the peace from the car. The cases which sustain this right of removal are too numerous for citation. And in the exercise of this right, the conductor acts as a police officer. He is not to act or refuse to act at the dictation of his own will and pleasure. When indecent or profane language is being used in his car, it is his duty to check it, and he will be guilty of a breach of duty if he fails to do so. And if, in a car filled with passengers, nearly one-half of whom are ladies, a man in earnest conversation undertakes to emphasize his statements, as some men are apt to do, by saying: "By God," it is so, or: "By God," it is not so, the law makes it the duty of the conductor to check him; and if the latter denies his guilt, and upon being assured by the conductor that he was guilty, flies into a passion and calls the conductor a "damned liar," it is the opinion of the court that he may rightfully be removed from the car. Not as a punishment for his insult to the conductor as an individual; but to vindicate the authority of the law, which forbids the use of such language in a street car, or any other public place, where women and children have a right to be. The fact, if it be a fact, that the offender was innocent of the misconduct with which he was at first charged can be no excuse for his subsequent offense. A thief can not excuse his crime by showing that before committing the theft in question he had been falsely accused of a similar offense. No more can a man excuse the use of indecent or pro-

fane language in a street railway car by proof that he was first falsely charged with the use of similar language. To be first falsely charged with an offense is not a license to become immediately guilty of a similar offense.

And herein lies the weakness of the plaintiff's case. He admits that he called the conductor of the car, "a damned liar," and he does not claim that he had any excuse for so doing, except that the conductor had first falsely accused him of swearing and admonished him to desist. And he does not claim that the conductor spoke to him in a loud, harsh, or angry tone of voice. He admits that the car was filled with passengers, nearly half of whom were ladies. He says that the conductor approached him, and, in an ordinary tone of voice, requested him to stop swearing; that he denied that he had been swearing; and that, upon the conductor's again affirming that he had been swearing, and that he must desist or he should be obliged to put him out of the car, he called the conductor, "a damned liar." And several witnesses testify that he went further and defied the conductor, and said that he, "would be God damned if he would put him off the car," and that he would swear as much as he "damned pleased," and that he used much other indecent and profane language.

But, if it should be conceded that the plaintiff's account of the transaction is strictly true, and that all of the defendant's witnesses are mistaken, it would still be the opinion of the court that the plaintiff's conduct justified his removal from the car.

We are reminded by the plaintiff's counsel that in *Goddard* v. *Grand Trunk Railway*, 57 Maine, 202, a verdict for very large damages was sustained. Certainly. And our present decision is in harmony with that decision. In that case, a servant of the railroad company used exceedingly foul and profane language to a respectable and unoffending passenger. Here, a passenger used very offensive and indecent language to a respectable and unoffending servant of the railroad company. We protected the passenger in that case, and, for the same reason, we hope to be able to protect the railroad servant in this case. Both decisions are in favor of morality and decency. In that case, the servants

of railroads were taught to treat passengers with civility, and in this case, we hope to teach passengers to treat the servants of railroads with civility. To call a street railroad conductor, who, in a crowded car, half filled with ladies, is endeavoring to maintain order and suppress profanity, "a damned liar," is a poor foundation on which to rest a suit for punitive damages.

Motion sustained.

MAURICE S. FISHER *vs.* ELKANAH E. BOYNTON.

Cumberland. Opinion April 11, 1895.

Sales. Delay to Deliver.

The defendant gave a written order for five thousand cigars, twenty-five hundred to be shipped at once, and the balance on call. Having waited nineteen days, and having heard nothing from his order, he countermanded it and bought cigars elsewhere. *Held;* that the delay was unreasonable, and that an action to recover the price of the cigars was not maintainable.

ON EXCEPTIONS.

This was an action of assumpsit upon an account annexed for 2500 cigars, sold by Julius M. Cohen, who assigned the account to the plaintiff, and tried by the justice of the Superior Court for Cumberland County, without the intervention of a jury, subject to exceptions in matters of law. Plea, the general issue, with brief statement that if any contract was made with plaintiff's assignor, or promise made to him, it was for goods to be delivered immediately and no goods were so delivered, and no promise made as set forth in plaintiff's writ.

May 2, 1892, an agent for Julius M. Cohen, the plaintiff's assignor, called upon the defendant at his drug store in Camden and procured from him a written order for five thousand cigars, "twenty-five hundred to be shipped at once and the balance on call."

Three weeks later, on May 21, 1892, the defendant, having heard nothing from his order, wrote Mr. Cohen that as he had not received the cigars, nor heard from him, he felt obliged to and did countermand the order, and bought cigars elsewhere.

May 28, 1892, Cohen wrote the defendant that the cigars were shipped from New York, May 20, and asking if they had been received. They in fact arrived in Camden, May 24. Cohen had factories in Boston and New York.

The only reason for the delay in filling the order, given by Cohen, was in a letter dated June 15, in which he says that having a large sale of that brand of cigars they invariably take from fifteen to twenty days to fill an order, but no such notice is shown to have been given the defendant at or before the time he gave the order. It appeared from the testimony that these goods were not in stock at the time of the receipt of the order but were manufactured to fill the order, of which fact the defendant was not informed.

After considerable correspondence between the parties, the cigars were re-shipped by the defendant to Cohen, who acknowledged the receipt of them and said he should hold them subject to the defendant's order, and insist upon the payment of the bill.

The court ruled, as a matter of law that, under the terms of this order the cigars should have been shipped or forwarded by regular conveyance, upon receipt of the order.

Upon this state of facts the court found that the plaintiff's assignor did not comply with the terms of the contract; that the delay in filling the order was unreasonable. The plaintiff thereupon took exceptions.

H. W. Gage and C. A. Strout, for plaintiff.

There seems to be no definite, ascertained legal meaning affixed by the courts by continuous construction of the words "at once." A thorough and extended search of authorities has failed to discover a case, analogous to this case, in which these words have been construed by the court; but we are aided by comparing the decisions of the court upon the legal meaning of words practically synonymous. Directly was held in *Duncan* v. *Topham*, 8 C. B. 225, to mean "speedily" or "as soon as practicable." Forthwith held to mean within a reasonable time and with reasonable diligence. *Bennett* v. *Lycoming Co.* 67 N. Y. 274. The word "immediately" does not, in legal pro-

ceedings, necessarily import the exclusion of any interval of time. It is a word of no very definite signification. *Goddis* v. *Howell*, 2 Vroom, 316. Immediately means within a reasonable time. *Rokes* v. *Amazon Ins. Co.* 51 Md. 519. Immediately should not receive a strict literal construction. Extreme cases are easily determined,—between them there is a wide belt of debatable ground, and cases falling within it are governed by the peculiar circumstances of each case. *Lockwood* v. *Middlesex Co.* 47 Conn. 568, and cases cited.

"Immediately afterwards" has been construed to mean "within such convenient time as is requisite for doing the thing." *Thompson* v. *Gibson*, 8 M. & W. 281; also *Pyles* v. *Mitford*, 2 Leon. 77 Eng. King's Bench.

"As soon as possible" held to be within a reasonable time. *Columbian Ins. Co.* v. *Lawrence*, 10 Peters, 507. "As soon as possible"—in *Atwood* v. *Emery*, 1 C. B. (N. S.) 110—the court held that in a contract by a manufacturer to furnish certain specified goods "as soon as possible," the words meant within a reasonable time, regard being had to the manufacturer's ability to produce them, and the orders he may already have in hand.

It was also held that the manufacturer was not bound to procure the goods elsewhere if he was not in a position to execute the order himself at once; nor was he bound to proceed at once to the execution of the order, laying aside all other orders he might have.

As one of the judges aptly said, "if the purchaser had intended to have the hoops within a limited time, he should have taken care to so express himself. Such words in a contract mean no more nor less than a reasonable time, regard being had to the manufacturer's facilities and extent of business and to the contracts he already had in hand."

In *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. Div. 670 (1878), which is in line with *Atwood* v. *Emery*, just cited, it is said "that a manufacturer or tradesman is not bound to discard all other work for the occasion, in order to take in hand a thing which he promises to do 'as soon as possible,' for instance a tailor, who accepts an order to make a coat 'as soon as possible'

need not put down a half made vest in order to begin the coat; every customer knows at the time of giving the order that the manufacturer or tradesman may have other orders on hand."

We have seen that there is no absolute rule of construction, by which the court is bound to construe the words "at once"— though we think the cases cited are entitled to great weight as showing the line of construction followed by the courts with respect to words whose signification is similar to those used in the contract in this case.

Therefore the well known principle applies, that the situation and true intent of all parties to a contract and the subject matter of it, are to be considered in determining the meaning of the contract. *Howland* v. *Leach*, 11 Pick. 151; *Merriam* v. *U. S.* 107 U. S. 437; *Lowber* v. *Bangs*, 2 Wall. 728; *U. S.* v. *Peck* 102 U. S. 64; *U. S.* v. *Gibbons*, 109 U. S. 200; *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584; *Church* v. *Hubbart*, 2 Cranch, 187; *Ames* v. *Hilton*, 70 Maine, 42; *Bradley* v. *Steam Packet Co.* 13 Peters, 89; *Mauran* v. *Bullus*, 16 Peters, 528.

When any words in a contract are indefinite and ambiguous, that is to say, of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling influence. *Chicago* v. *Sheldon*, 9 Wall. 50.

The shipment on May 20th, was a legal acceptance of the order. *Billings* v. *Mason*, 80 Maine, 499.

When the facts are ascertained or admitted, as in this case, what is a reasonable time is a question of law. *Attwood* v. *Clark*, 2 Maine, 249; *Kingsley* v. *Wallis*, 14 Maine, 57; *Hill* v. *Hobart*, 16 Maine, 168; *Greene* v. *Dingley*, 24 Maine, 137; *Portland* v. *Water Co.* 67 Maine, 139. Counsel also cited: Add. Con. § 324; *Hayden* v. *Madison*, 7 Maine, 79; *White* v. *Harvey*, 85 Maine, 213.

Clarence Hale, for defendant.

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

WALTON, J. We think this case was correctly decided. The defendant gave a written order for five thousand cigars, "twenty-

five hundred to be shipped at once, and the balance on call." Having waited nineteen days, and having heard nothing from his order, he countermanded it and bought cigars elsewhere. The justice of the Superior Court, by whom the case was tried without a jury, decided that the delay was unreasonable, and that the action to recover the price of the cigars was not maintainable. It is the opinion of the court that the decision was right.

Exceptions overruled.

SOPHRONIA E. ROBINSON

vs.

PENNSYLVANIA INSURANCE COMPANY.

Knox. Opinion April 11, 1895.

Fire Insurance. Dwelling-House. Carriage-House.

There is no rule of law in fire insurance declaring how near a carriage-house must be to a dwelling-house to belong with it.

If it is on the same lot, and is actually used as an appurtenance of the dwelling-house, the fact that it is one hundred and eighty-nine feet from the dwelling-house does not prevent its being regarded as belonging with the dwelling-house; nor does the fact that it is used in part for other purposes prevent its being so regarded. These are circumstances which, in a case of doubt, may be considered by the jury; but the jury can not be rightfully instructed as matter of law, that they are conclusive.

Held; that an instruction to the jury, that if a building is one hundred and eighty-nine feet away from a dwelling-house, and is used in part for other purposes, it cannot be regarded as a carriage-house belonging with the dwelling-house, and be so described in an insurance policy, was erroneous.

This was an action on a policy of fire insurance in which the jury returned a verdict for the defendant and the plaintiff took exceptions. The exceptions show the following facts:

On the 27th day of May, 1892, the plaintiff took out a policy from the defendant company for three years at a premium of one per cent for three years on certain goods and chattels. A part of the goods and chattels covered by said policy was: "Three hundred and twenty-five dollars on her vehicles of all kinds, harnesses, robes, and all horse-furnishings, hay and grain, together with farming

and miscellaneous tools, all while contained in her frame stable and carriage-house buildings, belonging with said dwelling-house and on said lot."

The plaintiff was then in occupation of a one and one-half story frame dwelling-house and ell with a stable attached to the ell.

On the same lot of land the plaintiff erected a new building which was finished on the 28th day of May, 1892, the day following the issuing of the above named policy. The husband and agent of the plaintiff testified that said new building was to be used for a carriage-house and paint shop. It was situated on the same parcel of land upon which the plaintiff's dwelling-house, ell and stable were standing, but by actual measurement, was one hundred and eighty-nine feet from such stable.

On the 30th day of June, 1892, the defendant company issued to the plaintiff and her son, Oscar E. Robinson, a policy of insurance of that date upon said new "carriage-house and paint shop building" and its contents consisting of paint stock, furniture, vehicles, &c. This last named policy was for one year at a premium of one per cent for one year. There was testimony tending to show that the new building, from the time of its completion to the 30th day of September, was used in part for the storage of carriages, &c., a portion of which was not intended for use by the plaintiff or her family but for the purpose of traffic, and in part by said Oscar E. Robinson in making and painting carriages. During said time said Oscar E. had made one carriage and had painted that and one other carriage in said building.

On the thirtieth day of September, 1892, the new building and its contents were destroyed by fire. The contents consisted of several carriages and several parts of unfinished carriages, the property of the plaintiff, and also a quantity of paint stock valued at $144.55, the property of Oscar E. Robinson, the carriage maker and painter.

The defendant claimed that the goods and chattels insured to the plaintiff, by the policy of May 27th, were not within the terms of the policy, unless such policy covered her property in the new building.

Before the commencement of this suit the defendant company had paid to the plaintiff and Oscar E. Robinson the full amount of insurance under the policy of June 30th, on the new building and contents. The plaintiff brought this suit upon the first named policy, that of May 27th, and claimed to recover for the goods and chattels which were contained in the new building at the time of its destruction by fire.

The defendant contended that the policy of May 27th, upon which this suit is brought, did not, by its terms or in fact, insure any of the contents of the new carriage-house and paint-shop building which was completed after the issuing of the policy of May 27th, and which was occupied from the time of its erection until its destruction as a carriage and paint shop.

The issue to the jury was, therefore, whether the plaintiff's vehicles and horse-furnishings contained in the new building and destroyed on the 30th of September, were included and covered by the policy in suit, dated May 27th.

True P. Pierce, for plaintiff.

Wm. H. Fogler, for defendant.

The question as to the location of the building and its use was, therefore, left to the jury as a question of fact, and the verdict shows that the jury found the location and the use to be as claimed by the defendant.

The goods of the plaintiff were covered by the policy only while in the place stipulated in the contract. *Bradbury* v. *Ins. Co.* 80 Maine, 398-9; 2 May on Insurance, §§ 401, a, 401, b. In *Bradbury* v. *Ins. Co. supra*, the court say: "The general rule stated by text writers and held by the general current of decided cases is, that the place where the personal property is kept is the essence of the contract, as by that the character of the risk is largely determined, and the property is covered by the policy only while in the place described.

The buildings named in the policy in which the plaintiff's property should be contained to be covered by the contract of insurance are specifically defined. First, they must be "on the same lot;" second, they must be "belonging with the dwelling."

"Belonging" is defined by Webster, "pertaining," "appertaining," "being appendant to." A building "belonging with a dwelling-house" must therefore mean a building "appertaining to," or "appendant to" the dwelling.

The jury were instructed that if this building was used as a carriage-house in connection with the dwelling its contents would be included in the terms of the policy. Such instruction was sufficiently favorable to the plaintiff. But the jury were further instructed that if it was used as a place for carrying on the work of building and painting carriages for purposes of trade or traffic its contents would not be so included, because it would not in such case belong to or be appended to the dwelling. These instructions are not only in accord with legal and grammatical rules of construction but, as sufficiently appears in the exceptions, they were undoubtedly in accord with the intention and understanding of the parties to the contract.

The building was erected to be used, in part at least, for a paint shop. It was placed at a distance from the dwelling-house so as to avoid an increase of premium upon the last named building and its contents. The premium upon the contents of the new building was three times as large as that upon the dwelling and the buildings belonging with it and the contents of the same. The last policy contained no statement of any prior insurance which it would undoubtedly have contained if the policy in suit had been intended to cover the goods in the new building.

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

WALTON, J. This is an action on an insurance policy. The first clause of the policy insures the plaintiff's household goods and furniture. The second clause insures a horse. The third clause insures a cow. The fourth clause is the one to be considered, and it is as follows: "Three hundred and twenty-five dollars on her vehicles of all kinds, harnesses, robes, and all horse-furnishings, hay and grain, together with farming and miscellaneous tools, all while contained in her frame stable and carriage-

house buildings, belonging with said dwelling-house and on said lot."

The property burned was in a building which the plaintiff (Mrs. Robinson) claims was her carriage-house, belonging with her dwelling-house, and on the same lot.

The insurance company claims that, under the circumstances disclosed in the evidence, the building burned can not be regarded as a carriage-house belonging with the plaintiff's dwelling-house; that although upon the same lot, it was too far away from the house, and was used in part at least by the plaintiff's son as a work shop and a paint shop and a place of traffic.

At the trial in the court below, the presiding justice instructed the jury as follows:—

"I instruct you that, 'her frame stable and carriage-house buildings belonging with said dwelling and on the same lot,' can not mean a separate building situated eleven and one-half rods, or one hundred and eighty-nine feet from the dwelling-house, provided you are satisfied that that building, thus situated, was used as a paint shop, as a work shop, and as a place of business, or of labor. Her carriage-house must be a building belonging with the dwelling-house,—'belonging with,' meaning pertaining to the dwelling-house. It might, if it were so situated as a mere store house and carriage-house and used with the building, and not for the purposes of trade or traffic, or for the purposes of an industry. In other words, if it was a carriage-house, and nothing else, it would be within the meaning of the policy. But, situated eleven and one-half rods, or one hundred and eighty-nine feet, from the dwelling-house,—if you are satisfied of that fact,—and if you are satisfied of the fact that the son of this plaintiff carried on the manufacturing of carriages there, and of painting, and using it for a paint shop, and for other purposes of traffic, then I instruct you it would not be a 'carriage-house building belonging with said dwelling,' within the meaning of this contract. But if, on the other hand, you are satisfied, as I have said, that it was used merely for a carriage-house, and used for no other purpose than a carriage-house, or not used for the purpose of traffic, for purposes of

manufacturing carriages, and as a paint shop, then it would be appertaining to or belonging to the dwelling, although situated at that distance. It is a question of fact for you whether or not this carriage-house was so used, as is claimed by the defense, for purposes other than as a carriage-house, for a paint shop, as a place of traffic, and manufacturing carriages. If so and the property was destroyed therein, this plaintiff can not recover. It would not be a 'carriage-house belonging with said dwelling, and on the same lot.'"

We do not think this instruction can be sustained. The assumption that if a building is one hundred and eighty-nine feet away from a dwelling-house, and is used in part for other purposes, it can not be regarded as a carriage-house belonging with the dwelling-house, and be so described in an insurance policy, seems to us to be clearly erroneous. It often happens that a building is used for several purposes. The first story may be used as a carriage-house, the second story as a work shop, and the third story as a paint shop, and we fail to see any reason why, in such a case, the painter may not insure his property, and describe it as contained in his paint shop; nor why the mechanic may not insure his, and describe it as kept in his work shop; nor why the owner of the carriages, harnesses, and other articles usually kept in a carriage-house, may not insure his property, and describe it as contained in his carriage-house; nor why, in the absence of fraud, or deception, or breach of warranty, the insurance of property so situated and so described may not be valid. Surely, there is no rule of law declaring how near a carriage-house must be to a dwelling-house to belong with it. If it is on the same lot, and is actually used as an appurtenance of the dwelling-house, we fail to see why the fact that it is one hundred and eighty-nine feet from the dwelling-house should prevent its being regarded as belonging with the dwelling-house; nor why the fact that it is used in part for other purposes should prevent its being so regarded. These are circumstances which, in a case of doubt, may be considered by the jury; but we do not think that the jury can be rightfully instructed, as a matter of law, that they are conclusive.

Exceptions sustained.

EBEN J. PULSIFER *vs.* JOHN BERRY, and another.

Androscoggin. Opinion April 13, 1895.

Negligence. Evidence. Experts. Custom.

The opinions of experts are not deemed admissible where the subject of the inquiry is one of general observation or experience, and not such as to require any peculiar habits or study in order to understand it. *Held;* that the management of fires burning in heaps of brush and lingering in piles of brands, does not present such a question. The tendency of fire to spread and cause damage is a matter of common knowledge and experience, and the question of proper safeguards to prevent it is not one for expert testimony.

The usual practice adopted, within the limits of the experience of a civil engineer, in guarding fires kindled in clearing and grubbing on railroad locations, is not a safe criterion of the question of ordinary care, and evidence of such practice is immaterial and inadmissible.

Where the gist of the action is negligence and it is a simple question of fact for the jury to determine whether, under the particular circumstances and conditions shown to exist, the defendants are guilty of negligence, *Held;* that it is impossible that there should be any uniform practice or fixed standard of care with respect to a duty so peculiarly dependent upon varying circumstances and conditions as that of guarding fire to prevent its spreading. The number and magnitude of the fires, the condition of the soil, the state of the weather, the direction and force of the wind, and the relative situation and exposure of the plaintiff's property are all factors to be considered in the solution of the question in every case.

A general custom cannot be deemed a relevant fact in an action for negligence respecting any non-contractual duty which is not performed under fixed conditions.

ON EXCEPTIONS.

This was an action on the case for negligence, in which there was a verdict for the defendants. The plaintiff claimed that the injury to his premises, in Poland, was caused by the defendants' negligent acts while burning and clearing a railroad location. The plaintiff took the following exceptions to the rulings of the court in matters of evidence:

To the ruling of the court permitting the defendants to show the rain-fall in Lewiston; permitting the defendants' engineer to testify what is usually done, in the construction of railroads, in the way of clearing the road location of brush and burning

it; to the admission of the testimony of what the laborers said after they ran from the fire; and to the exclusion of the testimony offered by the plaintiff, in rebuttal, that fire and smoke were seen in the defendants' brush heaps as late as six o'clock in the afternoon of the day previous to the fire which damaged the plaintiff's premises that were adjoining.

The second exception only is considered by the court, the facts relating to which appear in the opinion.

A. R. Savage and H. W. Oakes, G. E. McCann and A. E. Verrill, with them, for plaintiff.

J. M. Libby and F. E. Hurd, for defendants.

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

WHITEHOUSE, J. This is an action to recover damages for an injury to the trees on the plaintiff's lot, alleged to have been caused by the negligence of the defendants in omitting to take proper precautions to prevent the spreading of the fires kindled by them on the land of the Portland and Rumford Falls Railway, then in the possession of the defendants for the purpose of constructing a railroad.

The plaintiff introduced evidence tending to show that the fire on his lot caught from burning brush heaps which had not been sufficiently watched and guarded by the defendants' servants.

The defendants introduced evidence tending to show that trenches were dug around the brush heaps and sand thrown upon the piles where the fire had been.

The assistant engineer of the railroad company was a witness for the defendants and testified that he graduated nine years before and had been engaged on railroad surveys and construction seven or eight years. The further examination of this witness appears in the facts reported as follows:

"Ques. In your opinion what more could have been done in the exercise of care, for the prevention of fire than what was done there?"

To this question the plaintiff objected on the ground that it was not a matter of expert testimony.

The court remarked: "If Mr. Hall has been engaged upon surveys and constructions where they have been at work clearing and grubbing and building fires, then I think he may properly state what they usually do, what the usual course is, what the usual remedies are that are resorted to, and then it will be for the jury to say whether or not this comes up to the standard."

Plaintiff's counsel: "I take exceptions to that testimony."

"Ques. [By defendants' counsel] Will you state what is usually done in cases of this sort in the construction of railroads, in the way of clearing the road, location of brush and burning it?"

To this question the plaintiff objected on the ground that it called for irrelevant matter; but the court permitted the witness to answer, and the plaintiff excepted.

"Ans. To pile up the brush somewhere in the right of way and burn it, and tend it until it burns down; and then the brands are kicked into the middle or knocked in there so it cannot spread, and left there. Down there where they burned it, they were covering it. I had been at Berry some time to burn it. I believe that is all of the usual manner, to pile it up and burn it and look after it."

It is an elementary rule respecting the introduction of oral evidence that, in general, witnesses are only permitted to state facts within their knowledge, and not to give their opinions or conclusions. The testimony of experts constitutes one of the exceptions to this rule. "When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts; and the words 'science or art' include all subjects on which a course of study or experience is necessary to the formation of an opinion." Steph. Dig. of Ev. Art. 49.

But the opinions of experts are not deemed admissible where the subject of the inquiry is one of general observation or experience, and not such as require any peculiar habits or study in order to qualify a man to understand it. Lawson Ex. & Op. Ev. Rule thirty-seven and illustrations; *Mayhew* v. *Mining Co.* 76 Maine, 100. "It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the sub-

ject of the inquiry, and may better comprehend and appreciate it than the jury; but to warrant its introduction the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses and yet have enough to draw their own conclusions and do justice between the parties. Where the facts can be placed before a jury and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is no occasion to resort to expert or opinion evidence. . . . When witnesses testify to facts, they may be especially contradicted; and if they testify falsely they are liable to punishment for perjury. But they may give false opinions without the fear of punishment." *Ferguson* v. *Hubbell*, 97 N. Y. 507 (S. C. 49 Am. Rep. 544). With respect to all matters which, "may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life," it is deemed safer to take the judgment of unskilled jurors than the opinion of biased experts. *Higgins* v. *Dewey*, 107 Mass. 494; *State* v. *Watson*, 65 Maine, 74; *White* v. *Ballou*, 8 Allen, 408; *Glass Co.* v. *Lovell*, 7 Cush. 321; *Fraser* v. *Tupper*, 29 Vt. 409; and *Carter* v. *Boehen*, 3 Burr. 1905; and note to Smith's Lead. Cases, 9 Am. Ed. Vol. 1 p. 791; 1 Whart. Ev. § 436.

The management of fires burning in heaps of brush, and lingering in piles of brands, is manifestly a subject of inquiry with respect to which men of ordinary experience and intelligence must be deemed capable of drawing conclusions from facts proved without the aid of those claiming special skill or experience in the premises. The tendency of fire to spread and cause damage, under certain circumstances and conditions, is a matter of common knowledge and experience, and the question of proper safeguards to prevent it is not one for expert testimony. *Higgins* v. *Dewey*; *Frazer* v. *Tupper*; and *Ferguson* v. *Hubbell*, *supra*.

In commenting on the first question put to the assistant engineer calling for his opinion as to, "what more could have been done, in the exercise of care for the prevention of the fire," the presiding judge was evidently impressed with the belief that the issue before the court did not present a proper inquiry for the opinion of an expert, and therefore remarked that "if the witness had been engaged in surveys and constructions" he might testify to the usual practice in guarding fires kindled for the purpose of "clearing and grubbing." It will be noticed that the testimony thus authorized by the suggestion of the court, as well as that actually given by the witness in pursuance of it, is not even restricted to the usual practice of "ordinarily careful and prudent men," or to cases arising under "similar circumstances and conditions," but simply to the "usual course" pursued within the limits of that witness' experience.

The admission of this evidence was no less objectionable than a direct expression of opinion by the witness as an expert. The gist of the action was negligence. It was a simple question of fact for the jury to determine whether, under the particular circumstances and conditions shown to exist in the case, the defendants had omitted any precautions which ordinarily careful and prudent men in the same relation would not have omitted, or performed any acts which ordinarily prudent men would not have performed. Even if a general usage could ever be deemed a safe criterion of a question of ordinary care, such a limited usage as that received in this case would not be material evidence.

It is impossible, in the first place, that there should be any uniform practice or fixed standard of care, with respect to a duty so peculiarly dependent upon varying circumstances and conditions as that of guarding fire to prevent its spreading. The number and magnitude of the fires, the condition of the soil, the state of the weather, the direction and force of the wind, and the relative situation and exposure of the plaintiff's property, would all be factors to be considered in the solution of the question in every case. Thus collateral issues would be raised by the evidence of such a usage as was shown in this case, no less

than by testimony of the methods adopted in other special instances. In *Sturgis* v. *Robbins*, 62 Maine, 289, the action was based on a statute (R. S., c. 26, § 17), in affirmance of the common law, requiring such fires to be kindled "at a suitable time and in a careful and prudent manner," and the plaintiff offered to show what precautions were taken by a witness who set another fire on the same day that the defendant set the fire in question. But the court says: "The mode and manner in which this witness set or managed his fire when set, were immaterial to the issue. The conditions under which his fire was set may have been entirely different from those attendant upon that set by the defendant."

But not even a general custom can be deemed a relevant fact in an action for negligence respecting any non-contractual duty which is not performed under fixed conditions. In Deering on Negligence, § 9, the rule is stated even more strongly as follows: "It may be stated as a general rule that where a party is charged with negligence, he will not be allowed to show that the act complained of was customary among those engaged in a similar occupation or those placed under like circumstances, and owing the same duties."

In *Hill* v. *Railroad Co.* 55 Maine, 438, the plaintiff's horse was frightened by the loud and sudden blowing of the defendant's locomotive whistle, and evidence of the custom in that respect on other railroads was held rightly excluded. The court say in the opinion: "It does not appear in terms whether the object was to prove a general custom on all railroads. The question might be limited to one or two roads. But if such a general custom could be established, it would not be a legitimate defense in this case or tend to establish it. If all the railroads in the country adopt any rule or custom which is unreasonable or dangerous and productive of injury, the generality of the custom cannot in a given case, in any degree excuse or justify the act. Every case must be determined upon the facts and not upon the proceedings of other corporations in somewhat similar cases." To the same effect are the following decisions: viz: *Miller* v. *Pendleton*, 8 Gray, 547; *Judd* v. *Fargo*, 107 Mass. 264; *Lewis*

v. *Smith*, *Id.* 334; *Hill* v. *Steamship Co.* 125 Mass. 292; *Hinkley* v. *Barnstable*, 109 Mass. 126; *Littleton* v. *Richardson*, 32 N. H. 59; *Lawrence* v. *Hudson*, 12 Heisk. (Tenn.), 671; *Crocker* v. *Schereman*, 7 Mo. App. 358; *Hamilton* v. *Railroad*, 36 Iowa, 31.

The admission of the testimony of a usage in the case at bar must be deemed error. Though apparently unimportant, it tended to give the jury the impression that in "digging trenches around the brush heaps," and "throwing sand upon the piles," the defendants had taken greater precaution than usage required, and thus it could not have failed to affect the judgment of the jury upon the question of negligence.

This conclusion renders it unnecessary to consider the other questions presented in the exceptions.

Exceptions sustained.

JAIRUS MARTIN

vs.

GRAND TRUNK RAILWAY OF CANADA.

Androscoggin. Opinion April 13, 1895.

Railroad. Fires. Pleading. R. S., c. 51, § 64.

In an action to recover damages for injury to the plaintiff's wood and timber resulting from fire communicated by a locomotive engine in the use of the defendant company, *Held;* that the defendant's responsibility is limited to property "along the route;" and it is to be deemed "along the route" if it is so near the railroad as to be exposed to the danger of fire from the engine.

A declaration is sufficient when it distinctly alleges that the fire was in fact communicated by the defendant's engine to the plaintiff's land, and that the growth of wood thereon was greatly injured by burning. If it was so near the railroad that it in fact took fire from the engine, it must have been "so near as to be exposed to the danger of fire from the engine," and must, therefore, be deemed to be situated "along the route" of the defendant's railway.

ON EXCEPTIONS.

The case appears in the opinion.

Tascus Atwood, for plaintiff.
A. A. Strout and C. A. Hight, for defendant.

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

WHITEHOUSE, J. This is an action to recover damages for an injury to the plaintiff's wood and timber resulting from fire communicated by a locomotive engine in the use of the defendant railway company.

The declaration in the plaintiff's writ contains no averment of negligence on the part of the defendant company, but is based solely on section 64, chapter 51, of the Revised Statutes, which reads as follows: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route for which it is responsible, and may procure insurance thereon."

The defendant filed a general demurrer to the declaration. The presiding justice overruled the demurrer and the case comes to this court on exceptions to that ruling.

In support of the demurrer the counsel for the defendant argues that the declaration fails to allege either in terms, or in substance and effect, that the property injured was situated "along the route" of the defendant's railway; and that inasmuch as the corporation is only made responsible, by the statute above quoted, for injuries thus situated "along the route" of the railway, the omission of such an allegation must be held a fatal defect.

The construction of this statute has been brought directly in question in several reported cases in this State. *Chapman* v. *Railroad*, 37 Maine, 92; *Pratt* v. *Railroad*, 42 Maine, 579; *Lowney* v. *Railroad*, 78 Maine, 479; *Thatcher* v. *Railroad*, 85 Maine, 502. In *Pratt* v. *Railroad*, *supra*, the interpretation of the phrase, "along the route," was critically considered in the light of etymology and lexical definition, as well as of the rules of legal construction and judicial precedent; and it was there

determined in accordance with the decision in *Hart* v. *Railroad*, 13 Met. 99, that as the legislature manifestly designed to afford no greater security to property situated very near the railroad track than to that which was more remote, provided each was equally exposed, and as it had prescribed no particular distance beyond which the railroad company was not liable, the definition of these terms must be found in the answer to the question, "was the property destroyed so near to the route of the railroad as to be exposed to the danger of fire from the engine?"

The plaintiff alleges in his declaration that fire was communicated by the defendant's engine to the plaintiff's land, "situated in said Auburn on the east side of the main line of said defendant and next north of the "Y" so-called at Lewiston Junction in said Auburn, . . . by reason of which communication of fire the said plaintiff's growth of wood upon said land was greatly injured by burning."

It may be conceded that it is not a necessary inference from this description that the land on which the injured wood was standing, was "adjacent" to the defendant's location; but the right to recover is not restricted to cases where the property injured is "adjacent" to the route of the railway. The defendant's responsibility is limited to property "along the route;" and we have seen that it is to be deemed "along the route" if it is "so near the railroad as to be exposed to the danger of fire from the engine." It is distinctly alleged that the fire was in fact communicated by the defendant's engine to the plaintiff's land, and that the growth of wood thereon was in fact greatly injured by burning. If it was so near the railroad that it in fact took fire from the engine, it must have been "so near as to be exposed to the danger of fire from the engine," and must therefore be deemed to be situated "along the route" of the defendant's railway.

The declaration is sufficient and the ruling of the presiding justice was correct.

Exceptions overruled.

PETER DOYLE, and others, in equity,

vs.

PATRICK WHALEN, and others.

Washington. Opinion April 13, 1895.

Charity. Eastport Fire-Fund. Trusts.

The defendants and others were constituted a relief committee of twenty for the purpose of making the generous contributions of the people, amounting to $38,000, promptly available in relieving the suffering and distress caused by the disastrous fire of 1886 in the town of Eastport. *Held;* that the result of these liberal donations of money, was to create a private charity for the benefit of a designated class of persons, already well-known or capable of being readily ascertained; that the committee became trustees for the execution of a private trust for the benefit of the sufferers by the fire; and that the contributions were primarily designed for the immediate relief of the needy and distressed: and should have been managed under the influence of its primary purpose, and in the spirit of helpful beneficence and liberality contemplated by the donors. *Held*; *also*, that the bounty of the donors was limited to a specified class of persons then in being; that the donors had no purpose to create a permanent fund for a public and general charity in Eastport; and that the trust has not failed but is within the jurisdiction of the court sitting in equity.

Held; that when the primary purpose of the fund was accomplished, it being impracticable to restore the unexpended balance to the donors, who are unknown, the surplus, if any, should be used to repair the losses, as well as to relieve the immediate distress, of the sufferers by the fire.

Held; that the employment of this fund as a substitute for municipal taxation in the support of the town poor, would be a perversion of the charity, if such course were adopted after the fund was capitalized. Such a course would be contrary to sound public policy as tending to discourage similar acts of humanity and christian benevolence in like exigencies in the future.

The court, therefore, orders the appointment of special masters in chancery who, after due notice of the times and places appointed therefor, are directed to receive applications from all the sufferers by the fire, hear evidence in regard to the nature and extent of their respective losses and sufferings, and thereupon devise a scheme for the distributions, among such sufferers, of the entire relief fund available for that purpose, consisting of the $20,000 invested in Eastport bonds, with all income thereof not expended by the defendants prior to the service of the bill, and also of the proceeds from the sale of the relief building erected by the use of a portion of the fund.

The masters may consider not only the actual distress and amount of loss suffered by each, but the difference in the degree of suffering entailed upon

the rich and upon the poor, by the same amount of loss, and such other cognate matters as in their good judgment and discretion will aid in reaching conclusions most in harmony with the probable wishes and purposes of the donors under the circumstances.

ON REPORT.

Bill in equity, heard on bill, answers and proof, praying that the defendants, a finance committee and the inhabitants of Eastport, be required to render an account of all sums received by them and contributed to the sufferers by the Eastport fire in 1886, and of all sums paid out by them to said sufferers, and a statement of what they have done with the balance remaining in their control, and that the Relief building, so-called, built with funds contributed for the sufferers by the fire, be sold and the proceeds of said sale be added to the funds in the hands of the committee, and not distributed among the sufferers by said fire; and that all the funds now in hand, with such sums as have been paid to the town of Eastport to support paupers, and with such further sum as may result from the sale of the building aforesaid, be placed in the hands of a receiver, to be by him distributed among the sufferers by said Eastport fire, your orators, as well as all others who shall show themselves entitled thereto and become parties to this suit, as the court by its master in chancery may direct.

(Answer.)

The joint and several answers of Patrick Whalen, Noel B. Nutt, Alden Bradford and the inhabitants of the town of Eastport.

The said defendants, answering, say:

First:—They admit that on the fourteenth day of October, A. D. 1886, a large amount of property in said town of Eastport was destroyed by fire, but they deny that the plaintiffs, or any of them, suffered large loss by reason of said fire, and if any of the plaintiffs suffered any loss whatever by reason thereof these defendants do not admit the same, but leave such plaintiffs to make proof of the same as they shall be advised, the facts relating thereto being much more fully within the knowledge of such plaintiffs than of these defendants; and these defendants, further answering, especially deny that said plaintiffs, or either

of them were, at the date of the filing of said bill, or at any time prior thereto, in any condition of suffering or distress caused by said fire.

Second: — These defendants, further answering, say they admit on the fifteenth day of October, 1886, and on divers dates thereafter, contributions in clothing, money and other supplies, aggregating a large sum, were sent to said Eastport; but they say that said contributions were sent for the purpose of relieving actual suffering and distress then existing in said Eastport as the result of said conflagration; and they deny that such contributions were ever intended by their donors to be used for the purpose of making good to persons who were not in suffering or distress, losses of property sustained by them by reason of that fire.

Third: — And these defendants, further answering, say that a relief committee was chosen, as stated in said bill, consisting of many of the prominent and active citizens of said town of Eastport, and containing many more members than are stated in said bill, and that an executive committee and a finance committee were also chosen, and that said finance committee consisted of Noel B. Nutt, Patrick Whalen and Alden Bradford, as stated in the bill; that all said contributions were received by said relief committee, and that during the fall of 1886, succeeding said conflagration, and the following winter and spring, a large part of said contributions were distributed by said committees among those who were entitled to receive the same.

Fourth: — And these defendants, further answering, say that during said period from the date of said conflagration until the close of the month of March, 1887, the members of said committee gave their time and effort regularly, without compensation, to the work of distributing the funds and supplies which had been so received among those who were in any degree in distress or suffering caused by said fire; that said committees held regular meetings, considered every case as it was presented, obtained all information in regard to the same that could be reasonably procured, and at the close of said

month of March, by the distribution of said funds and supplies, had relieved every instance of distress then existing in Eastport, according to their best knowledge and belief, which had resulted from said conflagration. There then remained of said relief fund undistributed the sum of twenty thousand dollars which said executive committee invested in the town of Eastport four per cent bonds, where it still remains, said bonds being now in the possession of Edward E. Shead, treasurer of said relief committee. Since the said thirty-first day of March, 1887, the income of said fund of twenty thousand dollars so invested in the bonds of the town of Eastport has been used, under the authority of said relief committee and said town of Eastport, in the relief of actual destitution and distress existing in said town of Eastport, and the principal thereof has remained untouched. In many instances of the destitution and distress so relieved, losses by said fire had been one of the causes of the necessity for such relief.

Fifth: — And these defendants, further answering, say that, as many people in Eastport were left without homes by reason of the fire, it was determined by said committee, at an early date after the fire, to erect a relief building for their accommodation; that by reason of unexpected delays in procuring the lumber, owing to the early freezing of the river, the actual erection of the building was delayed until late in the season, but that said building was finally erected at an expense of about five thousand dollars upon land belonging to the United States Government in said Eastport; that said building was used for the benefit of sufferers by the fire so long as any actual destitution or distress resulting therefrom existed, but since that time has been used to furnish apartments and tenements, free from rent, to respectable and worthy poor persons in said town of Eastport, many of whom had met with losses by reason of said fire, and a portion of said building, during a part of the time, has been used as a place for keeping a primary school. And these defendants say that said building has been permitted by the United States Government to remain upon its lands without any payment of land rent whatever, and in its present position serves

the useful and benevolent purposes hereinbefore stated without any corresponding expenditure, and at the same time, that such building for purposes of sale or removal from the lot on which it stands would be without any value whatever.

Sixth: — And so these defendants say that the gratuities aforesaid given by benevolent persons, under the circumstances already stated, to the town of Eastport as aforesaid, for the relief of destitution, distress and suffering caused by the fire of October fourteenth, 1886, in that town, have been used and are being used under the authority of inhabitants of said Eastport, so far as practicable, directly for the purposes for which they were given, and in so far as they were not required and could not be used specifically for the primary purpose for which they were intended, they have been used, and are being used by said inhabitants, and under their authority, for purposes which approximate as closely and are as nearly akin to the purposes for which they were directly given as it is reasonable or practicable to do; not in any way to relieve the town of Eastport from its legal obligation to support its poor, but as an additional fund to meet and provide for deserving instances of actual suffering, distress and destitution, as nearly related as possible to said fire, as the cause thereof, existing in that town; and these defendants deny that the plaintiffs, or either of them, are losers or sufferers by the conflagration aforesaid in any such sense as to entitle them, or either of them, to make any claim whatever upon said fund.

Seventh: — And these respondents, further answering, deny that any portion of the funds and supplies contributed as aforesaid, have ever been, or are being used for any purposes whatever foreign to those for which they were given, and further deny all and all manner of illegal or improper acts wherewith they are in any way by the said bill charged, and invite the strictest investigation of all their acts and doings relating thereto, and are ready to maintain and prove their allegations herein as the court shall direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

Before filing of a replication, the defendants amended their answer by adding a demurrer to the sixth paragraph.

A. MacNichol and G. A. Curran, for plaintiffs.

J. W. Symonds, D. W. Snow, and C. S. Cook, for defendants.

The administration of these funds came properly and rightfully into the hands of trustees in Eastport, constituting, within such limitations as the court shall say, a domestic and local tribunal for that purpose. Their action has been fair and honest and according to their best judgment and the bill does not allege, and the case does not show, ground on which, at the suit of these plaintiffs, such local administration will be superseded by the decree of the court.

The gifts were not directly to individuals who had suffered by the fire but to the persons to whom they were addressed, or who should rightfully act in the premises, for the due and proper relief of the suffering which the fire had caused. They were gifts to a community which had suffered great misfortune — and the manner of using the gifts was primarily and principally a matter for the community to decide.

The case abundantly shows that it was the judgment of this committee in April, 1887, that the worthy cases of distress caused by the fire had been relieved and had disappeared; that circumstances no longer existed calling for the immediate distribution of the residue of the fund. The committees believed that to invest the remaining principal of the fund, and for the present to use only its income for the purposes of the trust, was a procedure more in harmony with the intention of the donors than any other course it was practicable to pursue.

All that the bill claims, substantially, or all that can be claimed in its support upon the evidence which has been taken, is that there should be an immediate distribution of this twenty thousand dollars instead of the use of the income of it only; and such a distribution is demanded now, eight years after the fire, when it is obvious that the necessity for such distribution to relieve suffering caused by the fire cannot even be fairly claimed and when even the attempt to make such distribution in any such way as to meet the original purposes intended would be manifestly impracticable.

If the object of this fund was to relieve present suffering and to tide over distress caused by the fire, the lapse of time which has intervened would afford a strong argument in favor of the present use of the income only of the fund rather than of the unnecessary and impracticable attempt to distribute it.

Who are the parties plaintiff who ask for this distribution and under what circumstances do they ask? No donor of the fund applies, no person who gave a dollar or contributed an article makes this application to the court. The only description the plaintiffs give of themselves in their bill is that they suffered great loss by reason of the fire. No application was ever made to the town of Eastport, or to the city of Eastport, since it has become a city, to change the policy established by the committee in its management of this fund. No public meeting of citizens was ever called in Eastport to direct a different policy or to change the constituent members of the committee, no effort alleged or made by the plaintiff to induce either the city or the citizens of Eastport to change the result, but a direct application made in the first instance to the court to give the relief asked for by the plaintiffs solely upon the ground that they are losers or sufferers by the fire.

We submit that this ground is wholly untenable; that the court will recognize the right of the city of Eastport and its citizens, the community which received these gratuities, to deal in the first instance with the management of this fund; that the gifts themselves, and the manner in which they were made, contemplated the action of such agencies in the first instance; that all presumptions are in favor of the validity of the action of such a domestic tribunal; that the whole subject, within proper limitations, is submitted to their judgment; that good faith and reasonable judgment are all that could be required on the part of such committees or the municipality itself; that the exercise of such good faith and reasonable judgment removes them from the jurisdiction of the court, or rather, that the court will not assume jurisdiction over them so long as they keep themselves within these lines. When these committees and the municipality determine that there is no further immediate occasion for the use of this fund and that the purposes of the trust will be better served

by capitalizing it and using only its income, are they not fairly acting within their own province in making that decision; and is it for any person claiming merely the status of a sufferer by the fire to apply to the court to reverse that decision? It was an implied and an inherent term in the whole trust that the fund should be managed according to the judgment of a properly constituted committee. It is not the right of a sufferer by the fire to claim it merely in the right of such a sufferer, but only under such circumstances as commend themselves to the authorities making the distribution. It would be impracticable to deal with such a fund in any other way. The court cannot administer it, and if it should attempt it, by a receiver or other instrumentality, it is hardly to be supposed it could be so well done as by these local committees representing the best sentiment of the city.

The evidence, even that for the plaintiffs, shows that the committees have not violated faith or proceeded otherwise than according to their own best judgment. The case does not proceed upon the ground that the plaintiffs have exhausted other remedies, or have attempted to do so, before applying to the court. The municipality of Eastport, or a public meeting of citizens such as originally constituted the committees, would seem to be the first court of appeal from the committees in such a case as this; because while the whole matter is informal, and necessarily must be so, and understood and expected to be so, even by the donors, still it must be for the municipality and the citizens, the community which suffered the misfortune and which the donors intended to aid and relieve, to say in the first instance what is to be done with the gifts; and more than that, we submit to the court, that their action must control and prevail and be final except in extreme cases. Neither upon the averments of the bill,—and our answer includes a demurrer,—nor upon the evidence in the case, are the plaintiffs entitled to the relief for which they ask.

SITTING: PETERS, C. J., WALTON, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

WHITEHOUSE, J. On the fourteenth day of October, 1886, the town of Eastport in this State was the scene of a destructive conflagration which caused temporary destitution and distress among the inhabitants. News of the disaster awakened a wide-spread feeling of sympathy and a spirit of active benevolence which resulted in generous contributions of money and various articles of supplies from nearly all parts of New England and many points beyond, "for the relief of the sufferers by the fire." The total amount of the money thus contributed exceeded thirty-eight thousand dollars. A relief committee of twenty was promptly organized at Eastport with appropriate officers and sub-committees for the purpose of making these voluntary offerings of the people at once available in relieving suffering and distress. During the fall and winter following the fire, the committee received applications and systematically dispensed the supplies and disbursed the funds thus received to those who appeared to be in need of immediate relief in consequence of the fire. A relief building was also erected at an expense of about five thousand dollars, taken from the relief fund, for the accommodation of those who were left homeless and shelterless by the fire.

But on the third day of March, 1887, the following resolution was adopted by the full committee: "Resolved, that the reduced condition of the relief fund together with the distressed condition of over fifty families comprising more than two hundred persons for which the committee is obliged to provide food, fuel and clothing for an indefinite period, forbid the appropriation of large sums of money aid in the future." It appears, however, that at this time only three thousand dollars in money had been disbursed and that there was then in the hands of the finance committee an unexpended balance amounting to thirty-five thousand dollars, of which the sum of twenty thousand dollars was soon after invested in the four per cent bonds of the town of Eastport; and on the thirty-first day of March it was voted by the committee that the twenty thousand dollars, so invested "be made a permanent fund, the interest of which to be used in

aiding towards the support of the town poor." On the twenty-first day of April, 1889, it was voted that the finance committee of the relief committee (the individual defendants in this proceeding) in connection with the treasurer of the relief committee, be authorized to act as trustees and to hold all bonds, property, money," &c.; and thereupon the committee "adjourned *sine die*."

It is not in controversy that since that date, the treasurer of the relief committee has been the custodian of the bonds in which this fund of twenty thousand dollars was invested; that the income thereof has been regularly collected by him and turned over to the town treasurer, and that it has then been disbursed and distributed through the agency of the successive overseers of the poor for the purpose of relieving actual destitution and distress in the town without special reference to the inquiry whether the necessity for such relief was occasioned by the fire or otherwise. The "relief building" since that date has been used to furnish apartments and tenements free from rent to the worthy poor, some of whom met with losses by the fire; and a portion of the building has been used as a school-house for a public school.

The plaintiffs represent that they suffered great loss by the fire, and complain on their own behalf, and in behalf of all others of like interest with themselves, that they are aggrieved by the refusal of the committee to distribute this generous fund among the sufferers by the fire in accordance with the intention of the donors. They contend that it should have been used to repair the losses as well as to relieve the destitution and distress of the sufferers by the fire, and that the appropriation of it as a supplement to the pauper fund of the town is wholly unauthorized for the reason that it aids the rich as well as the poor without distinguishing the sufferers by the fire, by relieving all alike of a part of the burden of taxation, and thus diverts these charitable donations from the purposes and uses for which they were designed.

The defendants say that these benevolent contributions came properly and rightfully into custody of the relief committee with an express or implied request that they should be distributed

in the sound discretion of the committee for the relief of actual suffering and distress caused by the fire; that they labored faithfully and gratuitously to discharge the responsibility imposed upon them and distributed the supplies and disbursed the funds according to their best judgment for the real purpose for which they were donated, and that "in so far as they were not required and could not be used specifically for the primary purpose for which they were intended, they have been used and are being used by the inhabitants of Eastport for purposes which approximate as closely, and are as nearly akin, to the purpose for which they were designed as it is reasonable or practicable to do." They further say that it was never the intention of the committee that the income of the twenty thousand dollars should be used as a part of the pauper funds of Eastport, or as a substitute therefor, or that the receipt of any part of it should affect the persons in whose favor it was applied with pauper disabilities. They accordingly contend that the mere fact that the plaintiffs' applications for more of the funds than they have received have not been approved by the committee, does not give them the right to appeal from this domestic tribunal and call on the court to administer the fund.

The situation presents some novel inquiries which are not entirely free from difficulty. These prompt and liberal donations were acts of benevolence primarily designed undoubtedly for the immediate relief of the needy and distressed among the sufferers by the fire. The existence of a large surplus, after suitable relief had been afforded in all cases of actual distress, was probably a contingency not anticipated by the charitable donors. But in all the letters and telegrams received from them, it is either directly expressed or clearly implied that all contributions of money and supplies were to be applied "for the benefit of the sufferers by that fire." There is nowhere any intention of a purpose to bestow these gifts upon all the worthy poor of Eastport; and it may fairly be assumed that it was never in their contemplation to create a permanent fund for such public charitable use in that town. The result of these gratuities was to create a private charity for the benefit of a

designated class of persons who were already well-known or who were capable of being readily ascertained. "A good charitable use is 'public' not in the sense that it must be executed openly and in public, but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. . . . It is public in its general scope and purpose, and becomes definite and private only after the individual objects have been selected." *Saltonstall* v. *Sanders*, 11 Allen, 456. The essential elements of a public charity are that it is not confined to privileged individuals but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it its public character. *Donohugh's Appeal*, 80 Pa. 306; *Bangor* v. *Masonic Lodge*, 73 Maine, 428. "Private trusts," says Mr. Pomeroy, "are . . . for the benefit of certain and designated individuals in which the *cestui que trust* is a known person or class of persons. Public, or, as they are frequently termed, charitable trusts, are those created for the benefit of an unascertained, uncertain and sometimes fluctuating body of individuals, in which the *cestuis que trustent*, may be a portion or class of a public community, as for example, the poor or the children of a particular town or parish." 2 Pom. Eq. § 987. "In private trusts," says Mr. Perry, "the beneficial interest is vested absolutely in some individual or individuals who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or within the allowed limit, will be competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity. . . . But a trust created for charitable or public purposes, is not subject to similar limitations, but it may continue for a permanent or indefinite time." 1 Perry on Trusts, § 384. In *Att'y Gen'l* v. *Price*, 17 Ves. 371, Lord Hardwicke draws this distinction between the creation of permanent trusts and the exercise of present benevolence, observing of the former: "It is to have perpetual continuance in favor of a particular description of poor, and is not like an immediate bequest of a sum to be distributed among poor relations."

The defendants, then, with other members of the committee of twenty, became trustees for the execution of a private trust for the benefit of the sufferers by the fire. The administration of the trust was in the first instance committed to their discretion; and having reference to the primary purpose of the contributions, after all cases of actual distress and need had according to their best judgment been amply relieved by them, the committee would doubtless have been justified, if such a course had been practicable, in restoring to the donors the unexpended balance. This would have been the obvious equity of the situation, but its observance was not possible; since by far the larger part of the contribution in money was received through the agency of municipal officers, from very small donations made by numerous persons whose names are now as unknown as the contributor of the "widow's mite."

In the administration of trusts under the general equity jurisdiction of the court, it is an old and familiar principle that if the original purpose of a public charity fail and there are no objects to which, under the specific terms of the trust the funds can be applied, the court may determine whether, in the event that has happened it was not the probable intention of the donor that his gift should be applied to some kindred charity as nearly like the original purpose as possible. This is commonly known as the doctrine of *cy pres*, which, in its last analysis is found to be a simple rule of judicial construction designed to aid the court to ascertain and carry out, as nearly as may be, the true intention of the donor. *Jackson* v. *Phillips*, 14 Allen, 539; 2 Perry on Tr. §§ 717-729, and cases cited. But if it appears that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift *cy pres* the original purpose. "There is a class of cases," says Mr. Perry, "where the gift is distinctly limited to particular persons or establishments, and upon a change of circumstances the doctrine of *cy pres* does not apply." 2 Perry Tr. § 725, note and § 726, and cases cited. It is not applicable to private trusts to the extent of authorizing the court to convert the funds donated for a private and particular purpose into a permanent

fund for a public charitable use of a different character. *Coe* v. *Washington Mills* 149 Mass. 543; 2 Pom. Eq. § 1027.

In the case at bar, there is no evidence of *mala fides* on the part of the defendants, or any member of the relief committee, in their management of the funds intrusted to their charge. As suggested by the learned counsel for the defendants, the apparently unwarranted resolution of March third above quoted, was doubtless designed to discourage the more persistent and less meritorious applications. But a careful examination of the evidence reported leads to the conclusion that the committee managed the fund under the influence of a too rigid construction of its primary purpose, and not in the spirit of helpful beneficence and liberality contemplated by the charitable donors.

It is clear, then, that the donors did not expect or intend that any part of their contribution should be returned to them, or if so, that it is not practicable to effectuate such intention. It is equally clear that they had no purpose to create a permanent fund for a public and general charity in Eastport. Their bounty was distinctly limited to a specified class of persons then in being. As stated in some of the letters, it was "for the benefit of the sufferers by the fire." These sufferers or their legal representatives, may still be found; and if the privilege is granted, it may safely be assumed that they will promptly apply for their respective shares of the fund under any new scheme devised for its distribution. The trust has not failed. The application of a rule of construction analogous to the doctrine of *cy pres* discovers a probable intention on the part of the donors that when the primary purpose of their contribution should be accomplished, the surplus, if any, should be used to repair the losses as well as to relieve the immediate distress of the sufferers by the fire. As the value of the property destroyed is estimated to reach an aggregate of seven hundred and fifty thousand dollars, and four hundred thousand dollars above all insurance, it would seem that the entire relief fund might have been distributed among the sufferers under a scheme not greatly at variance with the probable intention and wishes of the donors.

It may be true, as claimed, that there has been no definite purpose to employ this fund as a substitute for municipal taxation in the support of the town poor, but such a perversion of the charity will be the inevitable result, if the course adopted after the fund was capitalized shall be pursued in the future. Such a course is contrary to sound public policy, as tending to discourage the prompt exercise of similar acts of humanity and Christian benevolence in like exigencies in the future.

The situation, therefore, requires the court to assume jurisdiction of the matter and to appoint special masters in chancery, who after due notice of the times and places appointed therefor, shall receive applications from all the sufferers by the fire, hear evidence in regard to the nature and extent of their respective sufferings and losses, and thereupon devise a scheme for the distribution, among such sufferers, of the entire relief fund now available and which may be available for that purpose at the time of final decree. In determining the proportional part of the fund which each should receive, the masters may be justified in considering not only the actual distress and amount of loss suffered by each, but the difference in the degree of suffering entailed upon the rich and upon the poor, by the same amount of loss, and such other cognate matters as in their good judgment and discretion will aid in reaching conclusions most in harmony with the probable wishes and purposes of the donors under these circumstances; such conclusions to be reported to the court for acceptance and approval. The fund for distribution will consist of the four per cent bonds of the town of Eastport in which the sum of twenty thousand dollars was invested, with all income thereof not expended by the defendants prior to the service of this bill, and all interest which has accrued therein since the service of this bill; and also of the proceeds from the sale of the relief building. Such sale is to be effected by the defendants in conjunction with E. E. Shead, treasurer of the committee (who is to be made a party to this bill) under the direction of a single justice. The proceeds thereof, and also the bonds and income above named, will be held by the defendants and E. E. Shead, treasurer, until further order of the court.

Lemuel G. Downes of Calais, Benj. B. Murray of Pembroke, and Reuel Small of Deering, are to be appointed masters.

Bill sustained. Decree in accordance with opinion.

HASKELL, J. I consider the donation an express, public, charitable trust. Express, because applied to a specific object. Public and charitable, because given for the relief of suffering visited upon an undetermined portion of a community, the result of conflagration. It was the generous out-pouring of money to relieve suffering humanity from misfortune that had befallen a city and made hundreds of its inhabitants, houseless, homeless, idle and sick in late autumn with the frosts of a northern winter hard by.

To these purposes it should have been promptly applied, not with stingy hand, but with such broad and generous spirit as moved the donation. It was not indemnity, but relief. Relief for suffering, whether occasioned by loss of property, or of health, or of employment that earned bread, albeit a result from the conflagration that worked a distress to incite the donation.

The proofs show that suffering entailed by the calamity still remains. The donors intended that it should long ago have been relieved. That intent must now be put in execution. I concur, therefore, in sending the cause to masters for an account of individuals still suffering from the effects of the fire, and to devise such equitable methods of distribution as seem best suited to carry out the purposes of the donation.

ALEXANDER DUNCAN *vs.* JAMES GRANT.

Knox. Opinion April 15, 1895.

Contract. Consideration. Stat. Frauds. Receipts.

The plaintiff claimed that, as the consideration for the sale and assignment to the defendant of a lease, the defendant agreed to pay him a certain price and in addition thereto to assume and pay him a claim for damages which the plaintiff had against third parties. In an action against the defendant to

recover the last named claim, *held;* that to entitle the plaintiff to recover, he must prove an original, personal promise on the defendant's part to assume and pay the claim as a part of the consideration for the sale of the lease.

The statute of frauds is not involved in the question whether or not such claim formed a part of the consideration for the sale of the lease; nor is it necessary that, prior to the defendant's promise to assume and pay such claim, there should have existed a personal liability on the part of the defendant to pay it.

The third party against whom the plaintiff held his claim was an association. The defendant was not obliged to plead in abatement to avoid being held liable for the claim so made against the association, because the action is not against the defendant as member of the association. The liability of the defendant, if any, depends upon the defendant's personal promise.

A receipt in full, uncontradicted, is binding upon the parties, but may be explained by evidence and circumstances, when it does not contain the details of a contract. A jury are not debarred from finding that a receipt in full was not intended to cover all demands but only to limit the demands when such is the fact and intention of the parties.

ON MOTION AND EXCEPTIONS.

This was an action brought on the following account annexed:

"James Grant to Alexander Duncan, Dr.

To balance due on sale of lease of Deep Hollow Quarry,	$72.00
Interest,	1.44
	$73.44"

Plea, general issue.

The jury returned a verdict for the plaintiff and the defendant took exceptions, and filed a motion for a new trial.

The plaintiff introduced evidence tending to show the legality of a debt due him from the Paving-Cutters' Union; and further testimony tending to show a verbal promise made by the defendant to the plaintiff to pay this debt as a part of the consideration for the sale of the lease of Deep Hollow Quarry.

The defendant introduced in evidence a receipt in full given by the plaintiff.

The defendant seasonably made the following requests for instructions, viz:

1. That a receipt uncontradicted by evidence, as to signing, execution and delivery is binding upon the parties; and that

where the plaintiff admits signing a receipt, after carefully reading it, and then fails to explain or contradict the evidence in any way, the jury are entitled to find that the receipt is conclusive as to all facts stated in it.

2. That if the jury find from the evidence that the alleged bill for loss of time made no part of the consideration for the lease, then the plaintiff cannot recover in this action.

3. That in order for the plaintiff to recover, the jury must find a personal liability on the part of the defendant, if they find from the evidence that the plaintiff and defendant were at that time both members of the Paving-Cutters' Union.

4. That on the cause of action presented by the plaintiff's writ, the defendant was not obliged to plead in abatement to avoid being held liable for the debts of the Paving-Cutters' Union.

To the first requested instruction the court said:

"I will give you that with this addition, that if it was the intention of the parties, and you can find that that was the intention from the evidence in the case, that the receipt was only intended to cover the intention as expressed on the back of the lease, then it would not be binding; that the jury can say that the lease is explained by the evidence and circumstances. The defense relies upon the fact, as they contend, that the plaintiff gave no explanation of why he gave the receipt in full. If he did not, that is a strong point against him. I don't think the jury is debarred from finding, upon the evidence in the case, that it was not in fact to cover all the demands, but only to limit the demands."

The court declined to give the second requested instruction it having been already embodied in the charge.

To the third requested instruction the court said:

"I have given that. I gave the same rule bearing upon the statute of frauds, that even although the plaintiff himself was a member of it, in the same transaction, that the case must rest upon the personal promise of the defendant; that he is not bound to pay the debt because he was a member of the association, but the plaintiff claiming that the association, although plaintiff and

defendant are both members of it, owed a certain sum, I think the defendant can by a personal promise agree to pay the plaintiff—to pay a sum equivalent to that, or even that same sum, for a consideration."

To the fourth requested instruction the court said:

"I will give that so far as it is applicable. If they had sued him as a member of that association, then he might plead an abatement; but the case is not against the association—not against him because he is a member of the association, but because he made a personal promise, if you find he made such a promise."

The defendant excepted to these instructions and refusals to instruct.

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

A. A. Beaton and R. R. Ulmer, for defendant.

Duncan as a member of the Union was as much responsible for its debt as the defendant. One person cannot sue himself and another. *Blaisdell* v. *Pray*, 68 Maine, 274; *Denny* v. *Metcalf*, 28 Maine, 390; Story Part. § 234. Defendant's promise, if any, not affected by the original liability of the Union, and is within the statute of frauds. *Manley* v. *Geagan*, 105 Mass. 445; *Farnham* v. *Davis*, 79 Maine, 282; *Furbish* v. *Goodnow*, 98 Mass. 299.

Receipt in full: Am. & Eng. Enc. of Law, vol. 19, p. 1122, and cases. Third request: *Lane* v. *Tyler*, 49 Maine, 252; *Bruce* v. *Hastings*, 41 Vt. 380; *Holyoke* v. *Mayo*, 50 Maine, 385; *Farrar* v. *Pearson*, 59 Maine, 561; *Couilliard* v. *Eaton*, 139 Mass. 105.

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

WHITEHOUSE, J. The plaintiff claims that, as the consideration for the sale and assignment to the defendant of a lease of some quarry property, the defendant agreed to pay him the sum of one hundred and twenty-five dollars, and also to assume and pay to him a claim for damages of seventy-two dollars which

the plaintiff had against the Paving-Cutters' Union ; and he seeks to recover this sum of seventy-two dollars in this action.

The defendant denies that he made an absolute promise to pay the plaintiff this sum of seventy-two dollars, but admits that he agreed to use his influence and best endeavors to collect the claim for the plaintiff.

The jury were instructed that to entitle the plaintiff to recover, it was incumbent upon him to prove a personal promise, on the part of the defendant, to assume and pay to the plaintiff this claim of seventy-two dollars as a part of the consideration of the sale of the lease.

It was obviously immaterial to the plaintiff what authority the defendant had, or what measures he proposed to take respecting the settlement of the claim against the Union. The instructions given to the jury clearly required them to find an original, personal undertaking on the part of the defendant to pay the plaintiff the sum of seventy-two dollars, in addition to the sum of one hundred and twenty-five dollars which was not in controversy, as a part of the consideration of the lease. The statute of frauds was not involved in the inquiry. It was not necessary that, prior to the defendant's promise to assume and pay this sum of seventy-two dollars to the plaintiff, there should have existed "a personal liability on the part of the defendant" as a member of the Union. The requested instruction upon this point was properly qualified, and the instructions given were correct.

The other requested instructions were fully covered by the charge, and all the principles of law applicable to the case were clearly stated and correctly applied.

The testimony was conflicting, and if it cannot be said that the report shows a clear preponderance of evidence in favor of the plaintiff, there was sufficient evidence to support the verdict, and we find no justification for setting it aside.

Motion and exceptions overruled.

WILLIAM H. GLOVER COMPANY *vs.* MARY M. ROLLINS.

Knox. Opinion April 15, 1895.

Pleading. Amendments. Parties. Lien. R. S., c. 82, § 13; c. 91, § 34.

Revised Statutes, c. 82, § 13, which provides that "a writ founded on contract express or implied, may be amended by inserting additional defendants," do not authorize the substitution of a new defendant for the only one originally named in the writ.

Held: such an amendment, if allowable, in an action to enforce a lien under R. S., c. 91, § 34, would be of no avail, if more than ninety days had elapsed after the last items of materials were furnished before the amendment could be allowed.

ON EXCEPTIONS.

The case appears in the opinion.

L. R. Campbell, for plaintiff.

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

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

WHITEHOUSE, J. This is an action of assumpsit in which the plaintiff corporation seeks to enforce a lien on the defendant's dwelling-house and the lot of land on which it stands, for materials furnished to James A. Clark, the contractor, in the erection of the building.

The house was built by James A. Clark under an entire contract made by him with the defendant to furnish all the labor and materials and build the house for a stipulated sum. The materials embraced in this suit were all used in the erection of the building, but they were furnished by the plaintiff at the request of Clark and charged to him, and it was admitted that the defendant was not liable to the plaintiff for any part thereof.

In view of these facts the plaintiff, at the return term of the action, moved to amend the writ by striking out the name of Mary M. Rollins as defendant, and inserting in place of it the name of James A. Clark as the only defendant in the suit.

But the presiding justice ruled, as a matter of law, that the court had no power to allow the amendment, and the case being submitted to him on the facts, ordered a nonsuit. The case comes to this court on exceptions to these rulings.

The nonsuit was rightly ordered. At common law, in actions of assumpsit, or on contract, amendments by striking out the names of existing plaintiffs or defendants, or by inserting those of new and additional ones, were not allowable. *Ayer* v. *Gleason*, 60 Maine, 207. The power to allow such amendments has been conferred upon the court by statute; and the only authority invoked by the plaintiff for the amendment proposed in this case is found in R. S., c. 82, § 13, which provides that: "A writ founded on contract express or implied may be amended by inserting additional defendants; and the court may order service to be made on them, ... and on return of due service they become parties to the suit." It will be observed that the language of this statute is that the writ may be amended by inserting "additional defendants." It does not say that it may be amended by striking out the only defendant or defendants, named in the writ, and inserting other defendants in place of them. It does not authorize the substitution of a new defendant for the only one originally named in the writ. In *Duly* v. *Hogan*, 60 Maine, 355, the plaintiff sought to accomplish indirectly what the plaintiff here attempts to reach directly. He obtained an order for an amendment authorizing the insertion of additional defendants upon whom copies of the writ were duly served, and at the next term discontinued as to the original defendant. But the court held that, under this statute, a plaintiff could not thus summon in additional defendants unless he also continued to prosecute his action against the original defendant. Such a proceeding is thus characterized in the opinion: "A statute which was designed to authorize the summoning in of additional defendants, where there is a *bona fide* intention to pursue the claim against all the original joint promisors ought not to be perverted into a means of conjuring a fresh set of defendants into a suit already commenced which is not intended to be prosecuted against the party originally sued.

That is not a summoning in of additional defendants, but an entire change of parties defendant, a substitution of one defendant for another." So in *Jones* v. *Sutherland*, 73 Maine, 158, a similar construction was placed on the corresponding provision of the statute respecting additional plaintiffs. See also *Lodge* v. *Brooks*, 61 Maine, 585; and *Association* v. *Remington*, 89 N. Y. 22. It is in effect the institution of a new suit against Clark and he is entitled to have the action commenced against him by an original writ in accordance with Chapter 81, § 2, R. S.

But since the amendment, if allowable, would have been equivalent to the bringing of a new suit, the plaintiff, would have found it of no avail in the enforcement of the lien, as more than ninety days had elapsed after the last items of material were furnished before the amendment could have been allowed. R. S., c. 91, § 34.

Exceptions overruled.

ZORADUS D. STEVENS *vs.* JOHN W. MANSON, and another.

Somerset. Opinion April 16, 1895.

Disclosure Commissioners. Execution. Arrest. R. S., c. 82, § 138; c. 83, § § 18, 22; Stat. 1887, c. 137, § § 20, 23.

By the statutes of this State, the Supreme Judicial Court and trial justices may not issue executions until twenty-four hours after rendition of judgment.

It was the rule of procedure at common law that execution might issue as soon as final judgment was signed.

Held: that the statutes applicable to the Supreme Judicial Court and trial justices, requiring the issue of execution to be deferred twenty-four hours after the rendition of judgment, do not apply to disclosure commissioners.

Under the statute of 1887, c. 137, § 20, there is no appeal by a debtor from the decision of a commissioner refusing a discharge, and that magistrate may issue at once a *capias*, and also an execution for costs at the same time.

A poor debtor failed to obtain a discharge before a disclosure commissioner, and, having been arrested afterward on a *capias* issued by the commissioner, began a disclosure before two justices of the peace which was interrupted by his refusal to be examined, he claiming that one of the magistrates was not authorized to act, although he was mistaken in that respect.

The officer holding him in arrest assumed, under the statute, to select another justice and the debtor then went on with his disclosure and was discharged. From the time of the debtor's arrest on the *capias* and attempted disclosure until he was discharged, he was not committed to jail or actually held in confinement by the officer, but was allowed to remain at home, when not under examination, upon the assurance of his attorney that he would be responsible for him as keeper. The attorney of the execution creditor claimed that the proceedings at the time of the interrupted disclosure, as stated above, were illegal and notified the officer who informed the debtor that he should have to hold him in custody. *Held:* that there was no second arrest.

ON REPORT.

This was an action for false imprisonment brought by the plaintiff, an execution debtor, against two defendants, one being the attorney of the creditors and the other a disclosure commissioner.

The case is sufficiently stated in the opinion.

Frank W. Hovey, for plaintiff.

J. W. Manson and Abel Davis, for defendants.

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

STROUT, J., having been of counsel, did not sit.

WHITEHOUSE, J. This is an action for an alleged unlawful arrest and false imprisonment.

March 11, 1893, the plaintiff was cited to disclose at Pittsfield in the County of Somerset, on an execution against him for twenty-five dollars and sixty-one cents damages, and ten dollars and twenty-nine cents costs, before the defendant, Davis, as disclosure commissioner, in accordance with the provisions of chapter 137 of the laws of 1887, but failed to obtain the benefit of the oath provided for in section eight of that Act. Thereupon, May 2, 1893, the magistrate appears to have issued a *capias* and annexed it to the execution in force at that time in accordance with section 20, and on the same day rendered judgment and issued a separate execution against the debtor and in favor of the petitioner for his costs and fees taxed at fifteen dollars and twelve cents, pursuant to section 23, of the same Act. June 19,

1893, the plaintiff was arrested by virtue of this execution for costs, and also of the original execution, and caused the creditor to be cited on the former to appear before two justices of the peace and quorum June 21, 1893, for the purpose of submitting himself to examination and obtaining the benefit of the oath authorized by R. S., c. 113, § 30. The creditor appeared by his attorney, J. W. Manson, one of the defendants in this suit, and selected a justice residing in another county. Under the erroneous impression that such a justice was ineligible (*Blake* v. *Peck*, 77 Maine, 588) the debtor's attorney objecting to the creditor's choice, the debtor refused to be examined before him, and the officer chose another justice, certifying that he did so because the creditor had "unreasonably neglected and refused to procure the attendance of a justice residing in Somerset county." The creditor's attorney withdrew, and the tribunal thus organized heard the debtor's examination and administered the oath. But the debtor becoming satisfied that this proceeding was *coram non judice* and void, caused the creditor to be cited again to appear at his disclosure on the original execution before two justices on the twenty-sixth day of June. It appears from the record of the magistrates and the return of the officer that, after a disagreement on the part of the justices then selected by the debtor and creditor, and a selection of a third justice by the officer, the oath was administered and a discharge granted to the debtor on the twenty-eighth day of June.

The plaintiff now claims that the defendants are liable for an unlawful arrest on the execution for costs, on the ground that it was issued by the disclosure commissioner before the expiration of twenty-four hours from the rendition of the judgment and therefore irregular and void; and secondly, that they are liable for an unlawful arrest on June 21, for the alleged reason that the officer released the debtor after the attempted disclosure of that date and subsequently re-arrested him.

I. It is the opinion of the court that the first ground is indefensible as a matter of law. It was undoubtedly the rule of procedure at common law that execution might issue as soon as final judgment was signed, and before its entry of record "provided there was no writ of error depending or agreement to the

contrary." This is expressly laid down in the English books of practice. Tidd's Pr. 994; Sheridan's Pr. 299. Not even the docketing of a judgment was deemed essential to its existence or a condition precedent to the issue of execution. But the time when execution may issue has been the subject of regulation by statute in the different states, and while considerable diversity exists, it seems to be the policy of these statutes in a majority of the states to allow execution to issue immediately upon the rendition, entry or docketing of a judgment. Freeman on Ex'ons, § 24; Herman on Ex'ons, § 70.

In this State the provisions of the statute, relating to the Supreme Judicial Court and trial justices, authorize the issue of execution twenty-four hours after the rendition of judgment. R. S., c. 82, § 138, and c. 83, § 22. With respect to the former, the general object of the statute was undoubtedly to "give the debtor an opportunity to examine into the correctness of the judgment." *Penniman* v. *Cole*, 8 Met. 496. In the case of trial justices, the obvious purpose was to maintain the consistency of the different provisions of the statute respecting the procedure, and preserve the debtor's right given by section 18, chapter 83, to enter an appeal from the decision of a trial justice at any time within twenty-four hours after its rendition. Prior to 1871 there seems to have been no express provision of the statute designating the time that must elapse before a justice of the peace or trial justice could issue execution; but in *State* v. *Hall*, 49 Maine, 412, it was declared to be inconsistent for a justice to issue an execution while the right of appeal existed.

The statute authorizing the disclosure commissioner to issue the "separate execution" for costs under consideration is as follows: "In case said oath is not administered to the debtor, the petitioner shall recover his costs and said fees, as in actions before a trial justice, and the magistrate shall issue a separate execution therefor." Statute of 1887, c. 137, § 23. This language cannot reasonably be construed to bring disclosure commissioners within the prohibition of the statutes, applicable to trial justices, in regard to the time within which the execution may be issued. It simply provides that the petitioner may

recover judgment for his costs to be taxed as in actions before a trial justice. Nor does the reason for deferring the issue of a justice execution exist in case of a disclosure commissioner. Section 20 of the act above named gives the debtor no appeal from the decision of the commissioner that he is not entitled to the benefit of the oath, but authorizes that magistrate to issue a *capias* at once and attach it to the execution in force at the time of the disclosure; and upon this execution the debtor may be at once arrested. No valid reason is apparent why the separate execution for costs should not issue at the same time by virtue of the provisions of section 23 above quoted. Under the construction claimed by the plaintiff, the operation of this section would be inconsistent with that of section 20, and incompatible with the obvious purpose of both. The meaning of the statute cannot in this instance be thus extended by construction beyond its terms.

The execution, therefore, appears from the commissioner's original record to have been regularly and properly issued.

II. The plaintiff's second contention, that he was released from arrest and subsequently re-arrested on the same execution, is not supported by the facts. The plaintiff was never committed to jail or actually held in any place of confinement by the officer, but was allowed to remain at home, when not under examination, upon the assurance of his attorney that he would be responsible for him as keeper. No change appears to have been made in this arrangement after the attempted disclosure of June 21st. The officer who was a witness for the plaintiff says he informed the plaintiff of the creditor's claim that those proceedings were illegal and that he "should have to hold him in custody;" that he did not discharge the debtor but followed the instructions of Mr. Manson to hold him whether the justices then sitting discharged him or not. But he was allowed to go to his home as before when his presence was not required before the justices. The arrangement for his attorney to act as keeper continued from June 19, until the discharge of the debtor on June 28. There was no second arrest.

Judgment for defendants.

HORACE E. FIELD *vs.* PETER H. LANG.

Somerset. Opinion April 16, 1895.

Dower. Deed. Lien. Trespass.

A widow's release of her right of dower, except to a party in possession or in privity of the estate, before it is assigned to her, is without effect.

Where the defendant in accordance with plaintiff's direction, purchased the widow's dower before assignment, acting and intending to act for the plaintiff's benefit, and took the deed without covenants in his own name for the plaintiff, who owned the residue of the premises, and paid the consideration therefor, *Held:* that the defendant did not thereby acquire an equitable lien upon the premises to secure his advances, nor any right to possession of the same, or to take any of the products of the land; but would be liable to an action of trespass *quare clausum*, if he entered upon the premises and cut grass thereon, without consent of plaintiff, who acquired the dower rights by levy after assignment and before the trespass.

ON MOTION AND EXCEPTIONS.

This was an action of trespass, *q. c.*, in which a verdict was returned for the defendant, and the plaintiff took exceptions and moved for a new trial.

The case is stated in the opinion.

Henry Hudson, for plaintiff.

Frank W. Hovey, for defendant.

The defendant was placed in control of the premises by the plaintiff in 1890, and being authorized by plaintiff to purchase the premises, the plaintiff is estopped from bringing this action.

Estoppel: *Tindall* v. *Den*, 1 Zab. 651; *Kelley* v. *Kelley*, 23 Maine, 192; *Wendall* v. *Van Rensselaer*, 1 Johns. Chan. 344; *Beaupland* v. *McKeen*, 4 Casey (Pa.), 124. Defendant's lien: *Donald* v. *Hewitt*, 33 Ala. 534; *Peck* v. *Jenness*, 7 How. 612, 622; Story's Eq. 13th Ed. §§ 674, 1217; *Perry* v. *Board of Missions*, 102 N. Y. 99.

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

STROUT, J. Trespass *quare clausum* upon a parcel of land which had been assigned to Lucinda H. Field, as her dower in the farm of Cyrus Field. Plaintiff acquired title to this parcel

by levy on execution against Lucinda. He also had title to the residue of the farm. Defendant denied the act of trespass alleged. He also claimed that at the request of the plaintiff, and for him, he had obtained from Lucinda a quitclaim to himself of her right of dower in the Cyrus Field farm, which had not then been assigned and set out to her, and also title to certain personal property which had been allowed by the judge of probate from the estate of Cyrus, for all which he paid three hundred and fifty dollars of his own money; and that he did this at the request of and for the plaintiff, and in consequence had an equitable lien upon the parcel of land afterward set out to Lucinda for her dower, to secure the repayment of the amount he had paid for her release, and for the personal property. Upon this claim the presiding judge instructed the jury that: "If the defendant was requested by the plaintiff to purchase for him the dower interest of the widow and certain personal property at a certain definite price, or not to exceed a certain price, and if successful in making the purchase, to take the deed in his, defendant's name, and pay the consideration for the same; and if the defendant in compliance with the request and in accordance with the plaintiff's directions purchased the widow's dower and other property, acting and intending to act for the plaintiff and for his benefit, and took the deed in his name for the plaintiff, paying the consideration therefor, then as between the defendant and the plaintiff who afterward acquired title, the defendant would have an equitable lien upon the premises as security for the amount advanced; and until payment, defendant would be entitled to the possession of the property and plaintiff would be estopped from commencing or maintaining suits for such acts as are complained of in this suit." To this instruction the plaintiff excepted.

The case shows that defendant took to himself a deed of release of dower, without covenants, from Lucinda H. Field on September 13, 1890. At that date her dower had not been assigned, and defendant had no interest then or afterward in the Cyrus Field farm, to which the dower interest attached. Her deed, therefore, conveyed nothing; and the jury was so instructed. *Johnson* v. *Shields*, 32 Maine, 424.

Subsequently the dower was assigned, and the widow's title passed to the plaintiff by levy on execution. At the date of the alleged trespass, plaintiff was the owner in fee of the Cyrus Field Farm, including that portion assigned to Lucinda as her dower.

If the deed from Lucinda to the defendant had conveyed title, no question of lien could have arisen. The futile attempt to obtain the dower title, under the alleged arrangement with plaintiff, did not create an equitable lien upon the land afterward assigned to the widow as her dower against the plaintiff, who acquired legal title from her after the assignment. Taking her release without covenants, failure to obtain title thereunder, did not furnish defendant cause of action to recover the money paid, in the absence of fraud. *Soper* v. *Stevens*, 14 Maine, 133. Equity will not accomplish an opposite result through an equitable lien, against the widow, or her grantee.

If defendant had procured a release of dower to the plaintiff, at his request, he might have had a lien upon the land for his advances, as was held in *Perry* v. *Board of Missions*, 102 N. Y. 99. But he purchased in his own name with his own money, and took a release to himself, which failed to transfer either legal or equitable title, and no equity exists to afford him a lien upon the after acquired legal title of the plaintiff.

But if an equitable lien had existed, the instruction excepted to was too broad. Such liens are neither a *jus ad rem*, nor a *jus in re*, but a right of a special nature over the thing, which may, by proper process, be sold or sequestered under a judicial decree, and the proceeds in the one case, or the rents and profits in the other, applied upon the demand of the party holding the lien. But such party is not entitled to possession of the thing, nor to the rents and profits, except under a judicial decree. This is a distinguishing feature between equitable and legal liens. Pomeroy's Equity, § 1233; *Bruce* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Knott ex parte*, 11 Vesey, 609, 617. The holder of such lien could not justify under it the acts complained of in this suit.

Exceptions sustained.

SARAH E. PARKER *vs.* EDMUND E. PRESCOTT.

Waldo. Opinion April 16, 1895.

Attachment. Deed,—unrecorded.

It is the settled law of this State that an attachment of all the right, title and interest which the debtor has in lands, is a good attachment of the land itself; and a seizure and sale on execution pursuant to the attachment, of such right, title and interest, will pass to the creditor a good title to the land as against a prior unrecorded deed of the debtor.

See *Parker* v. *Prescott*, 85 Maine, 435, 86 Maine, 241.

ON REPORT.

The case is stated in the opinion.

Joseph Williamson, for plaintiff.

Wm. H. Fogler, for defendant.

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

WHITEHOUSE, J. This is a real action to recover a small farm in Palermo in the county of Waldo. Both parties to the suit derive title from Willard H. Chadwick. The plaintiff claims to hold through an attachment made November 3, 1884, in a suit brought by her against Chadwick and a sale on the execution which issued on the judgment recovered in that suit. The defendant seeks to establish his title by virtue of two deeds of warranty; one from Willard H. Chadwick to Edwin O. Chadwick, dated May 17, 1875, and the other from Edwin O. Chadwick to the defendant, dated April 27, 1878. These deeds were not recorded until 1890; but the defendant claimed that at the date of the plaintiff's attachment, she had actual notice that the land had been previously conveyed by her debtor. On the issue of fact raised by the plaintiff's denial of this claim, two verdicts have been rendered in favor of the defendant, and both have been set aside by the law court. 85 Maine, 435; 86 Maine, 241.

The case now comes to the court on a report of the documentary evidence only, and no issue of fact is presented. The defendant's contention now is that inasmuch as the sheriff's deed to the plaintiff, given in pursuance of the attachment on the writ and the sale on the execution, only purports to sell and convey to her, "all the right, title or interest," which the debtor had at the time of the attachment, it is not effectual to transfer the title to the land when it appears that the debtor had previously conveyed his title to another person, although such conveyance was not recorded.

But this contention is not supported by the authorities. It is the settled law of this state that an attachment of all the right, title and interest which the debtor has in lands is a good attachment of the land itself; and it was held in *Roberts* v. *Bourne*, 23 Maine, 165, and *Veazie* v. *Parker*, *Id.* 170, that such an attachment is effectual as against a prior unrecorded deed. In *Woodward* v. *Sartwell*, 129 Mass. 210, it was held, after mature consideration, that the seizure and sale on execution by the officer of all the debtor's right, title and interest in land, passed to the creditor a good title to the land as against a prior unrecorded deed of the debtor. This case was cited with express approval in *Millett* v. *Blake*, 81 Maine, 531.

These authorities undoubtedly establish the plaintiff's right to recover, and the entry must be,

Judgment for the plaintiff.

VIRA E. RIDLEY, by guardian, *vs.* HENRY RIDLEY.

Somerset. Opinion April 17, 1895.

Mortgage for Support. Possession. Heirs of Mortgagor. Stat. 1893, c. 217.

When the condition of a mortgage for maintenance is that the mortgagee shall be supported upon the mortgaged premises by the mortgagor, with no mention of the heirs, assigns or other representatives of the mortgagor, such heirs are not entitled to the possession of the mortgaged premises against the mortgagee.

This was a real action and in which the plaintiff's right of possession was determined strictly at law. The defendant filed a plea in equity under Stat. 1893, c. 217, which was sustained by the court below; but afterwards the case was reported to the law court, by consent of the parties, as an action at law.

ON REPORT.

This was a writ of entry to recover certain real estate in Athens, Somerset county. Writ dated August 16, 1893. The defendant pleaded the general issue, *nul disseizin*, with a brief statement. At the trial of the action the parties waived a jury, and submitted the case to the court with the right of exception.

The following facts appeared in evidence: The plaintiff is the only child and sole heir of Horace D. Ridley, late of said Athens, who died June 14, 1893. She is about three years old; and her mother, Ida E. Ridley, widow of said Horace D. Ridley, was duly appointed her legal guardian by the probate court of said county, on the second Tuesday of July, 1893.

It was further proved that on April 3, 1884, Henry Ridley, the defendant, conveyed to said Horace D. Ridley, his son, the farm in Athens on which he lived, by deed of warranty, being the premises of which possession is demanded in this suit, said Henry Ridley being then about seventy years of age. At the same time, said Horace mortgaged the same back to his father, for the support during life, on said farm, of his said father and mother (Eunice S. Ridley), with a further stipulation that the two daughters, of said Henry Ridley (Rebecca M. and Abbie E. Ridley), sisters of said Horace D. Ridley, should have a home on said premises until each should have a home of her own.

It further appeared that the mother of the plaintiff, widow of said Horace, upon the Monday following his burial on the Saturday previous, offered to furnish the same support, in the same manner, to the defendant and his family as they had received prior to the death of said Horace, and several times repeated such offer before and after her appointment as guardian of the plaintiff, and renewed it on and before the date of the present writ.

It was admitted by the defendant that said Horace had fully performed all the conditions of the mortgage down to the time of his death, he having taken possession of the property on the day the deed and mortgage were executed, and having rendered to his father and his father's family all the support asked, or required, by them from that time until he died — a little more than nine years.

It was further proved that said Henry Ridley refused all offers of support made to him, as aforesaid, by said Ida E. Ridley as widow of said Horace and as guardian of the plaintiff, although living in common with the plaintiff and her mother, upon the supplies furnished by said Horace prior to his death, but not living together as one family; and that he claimed title to the property in himself as mortgagee.

Henry Ridley, the defendant, claimed that the contract of support was a personal one; that it could be performed only by said Horace D. Ridley; that neither the heir nor administrator of said Horace D. Ridley could claim to carry out the condition of the mortgage; that upon the death of said Horace D. Ridley there was no one authorized to support said Henry and his family, and that he then had the right to enter into possession and use the property for his own support and that of his wife; that upon the death of the said Horace there was a breach of the condition of said mortgage, from the fact that there was no one who could, against the will of said Henry, perform its conditions; that he entered upon said property after the death of said Horace, and occupied certain portions of the house, and carried on the farm in part until the bringing of this suit.

The defendant admitted that the estate of said Horace was entitled to equitable compensation for such support as had been furnished by said Horace in his lifetime; or was entitled to redeem said premises upon payment of such sum as should be a legal compensation for the support of said Henry and family, as was provided for in said mortgage; that after the bringing of the suit, to wit, on September 11, 1893, said Henry entered peaceably and openly and unopposed, in the presence of two witnesses, and took possession of the premises, for the purpose

of foreclosing the mortgage claiming a breach of the condition, &c.

The plaintiff's counsel contended that all the rights of Horace descended to and vested in the plaintiff, his sole heir; that the widow was entitled to dower in the property, and each had the right to continue to perform the conditions of the mortgage; and that the offers of the mother in behalf of herself and her child (the plaintiff), which were rejected by the defendant, were equivalent to a full performance of said conditions, and entitled the plaintiff to recover in this action the possession of the premises, to enable her to continue to perform the conditions of the mortgage, to support the defendant and his family on said farm, in the same manner as they had been supported by said Horace Ridley prior to his death.

The plaintiff claimed to recover possession of the farm, buildings and rooms occupied by said Horace D. Ridley and his wife prior to his death. This included the kitchen, which was necessarily used by said Horace and wife in cooking the food for both families, but of which, as appeared in evidence, the defendant took possession on June 23, 1893, and refused to allow her to occupy longer.

The plaintiff did not claim to recover actual possession of the rooms occupied by said defendant and his family prior to the death of said Horace Ridley, that occupation having been unbroken from April 3, 1884, to the time of the trial — more than nine years, and the rooms having been selected under the mortgage.

After the hearing and arguments of counsel, the court, by consent and agreements of parties and their counsel, continued the case *nisi* for consideration; the decision to be made in vacation as of said September term, 1893, and to be so entered upon the docket, with right of exception to each party.

On December 11, 1893, the defendant's counsel filed in the clerk's office a motion to amend his pleadings by striking out the brief statement therein, and by inserting therefor the following grounds of equitable relief, as provided in chapter 217 of the statutes of 1893, as follows:

1. That prior to the third day of April, A. D. 1884, he was the owner in fee and possessor of the premises described in plaintiff's writ and declaration.

2. That on said third day of April, he conveyed the said premises by deed, to one Horace D. Ridley, as alleged in plaintiff's declaration.

3. That the plaintiff is the heir of said Horace D. Ridley, and derives her interest in said estate as such heir; and is an infant in arms.

4. That on said third day of April, A. D. 1884, the said Horace D. Ridley conveyed the said premises to the defendant in mortgage, the condition whereof is as follows: "Provided, nevertheless, that if the said Horace D. Ridley shall well and faithfully support and maintain said Henry Ridley, and his wife Eunice F. Ridley, on said premises, during the term of their natural lives, and the survivor of them, and furnish them with suitable food, raiment, and, in sickness, with proper nursing, medicine and medical treatment, all according to their age and condition in life; and shall also furnish thereon a home for Rebecca M. Ridley and Abbie E. Ridley, in such manner as they have had a home therein heretofore, until they and each of them shall have a home of their own; then this deed shall be null and void; otherwise remain in full force and virtue."

5. That thereupon the said Horace D. Ridley entered into possession of said premises, and fulfilled the conditions of said mortgage during his lifetime.

6. That the said Horace D. Ridley died June 14, 1893.

7. The defendant charges that the duty of performance of said condition was a personal one, and that by law it cannot be performed by the plaintiff without the consent or against the will of the defendant.

8. That the defendant has not consented and does not consent to the performance of the same by the plaintiff.

9. That because of the non-performance of the condition of said mortgage upon and after the death of the said Horace D. Ridley, the defendant entered and took possession of the said premises as for breach of the condition of the mortgage; and the defen-

dant charges that the condition of said mortgage became and is broken.

10. That since the date of the plaintiff's writ, the condition of the said mortgage being broken as aforesaid, the defendant formally entered, peaceably and openly, no one opposing, in the presence of two witnesses, and took possession of the said premises for the purpose of foreclosure, in accordance with the statute in such case made and provided, and caused a certificate thereof, in due form of law, to be seasonably recorded in the Somerset registry of deeds.

11. Forasmuch as the defendant can have relief only in equity, the defendant prays that an accounting be had, and that the plaintiff be decreed to pay the mortgagee the difference between the value of said premises and the amount expended by the said Horace D. Ridley in fulfilling the condition of said mortgage in excess of the use and income of said premises received by him, and that he hold said premises thereafter discharged of said mortgage liability; or that the defendant be permitted an annual allowance for his support; or, if he so elect, to pay such amount, if any, as the said Horace D. Ridley expended in performing the condition of said mortgage in excess of the income received by him from said premises, and thereupon the plaintiff be decreed to convey said premises to the defendant.

12. And the defendant prays for such other and appropriate relief as to the court may seem meet.

Henry Ridley.

By Savage & Oakes, his attorneys.

On February 21, 1894, this motion was granted by the court, and the parties were directed to plead in equity. To this ruling and order, the plaintiff duly excepted, claiming that the contracts of the parties measured and determined the rights of each and of both, and that the law applicable to those contracts regulated and fully protected those rights, and that there was no element or ground of equitable jurisdiction arising out of the facts in the case. Exceptions were allowed to the plaintiff.

By agreement of the parties, the action was reported to the law court, who are to enter such judgment and give such direction to the case as the foregoing facts shall require.

D. D. Stewart, for plaintiff.

Defendant denies the power of any living person to redeem. This presents the anomaly of an irredeemable mortgage. Mortgage redeemable although the condition contains no reference to heirs. Litt. Ten. § 334; Co. Litt. §§ 205 (b), 206 (a), and 334. Mortgage is valid. *Lanfair* v. *Lanfair*, 18 Pick. 299; *Gibson* v. *Taylor*, 6 Gray, 310; *Moulton* v. *Trafton*, 64 Maine, 218; *Farnsworth* v. *Perry*, 83 Maine, 449. Parties are presumed to know that the father might outlive the son. Intention of the parties should govern. *Steel* v. *Steel*, 4 Allen, 419-421. Cases of similiar mortgages: *Wilder* v. *Whittemore*, 15 Mass. 262; *Lamb* v. *Foss*, 21 Maine, 240, 249; *Hill* v. *Morse*, 40 Maine, 522, 523; *Boggs* v. *Anderson*, 50 Maine, 162; *Dunklee* v. *Adams*, 20 Vt. 416; *Henry* v. *Tupper*, 29 Vt. 358; *Joslyn* v. *Parlin*, 54 Vt. 670; *Slater* v. *Dudley*, 18 Pick. 373; *Rowell* v. *Jewett*, 69 Maine, 294.

Heirs of an equitable mortgagor may redeem, *McPherson* v. *Hayward*, 81 Maine, 335. *A fortiori*, where the terms of a legal mortgage are set out expressly.

The title of a legal mortgagor having, therefore, descended to his heir, the plaintiff in this suit, she is entitled to maintain this writ of entry to recover possession of the property so that she may continue by her guardian, her mother, to render the support required by the mortgage and to perform its conditions. And the defendant, the mortgagee, has no right to oust her, or dispossess her. R. S., c. 90, § 2; *Clay* v. *Wren*, 34 Maine, 187; *Brown* v. *Leach*, 35 Maine, 39, 41; *Byrant* v. *Erskine*, 55 Maine, 156; *Wales* v. *Mellen*, 1 Gray, 512; *Haven* v. *Adams*, 4 Allen, 90.

The rights of these parties are measured by the contract and protected under it, and governed by it. The court cannot make new contracts for them. They can only enforce those made by the parties. *Dunklee* v. *Adams*, 20 Vt. 422, 424; *Eastman* v. *Batchelder*, 36 N. H. 150, 151; *Mason* v. *Mason*, 67 Maine, 548; *Hedges* v. *Dixon County*, 150 U. S. 189.

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

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

EMERY, J. Henry Ridley once owned and occupied a farm. He conveyed the farm in fee to his son, Horace, and took back a mortgage, conditioned that "the said Horace D. Ridley shall well and faithfully support and maintain said Henry Ridley and his wife on said premises during the term of their natural lives and the survivor of them," etc. Horace D. Ridley entered into occupation of the farm, and faithfully performed the condition of the mortgage for nine years and up to the day of his sudden death, June 14, 1893. He left a widow and minor daughter. Immediately after the burial, the widow, in behalf of herself and daughter, offered to perform the condition of the mortgage, and, after being appointed guardian for the minor daughter, renewed the offer. Henry Ridley, the mortgagee, declined to receive performance of the condition at their hands, and undertook to expel them from the premises and take possession himself, and to foreclose the mortgage for condition broken. They have elected to consider themselves disseized by this act of Henry Ridley, and have brought, in the name of the daughter and heir, a writ of entry against Henry Ridley to recover possession.

At the trial, the presiding justice was of the opinion that both parties had rights and interests which could be better determined and enforced by proceedings in equity, and he directed the parties to strike out their pleadings at law and plead in equity, under chapter 217 of the statutes of 1893. This the plaintiff declined to do, questioning the authority of the justice to make such order. Instead of nonsuiting the plaintiff, or otherwise enforcing his order, the presiding justice consented to report the case to the law court. It is now before us as an action at law, the plaintiff insisting on a judgment at law, and declining to avail herself of the statute of 1893. Without exercising our power under that statute, we proceed at her request to examine the question of strict law, whether she was entitled to the possession of the premises at the date of her writ.

The plaintiff claims that, as sole heir of Horace, she inherits the farm as his real estate, subject to the mortgage, and that she also inherits his right to perform the conditions of the mortgage, and to have possession of the farm for that purpose. The defendant claims that, while the plaintiff may inherit the farm, subject to the mortgage, she does not inherit any right to perform the condition of the mortgage, and hence has no right of possession as against him, the mortgagee. The case evidently turns upon the question whether the condition of this mortgage can be performed by an heir of Horace, the mortgagor, without the consent of Henry, the mortgagee.

It is to be noticed that the mortgage does not provide, in terms, that the condition may be performed by any heir, or assignee, or other representative of the mortgagor. By its terms, the mortgage can be satisfied only by Horace D. Ridley. In ordinary mortgages, to secure the payment of money or some like impersonal duty, the omission of the words "heirs" or "assigns" would have no effect to limit the right of performance of the condition to the mortgagor personally. In such cases it could make no difference to the mortgagee, who paid the money or rendered the impersonal service, and hence he could not equitably refuse to receive the performance from an heir or assignee of the mortgagor. The cases cited by the plaintiff amply establish this proposition.

The duty or service which this mortgage was given to secure is not of an impersonal character, like the payment of money. Much of the comfort of old age depends upon other things than food, clothing and shelter. Manifestations of personal interest, respect and kindness are very sweet to the aged. Domestic harmony and affection are more essential to them than to younger and stronger men. Henry Ridley was seventy years of age and was the absolute owner of the farm. He desired to live and be supported in his old age on this farm. In so disposing of it as to secure such support, he might well have a decided choice as to who should be master of the farm, and have the duty of his support. He might trust one person when he would not trust another. He might lovingly trust a son,

when he would not trust a son's widow or child. We think in mortgages of this kind, the omission of any reference to a performance of the condition by an heir or assignee of the mortgagor, indicates an intent that the mortgagee need not receive the service from such heir or assignee.

There are authorities for holding that such a condition as this is of a personal nature, creating a personal trust. In *Clinton* v. *Fly*, 10 Maine, 292, one Roundy, Sr., had conveyed his farm to the town of Clinton for his support. The town agreed to give Roundy, Jr., a deed of the farm, if he would support his father during his life. In this agreement no mention was made of heirs or assigns. *Held*, that an assignee of Roundy could not perform the condition. In *Eastman* v. *Batchelder*, 36 N. H. 141, Batchelder gave a deed of his farm to one Tasker, and took back a mortgage conditioned that he should be supported upon the premises during his natural life by Tasker, his heirs, executors or administrators. No mention was made of assigns. *Held*, that a grantee of Tasker was not entitled to perform the condition or redeem the mortgage. This case was cited with approval in *Bryant* v. *Erskine*, 55 Maine, 156. In this latter case, the mortgage was conditioned that "Linscott, [the mortgagor] his heirs, executors or administrators, should support," &c. It was held, that the assignee or grantee of the mortgagor could not maintain a bill to redeem, without alleging and proving that the assignment was with the consent of the mortgagee. In *Greenleaf* v. *Grounder*, 86 Maine, 298, the condition of the mortgage was that the mortgagor should support the mortgagee on the farm. A judgment creditor levied on the mortgagor's interest in the farm, and then brought a writ of entry to eject him. *Held*, that the mortgagor was entitled to the possession as against even his own levying creditor, since the creditor could not perform the condition of the mortgage. The court, speaking through Mr. Justice WALTON, said it was settled law in such cases, (where the mortgagee is to be supported on the premises) that the possession is more that of the mortgagee than of the mortgagor, and that neither can be ejected without the mortgagee's consent. In the opinion, the cases of *Bodwel*

Granite Co. v. *Lane*, 83 Maine, 168, and *Wilson* v. *Wilson*, 38 Maine, 18, were plainly distinguished. It may be further noticed that in *Wilson* v. *Wilson*, one, at least, of the surviving persons to be supported consented to the transfer.

It is true that in all the above cases the question was whether an assignee of the mortgagor could perform the condition. The question of the right of the heir of the mortgagor did not arise. It must be evident, however, that the heir is within the principle of these cases. The same reasons apply.

The mortgagee in this case does not consent to receive the performance of the condition of the mortgage from the heirs of the mortgagor. The heir cannot force him to receive it, and hence is not entitled to the possession of the farm. The question of strict law presented by the plaintiff must be determined against her.

Plaintiff nonsuit.

VIRA E. RIDLEY, by guardian, *vs.* HENRY RIDLEY.

Somerset. Opinion April 17, 1895.

Replevin. Possession.

Principle in preceding case applied.

This was an action of replevin for hay cut on the premises described in the above action. The case was tried before the Court without the intervention of a jury, with a right to except. The facts reported in the exceptions, taken by the plaintiff, will be found in the foregoing case.

D. D. Stewart, for plaintiff.

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

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

EMERY, J. In the case of the writ of entry, between the same parties, the court has held that the plaintiff was not entitled to the possession of the farm upon which the hay was cut, and that the defendant was, at the time of the cutting, rightfully in possession. The title to the hay, therefore, was not in the plaintiff.

Exceptions sustained.

CHARLES P. WHITTEMORE, and another,

vs.

EDWARD N. MERRILL.

Somerset. Opinion April 18, 1895.

Nonsuit. Practice. Evidence. Variance.

It is settled law in this State, that the court may order a nonsuit when the plaintiff's evidence is insufficient to authorize or justify a verdict in his favor.

If a joint contract with two plaintiffs in one and the same action is alleged, *held:* that proof of a several contract with each plaintiff will not support the action.

ON EXCEPTIONS.

This was an action of assumpsit based on an alleged contract as set forth in the following declaration. The plea was the general issue.

After the plaintiffs had put in their evidence and rested their case, the presiding justice ruled that the evidence tended to show a separate contract with each plaintiff, and did not tend to show a single contract with both plaintiffs as alleged in the declaration, and thereupon directed an entry of nonsuit.

To this ruling and direction the plaintiffs excepted.

(Declaration.) "In a plea of the case; for that the said Merrill, on the 26th day of March, A. D., 1885, at Skowhegan aforesaid, in consideration that the said plaintiffs would become bound as sureties, with one Ellsworth Dunlap as principal, to one Lucy A. Corson, by a bond, in the penal sum of five hundred dollars, conditioned that the said Ellsworth Dunlap should appear at the September term, A. D., 1885, of the Supreme Judicial Court for the county of Somerset and should abide the order of the court thereon, promised the plaintiffs that he would have the said Dunlap to appear at the said court, at the said time before the forfeiture of said bond and before the plaintiffs should become liable on the same, and that he the said defendant would save them, the said plaintiffs, harmless from all demands, suits and

troubles that might happen to them by means of their being so bound as aforesaid; and the plaintiffs in truth say, that, giving credit to the said defendant's promises as aforesaid, they did then and there, at the request of the said defendant, become bound, with the said Ellsworth Dunlap, to the said Lucy A. Corson by such a bond as aforesaid, conditioned as aforesaid. Yet the said defendant, not minding his promise aforesaid, did not have the said Dunlap to appear at the said September term of the Supreme Judicial Court, for the county of Somerset, in season to save the forfeiture of said bond, nor save the plaintiffs harmless concerning the premises; but the said plaintiffs at the December term, A. D., 1886, of the Supreme Judicial Court within and for the county of Somerset, were sued upon the bond aforesaid, by the said Lucy A. Corson, by her next friend, and the said Lucy A. Corson recovered judgment against the plaintiffs upon the said bond for the penal sum of the bond, viz: five hundred dollars, and one hundred and forty dollars and thirty-nine cents, costs of the suits, and the plaintiffs have been compelled to pay not only those sums but divers other sums of money, and have been put to great trouble and expense by means of the suit aforesaid. Yet the defendant, although often requested," etc.

It appeared that on March 25, 1885, one Dunlap was arrested on a bastardy process and taken to Merrill & Coffin's office, in Skowhegan, and in default of bail was committed to jail on the same day; that on the next day, March 26th, one of the plaintiffs, Charles P. Whittemore, and one Eleazer Clark signed as sureties a bastardy bond for Dunlap's release from jail; that this bond, signed by Charles P. Whittemore and Clark was rejected by Mr. Baker, the jailer; that later on the same day, a second bond was made, signed by the plaintiffs, Charles P. Whittemore and John P. Whittemore, as sureties, and then taken to the jail to Dunlap and there signed by him as principal and then given to Mr. Baker, the jailer, who thereupon released said Dunlap from custody; that the plaintiffs subsequently were obliged to pay and did pay the penal sum of said second bond

so signed by them; and in this action sought to recover the sum so paid, of the defendant, upon an alleged joint oral promise, which they in their declaration alleged that he made to them, that he would save them harmless from liability by reason of their signing said second bond.

The material testimony of the plaintiff, Charles P. Whittemore, is as follows: On going to Mr. Merrill's office with Clark, the defendant said, "Dunlap had sent down word for him to come up, but he thought there was no need of it. He wanted him to give bonds, and asked if we would sign bonds for him. We told him we didn't know anything about bonds and didn't care to sign them and get drawn into any trouble. He said the bond was nothing but a common bond, and all the risk there was, was the prisoner running away. Mr. Merrill said that. About that time Mr. Baker [the jailer] came in and said the bond wasn't a common bond and there was risk; and Mr. Merrill said the bond was nothing but a common bond, and if we would sign the bond he would guarantee to protect us from all harm if the prisoner appeared at the trial and didn't run away. I told him we didn't consider there was any risk of his running away, and we offered to sign the bond." . . .

"Q. Whether or not Mr. Merrill said anything to you about getting your brother, John P. Whittemore, to sign the bond? A. Yes; he said they had objected to Clark's signature on the bond and wanted to know if I couldn't get my brother. I told him I didn't think he would care to sign a bond. Mr. Merrill says: 'You tell your brother that all the risk there is, is the prisoner running away, and if he appears at the trial I will guarantee to protect him from all harm; if he will sign the bond, he will never have a cent to pay.' Merrill said they was common bonds, and all the risk was of the prisoner running away; and if we would sign the bond he would guarantee to protect us from all harm if the prisoner would appear at the trial; and we told him we wasn't afraid of his running away.

"Q. That was stated in the presence of Mr. Baker? A. Yes.

"Q. After Mr. Merrill made this statement, as you say,

what was next said? A. The bonds were made out, and we waited until they were made out and signed them.

"Q. When you went in there on your second errand what was said to you? A. Mr. Merrill said the bonds had been returned.

"Q. What did he say? A. He said Baker would not accept the bonds on Clark's signature.

"Q. What else was said? A. He wanted to know if I couldn't take the bond down and get my brother to sign it. I told him I didn't know as he would care to sign it. He says: 'You take it down to him; all the risk there is, is the prisoner running away, and if he appears at the trial I will protect him, he never shall have a cent to pay.'

"Q. What did you say? A. I told him I would take the bond down, and I signed it and took it down to him.

"Q. Was that the first intimation made to you in any way from anybody that your brother John's signature was wanted on that bond? A. That is the way I understand it.

"Q. It came to you from Mr. Merrill as a direct proposition that John should sign that bond? A. That is where I got it, yes, sir.

"Q. The proposition that that first bond should be withdrawn and a second bond signed by you and John was broached to you then for the first time by Mr. Merrill in his office? A. That is the way I understand it.

"Q. You said that you thought that that would be satisfactory to John, did you? A. I said I didn't know as he would care to sign it.

"Q. You were willing to sign it and take it to him with the message to see if he would sign it? A. Yes, sir.

"Q. Who drew that second bond? A. I think Mr. Coffin drew it. . . .

"Q. Now, as matter of fact, don't you know that Mr. Coffin wrote that second bond in your presence? A. He might have wrote it there. . . .

"Q. Didn't you see him write his name and witness your signature? A. I did." . . .

Eleazer Clark testified: "Mr. Merrill asked Mr. Whittemore and myself about giving a bond for the release of Ellsworth Dunlap. After talking it over for a few minutes he said it was nothing whatever but a common bond, and if we would sign the bond, and the prisoner did not run away, and was delivered up to the court he would protect us from all harm,— that is all."

John P. Whittemore testified: "The first I knew anything about it my brother, Charles, asked me if I would sign them."

"Q. What did Charles says? A. He said Merrill wished him to take them out and see if I wouldn't sign them, and all the danger in signing them was the prisoner running away; if he would appear at court he would indemnify us from all trouble and harm."

Forrest Goodwin, for plaintiffs.

Counsel argued that the contract was joint because the language used shows an intention to create a joint contract; because the interests of the plaintiffs were joint; and there was sufficient evidence to go to the jury. *Union Slate Co.* v. *Tilton*, 69 Maine, 245, *Page* v. *Parker*, 43 N. H. 263; *Fickett* v. *Swift*, 41 Maine, 65; *Wilkinson* v. *Scott*, 17 Mass. 249; *Wentworth* v. *Leonard*, 4 Cush. 414; *Priest* v. *Wheeler*, 101 Mass. 479. Parties: *Holyoke* v. *Loud*, 69 Maine, 59; *Hill* v. *Tucker*, 1 Taunt. 7; 1 Chit. Pl. 8, 9; *Capen* v. *Barrows*, 1 Gray, 376; Bullen, Pl. 3d, ed. pp. 471, 472.

As no new promise was made to Charles P. or John P. Whittemore, on the occasion of signing the second bond, but by an agreement all around, as it were, John P. Whittemore simply took Eleazer Clark's place as co-promisee. If the promise of the defendant on the first bond was joint, the promise on the second bond was also joint. *Skinner* v. *King*, 4 Allen, 498.

H. M. Heath, *E. N. Merrill and G. W. Gower*, for defendant.

Nonsuit: *Perley* v. *Little*, 3 Maine, 97; *Smith* v. *Frye*, 14 Maine, 457; *Cole* v. *Bodfish*, 17 Maine, 310; *Head* v. *Sleeper*, 20 Maine, 314; *Beaulieu* v. *Portland Co.* 48 Maine, 291; *White* v. *Bradley*, 66 Maine, 254; *Heath* v. *Jaquith*, 68 Maine, 433; *Doremus* v. *Selden*, 19 Johns. 213; Dicey Parties, p. 104; *Holyoke* v. *Loud*, 69 Maine, 59. Parties: Dicey Parties, Tru-

man's notes, p, 113; c. 4, rule 10. Evidence tending to show defendant's liability relates solely to the first bond and did not refer to the second bond,—then not contemplated. Declaration alleges promise on occasion of giving the second bond. Plaintiffs' testimony does not state that second bond was signed at defendant's request. There is no intimation of promise to Charles for the second bond, his statement shows an express promise restricted to John alone.

There is no evidence that there was payment from a joint fund; and where several sureties pay the debt of their principal, and there is no evidence of a partnership, or joint interest, or of payment from a joint fund, the presumption of law is that each paid his proportion of the same, and a joint action cannot be maintained. *Moody* v. *Sewall*, 14 Maine, 297; *Bunker* v. *Tufts*, 55 Maine, 180; *Doremus* v. *Selden*, 19 Johns. 213.

Plaintiffs' testimony shows nothing but assurances, and discloses no actionable promises.

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

WALTON, J. If, in the trial of an action, the plaintiff's evidence is insufficient to authorize or justify a verdict in his favor, the court may properly order a nonsuit. Such is the settled law in this state. And it is a rule of law too well-settled and too often acted upon to require the citation of authorities in support of it.

Another fundamental rule of law is that, in an action upon a contract, if any part of the contract proved varies materially from that stated in the plaintiff's declaration, it will be fatal; for a contract is an entire thing, and must be proved as it is alleged. If a joint contract with two plaintiffs is alleged, proof of a several contract with each plaintiff will not support the action, and the plaintiff may be nonsuited. 1 Green. Ev. § 66, and 2 Green. Ev. § 110.

At the trial of this action in the court below, after the plaintiffs had put in their evidence and rested their case, the presid-

ing justice ruled that the evidence tended to show a separate contract with each plaintiff, and did not tend to show a single contract with both plaintiffs, as alleged in the declaration, and thereupon directed a nonsuit.

We have carefully examined the evidence, and we think the ruling was correct, and the nonsuit properly ordered.

Exceptions overruled.

STATE *vs.* FRED WITHEE.

Somerset. Opinion April 18, 1895.

Indictment. Pleading. False Pretenses. R. S., c. 126, § 1.

In an indictment for cheating by false pretenses framed under a statute declaring that, "whoever designedly, and by any false pretense" obtains from another any money, goods, or other property, shall be deemed guilty of cheating by false pretenses, *held:* that the word "designedly" describes an essential element of the crime; and its omission, or words equivalent thereto, will be fatal to the indictment.

Held, also, that in such an indictment the time when the offense was committed is a necessary allegation; and its omission, although accidental, is fatal to its validity.

ON EXCEPTIONS.

The defendant was found guilty upon the following indictment:

"Somerset, ss.—At the Supreme Judicial Court, begun and holden at Skowhegan, within and for the county of Somerset, on the third Tuesday of March in the year of our Lord one thousand eight hundred and ninety-four.

The jurors for the State aforesaid, upon their oaths present that Fred Withee of Madison, in the County of Somerset, and State of Maine, on the twelfth day of March in the year of our Lord one thousand eight hundred and ninety-four, at Anson in the County of Somerset aforesaid, contriving and intending to cheat and defraud one Fred D. Moore of said Anson did knowingly and falsely pretend to said Fred D. Moore that a certain horse which he, the said Fred Withee, then and there wished and offered to exchange with said Fred D. Moore for a certain horse

which the said Fred D. Moore, then and there had, was a sound horse and said Fred Withee then and there further represented that his said Fred Withee's horse which he then and there offered to exchange with said Fred D. Moore was not the Andrew Hilton horse, by which false pretenses and false representations said Fred Withee then and there induced said Fred D. Moore to exchange with and deliver to said Fred Withee his said Fred D. Moore's said horse for said horse of said Fred Withee's falsely represented to be sound, and further represented to be not the Andrew Hilton horse; whereas in truth and in fact the horse which said Fred Withee offered to and exchanged with said Fred D. Moore, which said Fred Withee represented as a sound horse and not the Andrew Hilton horse, was unsound and was the Andrew Hilton horse and wholly worthless, and whereas the said horse said Fred D. Moore offered to exchange with said Withee was of great value, to wit, of the value of sixty dollars, wherefore by reason of the false and fraudulent representations of said Fred Withee said Fred D. Moore was induced to part with his said horse and was thereby defrauded and injured, against the peace of the state and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, for the state aforesaid, upon their oaths do further present that Fred Withee of Madison, in the County of Somerset and State of Maine, feloniously devising and intending to cheat and defraud one Frank Moore of Anson, in said Somerset County, did then and there falsely and feloniously and designedly pretend to one Fred D. Moore, the duly authorized and general agent of said Frank Moore, that a certain horse which he, the said Fred Withee, then and there wished and offered to exchange for a certain horse owned by said Frank Moore, then and there in possession of said Fred D. Moore, was sound, and said Fred Withee then and there further represented to said Fred D. Moore, that his said Fred Withee's horse which he then and there offered to exchange with said Fred D. Moore, was not the Andrew Hilton horse but that it came from down east, by reason of which false pretenses and false representations said Withee then and there induced the said Fred D. Moore to

exchange with and deliver to said Fred Withee the said horse of Frank Moore, for said horse of said Fred Withee falsely represented to be sound, and not the Andrew Hilton horse; whereas in truth and in fact the horse which said Fred Withee offered to and exchanged with said Fred D. Moore, which said Withee represented as a sound horse, that it came from down east and was not the Andrew Hilton horse, was unsound, did not come from down east but was the Andrew Hilton horse and totally worthless and whereas the horse owned by Frank Moore, which said Fred D. Moore offered to, and exchanged with said Fred Withee was a horse of great value, to wit, sixty dollars, wherefore by reason of the false representations of said Fred Withee, said Fred D. Moore, relying on the representations of said Fred Withee, was thereby induced to part with the said horse of Frank Moore and by reason of such false and fraudulent representations of said Fred Withee, said Frank Moore was thereby defrauded and injured, against the peace of the state and contrary to the form of the statute in such case made and provided."

(Motion in arrest.) "And now within two days after verdict of guilty and before sentence, comes the said Fred Withee and prays that judgment against him may be arrested, and for cause says:

First. Said bargain and exchange are not sufficiently set forth in said indictment.

Second. There is no averment or allegation in said indictment that the false pretenses or false representations set out in said indictment, were made with a view or design or intent to effect the exchange of horses set out in said indictment.

Third. Said indictment does not contain any sufficient averment or allegation that by reason of any false pretenses said Moore was induced to exchange his mare for the horse of the said Fred Withee.

Fourth. For other manifest defects in the indictment aforesaid appearing.

Fifth. Both counts in said indictment charge two separate offenses in each count—whereas by law but one offense can be charged in one count.

The motion in arrest of judgment was overruled and the defendant took exceptions. He also took exceptions to matters of evidence, but they are not considered by the court and, therefore, no report of them is necessary.

Frank W. Hovey, county attorney, for the state.

J. J. Parlin, S. J. and L. L. Walton, for defendant.

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

WALTON, J. At the trial of this case in the court below, exceptions were taken to several of the rulings of the presiding justice; but we do not find it necessary to consider these exceptions, for the reason that we are satisfied that the motion in arrest of judgment for the insufficiency of the indictment must be sustained.

The defendant is accused of cheating by false pretenses. It appears that he, and one Fred D. Moore swapped horses; and it is alleged in the indictment that the defendant falsely pretended that his horse was sound and that he falsely represented that he came from down east and was not the Andrew Hilton horse.

The indictment contains two counts. We think the first count is defective in omitting to allege that the false pretenses were made with a view or design to effect an exchange of horses. The statute on which the indictment is founded declares that, "whoever *designedly*, and by any false pretense," obtains from another any money, goods, or other property, shall be deemed guilty of cheating by false pretenses, and be punished therefor by fine or imprisonment. R. S., c. 126, § 1. It will be noticed that the statute uses the word "designedly." And this word has been inserted in all of the indictments founded on this statute, to which our attention has been called. In *State* v. *Mills*, 17 Maine, 211, the indictment alleged that the defendant did knowingly and "designedly" falsely pretend, etc. In *State* v. *Philbrick*, 31 Maine, 401, the indictment alleged that the defendant did falsely, knowingly, and "designedly" pretend, etc. In *State* v. *Stanley*, 64 Maine, 157, the indictment alleged that the defendant knowingly, "designedly," and falsely pretended, etc.

In *State* v. *Paul*, 69 Maine, 215, the indictment alleged that the defendant unlawfully, knowingly, and "designedly" did falsely pretend, etc. In *Com.* v. *Strain*, 10 Met. 521 (a leading Massachusetts case), the indictment alleged that the defendant unlawfully, knowingly, and "designedly" did falsely pretend, etc. The word "designedly" describes an essential element of the crime which none of the words or phrases in the first count of the indictment in this case do or can supply.

In the second count in the indictment the word "designedly" is properly inserted. But there is another omission in this count which is fatal to its validity. It omits to state the time when the alleged offense was committed. The omission was undoubtedly accidental, but it is none the less fatal. *State* v. *Beaton*, 79 Maine, 314; *State* v. *O'Donnell*, 81 Maine, 271; *State* v. *Dodge*, 81 Maine, 391; *State* v. *Fenlason*, 79 Maine, 117; *State* v. *Baker*, 34 Maine, 52.

The exceptions to the overruling of the motion in arrest of judgment are sustained, and the judgment is arrested, and the indictment quashed.

Indictment quashed.

STEPHEN MCDONALD *vs.* BOSTON AND MAINE RAILROAD.

York. Opinion April 20, 1895.

Railroad. Passenger. Negligence.

It is the obvious duty of a railroad company to stop its train at a station a sufficient length of time to give all passengers desiring to stop there a reasonable opportunity to alight upon the platform with safety. But the failure of the company to stop its trains at a station as it ought to do, or to stop it for a sufficiently long time, does not justify a passenger in leaving a moving train; his proper course is to be carried on until the train stops, and if he sustains pecuniary or other loss from being carried beyond his station his remedy lies in an action for damages.

It is an established rule of law that, in the absence of anything to create excitement or cause alarm, the attempt to leave a car while the train is in motion, by jumping from the steps of the car to the platform of the station is *prima facie* evidence of negligence on the part of the passenger.

The mere circumstance that the plaintiff is being carried past one station to the next station only a few rods further from his home, is insufficient to exonerate him from negligence in attempting to alight from a moving train.

Under such circumstances, in suggesting that the passenger should "jump with the train," or "not jump sideways," *held:* that it was plainly the intention of the conductor, not to advise the passenger to leave the train, but to remind him of the safest method of doing so, if he was resolved upon making the attempt.

ON MOTION AND EXCEPTIONS.

This was an action on the case in which the plaintiff recovered a verdict for injuries received by him in alighting from the defendant's passenger train.

The acts of negligence by the defendant, as alleged by the plaintiff, were in that while he was alighting from said train, the defendant carelessly, negligently, and violently started and caused to be started said train, throwing the plaintiff from said train suddenly and violently to the platform; and not stopping the train sufficiently long for him to get out.

Plea was the general issue. After all the evidence in the case had been taken out before the jury, counsel for defendant moved the court to direct a verdict in its favor, which the court refused to do; and to this refusal the defendant excepted. After the verdict for the plaintiff, the defendant also filed a general motion for a new trial.

The facts as claimed by plaintiff were as follows:

About 7 P. M., July 25, 1893, he purchased a ticket at defendant's station at Saco, and took the train for Old Orchard. Before reaching that station the train stopped at the station of "Camp Ground," which was previously announced. No actual notice had been given by plaintiff to any of the trainmen that he intended or desired to stop there. He started, however, to leave the train, he says, as soon as it stopped, going towards the door in the forward end of the car, and when he reached the door he discovered that the train was in motion. He passed out upon the car platform, when, he says, the conductor told him to "jump with the train." He jumped, and was injured by falling upon the station platform and dislocating his left hip-joint. He was about fifty years of age, and had a basket containing groceries. Rain had fallen and the platform of the station was damp.

Defendant claimed that the facts were as follows:

Plaintiff's ticket being for Old Orchard, it had no actual and no seasonable, constructive notice that he wished to terminate his journey elsewhere; that the train, however, did stop at Camp Ground, that station having been previously announced through the train, long enough to permit all to get out of whose intention so to do it had, or, exercising reasonable diligence and care, could obtain, seasonable notice, and also long enough for those desiring to get in; that, in fact, two other persons did get out and one got in during the stop, which was from three-quarters of a minute to a minute; that before starting the train, the brakeman looked through the door and the aisle of the rear car (where plaintiff was), and also into the car ahead of it, and saw no one either in the aisles or making any preparation to get out, then gave the signal to the conductor, who was upon the station platform, and who, after receiving a similar signal from the train baggage-master, signalled the engineer to start, which he did without jerk and in the usual manner.

The conductor then stepped upon the car platform, and was about to enter the rear door of the car immediately ahead of the rear car, when, partially turning, he saw plaintiff upon the platform, with basket in both hands, about to jump. He shouted to him, "Don't jump sidewise." Plaintiff did jump, and was injured.

B. F. Hamilton, B. F. Cleaves and C. S. Hamilton, for plaintiff.

Exception: There are only two grounds upon which the judge could have directed a verdict as requested:

First: That there was no evidence of negligence upon the part of the defendant — or,

Second: That the plaintiff's want of ordinary care, in all that he did, was so clearly and palpably manifest that court and jury, deciding alike, could not fail to say that he was not in the exercise of due care. Plaintiff says that there was evidence of negligence, and that the question was properly submitted to the jury.

The question of whether or not the company was negligent is one of fact, and for the jury to decide. *Webb* v. *R. R. Co.* 57 Maine, 134; *Bradley* v. *B. & M. R. R.* 2 Cush. 539.

In order for the court to take the question of negligence from the jury, it should be free from doubt. There may be extreme cases either way, where the judge's duty would be to pronounce upon the facts instead of submitting them to the jury. But where the line is doubtful between the two extremes, it is the vocation of the jury to determine the question, under such instructions from the court as may be proper and suitable to the case before them. *O'Brien* v. *McGlinchy*, 68 Maine, 555.

The question of negligence is one of mixed law and fact; the fact is to be determined by the jury on competent evidence and in accordance with the principles of law as given them by the court for their guidance. *Plummer* v. *R. R. Co.* 73 Maine, 593. Counsel also cited: *Lesan* v. *M. C. R. R.* 77 Maine, 90; *Shannon* v. *B. & A. R. R. Co.* 78 Maine, 60; *Gaynor* v. *O. C. & N. Ry. Co.* 100 Mass. 208, and cases; *French* v. *Taunton Branch R. R.* 116 Mass. 537, and cases; *Williams* v. *Grealy*, 112 Mass. 81; *Craig* v. *N. Y. N. H. & H. R. R.* 118 Mass. 432; *Copley* v. *N. H. & C. R. R. Co.* 136 Mass. 9-10; *McDonough* v. *Metrop. R. R. Co.* 137 Mass. 210; *Tyler* v. *N. Y. & N. E. R. R. Co. Ib.* 238; *Learoyd* v. *Godfrey*, 138 Mass. 324; *Lyman* v. *County Hampshire*, 140 Mass. 311; *Sonier* v. *B. & A. R. R. Co.* 141 Mass. 10; 16 Am. & Eng. Ency. pp. 465-6, and note.

Rights and duties of passenger and defendant: If defendant did not stop its train at the station a sufficient length of time to enable plaintiff, in the exercise of due diligence, to alight, that would be negligence. If the train is started while the passenger is in the act of leaving the train, and without giving him a reasonable time to alight, and an injury results, the company will be liable. Counsel cited: *Hendrick* v. *R. R.* 26 Ind. 226; *Penn. R. R.* v. *Kilgore*, 32 Pa. 292; Wood R. R. Law, pp. 1126, 1128, 1129, 1130, 1133, 1134, 1151; 2 Am. & Eng. Ency. p. 762; *Lucas* v. *T. & N. B. R. R. Co.* 6 Gray, p. 70; *Parker* v. *Springfield*, 147 Mass. 391; *Sweat*

v. *B. & A. R. R.* 156 Mass. 284; *Morrison* v. *Erie R. R.* 56 N. Y. 302; *State* v. *B. & M. R. R.* 80 Maine, 430; *Hooper* v. *Same*, 81 Maine, 260. Motion: *Webb* v. *P. & K. R. R.* 57 Maine, 117-133; 16 Am. & Eng. Ency. pp. 554-555, and cases; *Bryant* v. *Glidden*, 39 Maine, 458; *Milo* v. *Gardiner*, 41 Maine, 551-2.

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

WHITEHOUSE, J. The plaintiff obtained a verdict for fifteen hundred dollars against the defendant for an injury sustained by jumping from a moving train at Camp Ground station between Saco and Old Orchard. The negligence imputed to the defendant was its failure to stop the train a sufficient length of time to enable the plaintiff in the exercise of reasonable diligence to alight before the train proceeded. The plaintiff also claimed that in jumping from the train he acted under the direction of the conductor. The case comes to this court on a motion to set aside the verdict as against evidence, and exceptions to the refusal of the presiding justice to direct a verdict for the defendant.

It is the opinion of the court that the verdict cannot be allowed to stand on the evidence reported. The plaintiff fails to establish either the defendant's negligence or his own due care.

On the evening of July 25, 1893, the plaintiff purchased a ticket at Saco for "Old Orchard and Return," and took the local train, leaving the former station about seven o'clock, intending to stop at the intervening station called "Camp Ground" for which no tickets were specially provided. The train stopped there long enough for two passengers to alight and one woman to get aboard the train. The plaintiff was in the rear passenger car. He started to leave the train at sometime after it stopped, and when he reached the forward end of his car, he discovered that the train was in motion. He passed out upon the car platform when the conductor, according to the plaintiff's testimony, said to him, "Jump with the train," or according to the

conductor's testimony, "Don't jump sideways." He jumped and fell upon the platform dislocating his hip-joint. Rain was falling at the time and the platform of the station was wet. Before the conductor received from the brakeman the signal to start, none of the trainmen had any notice of the plaintiff's desire or purpose to leave the train, other than that indicated by his ticket for Old Orchard. But "Camp Ground" was duly announced through the train before its arrival there; and before giving the signal to start, the brakeman looked through the doors of the two passenger cars of the train, and saw no one in the aisle and no one preparing to leave his seat in either of them. The train stopped from three-fourths of a minute to a minute. The plaintiff says he started to leave the train as soon as it stopped, but the testimony of the conductor and brakeman to the effect that he did not leave his seat until the signal to start was given, is corroborated by the testimony of Mrs. Bryant, a disinterested passenger sitting near the plaintiff in the rear car, who says the car was in motion when the plaintiff walked past her towards the door.

The plaintiff was about fifty years of age and a weaver by occupation. At this time he was returning to his home situated about half way between "Camp Ground" station and Old Orchard, a little nearer the former, and was carrying a peck basket containing some groceries. He had been "riding on this train more or less during the summer," and must have known that only a short stop was required at that time for the business at Camp Ground station. The baggage master and station agent say the stop on this occasion was of "about the usual" length.

It is the obvious duty of a railroad company to stop its train at a station a sufficient length of time to give all passengers desiring to stop there a reasonable opportunity to alight upon the platform with safety; and in this case there seems to be a preponderance of all the evidence in favor of the defendant's contention that its train did so stop at Camp Ground station on the evening in question. There was a conflict of testimony, however, and it may be questionable if the court would be

required to reverse a finding of the jury against the defendant upon this point. But the conclusion is still unavoidable that the accident was not caused by the fault of the company, but by the plaintiff's own want of ordinary thoughtfulness and prudence.

It is now an established rule of law, recognized by the decisions of our own court, and supported by the great weight of authority elsewhere, that in the absence of anything to create excitement or cause alarm, the attempt to leave a car while the train is in motion, by jumping from the steps of the car to the platform of the station is *prima facie* evidence of negligence on the part of the passenger. *Gavett* v. *Manchester & Lawrence Railroad Co.* 16 Gray, 501; *Lucas* v. *New Bedford & Taunton Railroad Co.* 6 Gray, 64. "There cannot be a doubt," says PETERS, C. J., in *Shannon* v. *B. & A. Railroad Co.* 78 Maine, 59, "that generally speaking, a passenger is not justified in getting upon or off of a moving train, unless at his own risk. If all you know of it is that a passenger jumps from a train in motion and is injured, you would charge him with carelessness for the act. The act is *prima facie* negligence." In 2 Wood on Railroads (Minor Ed.) § 305, the author says: "It appears to us that, in view of the danger which necessarily attends such an act, it should be held as a matter of law that it is negligence to attempt to board or to alight from a train while it is in motion; and the question should not be left to the jury unless there are exceptional circumstances tending to excuse or justify the act. And the great weight of authority favors this view. The failure of the company to stop its trains at a station as it ought to do, or to stop it for a sufficiently long time, does not justify a passenger in leaving a moving train; his proper course is to be carried on until the train stops, and if he sustains pecuniary or other loss from being carried beyond his station, his remedy lies in an action for damages." See also 2 Rorer on Railroads, p. 1116; Deering on Negligence, § 95.

The burden was on the plaintiff to prove that he jumped from the train under exceptional circumstances which would justify or excuse such an act of imprudence. The mere circumstance that he was being carried past "Camp Ground" to the next

station at "Old Orchard," which was only a few rods further from his home than Camp Ground station, is plainly insufficient to exonerate him from blame, and if this had been the only excuse offered, it would have been the duty of the presiding judge to direct a verdict for the defendant.

But the plaintiff further says that, in jumping as he did, he acted under the direction or advice of the conductor. It is not in controversy that the conductor made some remark to the plaintiff respecting his manner of jumping either saying, "Jump with the train," or "Don't jump sideways." It is immaterial which form of expression was used. Interpreted in the light of the situation and circumstances, they may reasonably be regarded as having substantially the same import. The conductor saw a man of mature years appear upon the platform of the car evidently preparing to alight, and naturally assumed that the passenger understood the situation, but had determined to take the risk of stepping off of the train. It was plainly the intention of the conductor, not to advise the passenger to leave the train, but to remind him of the safest method of doing so if he was resolved upon making the attempt. It is wholly improbable that the plaintiff understood the remark in any other way. His decision to alight at "Camp Ground" station had already been made; it was not influenced by this remark.

The accident was a very unfortunate one for the plaintiff and his injury and suffering are a source of sincere regret; but the evidence wholly fails to establish any liability on the part of the defendant company, and it is the plain duty of the court to set aside the verdict.

Motion sustained. Verdict set aside.

CITY OF ROCKLAND *vs.* MARY FARNSWORTH.

Knox. Opinion April 23, 1895.

Debt. Penalty. Health Statute. R. S., c. 14, §§ 16, 33; c. 82, § 17.

When a penalty is given to one or more persons, an action will lie for it in the name of those persons, although no express authority to sue for it is contained in the statute.

A civil action of debt may be maintained by towns to recover the forfeiture imposed by R. S., c. 14, § 16, for refusing to remove filth or other cause of sickness.

The declaration in such action must contain an allegation that the filth is a "cause of sickness," or it will be demurrable.

ON EXCEPTIONS.

This was an action of debt to which the defendant's demurrer was sustained, and the plaintiff took exceptions to the ruling of the court.

W. R. Prescott, City Solicitor, for plaintiff.

D. N. Mortland and M. A. Johnson, for defendant.

Where a statute does not in terms declare in whose name a suit shall be conducted for the recovery of a penalty for its violation, the prosecution must be in the name of the state, no matter who may be entitled to the penalty or forfeiture. *Colburn* v. *Swett*, 1 Met. 232; *Drew* v. *Hilliker*, 56 Vt. 641; *Nye* v. *Lamphere*, 2 Gray, 295. The statute itself negatives the idea that it was the intention of the Legislature that the forfeiture might be recovered in a civil action of any kind. It provides that "All expenses thereof," viz: "The removal of the nuisance, shall be repaid to the town by such owner or occupant, or by the person or occupant, or by the person who caused or permitted it." Here is an express authority given the town to recover the expenses incurred in removing the nuisance. It was not the intention of the legislature to empower the town also to sue for the penalty provided, or it would have so enacted. The legislature certainly would not have provided for the recovery of the minor sum with no provision as to the major, if it intended that such penalty should be recovered in the same manner. *Brightman* v. *Bristol*, 65 Maine, 426; *Bangor* v. *Rowe*, 57 Maine, 436.

2. In penal actions the declaration must present a case strictly within the provisions of the statute, directly averring every essential fact, instead of leaving it to be gathered by argument or inference. *State* v. *Androscoggin R. R. Co.* 76 Maine, 411; *Barter* v. *Martin*, 5 Maine, 76; *Commonwealth* v. *Bean*, 14 Gray, 52.

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

EMERY, J. The city of Rockland seeks to recover by this action of debt the forfeiture of one hundred dollars imposed by the Health Statute (R. S., c. 14, § 16), for an offense alleged to have been committed in Rockland in violation of that statute. The defendant demurred and has argued two objections to the declaration.

1. The defendant contends that the city of Rockland cannot maintain this action of debt, nor any other civil action, for this forfeiture, but must leave it to be recovered for the city's benefit by the State by indictment, inasmuch as the statute imposing the forfeiture does not provide for any civil action by Rockland or by anybody. The statute (R. S., c. 14,) as a whole imposes various duties and expenses upon towns in the matter of preventing disease. It requires the owners of private property to remove any filth, or other causes of sickness, existing on their property, and imposes this forfeiture of one hundred dollars for each neglect or refusal (§ 16). It then requires the town in which such property is situate, to remove the filth, &c., in case the owner neglects or refuses, and it also gives to the town the forfeiture imposed upon the owner. (§§ 16 to 33.) It seems to be the clear intent of the legislature that each town should execute the statute within its limits; and, for that purpose, and as partial compensation for the expense, should have all the forfeitures imposed by the statute for offenses within the town.

But the town cannot have the full benefit of such forfeitures, unless it can itself sue for and recover them, without waiting for public officers whom it cannot control. In giving to the town, in compensation for a local duty, the forfeiture resulting from a local offense giving rise to that duty, the legislature must be held to have given the right to recover the forfeiture by the customary form of action, otherwise the gift would be unavailing. Such an interpretation of the statute is in accordance with the common law. If a statute prohibit a thing under

a penalty, and prescribe no mode of recovery, an action of debt will lie at the suit of the party entitled to the penalty. 1 Arch. N. P. 347. When a penalty is given to one or more persons, an action will lie for it in the name of those persons, although no express authority to sue for it is contained in the statute. *Pres. and Coll. of Physicians* v. *Salmon*, 1 Ld. Raym. 682. In affirmation of this common law rule, our general statute of procedure (R. S., c. 82, § 17) enacts, that where no other mode of recovery is provided, an action of debt may be used to recover a penalty. The conclusion is that the city of Rockland can maintain an action of debt to recover this penalty imposed for its benefit.

II. The defendant also contends that the declaration is insufficient, because it is not alleged therein that the filth found upon the defendant's property is a "cause of sickness," as described in the statute. The declaration is open to this objection. No such allegation is found in it. True, the filth is declared to be a "menace to the public health of the people of said city of Rockland," but that is not the language of the statute. The statute is aimed at "causes of sickness." Filth upon private property may be a cause of sickness or may not. If it is, the owner of the property must remove the filth upon notice. If it is not, he cannot be required to remove it under this statute. That it is a "cause of sickness" is the occasion for its removal. That it is a "cause of sickness" should be alleged in the declaration for the penalty for non-removal. In actions for a penalty under a penal statute, strictness of allegation is required. The declaration must present a case strictly within the statute, directly averring every essential fact. *State* v. *Androscoggin Railroad Co.* 76 Maine, 411.

This declaration must be adjudged bad; but it may be amended upon the statute terms.

Exceptions overruled.

In re, Brockway Manufacturing Company.
Ex parte, Mitchell.

Androscoggin. Opinion April 26, 1895.

Insolvency. Proof of Debt. Re-examination. Amendment. Waiver. R. S., c. 82, § 10; R. S., of U. S. § 954.

Written objections to a proof of debt in the Court of Insolvency should be verified by oath as required by rule X of that court. This rule will be enforced if the deposing creditor chooses to insist upon his rights at the proper time; but the want of such verification will be held to have been waived by the deposing creditor when he proceeds to a hearing in the Insolvency Court, and no objection is offered to such defect until after hearing and an appeal has been taken and a new hearing begun in the Appellate Court.

A treasurer of an insolvent corporation filed a proof of debt against his insolvent debtor consisting of its promissory notes issued by the treasurer to himself, the consideration of which was alleged to be money paid by him for the use of the corporation, and also as surety for it on other notes. It did not appear that the treasurer had authority to issue the notes thus taken to himself and the proof of debt for this reason was rejected by the Court of Insolvency. An appeal having been taken from that decree to this Court sitting below, the deposing creditor moved for leave to amend and reform his proof of debt by substituting in place of the notes an account to the same amount for the moneys thus paid by him for the use of the insolvent corporation. *Held:* that this being a court of general jurisdiction and not restricted by any statute, it has the power as an Appellate Court to grant the amendment (R. S., c. 82, § 10); that if the notes annexed to the proof of debt were given without authority, they did not extinguish the original cause of action, and, therefore did not introduce a new cause of action, and is only such an amendment as is frequently allowed by this court in actions at common law and those entered on appeal.

Jaycox v. *Green*, 12 Blatch. 209, examined.

On exceptions.

This was an appeal from the decree of the judge of the court of insolvency, for the county of Androscoggin, allowing in part and disallowing in part a certain claim filed by the appellant, Mitchell, in his capacity as assignee of the estate of Isaac N. Haskell, an insolvent debtor, against the estate of the Brockway Manufacturing Company, an insolvent corporation. The appeal was heard in the court below, where it was dismissed, and the appellant took exceptions which are fully stated in the opinion.

N. and J. A. Morrill, *J. W. Mitchell*, with them, for appellant.

First exception: Counsel cited: *Tibbetts* v. *Trafton*, 80 Maine, 264; *Milliken* v. *Morey*, 85 Maine, 340, 342; *Custy* v. *Lowell*, 117 Mass. 78.

Second exception: *In re Montgomery*, 3 B. R. 424; *In re Myrick*, 3 B. R. 156; *Morey* v. *Milliken*, 86 Maine, 464; *Perrin* v. *Keene*, 19 Maine, 355; *Holmes* v. *Robinson Manufacturing Co.* 60 Maine, 201; *McVicker* v. *Beedy*, 31 Maine, 314; *Strang* v. *Hirst*, 61 Maine, 9; *McAuley* v. *Reynolds*, 64 Maine, 136; *Bolster* v. *China*, 67 Maine, 551; *Cram* v. *Sherburne*, 14 Maine, 48; *Penobscot Boom Corporation* v. *Lamson*, 16 Maine, 233; *Freeman* v. *Fogg*, 82 Maine, 408.

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

First exception: The requirement of rule X is not one jurisdictional in its nature and might be waived. If such requirement can be waived at all, there can be neither reason nor justice in any other conclusion than that it was waived in the present case. Going to the hearing without objection; testimony being introduced for and against the objections; the judge allowed to make his decree without having the matter called to his attention for his determination; an appeal taken, and term after term of the appellate court allowed to elapse before the motion to dismiss is filed; must be conclusive evidence of a waiver on the part of the appellant, if such a waiver is possible.

Where jurisdiction and power to act exist, and the only objection to their exercise is one intended for the benefit and protection of the party complaining thereof, such objection must be taken at the earliest practical opportunity or it is waived. Thompson on Trials, § 1438; *Warren* v. *Glynn*, 37 N. H. 340; *Folsom* v. *Carl*, 5 Minn. 333; *Otis* v. *Ellis*, 78 Maine, 75; *Clapp* v. *Balch*, 3 Maine, 216. Amendment discretionary and not subject to exception. *Carter* v. *Thompson*, 15 Maine, 464; *Solon* v. *Perry*, 54 Maine, 493; *Place* v. *Brann*, 77 Maine, 342; *Cameron* v. *Tyler*, 71 Maine, 27.

Second exception: In a case coming from the court of insolv-

ency the appellate court must act upon the matter as it comes from the lower court, and has no power to amend the claim in the manner suggested. It is the lower court which controls the proceedings, and in which finally the proceedings are entered, and from which judgment issues. This court stands on a different basis from inferior courts for the trial of actions. We claim, then, that any amendments in process must originate in the lower court, and that the records of the lower court itself must in the first instance show such amendments. *Jaycox* v. *Green*, 13 N. B. R. 122.

The issue in the appellate court must be the same as in the court below. *Jaycox* v. *Green*, 13 N. B. R. 122; *Re Kellogg*, 104 N. Y. 648; *Re Hood*, 104 N. Y. 103; *Simmons* v. *Goodell*, 63 N. H. 458.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

PETERS, C. J. The Brockway Manufacturing Company, an insolvent corporation, being indebted to its treasurer, Haskell, an insolvent debtor, the latter, by his assignee proved his claim against the corporation, amounting to over fifteen hundred dollars. The assignee of the Brockway Manufacturing Company made objection to this claim, which appears to have existed in the form of an open account for moneys lent the corporation by its treasurer, and showing a balance due Haskell of three hundred and ninety-one dollars and thirty-three cents; the remainder of the claim consisting of two notes, one of five hundred dollars and another of one thousand dollars, given by the Brockway Manufacturing Company, by said Haskell, its treasurer, to said Haskell, the insolvent debtor. The consideration for said notes as alleged by the deposing creditor, was money paid by said Haskell for the use of said corporation, by reason of said Haskell having paid notes of said company on which he was surety for the benefit of the company, the proceeds of which notes went into the possession of said company.

The assignee of the estate of the Brockway Manufacturing

Company applied under the statute for a re-examination of the claim, and filed his written objections thereto, but they were not verified by oath as required by rule X of the rules of the court of insolvency. The cause proceeded to a hearing in the court of insolvency, no objection being made to the want of such verification. After the cause was heard in the court of insolvency, where that part of the claim existing on open account was allowed and the notes rejected, Haskell's assignee took an appeal from the decree of the Judge of Insolvency to this Court, where the same was duly entered and continued for further hearing.

The appellant filed in this Court below, after several continuances, a motion to dismiss the objections because they were not verified as required by the rule of court. The presiding justice ruled that the objection to the want of such verification by oath had been waived, and that the same was not open to the appellant in this court, he not having raised the question in the court below. The motion having been overruled, the appellant excepted, and this is the first question for our consideration.

We think it must be conceded that the rule invoked is binding, and would be enforced if the person proving his claim chooses to insist upon his rights at the proper time. Had he done so, the assignee might either have amended or filed new objections. But the appellant deliberately chose to go to a hearing on the merits of the case and thereby waived the rule made for his benefit and one whose enforcement he could have demanded, or waived, as he should see fit. *Littlefield* v. *Pinkham*, 72 Maine, 369, 375, and cases; *Otis* v. *Ellis*, 78 Maine 75. For these reasons we think the exception should be overruled.

In the appellate court below, the deposing creditor moved for leave to amend and reform his proof of debt by substituting in the place of the notes an account for the moneys paid by Haskell, the insolvent debtor, for the use of said Brockway Manufacturing Company, to the same amount as the two notes, and for the same sums of money which the deposing creditor claims was the consideration of the notes. The presiding justice

ruled, *pro forma*, that this court had no power on appeal to so reform the proof or allow such amendment, and overruled the appellant's motion, and ordered the decree of the judge of the court of insolvency to be affirmed, and the appeal dismissed. The appellant excepted to this ruling and this is another question for our determination.

It appears from the bill of exceptions to be conceded that the treasurer, Haskell, had no express authority under the by-laws of the company, or under any vote of the directors or stockholders, to give such notes to himself; and it is quite probable that this was the view of the case taken by the court of insolvency and a decision rendered accordingly without passing upon the merits of the question whether or not the treasurer had, in fact, any claim for moneys paid by him to the use of the corporation of which he was the treasurer. The ruling was *pro forma* only, as a matter of law, and obviously intended to reserve the question for determination by the law court.

The appellee does not deny that bankruptcy courts have great latitude in their powers to allow amendments of proofs of debt; but he contends that amendments should be first presented in the court of original jurisdiction; and that wherever amendments have been allowed, the reported cases show that they have been thus made in the lower court. He further contends, relying upon the case of *Jaycox* v. *Green*, 12 Blatch. 209; S. C., 13 N. B. R. 122, that the appellate courts have no power to grant the proposed amendment. That case was decided by the circuit court of the United States for the northern district of New York in 1876, and the opinion incidentally sustains the contention of the appellee. It was a case in which it was held that a savings bank, being prohibited by statute from making loans on personal securities, could not prove any claim whatsoever for the money so loaned to the bankrupt. The notes themselves, of course, given for such loans were held to be void. The court remark that it "has no original jurisdiction to receive and allow debts against the estate of a bankrupt. The claims of creditors must first be presented in the district court; and it is not proper to present one claim in the district court, and,

under cover of an appeal to this court, transform the claim into a new and distinct form of action. In other words, this court ought not, on appeal, to be called upon to decide questions, either of law or fact, that were not raised or involved in the decision of the district court." . . .

The court evidently felt, however, that this was a somewhat restricted view of its powers in the premises, for it adds that it has "no wish to avoid the examination of the whole case, or the expression of opinion thereon, by suggesting embarrassments which counsel or parties may deem technical."

An examination of the authorities, as they appear by decisions in other circuit courts of the United States bearing upon the power of granting amendments in such matters, shows that the practice is not uniform, but that the power of amendment has been exercised in favor of such motions made after an appeal has been entered in those courts from the lower court. A more recent decision than that cited by the appellee is *Warren* v. *Moody*, 9 Fed. Rep. 673, decided in the circuit court, Alabama, December, 1881. In this case the court say: "Numerous cases can be cited where cases have been remanded by the supreme court to allow amendments, none disputing the power or authority of the appellate court to allow the amendment, but alleging the practice against it. (*Kennedy* v. *Georgia State Bank*, 8 How. 610.) So that the power of the appellate court to allow amendments may be taken as established, and it remains to be determined only whether there is any well-settled practice of this court against it, and requiring a remanding of the case to do substantial justice. This court is mainly an appellate court for admiralty and revenue cases, and it is only under the bankrupt law that it has any other appellate jurisdiction of any moment. In the two former classes of appeals the practice is well settled to allow amendments. In the last class there is no practice settled that has been called to my attention. Section 636, R. S., of U. S., would seem to give authority to the circuit court to try every appeal case *de novo*, as it may direct 'such judgment, decree, or order to be rendered, etc., as the justice of the case may require.'"

And in looking back at *Kennedy* v. *Georgia State Bank*, *supra*, we find the Supreme Court of the United States hold: "There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the judiciary act of 1789, [R. S., of U. S. § 954,] allowing amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction." That court also cites *Anon.* 1 Gall. 22, in which case Mr. Justice Story, in a forcible argument, holds that amendments may be allowed in appellate courts.

In England the Court of Appeal acts not as a Court of Cassation merely, but, having obtained jurisdiction in the matter by the presentation of an appeal, it will proceed to make such order as may seem to it right; in this it follows the practice of the Great Seal formerly, and of the Court of Review and of the practice in chancery. Archbold's Bankruptcy, Griffith and Holmes' ed. 1867.

This being a Court of general jurisdiction and not restricted by any statute, we think the power resides in it sitting as an appellate court to grant the amendment asked below. R. S., c. 82, § 10. That amendments may be permitted in actions entered on appeal is decided in *Bolster* v. *China*, 67 Maine, 551.

The power thus residing in the court to grant such amendments is, of course, to be exercised with discretion. Cases may arise in which the power should not be used; but as in the present case, if the notes annexed to the proof of debt were given without authority, they did not extinguish the original cause of action, therefore the amendment asked for did not introduce a new cause of action; and is only such an amendment as is frequently allowed by this court in actions at common law. *Holmes* v. *Robinson Manufacturing Co.* 60 Maine, 201; *Freeman* v. *Fogg*, 82 Maine, 408.

Exception sustained.

GUSTAVUS W. SPINNEY *vs.* ANGIE SPINNEY.

Kennebec. Opinion April 26, 1895.

Fraudulent Divorce. Notice. Jurisdiction. R. S., c. 60, § 4; Stat. 1874, c. 184.

The statute word "residence" as used in R. S., c. 60, § 4, relating to divorce proceedings, does not mean "whereabouts" or "commorancy."

When the libelee has a known residence in this State and is only temporarily absent from it, an actual personal service of the libel must be obtained.

In such a case, a constructive newspaper notice is not a sufficient service of the libel.

It is provided by statute, R. S., c. 60, § 4, that when the residence of the libelee is known, it shall be named in the libel, and actual notice to him shall be obtained, notwithstanding he is out of the State. *Held;* that notice in a newspaper, which the libelee never saw, is not actual notice.

It is also provided in the same statute that when the libelee's residence is not known to the libellant and cannot be ascertained by reasonable diligence, the libellant shall so allege under oath in the libel. *Held;* that when a wife knows where her husband's residence is, and that it is in this State, she is not justified in swearing to her libel alleging that she does not know where her husband's residence is, simply because she does not know in what town he is, or where he is staying, at the moment when the oath is administered to her; *also*; that service of the libel in such case by newspaper notice is illegal and insufficient to confer jurisdiction upon the court; that the apparent jurisdiction is colorable only, and not real; and that the decree of divorce granted thereon should, upon the petition of the libelee, be annuled.

Upon a petition to annul a divorce granted on a libel by the wife against the husband, *held*, that the libellant had not used due diligence, under the following circumstances, to ascertain his residence: The parties had been married over twenty years and during that time resided together in this State in the same town, he owning and occupying a homestead therein. Four children were born to them, two of whom surviving being of adult age. In 1888 the wife deserted her husband and removed to an adjoining county, and thereon July 21, 1891, applied for a divorce. During some portion of each year, before and after the desertion, the husband was temporarily absent from the State engaged in the business of selling fruit trees, but always kept his home in said town, voting and paying his taxes there, and leaving his address with the postmaster. He was a town officer for many years and was a member of the school board in 1891. At the trial it appeared that the divorce had been granted upon a default and *ex parte* hearing, and the wife admitted that, between April and July 21, 1891, she made no inquiries for him whatever; and did not care to know his post office address,—that she never asked for it. It further appeared that about the middle of the same April, she was with her husband at the funeral of one of their daughters in a neighboring city although she claimed that she began immediately after, through her children and her attorney, to make inquiries for him but without success.

This was a petition to set aside a decree of divorce granted to the respondent, by the Superior Court for Kennebec County, at the September term, A. D., 1891, on her libel. The petition which sets forth fully its grounds, was filed in the same court.

The petition in this case is as follows:

Respectfully represents Gustavus W. Spinney of Starks, in the county of Somerset, and State of Maine, as follows:

1. That he was lawfully married to one Angie M. Oliver, of said Starks, on the 26th day of June, 1868, and that they continued to live and cohabit together in said Starks until the 3d day of September, A. D., 1888, when this respondent deserted your petitioner as hereinafter set forth. That four children had been born to them since their intermarriage, two of whom, Lena E. Bracket, and Josie L. Spinney, are now living.

2. Your petitioner further says that since their said marriage he has always conducted himself as a faithful, temperate, and affectionate husband, and has ever been faithful to his marriage vows and obligations, but that said respondent has been unmindful of the same, and on the 3d day of September, A. D., 1888, without any justifiable cause, deserted said petitioner and her family in said Starks, and since that time has continued away from said petitioner and her home and family, although frequently requested by said petitioner to return to him and her marriage relations.

3. Your petitioner further represents that on the 21st day of July, A. D., 1891, the said respondent then residing in said Augusta, still further wickedly intending to injure and disgrace your petitioner, did sue out of the office of the clerk of this court a libel for divorce from the bonds of matrimony between her and your petitioner. That said respondent wickedly set forth in said libel certain false and malicious charges against your petitioner as will more fully appear on the record of this court.

4. That your petitioner long before and ever since his marriage with this respondent has been a resident of said town of Starks, owning and occupying a homestead therein. That during some portion of each year, both before and after said respondent deserted her home in said Starks, he has been tem-

porarily absent from the state in the vicinity of Plymouth, Massachusetts, engaged in the sale of fruit trees, but has always kept his home, and his last and usual place of abode in said Starks. That on the 21st day of July, A. D., 1891, he was still a resident of said town, still owning the same homestead therein, and was a member of the school board in said town, all of which facts were well known to this respondent, or could have been ascertained by her by the use of reasonable diligence; yet this respondent, though well knowning the facts aforesaid, and well knowing the residence of your petitioner, but intending to injure said petitioner, and to avoid having him served with a copy of said libel, and to deceive and defraud this Honorable Court, did on the said 21st day of July, A. D., 1891, make oath in her said libel, before a justice of the peace, that she had used reasonable diligence to ascertain the residence of said petitioner, but was unable to do so, and did not know where it was. That in consequence of said false oath no service by copy was made upon this petitioner, but notice by publication was ordered by said court, and thereupon in order further to injure said petitioner, and to prevent his having any knowledge of the pendency of said libel, the respondent caused said notice to be published in the Hallowell Register, a newspaper published in Hallowell in the county of Kennebec, said respondent well knowing that said newspaper was merely of small local circulation, and would not come to the notice of the said petitioner or any of his friends in said Starks.

5. Your petitioner further alleges that said libel was duly entered at the September term, 1891, of said Superior Court, and by means of the false oath aforesaid, and of the fraudulent and deceitful practices above described, this petitioner had no knowledge or information of the pendency of the same, and on the 15th day of September, 1891, said libel was defaulted on the docket of said court, no appearance having been entered for the libelee, and on the same day a divorce was decreed this respondent for the alleged cause of gross and confirmed habits of intoxication, and refusal to support, as fully appears by the records of this court.

6. Your petitioner further alleges that although his residence and last and usual place of abode had been in the town of Starks, long before and ever since said libel was brought, as was well known to this respondent, yet no copy of said libel was ever served upon him or left at his place of last and usual abode in said Starks; that he never saw the publication of said libel in said Hallowell Register and had no information or knowledge regarding the same, that he never had any knowledge or even suspicion that a libel had been brought by his said wife, or a divorce granted, until the 18th day of January, 1892, all because of the false and fraudulent oath and practices of this respondent as hereinbefore set forth, and that had he known of the pendency of said libel he would have resisted the same, and as he thinks, successfully.

7. Wherefore, inasmuch as great injustice has been done to your petitioner by said decree, and a willful fraud has been committed upon this court by said respondent, your petitioner prays that said judgment and decree of divorce so fraudulently obtained may be set aside, vacated and annulled.

Dated this 1st day of March, A. D., 1892.

Upon the testimony the presiding judge dismissed the petition and the defendant filed the following exceptions:

1. To the ruling of the court that the evidence was sufficient in law to support a finding in favor of the respondent.

2. To the ruling of the court that the evidence was not sufficient to require, as a matter of law, a finding for the petitioner.

3. To the ruling of the court that R. S., c. 60, § 4, justified the libellant in averring under oath that the residence of the libelee was not known to her and could not be ascertained by reasonable diligence under the facts in the case, as admitted by the testimony and found by the court below, notwithstanding the libelee had a permanent home and residence within the state, and that fact and the place of such residence was actually known to the libellant, provided the libelee was temporarily absent from such residence and his exact whereabouts at the time of making said affidavit was not known to the libellant and could not be ascertained by her by reasonable diligence.

4. To the ruling of the court that the provisions of the statute under the facts as set forth in full in exception three above, gave the court any jurisdiction under the original libel to proceed against the libelee without obtaining, through some means actual notice to him as provided by the statute.

5. To the ruling of the court dismissing the petition, because it was not warranted as matter of law by the evidence in the case, and because the evidence in the case required, as a matter of law, the petition should be sustained.

The defendant appeared and filed a general denial.

Orville D. Baker, for plaintiff.

Exceptions lie to all rulings of the presiding judge, including any final ruling granting divorce. *Thompson* v. *Thompson*, 79 Maine, 291; *Rogers* v. *Rogers*, 122 Mass. 423-5; *McLathlin* v. *McLathlin*, 138 Mass. 299.

1. The court had no jurisdiction in the original libel, even on the face of the papers and certainly on the facts as found by the presiding judge below in this hearing; because the libellee, at the date of the libel, had his established residence in the town of Starks within the State, and this residence was duly named in the libel itself, yet, though the libellee was then out of the State, no actual notice upon him was obtained or attempted by the court; but a decree was rendered without legal notice to the libelee, and without his actual knowledge or appearance.

Under this head we claim by these exceptions that the court below was required, as a matter of law, to sustain the petition and vacate the decree of divorce, both by inspection of the original libel and by the facts as found and reported by him at the hearing.

2. Because at the date of the libel, viz., July 21st, 1891, the libellant in fact knew not only the residence but the whereabouts of the libellee, or by the use of reasonable diligence could have ascertained it.

Under this second head we claim by our exceptions that there was no evidence in the case which would warrant, as matter of law, the finding of the court below that the libellant had used reasonable diligence to ascertain the then residence, or even

whereabouts, of the libellee. R. S., c. 60, § 4, turns upon the fact of an existing, ascertainable residence. If the "residence" of the libellee can be ascertained it must be named in the libel (as was correctly done in this case), and then, if the libellee is out of the State (not resides out of the State, but "is," *i. e.*, is found or commorant out of the State), then, in the language of the statute, actual notice must be obtained, and this requirement is mandatory. If, then, the libellee in fact had an ascertainable residence at the date of the libel, still more if that residence was well known to the libellant, as the court below has expressly found by its opinion, then it had no jurisdiction to grant the original divorce, except on actual notice to the libellee, which was never ordered or given; and the petition must have been sustained as matter of law.

Nature of proceeding: This petition is in legal effect only a motion addressed to the court to vacate its own judgment for fraud and want of jurisdiction. Such is, indeed, the precise language of our own court in treating of a petition in the same form as the one at bar, in leading case of *Holmes* v. *Holmes*, 63 Maine, 424. The court there speak of the proceeding and petition as a "motion." Bishop Mar. & Divorce, 4th Ed. §§ 751, 753; *Adams* v. *Adams*, 51 N. H. 388; *Lord* v. *Lord*, 66 Maine, 265; *Edson* v. *Edson*, 108 Mass. 590, and cases; Freem. Judgm. § 93; 1 Chit. Prac. 104.

Residence: *Drew* v. *Drew*, 37 Maine, 393; *Warren* v. *Thomaston*, 43 Maine, 417; *Langdon* v. *Doud*, 6 Allen, 425. Counsel also cited *Mace* v. *Mace*, 7 Mass. 212.

F. E. Southard, for defendant.

Exceptions 1, 2 and 5 are to findings of fact by the justice to the Superior Court. Such findings by him are conclusive, and are not the subject of exceptions. *Hazen* v. *Jones*, 68 Maine, 343.

The question raised by exceptions 3 and 4 cannot be reached by this process. This petition is grounded upon the alleged fraud of the respondent. The errors complained of in these exceptions amount, at most, to errors of law or fact in the proceeding

wherein the decree of divorce was granted, and the petitioner's remedy is either a writ of error, or a petition for a review.

It is generally true that an erroneous judgment is to be avoided only by a writ of error. *Caswell* v. *Caswell*, 28 Maine, 232 (237).

This petition is addressed simply to the discretion of the court, and the decree dismissing it is not a subject for revision by this court. It has been repeatedly held that exceptions do not lie to the exercise of the discretion of a judge.

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

WALTON, J. This is a petition in which the petitioner avers that his wife fraudulently obtained a divorce from him, without his knowledge, and without a legal service of her libel; and he asks to have the divorce annulled. The petition was addressed to the justice of the Superior Court for the county of Kennebec, by whom the divorce was granted. The justice of that court dismissed the petition, holding that the service of the libel was legal, and that the alleged fraud was not proved. The case is before the law court on exceptions, accompanied by a full report of the evidence.

We think the ruling that the service of the libel was legal, was erroneous, and that, upon the uncontroverted facts in the case, the divorce should have been annulled.

The only service of the libel was by publication in a newspaper. Mr. Spinney never saw the newspaper, and never had any actual notice of the pendency of the libel till after an *ex parte* hearing had been had and the divorce granted. To obtain such an order of notice, Mrs. Spinney made an affidavit that she had used due diligence to ascertain the residence of her husband and that she had been unable to do so.

This affidavit was clearly false. Whether it was wilfully false, we will not now stop to inquire. It was in fact false. His residence, as his wife well knew, was in the town of Starks in this State. He had resided there for many years. His wife had resided there with him. He owned and occupied a house there, voted there, paid taxes there, and at the time of

which we are speaking, he was superintendent of the schools of the town. He had not abandoned his home or his wife. She had left him. Mrs. Spinney knew perfectly well where her husband's residence was, and that it was in the town of Starks in this State. It may be true and probably is true, that, at the very moment when she made her affidavit, she did not know in what town her husband then was; for he was a traveling agent for the sale of nursery stock, in and about Plymouth in the Commonwealth of Massachusetts. But he was not secreting himself; and there can not be the slightest doubt that, by the use of only ordinary diligence, a personal service of the libel could have been obtained. And this brings us to the consideration of an important question of law.

Is a wife, who knows perfectly well where her husband's residence is, and that it is in this State, justified in swearing that she does not know where her husband's residence is, simply because she does not know in what town he is, or where he is staying, at the moment when the oath is administered to her? We think not. And yet the court below seems to have so held. The language of the court, as stated in the exceptions, is this: "To construe the statute as meaning actual residence, in its usual sense, hardly seems reasonable; for, in that case, a person, by being absent from his residence, and out of the state, could avoid the service of process for divorce indefinitely, as service by copy and summons, left at the place of his last and usual abode, is not good, without proof of actual notice. . . . Therefore, in making oath that she did not know the present residence of her husband, although she had used reasonable diligence to ascertain it, she must be held to have meant his whereabouts,—*the place where he was then staying*." And upon this interpretation of the statute, and this construction of Mrs. Spinney's affidavit, the court held that the newspaper service of the libel was sufficient.

We can not accept this interpretation of the statute. We think it does mean "actual residence, in its usual sense." The statute declares that when the residence of the libellee is known, it shall be named in the libel, and actual notice shall be obtained,

notwithstanding the libellee is out of the state. R. S., c. 60, § 4. Notice in a newspaper which the libellee never sees, is not actual notice. This statute was first enacted in 1874, chapter 184; and we entertain no doubt that its purpose was to render impossible such a notice as the one given in this case. When the libellee has a known residence in this State, and is only temporarily absent from it, an actual personal service of the libel must be obtained. In such a case, a constructive newspaper notice is not a sufficient service of the libel.

And her alleged diligence was no diligence at all. Her affidavit was made July 21, 1891. She pretends to have made some inquiries for her husband during the latter part of the preceding April. But she does not claim that she made any inquiries at or near the time of making her affidavit. About the middle of April she was with her husband at the funeral of one of their daughters; and if it is possible to believe that she commenced immediately to make inquiries for him, for the purpose, as she says, of obtaining a personal service of her libel upon him, she admits that between April and the twenty-first of July, when she made her affidavit, she made no inquiries whatever. And in one of her answers she says she did not care to know his post office address,— that she never asked for it.

It appears that Mrs. Spinney left her husband in 1888; that as early as April, 1891, she had become acquainted with a man whom she has since married, *pendente lite*. She says that he then backed a letter for her. And it appears that, from that time on, she became very solicitous to obtain a divorce from her husband. Her attorney says that she was in his office once a week at least. July 21, 1891, she made her affidavit declaring that she had used due diligence to ascertain her husband's residence, and had been unable to do so. The affidavit was false. She had used no diligence at all. And she well knew where her husband's residence was. And our firm belief is that the affidavit was wilfully false, and was made for the express purpose of obtaining a newspaper notice of the pendency of her libel, which she hoped and believed would not be seen by her husband, and that she would thus be able to obtain an *ex parte* hearing upon her libel,

and an unopposed divorce. But if in this conclusion we are in error, still, it is the opinion of the court that the service of the libel was illegal and insufficient to confer upon the court jurisdiction; that the apparent jurisdiction was colorable only, and not real; and that it is the duty of the justice of the Superior Court, by whom the divorce was granted, to annul it.

Exceptions sustained.

EMERY, J. Concurred as follows:—

EMERY, J. I concur in sustaining the exceptions to the interpretation put upon the statute and the affidavit by the Superior Court.

So far as the language of the opinion may import that the findings of facts by the Superior Court may be reviewed upon a bill of exceptions, I do not concur.

RAYMOND SICKRA *vs.* JOSEPHINE W. SMALL, and another.

York. Opinion May 4, 1895.

Libel. Evidence. Damages. Reputation. Suspicion.

In an action of libel or slander the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation as a man of moral worth is bad, and may also show that his general reputation is bad with respect to that feature of character specially involved in the defamation published; for a man who is habitually addicted to every vice except the one with which he is charged, is not entitled to as heavy damages as one possessing a fair moral character.

An instruction in such action that, if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, is erroneous. The damages in an action of libel or slander are to be measured by the injury caused by the words published and not by the moral culpability of the writer or speaker. It is well settled that evidence of general report that the plaintiff is guilty of the imputed offense is not admissible for the purpose of reducing damages. *A fortiori*, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose.

ON EXCEPTIONS.

This was an action on the case for an alleged libel of the plaintiff, published in a newspaper, in which the jury rendered a verdict for the plaintiff, giving him only nominal damages.

The plaintiff took exceptions to the admission of evidence and instructions to the jury which are stated in the opinion.

G. F. Haley, for plaintiff.
E. J. Cram, for defendants.

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

WHITEHOUSE, J. This was an action of libel for defamatory matter published in a newspaper representing that the plaintiff and Mrs. Blake had "eloped" and were living together in adultery.

At the trial, evidence was offered by the defendant and admitted by the court subject to the plaintiff's right of exception that the plaintiff's "general character" was bad in the community in which he lived.

I. It was not questioned by the plaintiff that, in actions for libel or slander, the character of the plaintiff may be in issue upon the question of damages; but it is contended that the inquiry should be restricted to the plaintiff's general reputation in respect to that trait of character involved in the defamatory charge.

While there has been some contrariety of opinion, or at least of expression upon this question, it must now be regarded as settled both upon principle and the great weight of authority that, in this class of cases, the defendant may introduce evidence in mitigation of damages, that the plaintiff's general reputation as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question; and as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue. *Stone* v. *Varney*, 7 Met. 86; *Leonard* v. *Allen*, 11 Cush. 241; *Bodwell* v. *Swan*, 3 Pick. 376; *Clark* v. *Brown*, 116 Mass. 505; *Root* v. *King*, 7 Cow. 613; *Lamos* v. *Snell*, 6 N. H. 413; *Bridgman* v. *Hopkins*, 34 Vt. 533; *Eastland* v. *Caldwell*, 2 Bibb. 21 (4

Am. Dec. 668); *Powers* v. *Cary*, 64 Maine, 1; Odgers on Libel and Slander, 304; Sutherland on Damages, 679; Best on Ev. 256; 1 Whar. Ev. 53; 2 Starkie on Slander, 87; 1 Green. Ev. § 55; 2 *Id.* § 275.

In *Stone* v. *Varney*, *supra*, the libel imputed to the plaintiff "heartless cruelty toward his child," and it was held competent for the defendant to introduce evidence in mitigation of damages that "the general reputation of the plaintiff in the community, as a man of moral worth," was bad. After a careful examination of the authorities touching the question the court say in the opinion: "This review of the adjudicated cases, and particularly the decisions in this commonwealth, and in the state of New York, seems necessarily to lead to the conclusion that evidence of general bad character is admissible in mitigation of damages. . . . It cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result unless character be a proper subject of evidence before a jury. Lord Ellenborough in 1 M. & S. 286, says, 'certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.'"

In *Leonard* v. *Allen*, *supra*, the plaintiff was charged with maliciously burning a school-house, and it was held that, in the introduction of evidence to impeach the character of the plaintiff in mitigation of damages, the inquiries should relate either to the general character of the plaintiff for integrity and moral worth, or to his reputation in regard to conduct similar in character to the offense with which the defendant had charged him.

In the recent case of *Clark* v. *Brown*, 116 Mass. 505, the plaintiff was charged with larceny. The trial court admitted evidence that the plaintiff's reputation for honesty and integrity was bad, and excluded evidence that his reputation in respect to thieving was bad. But the full court held the exclusion of the latter evidence to be error, and reaffirmed the rule laid down in *Stone* v. *Varney*, and *Leonard* v. *Allen*, *supra*, that

it was competent for the defendant to prove in mitigation of damages that the plaintiff's general reputation was bad, and that it was also bad in respect to the charges involved in the alleged slander.

In *Lamos* v. *Snell*, 6 N. H. 413, the defendant's right to inquire into the plaintiff's "general character as a virtuous and honest man or otherwise," was brought directly in question; and it was determined that the defendant was "not confined to evidence of character founded upon matters of the same nature as that specified in the charge, but may give in evidence the general bad character of the plaintiff . . . in mitigation of damages; and for this inquiry the plaintiff must stand prepared."

In *Eastland* v. *Caldwell*, *supra*, the court say in the opinion: "In the estimation of damages the jury must take into consideration the general character of the plaintiff. . . . In this case the defendant's counsel was permitted by the court to inquire into the plaintiff's general character in relation to the facts in issue; but we are of opinion he ought to have been permitted to inquire into his general moral character without relation to any particular species of immorality; for a man who is habitually addicted to every vice except the one with which he is charged, is not entitled to as heavy damages as one possessing a fair moral character. The jury, who possess a large and almost unbounded discretion upon subjects of this kind, could have but very inadequate *data* for the *quantum* of damages, if they are permitted only to know the plaintiff's general character in reltaion to the facts put in issue."

With respect to the form of the inquiry, it is said to be an inflexible rule of law that the only admissible evidence of a man's character, or actual nature and disposition, is his general reputation in the community where he resides. Chamb. Best on Ev. 256, note. It would seem, therefore, that in order to avoid eliciting an expression of the witness' opinion respecting the plaintiff's character, the appropriate form of interrogatory would be an inquiry calling directly for his knowledge of the plaintiff's general reputation in the community either as a man of moral worth, without restriction, or in the particular relation covered by the libel or slander.

II. But the plaintiff also has exceptions to the following instruction in the charge of the presiding justice: "I am requested by the counsel for the defendant to instruct you that if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, the plaintiff alleging that he had never been suspected of the crime alleged. I give you that instruction."

This request was doubtless suggested by the note to § 275, 2 Green. Ev. which appears to be based on the old case of *Earl of Leicester* v. *Walter*, 2 Camp. 251. But that case has long ceased to be recognized as authority for anything more than the admission of evidence of the plaintiff's general reputation. A similar intimation is found in *Larned* v. *Buffinton*, 3 Mass. 353, but in *Aldermen* v. *French*, 1 Pick. 18, this *dictum* is declared to be unsupported by any authority. Again in the later case of *Watson* v. *Moore*, 2 Cush. 134, it was held incompetent for the defendant in an action of slander, to prove in mitigation of damages, "circumstances which excited his suspicion, and furnished reasonable cause for belief on his part, that the words spoken were true." The obvious objection to it is that the damages in an action of slander are to be "measured by the injury caused by the words spoken and not by the moral culpability of the speaker." We have seen that the defendant is permitted to prove that the plaintiff's general reputation is bad, because this evidence has a legitimate tendency to show that the injury is small; but the evidence of general report that the plaintiff is guilty of the imputed offense is inadmissible for the purpose of reducing damages. *Powers* v. *Cary*, 64 Maine, *supra*,; *Mapes* v. *Weeks*, 4 Wend. 659; *Stone* v. *Varney*, *supra*. *A fortiori*, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose." *Watson* v. *Moore*, *supra*.

This instruction to the jury must therefore be held erroneous; and for this reason the entry must be,

Exceptions sustained.

HASKELL, J., concurred in the result.

STATE *vs.* LUTHER W. LEWIS.

Penobscot. Opinion May 7, 1895.

Fish. Trout. R. S., c. 40, § 49.

The word "trout" as used in R. S., c. 40, § 49, which prohibits the sale of "any land-locked salmon, trout or togue" between certain days of each year, means a fresh water fish, a fish which at least breeds and ordinarily lives in fresh water.

ON REPORT.

This case came up to the February term, 1894, of the court below on appeal by the defendant from the Bangor municipal court where he was convicted on complaint, December 30, 1893, upon a plea of not guilty, for that the defendant on said day, at Bangor, did have in possession fifty trout with intent, then and there to sell the same, and did then and there sell said trout, said thirtieth day of December, being then and there close time on said trout.

The defendant was accordingly fined ten dollars and costs of prosecution, and from said sentence he appealed to the Supreme Judicial Court.

When the cause was brought to trial, it appeared that the fish with which the defendant stood charged with having in his possession and selling were salt water fish imported from Halifax, in the Dominion of Canada, into the United States September, 1893, by one Treat, a wholesale dealer in Boston, and by him sold to the defendant in Bangor, who claimed in defense that their sale was not prohibited by the laws of Maine, and that any statute forbidding the sale, etc., of such fish would be a violation of the defendant's rights under the Constitution of the United States. These fish are trout and resemble the fresh water trout of the waters of Maine and sell at about one-half their price.

They are sold in fairly large quantities in the form of pickled fish, and are known to the trade as Labrador trout.

Upon the foregoing facts and the request of the parties, the question of law thereon arising was reserved for the opinion of

the law court, and the case was reported by the Chief Justice presiding under R. S., c. 134, § 26. It was stipulated in the report that, if the complaint was maintainable, the defendant should be defaulted, otherwise the complaint to be dismissed.

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

Statute is prohibitive and held constitutional. *Bowman* v. *C. & N. W. R. R.* 125 U. S. 465. States have the power to regulate and forbid the sale of a commodity after it has been brought within its limits. *Ib.* Statute is not the same as in *Allen* v. *Young*, 76 Maine, 80.

Counsel cited: *Phelps* v. *Racey*, 60 N. Y. 10; *Magner* v. *People*, 97 Ill. 320, 336; *State* v. *Randolph*, 1 Mo. App. 15; *Whitehead* v. *Smithers*, 2 C. P. Div. 553; 8 Am. & Eng. Ency. pp. 1027-1032; *State* v. *Beal*, 75 Maine 289.

Charles Hamlin and Charles J. Hutchings, for defendant.

Counsel cited: *Allen* v. *Young*, 76 Maine, p. 82; *Com.* v. *Hall*, 128 Mass. p. 410; *People* v. *O'Neil*, (Mich.) Am. Ann. Digest, 1888.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

WISWELL, J. Complaint for having in possession trout with intent to sell the same in violation of R. S., c. 40, § 49, which reads as follows: "No person shall sell, expose for sale or have in possession with intent to sell, or transport from place to place any land-locked salmon, trout or togue, between the first days of October and the following May; or any black bass, Oswego bass or white perch, between the first days of April and July, under a penalty of not less than ten nor more than fifty dollars for each offense."

The case comes to the law court upon an agreed statement of facts in which it is said that the fish, which the defendant had in his possession for sale, "were salt water fish" and that they were known to the trade as "Labrador trout."

The prohibition of the statute relates to land-locked salmon, trout or togue. The common and ordinary meaning of the

word "trout" is a fresh water fish, a fish which at least breeds and ordinarily lives in the fresh water, even if it may sometimes escape to the salt water when it has an opportunity; and although zoologically the term may be more inclusive, we think that the legislature used the word in this section in its more limited, but common and ordinary sense. Words of common use in a statute are to be taken in their ordinary signification. Sutherland on Statutory Construction, § 229.

We are confirmed in the belief that the legislature intended to make this section apply to fresh water fish only, from the fact that all other kinds of fish referred to are exclusively fresh water fish, except salmon and the meaning of that word is expressly limited by the word "land-locked."

It being admitted that the fish in the possession of the defendant for the purpose of sale were salt water fish, the statute does not apply.

Complaint dismissed.

STATE *vs.* ROBERT BROWNRIGG.

Waldo. Opinion May 7, 1895.

Pleading. Indictment. Date. Prior Conviction.

At the April Term, 1894, of this court for Waldo county, the defendant was indicted for keeping a common nuisance, on the 17th day of October, 1893, and on divers other days and times between that day and the day of the finding of the indictment. He seasonably pleaded in bar a previous conviction of the same offense, and offered in evidence the records of the court, showing that at the October term, 1893, of the court for the same county, he was indicted for keeping a common nuisance at the same place, on the 1st day of May, 1893, and on divers other days and times between that day and the finding of that indictment, and a conviction, judgment and sentence under this last indictment. The October Term, 1893, of the court commenced upon the 17th day of October; the indictment, found at that term, was reported to the court upon the 31st day of October.

Held; that the day of the finding of an indictment by a grand jury, is the day when the indictment is returned and presented to the court.

The test is not what facts were offered in evidence in the trial upon the first indictment, but, from the record, what facts might have been proved under that indictment, and whether the same facts if proved under the last indictment would warrant a conviction.

In a trial upon the indictment found at the October Term, 1893, the State might have proved that the defendant kept and maintained a common nuisance between the seventeenth and the thirty-first days of October, 1893. In a trial upon the present indictment the same evidence, confined to the same period of time, would warrant a conviction for the same offense.

Held; that the records of the court, introduced by the defendant, under his plea in bar, show that he had previously been convicted of the same offense.

ON EXCEPTIONS.

The defendant was indicted for keeping a common nuisance and filed in bar a plea of former conviction which was overruled, and he thereupon took exceptions.

The case is stated in the opinion.

W. T. C. Runnells, County Attorney, for State.

Joseph Williamson, Jr., for defendant.

SITTING: PETERS, C. J., EMERY, WHITEHOUSE, WISWELL, STROUT, JJ.

WISWELL, J. At the April Term, 1894, of this Court for Waldo county, the defendant was indicted for keeping a common nuisance "on the seventeenth day of October, in the year of our Lord one thousand eight hundred and ninety-three and on divers other days and times between that day and the day of the finding of this indictment."

The defendant seasonably pleaded in bar a previous conviction of the same offense, and offered in evidence the records of the Court showing that at the October Term, 1893, of the Court, for the same county, he was indicted for keeping a common nuisance at the same place "on the first day of May, in the year of our Lord one thousand eight hundred and ninety-three, and on divers other days and times between that day and the finding of this indictment." And a conviction, judgment and sentence under this indictment.

The October Term, 1893, for Waldo county, commenced on the third Tuesday, the seventeenth day of October. It was further shown by a certificate of the clerk that this indictment was reported to the court by the grand jury on the 31st day of October. The justice presiding ruled *pro forma* that these facts did not sustain the plea.

The indictment, relied upon by the defendant, alleges the commission of the offense upon a particular day and on divers other days and times between that day and the day of the finding of the indictment.

The first question therefore is what is the day of the finding of an indictment. Although it is usual to entitle the caption of an indictment as of the first day of the term, this day cannot be regarded as of the day of the finding, because, among other reasons, it is well settled that a grand jury may consider and find an indictment for an offense committed after that date but before the finding of the indictment. *Commonwealth* v. *Hines*, 101 Mass. 33.

If the first day of a term should be considered as the day of the finding, there would be presented the inconsistency of a finding by a grand jury of the commission of an offense subsequent to the time of the finding.

The date of the finding of an indictment should be one that is capable of being definitely ascertained. The present case is an illustration of the necessity of this. We have already seen that that cannot be the first day of the term although that is ordinarily the date of the caption. The only other day that can at all times be definitely and accurately ascertained is the date of the return and presentment of the particular indictment to the court. We are satisfied, therefore, that the day of the finding must be the day when the indictment is returned and presented to the court.

This being so, the allegation in the October term indictment is in effect the commission of a continuing offense on the first day of May, 1893, and on various other days and times between that day and the thirty-first day of October, 1893. The indictment in this case covers the period between the seventeenth day of October and the thirty-first day of October, 1893, as well as the time after the last date up to the finding of the present indictment at the April Term, 1894, and the question is whether a conviction under the first is a bar to the second.

We think it unquestionably is, both upon principle and authority. The test is not what facts were offered in evidence

in the trial upon the first indictment, but from the record what facts might have been proved under that indictment and whether the same facts if proved under this indictment would warrant a conviction. In a trial upon the first indictment the State might have proved that the respondent kept a common nuisance between the seventeenth and the thirty-first days of October, 1893. In a trial upon the present indictment the same evidence, confined to the same period of time, would warrant a conviction for the same offense.

The plea in bar, therefore, was good and the facts therein set out were proved by the records of this court. The Massachusetts court has come to the same conclusion in *Commonwealth* v. *Robinson*, 126 Mass. 259; and *Commonwealth* v. *Dunster*, 145 Mass. 101.

There are two other cases against the same defendant, in which precisely the same question is presented, and in each of the cases the entry will be,

Exceptions sustained.

SPRAGUE ADAMS, and others, in equity,

vs.

COUNTY OF PISCATAQUIS, and FRANK E. GUERNSEY, Treasurer.

Piscataquis. Opinion May 7, 1895.

Taxation. Towns. Incorporation. Annexation. Repeal. R. S., c. 6, § 80.

The town of Elliotsville in Piscataquis county was incorporated by an Act of the Legislature approved February 19th, 1835. In 1848, the Legislature annexed to Elliotsville a portion of the town of Wilson. In 1858 the Act incorporating the town of Elliotsville was repealed. The county commissioners for Piscataquis county, at their December Term, 1891, made an assessment upon all the lands within the territory which formerly constituted the town of Elliotsville, for the repair of roads within said territory, in accordance with the provisions of R. S., c. 6, § 80.

Held; that when the Act incorporating the town of Elliotsville was repealed, the whole territory, which up to that time had been the town of Elliotsville, including the portion of the town of Wilson previously annexed to it, became one unincorporated township; and that the assessment of taxes by the county commissioners in the whole territory of the former town of Elliotsville for the repair of the roads in that unincorporated township, was proper and in accordance with the provisions of the statutes.

ON REPORT.

Bill in equity, heard on bill and answers, to determine the validity of an assessment for taxes made in 1891 by the commissioners of Piscataquis county upon the unincorporated lands comprising what was formerly the town of Elliotsville, its charter having been repealed in 1858. At the time of the repeal of the town charter, its territory included a part of what was formerly the town of Wilson, and in which the plaintiff's lands were situated.

The case is stated in the opinion.

H. Hudson and J. S. Williams, for plaintiffs.

W. E. Parsons and F. E. Guernsey, for defendants.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

WISWELL, J. Township eight, range nine, in Piscataquis county was incorporated as the town of Elliotsville, by an act of the legislature approved February 19th, 1835. In 1848 the legislature annexed to Elliotsville, a portion of the town of Wilson, which town was originally township nine in the same range. By the same act of the legislature, another portion of the town of Wilson was annexed to Greenville, and the remainder to Shirley, so that nothing remained of the town of Wilson. By an act of the legislature passed in 1858, the act of 1835, incorporating the town of Elliotsville, was repealed.

The county commissioners for Piscataquis county, at their December term, 1891, made an assessment upon all the lands within the territory which formerly constituted the town of Elliotsville, for the repair of roads within said territory, in accordance with the provisions of R. S., c. 6, § 80.

The complainants contend that this assessment was invalid because the county commissioners treated the whole of the original township, number nine, and that part of original township number eight, which had been annexed to Elliotsville by the act of 1848, as one "unincorporated township" and made an assessment upon the lands in both original townships for the repair of the roads in the whole territory. For this reason they seek an injunction against the county treasurer from further proceedings to enforce the collection of the tax.

No other objection is raised to the validity of the tax. The contention of the complainants' counsel is, that upon the passage of the act of 1858, repealing the act incorporating the town of Elliotsville, the territory of that town became divided into the original townships of which it had been composed. If this were true the assessment of the taxes would have been illegal and invalid, because, as contended by the complainants' counsel, county commissioners have no power to assess a tax in one township, under the section referred to, for the repair of roads in another.

But we think there is no merit in the complainants' contention. The town of Elliotsville, after the act of annexation, consisted of the whole of one original township and a part of another. When the repealing act went into effect the whole territory, which up to that time had been the town of Elliotsville, became an unincorporated township.

The act of 1848, dividing the town of Wilson and annexing that portion in which the complainants' lands are situated to the then town of Elliotsville, has never been repealed and certainly the act repealing the act of incorporation did not have that effect. It is a familiar principle that the legislature has the exclusive power to create counties and towns and to establish the boundaries thereof, it may add to or take from the territory of towns.

By the original act of incorporation and the subsequent act of annexation, the town of Elliotsville consisted of certain territory with established boundaries. How that territory was made up is a matter of no consequence. When the act of incorporation was repealed, the territory of the former town remained unchanged in its boundaries, and the inhabitants of such territory simply lost their rights under the former municipal charter.

The assessment of taxes by the county commissioners in the whole territory of the former town of Elliotsville, for the repair of the roads in that unincorporated township, was proper and in accordance with the provisions of the statutes.

Bill dismissed with costs.

PROPRIETORS OF MACHIAS BOOM
vs.
CORNELIUS SULLIVAN, and others.

Washington. Opinion May 7, 1895.

Corporation. Sorting. Rafting Logs. Spec. Laws, Mass. Feb. 13, 1808, c. 55; Spec. Laws, Maine, 1891, c. 174.

The charter of the plaintiff corporation, granted by the legislature of Massachusetts in 1808, authorized it to maintain a boom and established the tolls it should be entitled to receive for rafting and securing logs and lumber, subject to revision or alteration by the legislature.

By a special act of the legislature of this State passed in 1891, chap. 174, laws of 1891, the fees and tolls were changed, and a rule established by which to fix the price for "sorting and rafting" logs and timber so rafted and secured at said boom.

The defendants claimed that it was the duty of the plaintiff, since the act of 1891, to sort and raft their logs by marks as well as by ownership.

Held; that no additional duty had been imposed upon the corporation by the use of the words "sorting and rafting" in the amendatory act, and that these words meant no more than the word "rafting" in the original charter.

The plaintiff had performed its whole duty, when it has secured the logs which come into its boom and sorted, rafted and delivered them according to ownership.

See *Same* v. *Same*, 85 Maine, 343.

ON MOTION AND EXCEPTIONS.

Besides the general motion for a new trial, the defendants took exceptions, which arose in the following manner:

This was an action on the case to recover tolls, accruing under chapter 174 of the private and special laws of 1891, earned during the seasons of 1891 and 1892, for booming and rafting logs at the plaintiff's boom in Machias; and also for special services rendered in rafting and sorting logs of the defendants' by kinds. The plea was the general issue.

The plaintiff's claim for tolls for boomage and rafting, exclusive of the special services aforesaid, amounted to $644.90, with interest from March 3, 1893, which the defendants admitted to be due, less damages sustained by reason of the plaintiffs having refused to sort and raft the defendants' logs, in 1891 and 1892, into lots by marks.

During these seasons the defendants had logs in the plaintiff's boom, marked by many separate and distinct marks, and demanded that the plaintiff should raft and sort the logs and deliver the same to them in lots each bearing the same mark, which the plaintiff declined to do, and upon the trial to the jury offered evidence tending to show such facts; but the court excluded the same and ruled and charged the jury that the plaintiff was not bound to so raft and sort the logs of the defendants and deliver the same to them in lots bearing the same mark, even if there were but two different marks upon the defendants' logs, but that it was only bound to deliver the defendants' logs in one lot, irrespective of marks.

The plaintiff also claimed to recover for extra services in delivering to the defendants their logs rafted and sorted by kinds, to wit: the pine, hemlock, spruce and cedar, each in lots by themselves, as requested by the defendants, and the defendants admitted their liability to pay a reasonable compensation for the same. That question was submitted to the jury under proper instructions from the court, to which no exceptions were taken, and the jury assessed the damages for such extra services in the sum of $559.22, with interest from the date that payment for the same was demanded, to wit: March 3, 1893, and returned a general verdict for the plaintiff in the sum of $1264.52.

To the ruling of the court that the plaintiff was not bound to raft and sort the defendants' logs and deliver the same to them in lots each containing the same mark, defendants took exceptions.

Charles Sargent, for plaintiff.

H. M. Heath and O. A. Tuell, for defendants.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

WISWELL, J. The plaintiff, a corporation created by an act of the legislature of Massachusetts in 1808, brings this action to recover for booming, sorting and rafting defendants' logs during the season of 1891 and 1892, in accordance with the

rule for fixing the maximum tolls for such services established by chapter 174, Private Laws of 1891, entitled, "An Act to regulate the tolls of the Machias Boom." The case comes to the law court upon both exceptions and motion.

Exceptions. The only question presented by the exceptions is this. During the seasons named the defendants had in the plaintiff's boom logs of "many separate and distinct marks." They claimed that it was the duty of the plaintiff corporation to sort and raft these logs by marks as well as by ownership, that is, that all of the logs of each mark, belonging to each owner, should be sorted and rafted separately, the logs of each mark by themselves, and that although this was demanded the plaintiff refused to do so, whereby the defendants sustained damage. The court excluded all evidence of such demand and of the damage resulting from the plaintiff's refusal and instructed the jury that the plaintiff was not bound to so raft and sort the logs of the defendants in lots bearing the same mark, but that it was only bound to deliver the defendants' logs in one lot, irrespective of marks.

It is the opinion of the court that the ruling and instruction were correct. The original charter authorized the corporation to maintain a boom and established the tolls it should receive for rafting and securing logs. The Act of 1891 changed the tolls for "sorting and rafting logs and lumber." In *Prop's Machias Boom* v. *Sullivan, et als.* 85 Maine, 343, an action between the same parties, this court held that no new nor additional duty had been imposed upon the corporation by the use of the words "sorting and rafting;" that these words in the amendatory act meant no more than the word "rafting" in the original charter, as the logs must necessarily first be sorted before they could be rafted. In that case the defendants contended that it was the duty of the plaintiff to sort and raft their logs not only by ownership but also by kinds of lumber. Judge FOSTER in the opinion in that case says, referring to this contention: "However convenient this might be for the owners there is nothing in the case, or in the signification of the words, that requires such a construction to be given."

We think this holds equally good as to the claim now made. To sort and raft the logs of different owners by marks as well as by ownership would probably be as burdensome at least as to do so by kinds. It is a burden not imposed by the use of the word "rafting" in the original charter and, as has already been decided, no additional duty was imposed by the act of 1891. The plaintiff has performed its whole duty when it has secured the logs which come into its boom and sorted, rafted and delivered them according to ownership.

Motion. Included in the account annexed were two items for sorting, 111,854 logs by kinds, during the two seasons, for which three-fourths of a cent per log was charged. These services were rendered under an agreement upon the part of the defendants to pay therefor what the services were reasonably worth.

The plaintiff was entitled to five-eighths of a cent per log for booming, seven-eighths of a cent for sorting and rafting according to ownership, and to such additional sum as the service was reasonably worth for sorting by kind. The jury, by a special verdict, found that this extra service was worth $559.22, one-half of a cent for each log.

After a careful examination of the testimony, an analysis of which in this opinion would not be profitable, we are satisfied that the amount allowed for the extra work is clearly excessive and that the jury must have acted under some bias or prejudice. It is true that some of the plaintiff's witnesses testified that in their opinion one-half of a cent per log was a fair compensation for the extra labor, but they gave no satisfactory reason for this statement, and from the cross-examination of these same witnesses, in connection with all the other evidence upon the question, it is clearly shown, we think, that one-half of the amount allowed by the jury for this extra labor would be sufficient to amply compensate the plaintiff for the same. Something should also be allowed for the use of the boom occasioned by this extra service. We think that the plaintiff should not have recovered for these two items referred to more than three hundred dollars. The motion for a new trial will, therefore, be granted unless the plaintiff within thirty days after notice that

the rescript has been received by the clerk of courts for Washington county, consents to remit all of the amount recovered by the special verdict over the sum of three hundred dollars, as of the date of such verdict.

Exceptions overruled. Motion granted, new trial ordered, unless the plaintiff enters a remittitur as above.

MARY E. MORRIS, Administratrix, *vs.* JOSEPH W. PORTER.

Penobscot. Opinion May 7, 1895.

Probate. Administrator. Over payment. Creditor.

An administrator who, within the year allowed by statute, pays a creditor's claim in full, acting upon the honest belief that the estate is solvent, may, upon the estate proving actually insolvent, recover back the difference between the amount so paid and that pro rata share which the creditor would have been entitled to in common with all other general creditors. But the creditor who in good faith has received payment in full of his claim against an estate, should not be placed in a worse position, by reason of such payment, than those whose claims have not been paid and who have had an opportunity to present and prove the same before the commissioner.

In a suit by an administrator to recover back the difference between the amount so paid by him, and the amount that the creditor would be entitled to, as a dividend upon his claim, the burden is upon the administrator to show what that difference is. He can do this by introducing the decree of the judge of probate, ordering a dividend to be paid to creditors and especially that to be paid upon the claim of the creditor from whom the excess of payment is sought to be recovered. It is incumbent upon an administrator, at his peril, to have this dividend upon such creditor's claim determined by decree of the judge of probate. For this purpose, he may prove any claim so paid in his own name, being subrogated to the rights of the creditor whose claim has been fully paid.

Such an action by an administrator cannot be maintained until the amount of such dividend has been ascertained, and all matters pertaining thereto fully and finally adjudicated in the probate court.

ON REPORT.

This was an action of assumpsit to which the defendant pleaded the general issue, and also filed a brief statement of further defense.

Upon the opening of the case and after the reading of the pleadings, it was agreed that the case should be reported to the law court upon the writ and pleadings; and if the case stated in the defendant's brief statement would constitute a defense, in whole or in part, to the plaintiff's claim the case should stand for trial; if the facts stated, if true, constitute no defense to plaintiff's claim, judgment to be rendered for plaintiff.

The brief statement of the defendant is as follows: that on the 25th day of September, 1889, the plaintiff's intestate, Isaiah Morris, held a permit, and was preparing for a lumbering operation, to be carried on during the then next ensuing logging season. And on said 25th of September, 1889, the said Isaiah Morris came to him, the said defendant, and made a contract with him, under and by which the said defendant was to supply the said Morris in said lumbering operation. That the said defendant had known the said Morris for many years, had previously repeatedly supplied him in lumbering operations, and knew that he was the owner of real estate of the value of at least fifteen hundred dollars, and on said 25th day of September, 1889, the records in the registry of deeds for County of Penobscot, showed the title to said real estate still to be in said Isaiah Morris.

On said 25th day of September, 1889, the defendant having made said contract with said Morris, began to furnish said Morris with supplies for said lumbering operation, and thereafter up to the time of said Morris' death on the 18th of May, 1890, defendant continued to furnish said Morris with supplies and money for said operation to the amount of $7825.21, on which amount defendant was entitled under the terms of said contract with said Morris, to a commission of six per cent, amounting to $469.51, so that there was due to defendant from said Morris on the day of his death the sum of $8294.72.

Defendant entered into said contract with said Morris and supplied him with goods and money to the amount aforesaid, solely upon said Morris' personal credit, and did not take an assignment of the permit of said Morris, for the reason that said Morris, at the time of making said contract with the defendant, did not have his permit with him.

At the time of said Morris' death said logs were being driven to market, and it was absolutely necessary to save the property represented by the said logs, that they should be driven to market and the stumpage and lien claims thereon be paid; as the logs, if left where they were at the time of said Morris death, and exposed to the claims of stumpage owners and laborers having liens, would have been sacrificed; while, if driven to market, they were worth substantially all they had cost said Morris, which was practically what the defendant had advanced him in money and supplies, and in addition what it would cost to get said logs to market.

In said condition caused by the death of said Morris, under such circumstances, it seemed necessary that somebody should assume the responsibility of doing what was necessary to get said logs to market, and to sell the same; and the defendant, after consultation with the judge of probate in and for said county, and negotiation and agreement with the plaintiff, then the widow of said Morris, and Charles Morris, son of the said plaintiff and her said intestate, who was engaged with his father in said operation, went on and did what was necessary to get said logs to market, becoming responsible to the men engaged in driving the logs for their pay, and paid all the claims upon said logs, including the stumpage and the cost and expenses of getting said logs to market.

The amount paid by said defendant after the death of said Morris, under the said agreement with the plaintiff and her son, amounted to $3622.97, being the amount credited by the plaintiff in her writ against the said defendant; and, in addition thereto, the sum of nine dollars paid to one W. H. Littlefield for labor on the logs.

The defendant sold said logs with the consent of the plaintiff and her said son, for the sum of $11,726.76, as alleged by said plaintiff in her said writ, and, at the time of said sale, there was due to defendant the amount advanced by him to said Isaiah Morris in his lifetime, with six per cent commission thereon, and the amount paid by him to free said logs from liens, and to get them to market, the sum of $11,911.97, and it was agreed

between the plaintiff and her said son and the defendant, that the defendant should be entitled to take in payment of what was due him the amount received from the logs.

During the summer of 1890 the plaintiff petitioned to be appointed administratrix upon the estate of her deceased husband, but the judge of probate within and for said County of Penobscot, stated that he did not regard her as a fit person to administer upon said estate unless all matters connected with said lumbering operation and the debt to defendant could be settled and adjusted and said lumbering operation to be so eliminated and not included in the settlement of the estate.

Whereupon, the defendant and the plaintiff, in the presence of the judge of probate, she being assisted by counsel, went over all the accounts and agreed upon a settlement, and then on the 6th day of August, 1890, at an adjournment of the July Term, 1890, of the probate court in and for said county, the plaintiff was appointed administratrix of the estate of Isaiah Morris, and subsequently, in the presence of the judge of probate and with his approval, settled with the defendant and gave him a receipt for the $11,726.76 received by him for the logs, and he gave her a receipt for $11,911.97 due him; and all matters between the said plaintiff, in her said capacity, and the said defendant were then so settled and adjusted, and defendant claims that said settlement is final and conclusive between the parties and constitutes a full defense to this suit.

But if said settlement is to be disturbed, defendant claims that in addition to the amounts credited to him by the plaintiff in her said writ, he should be allowed the amount due him from the said Morris at the time of his decease, and the further sum of nine dollars paid to said Littlefield for labor on said logs, and that when said claims are allowed there is no balance due to said plaintiff in this suit.

And the defendant further says that, according to the papers filed in the probate court by the plaintiff in her said capacity, the estate of said Isaiah Morris was not and is not, as a matter of fact, insolvent, as she represented that there existed and charged herself with goods and chattels, independently of said

logs sold by the defendant, and rights and credits of the aggregate value of $1099.97, while all the claims which have been proved against the estate, the time for proving claims having expired, amount in the aggregate to only $796.97, leaving the balance of assets in her hands, over and above the amount of claims proved, of $303 ;— so that all the creditors can be paid in full, and there is no reason in justice or equity for disturbing the settlement made between the plaintiff in her said capacity and the said defendant.

Defendant further says that plaintiff claims that the said Isaiah Morris in his lifetime, to-wit on the 23d of September, 1889, made a gift of and conveyed to her all his real estate, and the records in the registry of deeds for said county show that such a deed was entered for record on the 27th day of September, 1889 ; and the plaintiff further claims that her said husband in his lifetime gave her the most valuable part of his goods and chattels, and defendant says that the plaintiff did not include in her inventory either said real estate or the goods and chattels which she claimed to have been given her.

Defendant claims that the said gift of real estate and goods and chattels cannot be held by the plaintiff as against him, a creditor, or as against other creditors whose claims existed before said alleged gifts were made ; and that said real estate should be applied in payment of the defendant's claims and all pre-existing indebtedness, and the application of said property, so alleged to have been given, to the payment of such debts would leave the assets of said estate far in excess of the claims of all other creditors.

A. W. Weatherbee, for plaintiff,
F. A. Wilson, and C. F. Woodard for defendant.

SITTING : EMERY, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

PETERS, C. J., did not sit.

WISWELL, J. This case comes to the law court upon a report of the writ and the defendant's pleadings, with the stipulation that if the facts set up in the brief statement would constitute a

defense, in whole or in part, the case is to stand for trial; if not, judgment is to be rendered for the plaintiff.

These facts appear from the brief statement. Isaiah Morris, the plaintiff's intestate, died on the 18th of May, 1890. At the time of his death he was indebted to the defendant in the sum of $8294.72 for supplies, and commissions, furnished him by the defendant, during the preceding fall and winter while said intestate was carrying on a lumbering operation. At the time of Morris' death the logs were being driven to market, and in order to protect and save the property, to get the logs to market and to prevent the enforcement of lien claims by stumpage owners and laborers, with the consent of the widow, now the administratrix, and a son who was engaged with his father in the operation, the defendant made further advances to the amount of $3631.97, which paid all claims upon the logs and the expense of driving the same.

Subsequently, with the consent of the widow and son, before her appointment as administratrix, the defendant sold these logs, realizing from such sale the sum of $11,726.76. It further appears from the brief statement that, after her appointment as administratrix, the plaintiff and the defendant had a full settlement of all matters between him and the estate, in the presence and with the approval of the judge of probate, and after a full examination of the accounts by the plaintiff aided by her counsel. At this time there was in the hands of the defendant the sum of $11,726.76, the proceeds of the sale of the logs, and there was due him the sum of $11,926.69 for advances, supplies and commissions as above stated. By the terms of this settlement these two amounts were offset against each other, and each of the parties gave the other a receipt in full. In other words, the administratrix paid the defendant's claim, substantially in full, by the application to that purpose of the proceeds of the logs in the defendant's hands, which was accepted by the defendant in full satisfaction of the amount due him.

The plaintiff now seeks to recover back the amount so paid or applied, less the advances made by the defendant after the intestate's death.

It may be admitted that an administrator who, within the year allowed by statute, pays a creditor's claim in full, acting upon the honest belief that the estate is solvent, may, upon the estate proving actually insolvent, recover back the difference between the amount so paid and that pro rata share which the creditor would have been entitled to in common with all other general creditors. But this right of action is based upon the equitable doctrine that such creditor has received money, which in equity and in good conscience belongs to the estate, for the purpose of making a just and equal distribution among all the general creditors, which is the cardinal principle of the laws relating to the administration and settlement of decedents' estates.

The creditor who in good faith has received payment in full of his claim against an estate should certainly not be placed in a worse position by reason of such payment than those whose claims have not been paid and who have had an opportunity to present and prove the same before the commissioners. If an administrator could recover back the full amount paid under the above circumstances, it would leave the creditor, whose claim had once been paid in full, after the expiration of the time allowed to prove claims, entirely without remedy. This would not be just and equitable, but quite the reverse and to a very marked degree.

This question arose in *Walker* v. *Hill*, 17 Mass. 380, in which, after a full discussion of the principles involved, the court said: "The plaintiff will take judgment for the difference between the amount paid by him to the defendant, and the amount that would have been payable to him on the decree of the judge of probate for the distribution among the creditors, whose debts were allowed by the commissioners, with interest on the amount of their difference." To the same effect is *Heard, admx.* v. *Drake*, 4 Gray, 514.

An administrator cannot recover back the whole amount so paid but only the amount of the over-payment. The burden is upon the administrator to show what that difference is. He can do this by introducing the decree of the judge of probate ordering the dividend to be paid to creditors and especially that to be paid upon the claim originally of the creditor from whom the

excess of payment is sought to be recovered. It is incumbent upon an administrator, at his peril, to have this dividend upon such creditor's claim determined by decree of the judge of probate. It is a matter exclusively within the original jurisdiction of the probate court and cannot be determined in a common law court.

This is no great hardship upon an administrator who seeks to be relieved from his own mistake. He may prove any claim so paid in his own name, being subrogated to the rights of the creditor whose claim has been fully paid.

This course was adopted by the administrators in the two Massachusetts cases above cited, and either this, or some other course, must be pursued which will result in a decree of the probate court of the amount of the dividend on the claim that has been paid.

It is not the representation of insolvency which entitles an administrator to disturb a previously made settlement, and to recover any portion of the amount paid, but actual insolvency as shown after the commissioners have passed upon the claims presented, the acceptance of such report by the probate court, the settlement of the administrator's account showing the amount in his hands available for the payment of debts, and the decree ordering the payment of a dividend.

The defendant sets up in his brief statement that the estate is not actually insolvent, that the account of the administratrix shows that she charges herself with the sum of $1099.97, and that all of the claims allowed aggregate only $796.97. If the estate is not actually insolvent the plaintiff is not entitled to recover anything. It is further claimed in defense that the defendant's original claim has not been passed upon by the commissioners and that the time for presenting the same has expired. We have already seen that unless this has been done the action cannot be maintained.

What has already been said applies to the further contention of the defendant, set up in his brief statement, that the intestate, in his lifetime, made a conveyance and transfer of real and personal property to his wife, the present administratrix, which

was without consideration and void both as to then existing and subsequent creditors. This may be a pertinent inquiry upon the question of the amount of the estate in an administrator's hands, available for the payment of debts. But it is only after all such matters have been fully and finally adjudicated, and the amount of dividend that the creditor would be entitled to accurately ascertained, that such an action as this can be maintained.

In accordance with the terms of the report,

The action is to stand for trial.

CLARENCE M. KNOWLTON, in review,

vs.

JOSEPH E. DOHERTY.

Waldo. Opinion May 7, 1895.

Intox. Liquors. Sale. Interstate Commerce. Constitutional Law. R. S., c. 27, § 56. Act of Congress, August 8, 1890.

Where intoxicating liquors are bought in another State, with the intention of selling them in this State in violation of law, the vendor cannot maintain an action to recover the purchase price in any of the courts of this State, by reason of R. S., c. 27, § 56. And it is immaterial whether or not such vendor knew of the illegal intention upon the part of the purchaser or in any way participated in the same.

The statute is not in violation of that clause of the Federal Constitution, which gives Congress the power to regulate commerce between the states; and was not, prior to the act of Congress, approved August 8, 1890, making interstate commerce relating to intoxicating liquors subject to the police powers of the several states.

If liquors were bought in another State, prior to the act of August 8, 1890, with intent to sell them in this State in the original packages, it would not, at that time, have been any violation of the law. But the court finds that the purchaser of these liquors, bought before August 8, 1890, did not intend to sell them in the original packages, but did intend to sell them at retail and in violation of law.

Meservey v. *Gray*, 55 Maine, 540, affirmed.

McGlinchy v. *Winchell*, 63 Maine, 31, affirmed.

ON REPORT.

The original action, in which the plaintiff in review was defendant, was assumpsit on account annexed to recover the price of intoxicating liquors, and in which action judgment by default had been rendered and a review granted on petition of the plaintiff here.

The case appears in the opinion.

W. P. Thompson, for plaintiff.

R. W. Rogers, for defendant.

The sale was a Massachusetts contract, made in Boston and completed by delivery to a common carrier. Delivery to a common carrier, when goods are to be forwarded to a buyer at a distance, is a delivery to the buyer. *Banchor* v. *Cilley*, 38 Maine, 556, 557; *Torrey* v. *Corliss*, 33 Maine, 333; *Portsmouth Brewing Co.* v. *Smith*, 155 Mass. 100; *Smith* v. *Edwards*, 156 Mass. 221; *Dame* v. *Flint*, 64 Vt. 533; *Com.* v. *Hess*, 148 Pa. State, 98; *Bacharach* v. *Chester Freight Line*, 133 Pa. State, 414; *Farmers' Phosphate Co.* v. *Gill*, 69 Md. 537; *In re Murray*, 3 B. R. 187. The contract having been made in Massachusetts, its validity is to be determined by the laws of that state, and if legal there, may be enforced here, notwithstanding our statutes. Cases, *supra*.

The contract is valid by the common law of Maine, which, in the absence of evidence, is presumed to be the law of Massachusetts. *Carpenter* v. *G. T. Ry. Co.* 72 Maine, 388. Contract is protected by § 10, Art. 1, of the Constitution of the U. S. prohibiting the states from passing laws impairing the obligation of contracts. It is not necessary to inquire what would be the effect of this constitutional inhibition upon contracts made in Massachusetts since the Wilson Bill, so-called, went into effect. This contract was made before that, and the statutes of this state certainly can not have a retroactive effect. For a like reason the transaction is protected by the interstate commerce laws of the United States in force prior to the enactment of the Wilson Bill. At the time the liquors were delivered to the carrier in Boston, August 6th, 1890, the statutes of this State prohibiting the sale of intoxicating liquors and denying the right to maintain an

action for the price of intoxicating liquors sold, so far as they related to liquors imported into this State from another and sold by the importer in the original packages, were unconstitutional and inoperative. *Leisy* v. *Hardin*, 135 U. S. 100; *State* v. *Burns*, 82 Maine, 558, 568; *McLaughlin* v. *City of South Bend*, 126 Ind. 471. And the price of liquors so imported and sold by the importer could be recovered. *Leisy* v. *Hardin*, *supra*; *Wasserboehr* v. *Boulier*, 84 Maine, 165; *Carstairs* v. *O'Donnell*, 154 Mass. 357; *Durkee* v. *Moses* (N. H.), 23 Atl. Repr. 793; *Yearteau* v. *Bacon's Estate*, 65 Vt. 516.

SITTING: PETERS, C. J., EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

WISWELL, J. This case comes to the law court upon report, the court to render such judgment as the legal rights of the parties may require. The plaintiff in the original action recovered judgment upon default for $382.37 debt and costs. The action was upon an account annexed amounting to $330.38, for intoxicating liquors sold by the original plaintiff to the defendant, and three dollars for packing.

The plaintiff in review relies upon R. S., c. 27, § 56, which, so far as it is material, is as follows: "No action shall be maintained upon any claim or demand, promissory note, or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the State with intention to sell the same or any part thereof in violation thereof."

In answer to which the defendant in review says that the sale of intoxicating liquors was not made in this State, and that consequently the statute does not apply. It may be conceded that the sale was made in Massachusetts. An agent of the vendor took the purchaser's order in Belfast, but there was no payment, no memorandum in writing, and the order was filled in Boston, where the liquors were separated from the general stock, packed, marked and delivered to a steamboat company, in accordance with the purchaser's instructions, directed to him.

We find from the evidence that the liquors were bought with an intention upon the part of the purchaser to sell them in this State in violation of law; and that the vendor, through his agent, had actual knowledge of such intention, but that he had no participation in the same, and did nothing, beyond the mere sale, to assist or facilitate the illegal act. The question then is presented, whether under the statutes in this State, a vendor who makes a sale of intoxicating liquors in another state, where such sale is not prohibited, under the circumstances above stated, can recover the purchase price therefor in the courts of our State.

It is a general principle of law that the validity of a contract must be tested by the law of the place where the sale is made. Were it not for the statute, which expressly forbids the maintenance of such an action, the price could be recovered, such a sale not being invalid, even if the vendor knew that the purchaser intended to put the things sold to an illegal use, unless he participated in that intention, or in some way, beyond the mere sale, did something to assist or facilitate the violation of law, or at least, in the language of some of the cases, made the sale with the knowledge that the thing sold was to be resold by the purchaser in another state contrary to its laws, and with *a view* to such resale. *Webster* v. *Munger*, 8 Gray, 584; *Graves* v. *Johnson*, 156 Mass. 211.

The distinction between selling a thing with the mere knowledge that it is to be resold in violation of law, and in any way aiding in such illegal act is sound and well recognized. Upon this principle were decided the cases in this State relied upon by the counsel for the defendant in review. *Torrey* v. *Corliss*, 33 Maine, 333, and *Banchor* v. *Cilley*, 38 Maine, 553. But when *Torrey* v. *Corliss*, was decided, there was no such statute as is now in force. The act of June 2, 1851, which was somewhat similar to our present statute, was passed while that action was pending, and the court expressly held that it did not apply; and *Banchor* v. *Cilley*, was decided under the statute of 1846, which did not refer at all to sales made in other states. Some remarks made in the recent case of *Wasserboehr* v. *Boulier*, 84 Maine, 165, are also relied upon, but that case was decided upon

the ground that the sale was made in Maine and therefore illegal.

This very question was decided in *Meservey* v. *Gray*, 55 Maine, 540, in which Mr. Justice WALTON says: "It will be noticed that our present statute makes the fact that the liquors were purchased with intention of selling them in violation of law, and not the seller's knowledge of the fact, the criterion by which to determine whether the contract will support an action in this State or not. . . . If, therefore, the sale was made in New York, and the plaintiffs had no knowledge of the illegal purpose of the defendant to sell the liquors in this State in violation of law, yet, inasmuch as the evidence satisfies us, as a matter of fact, that they were intended for such illegal sale, the plaintiffs cannot recover for them."

In *McGlinchy* v. *Winchell*, 63 Maine, 31, it is decided that it matters not that the liquors are purchased out of the State; if purchased with intent to sell the same in violation of law within the State, an action for the price cannot be maintained. These cases are decisive of the question at issue. There is no question of their correctness. The statute is explicit, and it is one which it was entirely competent for the legislature to enact.

The further contention is made that this statute is unconstitutional, or was prior to the act of Congress, approved August 8th, 1890, making interstate commerce relating to intoxicating liquors subject to the police powers of the several states, because in violation of that clause of the Federal Constitution which gives Congress the power to regulate commerce between the states. The case of *Leisy* v. *Hardin*, 135 U. S. 100, is relied upon in support of this proposition. We think that there is no principle decided in that case which has any bearing upon the question under consideration. If the purchaser had bought the liquors with the intention of selling them in this State in the original packages, it would not, at that time, have been an intention to violate the law. *Leisy* v. *Hardin*, *supra*; *State* v. *Burns*, 82 Maine, 558, and consequently not within the terms of the statute; but in this case, as we have before said, we find that the liquors were bought with the intention of reselling them in this State in violation of law.

In accordance with the terms of the report, therefore, the entry should be,

Judgment for the plaintiff in review for the amount of the former judgment for debts and costs, with interest thereon from the time of rendition of said judgment. Costs in the review will follow.

DOROTHEA MATHIAS, Executrix, *vs.* WENDALL KIRSCH.

Cumberland. Opinion May 10, 1895.

Promissory Note. Consideration. Accommodation Paper. Indorsement.

A made a loan to B, taking a note for the amount loaned, secured by a chattel mortgage upon B's stock of goods, and, as additional security, a note of the defendant for $500, payable to B and by him indorsed. As between the defendant, the maker of the note, and the payee there was no consideration; it was given for the accommodation of the payee, but it was indorsed by the payee and delivered to A before its maturity, and as collateral security for a debt created contemporaneously with such indorsement and delivery.

At the maturity of this note it was renewed by another of like tenor, given by the defendant, payable to B, and was taken by A in place of the first note. Again, upon the maturity of the second note, a third, the one in suit, was given under like circumstances. Both of the last two notes were delivered to A and each was taken by A in the place of the preceding one, but neither of these two was indorsed by the payee, and there was no consideration for either as between the maker and the payee.

This suit is brought by the executrix of the payee upon the last of the three notes, for the benefit of A, the owner and holder thereof. *Held:* That under these circumstances the defendant cannot set up the want of consideration:

That the rights of the parties were established by the first note which the plaintiff in interest took, at the time of the creation of the indebtedness from B to her; the subsequent notes were mere renewals, extensions of credit:

That the note first given, being valid and enforceable by the person for whose benefit this action was brought, the surrender of that note was a good consideration for the second; and that this is equally true as to the substitution of the note in suit for the second.

ON EXCEPTIONS.

This was an action brought by the holder of an unindorsed note in the name of the executrix of the payee. It was tried before the Superior Court, Cumberland county, without a jury and judgment was rendered in favor of the defendant. The plaintiff

then took exceptions to the rulings in that court, which are stated in the opinion.

L. B. Dennett, for plaintiff.

When commercial paper is transferred as collateral security for a presently created debt, there is a sufficient consideration to validate the transaction and shut off the equities of the maker. While, of course, the debt itself is not the consideration (for if it were the transaction would be tantamount to a mere purchase of the paper) yet it is presumed that the debt would not have been created, or the loan made, except for the security. L. L. Smith, Nego. Paper (Phila.), p. 7, citing: *Munn* v. *McDonald*, 10 W. 270; *Miller* v. *Pollock*, 99 Pa. 206; *R. R. Co.* v. *Nat'l Bank*, 102 U. S. 14; *Chicopee Bank* v. *Chapin*, 8 Met. 40; *Griswold* v. *Davis*, 31 Vt. 390; *Roseborough* v. *Messick*, 6 Ohio St. 448; *Logan* v. *Smith*, 62 Mo. 455; *Bank* v. *Turnley*, 61 Texas 365; *Winship* v. *The Bank*, 42 Ark. 22; *Tucker* v. *Bank*, 58 N. H. 83.

In the everyday transaction of discounting notes, it is not unusual to ask for other notes as security for the ones discounted; and from the very demand for collaterals, it is manifest that the principal notes would not be discounted without them. The discount is made on the faith and credit of the collateral as well as the principal notes.

The bank parts with its money or property upon the faith of both, and not upon the faith of one of them. If it is the holder for value of the principal security, so it is of the collateral. The two, in regard to the element of consideration, are inseparable. Smith, *supra*, and cites *Miller* v. *Pollock*, 99 Pa. 202; *Bank* v. *Vanderhorst*, 32 N. Y. 557.

It is very well established that the maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of third persons, though it be there as collateral security merely. Smith, *supra*, page 31st and he cites: *Lord* v. *Ocean Bank*, 20 Pa. 386; *Appleton* v. *Donaldson*, 3 *Id.* 381; *Moore* v. *Baird*, 30 *Id.* 138; *Maitland* v. *Bank*, 40 Md. 540; *Tucker* v. *Jenks*, 5 Allen, 330; *Grant* v. *Ellicott*, 7 Wend. 227; *Banks* v. *Penfield*, 69 N. Y. 502; *Tucker* v.

Bank, 58 N. H. 83. Counsel also cited: *Smith* v. *Bibber*, 82 Maine, 34.

C. F. Libby, for defendant.

Counsel cited: *Haskell* v. *Mitchell*, 53 Maine, 468, and cases; *Allum* v. *Perry*, 68 Maine, p. 234; *Cent. Trust Co.* v. *Bank*, 101 U. S. 68.

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

WISWELL, J. In November, 1892, one Emma Shine loaned to Solomon Mathias three thousand dollars, taking from him a note for that amount, secured by a chattel mortgage upon a stock of goods, and, as further security, the promissory note of the defendant for five hundred dollars, payable to Mathias and by him indorsed.

As between the defendant, the maker of this note, and Mathias, the payee, there was no consideration, it was given for the accommodation of Mathias, but it was indorsed by the payee and delivered to Mrs. Shine before its maturity, and as collateral security for a debt created contemporaneously with such indorsement and delivery.

At the maturity of this note it was renewed by another of like tenor, given by the defendant, payable to Mathias and taken by Mrs. Shine in the place of the first note. Again, upon the maturity of the second note, a third, the one in suit, was given under like circumstances. Both of the last two notes were delivered to Mrs. Shine, and each was taken by her in the place of the preceding one, but neither of these two was indorsed by Mathias, and there was no consideration for either as between the maker and the payee.

The plaintiff, as executrix of the payee, brings this suit upon the last of the three notes for the benefit of Emma Shine, the owner and holder thereof.

The only question presented by the exceptions is whether, under these circumstances, the defendant can avail himself of the fact that the note was wholly without consideration, as between the maker and the payee, and was given for the accom-

modation of the latter. The judge who tried the case without the intervention of the jury, ruled as a matter of law, "that the note in suit not being indorsed by Mathias, and being without consideration, the defendant can set it up in defense of this suit."

The defendant's counsel relies upon the well-settled principle that the assignment and delivery of a negotiable promissory note before maturity, without the indorsement of the payee, gives to the assignee only the rights of the payee. *Haskell* v. *Mitchell*, 53 Maine, 468; *Allum* v. *Perry*, 68 Maine, 232.

This contention would unquestionably be correct if it were not for the transactions between the parties, previous to the giving of the note in suit. But we think that the rights of the parties were established by the first note, which the plaintiff in interest took at the time of the creation of the indebtedness from Mathias to her. The subsequent notes were mere renewals, extensions of credit. Before she surrendered the first note, she held a valid obligation of the defendant which she might have enforced at any time after maturity. Each of the subsequent notes was given by the defendant and taken by the plaintiff in interest for the purpose of replacing the prior note. It was merely a substitution of a new note for one that had matured. As between the defendant and the person for whose benefit the action is brought, there was a good and sufficient consideration for the last two notes. The note first given being valid and enforceable in her hands, the surrender of that note was a good consideration for the second, and this is equally true as to the substitution of the note in suit for the second. *Dockray* v. *Dunn*, 37 Maine, 442; *Dunn* v. *Weston*, 71 Maine, 270.

We think, therefore, that the ruling excepted to was incorrect, and that it was not competent for the defendant to show that as between him and the payee, there was no consideration.

Exceptions sustained.

ORRIVILLE M. KAHERL *vs.* INHABITANTS OF ROCKPORT.

Knox. Opinion May 10, 1895.

Way. Defect,—description of. R. S., c. 18, § 80.

A notice which sufficiently and definitely describes the location of an alleged defect, but does not describe the location of the defect that caused the injury, is not in compliance with the statute, R. S., c. 18, § 80.

The written notice in this case specified the location of the defect, in effect, as follows, "in the sidewalk of the highway known as Commercial street, at the termination of the planking on that evening, nearly abreast the steam grist-mill and lumber factory." At the time of the accident the town was rebuilding the sidewalk along Commercial street and had completed it to a point two hundred and ten feet beyond the mill mentioned in the plaintiff's notice. For a portion of the way the sidewalk consisted of wood plank, which terminated at a driveway nearly abreast the mill, and for the remaining distance it consisted of a concrete of limestone chips and gravel. The defect which caused the injury was not "nearly abreast the mill," but two hundred and ten feet distant therefrom; it was not at the termination of the planking but about two hundred feet from the end of the planking.

The location of the defect might have been accurately specified by reference to a dwelling-house in its immediate proximity.

ON REPORT.

The case is stated in the opinion.

J. H. and C. O. Montgomery, for plaintiff.

Substantial certainty in the notice is all that is required. Sufficient if not misleading. *Spellman* v. *Chicopee*, 131 Mass. 443; *Welch* v. *Gardner*, 133 Mass. 529; *Chapman* v. *Nobleboro*, 76 Maine, 427; *Blackington* v. *Rockland*, 66 Maine, 334.

C. E. and A. S. Littlefield for defendants.

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

WISWELL, J. The only question is, whether in an action against a town to recover for injuries caused by an alleged defect in the sidewalk of a street, the notice required by statute to be given within fourteen days after the accident, sufficiently specifies the location of the alleged defect.

The statute, R. S., c. 18, § 80, requires the person injured to give written notice, "setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury."

The written notice, in this case, describes the location as "a defect and want of repair in the sidewalk of a highway known as Commercial street at a point in said highway nearly abreast the Steam Grist-Mill and Lumber Factory." Further on in the same notice the nature and location of the defect are described as follows: "The defect and want of repair through which said injuries were occasioned, consisted of deep depression of the sidewalk at the termination of the the planking on that evening."

Fairly interpreted, the whole notice, in regard to the location of the defect, would read, "in the sidewalk of the highway known as Commercial street, at the termination of the planking on that evening, nearly abreast the Steam Grist-Mill and Lumber Factory."

At the time of the accident, the town was rebuilding the sidewalk along Commercial street and had completed it to a point two hundred and ten feet beyond the mill mentioned in the plaintiff's notice. For a portion of the way the sidewalk consisted of wood plank, which terminated at a driveway nearly abreast the mill, and for the remaining distance it consisted of a concrete of limestone chips and gravel. The defect which caused the injury was a hole at the end of the concrete walk and two hundred and ten feet distant from the mill referred to in the plaintiff's notice.

The question here is not whether a notice in general terms is sufficient to lead the municipal officers, "acting reasonably, into such inquiry and investigation as would result in their acquiring a full knowledge of the facts of the case," as in *Blackington* v. *Rockland*, 66 Maine, 332. The notice in this case is precise and definite; it describes the location as "at the end of the planking, nearly abreast the mill." While the defect which caused the injury was at an entirely different place, it was not nearly abreast the mill but two hundred and ten feet distant therefrom, and it was not at the end of the planking but about

two hundred feet, as shown by the plan, from the termination of the planking. This word "planking" must be taken in its common and ordinary meaning, "planks collectively," "a series of planks in place," and not in the unusual and extraordinary sense claimed by plaintiff's counsel.

The object of this statute requirement as to the subsequent notice is apparent. It is, that the municipal officers may be speedily informed of the nature and extent of a person's injuries, who claims to have sustained them by reason of a defective way; and that they may have an opportunity to examine into the facts, especially the alleged defective condition of the way, before changes have occurred, with a view, either of procuring testimony to contest the claim, or to settle it, if, after investigation, they deem such a course advisable. *Blackington* v. *Rockland*, *supra*. The municipal officers in this case, in making an investigation of the facts, based upon the information contained in the notice, would naturally have gone to the precise spot referred to in the notice. That place was at the end of the planking on the evening of the accident, nearly abreast the mill. There was nothing in the notice to call their attention to another place two hundred feet distant from the one referred to, and which might have been accurately described by reference to a dwelling-house upon the street, and only a few feet from the defect which is claimed to have caused the injury.

The notice sufficiently and definitely describes the location of an alleged defect; it does not describe the location of the defect which caused the injury. In accordance with the terms of the report the entry will be,

Plaintiff nonsuit.

FERDINAND PENLEY *vs.* CHARLES F. BESSEY.

Androscoggin. Opinion May 10, 1895.

Sales. Delivery. Passing of title.

In the sale of chattels, the property passes at once on the sale, if such is the intent, although the seller is afterwards to make delivery of the goods.

Such intent may be expressly declared, or may be inferred from the circumstances. In the absence of an express agreement, the intent that title should pass at the time of the contract, although the seller is to subsequently deliver, is inferred where payment in full is made.

The plaintiff bought of the defendant a yoke of oxen, the price was agreed upon and fully paid in money; the plaintiff had no previous acquaintance with the defendant and had no knowledge as to his pecuniary responsibility. The oxen were left with the defendant to be driven by him, the next day but one thereafter, to a designated place and there to be delivered to the plaintiff. Before the time agreed upon for delivery, without any fault of the defendant, one of the oxen was cast in the stall and died. There was no express agreement as to when the title should pass. The plaintiff sued to recover back the purchase price and the jury found for him. On a motion for a new trial, *it is considered by the court*, under the circumstances of the case, that the fact of the payment of the full purchase price should have very great and almost controlling influence in determining the intention of the parties, and that a new trial should be ordered.

ON MOTION.

This was an action of assumpsit to recover the purchase price of a pair of oxen sold by the defendant to the plaintiff, and which the plaintiff claimed were not delivered in accordance with the terms of the sale. The verdict was for the plaintiff.

The case appears in the opinion.

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

Counsel argued that the sale being conditional, the title had not passed, and cited: *Stone* v. *Peacock*, 35 Maine, 388; *Ballantyne* v. *Appleton*, 82 Maine, 573; *Fuller* v. *Bean*, 34 N. H. 299, 301; Benj. Sales, Bennett's Ed. 4th Am. p. 312, and cases. Question of intent for the jury. *Riddle* v. *Varnum*, 20 Pick. 283; *George* v. *Stubbs*, 26 Maine, 250; *Marble* v. *Moore*, 102 Mass. 443; *Merchants' National Bank* v. *Bangs*, 102 Mass. 291; *Kelsea* v. *Haines*, 41 N. H. 253; *Fuller* v. *Bean*, 34 N.

H. 290; *Dyer* v. *Libby*, 61 Maine, 45; *Bank* v. *Bangs*, 102 Mass. 291, 296; *Wigton* v. *Bowley*, 130 Mass. 254; *Bethel Steam Mill Co.* v. *Brown*, 57 Maine, 9; *Lewiston* v. *Harrison*, 69 Maine, 504, 509; *Sidensparker* v. *Sidensparker*, 52 Maine, 481, 490; *Hewey* v. *Nourse*, 54 Maine, 256, 259; *Houdlette* v. *Tallman*, 14 Maine, 400, 403; *Weld* v. *Came*, 98 Mass. 152; *Foster* v. *Ropes*, 111 Mass. 10; *Knight* v. *Mann*, 118 Mass. 143.

F. L. Noble and R. W. Crockett, for defendant.

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

WISWELL, J. The plaintiff's agent, acting for his principal, bought of the defendant a pair of oxen. The oxen were examined by the agent at the defendant's farm, the price agreed upon and fully paid in money. They were left in the defendant's possession, the plaintiff claiming that, by the terms of the contract, they were to be driven by the defendant, on the next day but one after, to a designated place there to be delivered to the purchaser.

Before the time of such delivery, and without the fault of the defendant, one of the oxen was cast in a stall and died. This action was brought to recover back the purchase price, paid as above. The plaintiff's contention at the trial was that the contract of sale was made with the defendant's wife at the time the money was paid, that the agent first offered a smaller sum, then proposed to divide the difference, and finally accepted the offer made by the wife to sell for one hundred and twenty dollars, but upon the condition that the oxen were to be driven to another place and there delivered. We quote from the agent's testimony: "I stepped to the sleigh and then went back again and knocked at the door, and she came to the door, and I told her I would take them at one hundred and twenty dollars, if she would have them driven to Parkhurst Corner next Saturday noon. She said she would take that and stepped back into the house."

The defendant claimed that the terms of the contract of sale had been previously agreed upon between him and the plaintiff's

agent, that the wife only received the money in his absence, and neither had, nor attempted to exercise, the authority of incorporating into the contract any agreement to deliver the property sold at another place.

Whether, if the contract was begun and completed with the wife, she agreed that the oxen should be driven to another place and there delivered, as claimed by the plaintiff, or not, there is much doubt; but we should not feel authorized to set the verdict aside upon this question, as the evidence was so very conflicting that a jury would be authorized to find either way. But for another reason, we think that this motion should be granted.

Assuming, as the jury has found, that the plaintiff's version of the transaction is correct, we are forced to the conclusion that it must have been the intention of the parties, so far as they gave the matter any thought, that the property passed upon the payment of the full purchase price. We can conceive of no reason why this should not have been so. If the agent had simply wanted to bind the bargain he would have paid some small sum in earnest, or would have made a memorandum in writing. When he fully paid the agreed purchase price to a person with whom he had no previous acquaintance, or as to whose pecuniary responsibility he had no knowledge, he must have intended and supposed that the money then belonged to the vendor and that the oxen became the property of his principal. It would have been very different if the contract had provided for the payment upon the subsequent delivery of the oxen.

This is always a question of intention; it is undoubtedly true, as stated in Benjamin on Sales, Vol. 1, § 325, that: "The effect of an agreement in the contract of sale, that the seller shall deliver the property sold at some particular place, is sometimes to postpone the vesting of title in the buyer until such delivery is made," and that if payment is not to be made until such subsequent delivery, the title will not ordinarily pass until such delivery. But the property passes at once on the sale, if such is the intent, though the seller is afterwards to make a delivery of the goods. *Idem*, § 329. "Such intent may be expressly declared, or may be inferred from the circumstances. . . . In the

absence of an express agreement, the intent that title shall pass at once by the contract, although the seller is to deliver, is inferred where the buyer is to give notice of time or place of delivery, *where payment in full is made*, where the buyer employs the seller to remove the property, or where there is other evidence that the continued possession of the seller is merely for the convenience of the buyer, or that the removal of the goods is made by the seller as agent for the buyer." Benjamin on Sales, Vol. 1, § 330.

We think that the foregoing is a correct statement of the rule. In *Bethel Steam Mill Co.* v. *Brown*, 57 Maine, 2, the plaintiffs made a contract for the purchase of a large quantity of spruce logs, the logs were to be marked with the plaintiff's mark and were to be driven by the vendor many miles down the Androscoggin River and there delivered. It was held that a survey of the logs on the landing place and the putting thereon of the vendee's mark constituted a sufficient delivery even as against subsequent purchasers, although, by the terms of the contract of sale, the vendor was bound to deliver the logs at a specified place many miles below the landing. And in *Dyer* v. *Libby*, 61 Maine, 45, it was decided that if by the contract goods sold are to be hauled by the vendor to a place specified, it does not necessarily follow that the title thereto does not pass till they reach the place designated.

In our opinion, the fact of the full payment of the purchase price should have very great, and under the circumstances of this case, almost controlling influence in determining the question of intention.

It is true that this is a question of fact in any case and one for the jury to pass upon. As no exceptions are presented, it must be presumed that the instructions to the jury were sufficient and proper; but the circumstances point so strongly to an intention upon the part of the parties that the property should pass, we believe that the jury must have misunderstood the instructions or erred from some other cause.

Motion granted. Verdict set aside.

VICTOR BEAUDETTE *vs.* NARCISSE GAGNE.

Androscoggin. Opinion May 10, 1895.

Seduction. Evidence. Offers of Compromise. Loss of Service.

In the trial of an action on the case by a father for the seduction of his daughter, where the plea was the general issue and the seduction was denied, evidence was properly admitted, tending to show that about three months after the date of the alleged seduction, the defendant accompanied the daughter to a city other than that in which they lived, where an abortion was performed upon her, and that upon her return home she at once became sick and so continued for some three weeks.

In an action of this nature, for the seduction of a minor daughter, the relation of master and servant between her and her father is presumed to exist; and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services.

When the daughter is of age, it must appear that she resided in her father's family and performed some acts of service, however slight. It is not necessary that the services of an adult daughter should be such as the father can command. It is sufficient if, by mutual assent, the relation of master and servant did in fact exist.

The law very wisely excludes testimony of mere offers of compromise. But, if during the negotiations, either party makes an admission of a fact material to the issue, because it is a fact, such admission, both upon principle and authority, may be offered in evidence the same if made elsewhere and under different circumstances.

If, when testimony is offered, it appears to be clearly admissible, but subsequently it is ascertained that the testimony was inadmissible, because of reasons not known or not stated at the time it was offered, counsel should ask to have it stricken out and for appropriate instructions, and having failed to do this, he cannot later take exception to its admission

Emery v. *Gowen*, 4 Greenl. 33, affirmed.

Cole v. *Cole*, 33 Maine, 542, affirmed.

ON EXCEPTIONS.

This was an action brought to recover damages for the seduction of the plaintiff's daughter. Plea, general issue. The jury returned a verdict of one thousand dollars for the plaintiff.

The defendant took exceptions to the admission of testimony, and the refusal of the presiding justice to give requested instructions, as appears in the opinion.

W. H. Judkins, W. H. Newell and W. B. Skelton, for plaintiff.

Distinct facts made by parties in negotiations for a compromise are admissible: *Cole* v. *Cole*, 33 Maine, 542; *Sanborn* v. *Neilson*, 4 N. H. 501; *Hamblett* v. *Hamblett*, 6 N. H. 333; *Eastman* v. *Amoskeag Co.* 44 N. H. 143; *Harrington* v. *Lincoln*, 4 Gray, 563; *Gerrish* v. *Sweetsir*, 4 Pick. 374; *Akers* v. *Demond*, 103 Mass. 318; *Durgin* v. *Somers*, 117 Mass. 55, and cases cited; *Emerson* v. *Boynton*, 11 Gray, 395; *Dickinson* v. *Dickinson*, 9 Met. 471; *Abbott* v. *Andrews*, 130 Mass. 145; *Hartford Bridge Co.* v. *Granger*, 4 Conn. 142; *Fuller* v. *Hampton*, 5 Conn. 416; *Travis* v. *Barger*, 24 Barb. 614; *Evans* v. *Smith*, 17 Am. Dec. 74; *Manistee National Bank* v. *Seymour*, 7 West. Rep. 178 (Mich.). *Webber* v. *Dunn*, 71 Maine, 331, when carefully examined, will not be found to conflict with the above authorities.

The fact disclosed by the testimony of the juryman has some tendency to destroy the presumption of innocency which the law, at the start, throws around the defendant. Therefore it is admissible. *Taylor* v. *Gilman*, 60 N. H. 506; *Egan* v. *Bowker*, 5 Allen, 449; *Hustings* v. *Stetson*, 130 Mass. 76; *Morgan* v. *Frees*, 15 Barb. 352 and cases cited.

Refusal of the court to instruct the jury that "unless the services rendered by the daughter were such as the plaintiff could command and were not voluntary on her part the plaintiff could not recover:" *Emery* v. *Gowen*, 4 Maine, 33; *Mercer* v. *Walmsley*, 9 Am. Dec. 486; *Vossel* v. *Cole*, 47 Am. Dec. 136; *Davidson* v. *Abbott*, 52 Vt. 570; *Bartley* v. *Richtmyer*, 53 Am. Dec. 338; *Herring* v. *Jestic*, 2 Houst. (Del.) 66; *Martin* v. *Payne*, 9 Johns. (N. Y.) 388.

F. L. Noble and R. W. Crockett, for defendant.

In an action for seduction the plaintiff cannot prove, in aggravation of damages, that the defendant had procured an act of abortion on the daughter. The action cannot be based upon the commission of the seduction alone, no matter how wrongfully done, but must be based upon the loss of service of the daughter. Addison on Torts Vol. II, 513; *Klapper* v. *Brommer*, 26 Wis. 372.

There was no testimony in this case of any acts of criminal intercourse between the defendant and the plaintiff's daughter in April, 1892, or prior thereto. This testimony was evidently introduced by the plaintiff to aggravate the damages and not for the purpose of proving the acts alleged in the plaintiff's writ, and was therefore irrelevant and inadmissible.

Offer of compromise: An admission of a fact not made simply because it is a fact, but expressly or clearly for the sake of and as a part of an attempted compromise, is not competent evidence in a subsequent action against the party making it. *Cates* v. *Kellogg*, 9 Ind. 506; *Harrington* v. *Lincoln*, 4 Gray, 563; *Louisville, etc. R. R.* v. *Wright*, 7 Am. St. Rep. 432, at 442.

Conversation while engaged in the endeavor to settle difficulties is privileged and not to be used against either party, unless one of the parties admits a fact because it is a fact. *Hart Bridge Co.* v. *Granger*, 4 Conn. 142; *Strong* v. *Stewart*, 9 Heisk. 137; *Rideout* v. *Newton*, 17 N. H. 71; *Wis. St. Bank* v. *Dutson*, 11 Wis. 371; 39 Mich. 274; 64 Ind. 545. Testimony of juror collateral and related to a different case. 1 Greenl. Ev. § 52; *Hubbard* v. *R. R. Co.* 39 Maine, 506; *Branch* v. *Libbey*, 78 Maine, 321; *Parker* v. *Portland Pub. Co.* 69 Maine, 175.

If the daughter is of age, some act of service is necessary on the part of the daughter to enable the father to maintain the action; but however slight the act of service may be, it must be a real genuine service, such as the parent may command. 2 Addison on Torts, Wood's Ed. 514, note and cases; 2 Greenl. Ev. § 572.

Had the plaintiff's daughter, although of age, resided in the plaintiff's family and in return for her board or other support done the acts of service mentioned above, the plaintiff could recover; but the evidence in this case shows that she supported herself from her own wages earned in the mills, and whatever acts of service she performed as a member of her father's family were purely voluntary on her part, and that the father had no right to command the performance of them.

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

WISWELL, J. Action on the case by a father for the seduction of his adult daughter. The defendant alleges exceptions for the following causes:

1. Because evidence was admitted tending to show that, on about the first of April, 1892, the defendant accompanied the daughter to Portland when and where an abortion was performed upon her, and that upon her return home she at once became sick and so continued for some three weeks. The admission of this evidence was perfectly proper. It was material and tended to prove the gist of the action, loss of the service of the daughter by reason of her sickness following the alleged seduction, pregnancy and abortion. The plea was the general issue; the seduction was denied. If the defendant accompanied the daughter, when she went to another city for the above stated purpose, it was a pertinent fact bearing upon the issue of seduction by him.

The defendant's counsel, at the trial, stated as his grounds of objection to the admissiblity of this evidence, that there was no allegation of intercourse in April, or near that time. This is not necessary. The specification of the times and places, when and where criminal intercourse took place, alleged the first time as on or about the first day of January, 1892, about three months prior to the time when it was claimed that the defendant accompanied the daughter to Portland.

II. The defendant next takes exception because witnesses were allowed to testify as to certain statements made by the defendant, when, as claimed by his counsel, the defendant was trying to effect a compromise of this suit.

The law very wisely excludes the testimony of mere offers of compromise. When one against whom a claim is made denies his liability or the extent of it, but for the purpose of buying his peace, makes an offer of concession or compromise, this should have no effect whatever against him, and therefore ordinarily should not be admitted in evidence. The same is, of course, true if a person making a claim against another, for the purpose

of preventing litigation, offers to settle for a less sum than he claims to be entitled to. But if during the negotiations either makes an admission of a fact material to the issue, because it is a fact, such admission, both upon principle and authority, may be put in evidence the same as if made elsewhere and under different circumstances.

This important distinction was early recognized in this State in the case of *Cole* v. *Cole*, 33 Maine, 542, as it has been by all other courts where the question has arisen.

In this case the evidence was admitted for this purpose only. The presiding justice, when the evidence was offered, said: "Mere offers to compromise a suit I shall exclude, but any admissions of matters of fact in relation to his connection with plaintiff's daughter I shall admit." And in his charge he very clearly explained to the jury that the offer of compromise made should have no bearing upon the case and that testimony of the conversation was only material so far as it showed any admissions of material facts.

It may often happen that such admissions of facts are so connected with negotiations of compromise that the whole conversation must be admitted in evidence, in which case care should be taken, as it was in this case, to explain to the jury the purpose of the testimony and to draw their attention to the distinction between that portion which is pertinent and proper for them to consider and that which is not.

III. The next exception is to the admission of the testimony of a juryman at a prior term of the court, who was allowed to testify to a conversation had with him by the defendant, wherein the defendant asked him "to hang out for him." The defendant's counsel now claims that this conversation was with reference to another case,—an indictment then pending against him and about to be tried. Before this testimony was admitted, the justice presiding inquired if the conversation was about this case, and upon being answered in the affirmative said: "I do not see any grounds for excluding any of your client's admissions." The record does not disclose that the counsel raised the objection that the conversation was not about the case on trial. As it appeared

when the testimony was offered, it was clearly admissible. If it was ascertained subsequently that the conversation was about another trial, the counsel should have asked to have had it stricken out and for appropriate instructions.

IV. Lastly, exception is taken to the refusal of the court to instruct the jury that unless the services rendered by the daughter were such as the plaintiff could command and were not voluntary on her part, the plaintiff could not recover.

This form of action is based upon the legal fiction of loss of service, and the relation of master and servant must exist. In the case of a minor daughter such relation is presumed to exist between her and her father, and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services. When the daughter is of age, it must appear that she resided in her father's family and performed some acts of service, however slight. This was decided to be the law in this State in the case of *Emery* v. *Gowen*, 4 Greenl. 33, a case which has been frequently cited and followed by the courts of other states.

The learned justice who presided, in his charge to the jury, fully and clearly explained the somewhat peculiar rules of law which are applicable to an action of this kind, in the course of which he said: "But if, at the time of the seduction, she is of age, that is, more than twenty-one years of age, then it must appear that the family relations continued to exist, that she was at least a resident of her father's family and performed some service. But it is held that the most trifling services, under those circumstances, are sufficient to create the relation." This instruction was all that the defendant was entitled to and was in accordance with the weight of authority. See *Emery* v. *Gowen*, *supra*; *Mercer* v. *Walmsley*, 5 Harris & Johnson (Maryland), 27; *Vossel* v. *Cole*, 10 Missouri, 634; *Davidson* v. *Abbot*, 52 Vt. 570; *Martin* v. *Payne*, 9 Johns. 388, and cases collected in the Am. & Eng. Encyl. of Law, Vol. 21, pages 1009 to 1017, under title of Seduction.

It is not necessary that the services of an adult daughter should be such as the father can command. Ordinarily a father

cannot command the service of a daughter of age, — he cannot compel the service of his child over twenty-one as he can that of his minor child. It is sufficient if by mutual assent the relation of master and servant did in fact exist.

Exceptions overruled.

MARJORIE ROMEO, *pro ami*,
vs.
BOSTON AND MAINE RAILROAD.

York. Opinion May 10, 1895.

Railroad. Negligence. Gates. Crossing. Practice. Jury.
Stat. 1885, c. 377.

The plaintiff, a young woman of nineteen years of age, in the full possession of her senses of sight and hearing, while walking on Main street in the city of Biddeford, across the track of the defendant corporation, was struck by the locomotive attached to a regular train on the defendant's road, and sustained certain injuries. Gates were maintained at the crossing in question, but at the time of the accident they were in disuse, because of alterations being made at that place, and were left open. A flagman was also stationed at the crossing, but a jury might be authorized from the evidence, to believe that, at the time and just before the train passed, he was not in a position to do the duty required of him in warning travelers of an approaching train. Plaintiff's witnesses estimated the rate of speed of the train, as it crossed Main street, at from thirty to thirty-five miles an hour. The plan, made a part of the case, shows that while the plaintiff was walking along Main street toward the track, for a distance of at least eighty feet before coming to the track, upon which this train was running, she had a plain view of the track in the direction from which it was coming for a great distance, obstructed only by a small gate-house which could only have shut off the view of a small portion of the track at any one time. She testified that before attempting to cross the track she neither looked nor listened for an approaching train. *Held:* That a jury would only be authorized, from evidence of these facts, to come to the conclusion that the plaintiff contributed to the accident by her own want of due care.

While the fact of open gates is a circumstance which a traveler may properly take into consideration, and upon which he may place some reliance, this does not relieve him of all care. This rule is especially applicable to the facts of this case, where the plaintiff was walking, with a generally unobstructed view of the track, and the slightest exercise of care upon her part would have prevented the accident.

Ordinarily the question of due care and of negligence is for a jury. This is necessarily so when the facts bearing upon these questions are in dispute or even when the facts are undisputed, and intelligent and fair-minded men

may reasonably differ in their conclusions; but it is not true where the facts are undisputed, and there is no evidence, or the evidence is too slight and trifling to be considered by the jury.

ON REPORT.

This was an action on the case by the minor plaintiff, a girl nineteen years old, to recover damages for injuries received by being struck by an east bound train while passing, about nine o'clock, P. M., July 17, 1893, along Main street in Biddeford where it crosses the defendant's railroad at grade.

The acts of negligence alleged in the declaration were the running of the train at a rate of speed in excess of that allowed by law, in the compact part of a city, where gates or flagmen are not provided; also a failure to lower the arms of the gates which stood on both sides of the track, and the want of signals by the flagman stationed at the place.

The plaintiff testified that she, with another girl about her own age, had been visiting a merry-go-round located northerly of defendant's tracks and easterly of Main street, and was returning southerly across the tracks. It appeared that there were then two tracks in use across the street, and another in course of construction; and the gates, which for some years had been in use there, were not then in operation because of the removal of the posts to be reset to cover the spur track then being constructed, and which occupied the ground where one of the posts had stood. Those upon the northerly side were detached from their posts, while one arm of those upon the southerly side remained erect upon the post and unused, that particular post not requiring resetting. They reached Main street from the lot where the merry-go-round was located, and a point about one hundred feet northerly of the tracks, and were walking slowly, side by side, the plaintiff upon the westerly side of her friend, toward the tracks.

The plaintiff appeared to have been familiar with the crossing, having lived in Biddeford most of her life, and crossed it many times. She said: "Just as we got on the sidewalk," she saw "gates up in the air. I did not pay much attention to it, and couldn't tell which side it was on." Her friend testified: "I saw one gate, and it was up." Neither heard whistle or bell,

or saw head-light or train, until as the plaintiff said: "It was on us — I lost my senses;" — her friend said: "almost on us. I screamed and started to run — don't remember what I did." The friend was seized by a person present who pulled her in front of the train across the track to the southerly side. Plaintiff did not get over, but was struck.

It appeared from a plan admitted in the case that the coming train, which was on the southern-most track, was visible from any point in most or all of the way from the point where the plaintiff entered upon the street to the crossing, about two thousand four hundred and twenty feet.

Several witnesses saw the head-light burning, and heard the whistle, the usual crossing whistle, of the coming train, and saw the flagman with flag or lantern in the street near his house upon the northerly side of the crossing; and one heard him cry out a warning. One saw the train about one hundred and fifty yards distant; another saw it about two hundred and fifty yards away.

The other material facts appear in the opinion.

B. F. Hamilton and B. F. Cleaves, for plaintiff.

Defendant's negligence undeniable: This crossing is near a compact part of the city of Biddeford, and yet no flagman was on duty, as required by law; or if one was assigned for duty there he flagrantly omitted to perform his duties. No whistle was sounded, no bell rung, and the train came down to and over the crossing at a far greater rate of speed than is allowed by law, in the absence of gates and flagman. The absence of flagman or gates was negligence *per se*. *State* v. *B. & M. R. R.* 80 Maine, 431, and cases cited by State; *Hooper* v. *Same*, 81 Maine, 260; Wood Ry. Law, p. 1313, note; *Sweeney* v. *O. C. R. R* 10 Allen, 368.

Railroads are bound to exercise reasonable care at crossings. And reasonable care upon the part of the company is the care ordinarily observed at that particular crossing. *Bradley* v. *B. & M. R. R.* 2 Cush. 539.

The railroad company is bound to use all reasonable care besides that of ringing bells, etc., to avoid collision when its

engines are crossing a way. *Linfield* v. *O. C. R. R.* 10 Cush. 569.

The plaintiff was not so lacking in the exercise of ordinary care that there is no question to be submitted to a jury:

1. Her failure to look and listen more carefully than she did, was excused by the negligence of the railroad, whose negligence placed her in the position of danger where she was injured; and by the circumstances of the case. *State* v. *B. & M. R. R.* 80 Maine, 430; *Hooper* v. *Same*, 81 Maine, 260. It may be true that, under ordinary circumstances, it is the duty of a person approaching a railroad-crossing to look and listen for the approach thereto of a train, before attempting to pass over. But whether or not a failure so to do in a given case, is negligence, depends upon all the facts and circumstances in the case; and upon these facts and circumstances a jury is to decide, under proper instructions, the question of whether or not, in the particular case, the plaintiff exercised ordinary care. Ordinary care is that degree of care which a person of ordinary intelligence and discrimination, would exercise under like circumstances. *Butterfield* v. *West. R. R.* 10 Allen, 532; *Plummer* v. *E. R. R.* 73 Maine, 591, and cases. It is not necessary to prove affirmatively that plaintiff looked and listened before attempting to cross; whether or not she used proper precautions is to be determined by all the circumstances in the case. Wood Ry. Law, p. 1317, note; *Penn. R. R.* v. *Webber*, 72 Penn. 27.

When the usual signals are not given, a traveler will not be held to that degree of diligence that he would had the company discharged its duty. The traveler has a right to expect that the company will discharge its duty, and comply with the law. Wood Ry. Law, p. 1319, 1328, and cases in notes; *Com.* v. *Fitchburg R. R.* 10 Allen, 189; *Whitton* v. *C. & N. W. R. R. Co.* 13 Wall. 270; *Chaffee* v. *B. & L. R. R.* 104 Mass. 108; *Hinckley* v. *Cape Cod R. R.* 120 Mass. 257, 263, and cases. If plaintiff used the precautions and vigilance which, according to common experience, men of ordinary prudence exercise under like circumstances, and there was a reasonable

excuse for her failure to more carefully look and listen, she cannot be said to be guilty of negligence as a matter of law for failing to look and listen. *Wheelock* v. *B. & A. R. R.* 105 Mass. 203, 207; *Tyler* v. *N. Y. & N. E. R. R.* 137 Mass. 238.

2. This plaintiff has a right to have the question of whether or not she was in the exercise of ordinary care passed upon by a jury. Whether or not she was in the exercise of due care and diligence, is wholly a question for the jury. *State* v. *B. & M. R. R.* 80 Maine, 430, 433, and cases cited by State. The evidence discloses that she exercised some care, in looking for the gates, and whether or not she was in the exercise of ordinary care is plainly a question for the jury. *Tyler* v. *N. Y. & N. E. R. R.* 137 Mass. 238, 241. Whether or not she was induced by the open gates and the absence of a flagman to come upon the crossing in an attempt to pass over, is a question for the jury. Ordinary care of plaintiff need not be proved affirmatively. If, in view of all the circumstances, she did what a person of ordinary prudence would have done, that is all that is required; and this is a question for the jury. *Mayo* v. *B. & M. R. R.* 104 Mass. 137; *Hinckley* v. *Cape Cod R. R.* 120 Mass. 257, 262.

Whether or not, under all the circumstances, she was careless in failing to look and listen more carefully than she did, is a question which the jury must decide. The surrounding circumstances, and the whole conduct of the plaintiff, will ordinarily afford a ground for such a variety of inferences as to make the verdict of a jury the only proper means to determine the essential fact. However indicative of carelessness the circumstances may seem to the court, if there be any evidence upon which a jury may find that reasonable care was in fact exercised, it is proper to submit it to them. *Mayo* v. *B. & M. R. R.* 104 Mass. at p. 142; *French* v. *Taunton R. R.* 116 Mass. 541; *Gahagan* v. *B. & L. R. R.* 1 Allen, 187; *Elkins* v. *B. & A. R. R.* 115 Mass. 190, 199; *Warren* v. *Fitch. R. R.* 8 Allen, 227; *Meesel* v. *Lynn R. R.* 8 Allen, 234; *Gaynor* v. *O. C. & N. R. R.* 100 Mass. 208, 212; *Williams* v. *Grealy*, 112 Mass. 79; *Craig* v. *N. H. & H. R. R.* 118 Mass. 431, 437.

G. C. Yeaton, for defendant.

State v. *B. & M. R. R.* 80 Maine, 430, and *Hooper* v. *Same*, 81 Maine, 260, will doubtless be cited by plaintiff as authority for her position here.

How little countenance these cases afford this plaintiff may be determined from the following six particulars, in all of which both those cases differed essentially from the case now at bar; viz: in both those, (1) deceased was found by the court to have both "looked and listened;" (2) deceased approached the crossing from the southerly side, upon which the view of the railroad was "mostly obstructed" until within about fifteen feet of the track on which came the train; (3) he was riding in a wagon; (4) the rate of speed of the train was unlawful; (5) there was no flagman on duty; (6) deceased saw all four arms of the gates erect. While here, this plaintiff (1) neither looked nor listened; (2) approached the crossing from the northerly side, and had a practically unobstructed view of the track for nearly half a mile, while (3) she was walking "slowly" nearly one hundred and twenty-five feet; (4) the speed of the train was not unlawful; (5) a flagman was there on duty; (6) she saw but one arm of the four erect.

In a multitude of reported cases, each one of the first five of the foregoing enumerated particulars has alone been held conclusive as to a plaintiff's contributory negligence. What shall we say of the combined force of all five, with the superadded weight of the sixth, whatever that may be?

It is too much to say that, because she had seen one arm of the gates erect when at some one hundred and twenty-five feet distant from the track, she was thereafter excused from any and all intelligent attention to so much so easily heard and seen. Moreover, she says she did not pay "much attention" even to the arms she saw erect.

In addition to our own case, *Allen* v. *M. C. R. R.* 82 Maine, 111, the following recent cases elsewhere illustrate the application of these now universally admitted general rules to facts more or less closely similar to those here; *Ely* v. *Pittsburg C. C. & St. L. Ry.* (Penn. Nov. 1893), 27 Atl. Rep. 970;

West Jersey R. Co. v. *Ewan* (N. J. Dec. 1893), *Id.* 1064; *Mark's Adm'r* v. *P. R. R. Co.* 88 Va. 1; *Magner* v. *Truesdale* (Minn. 1893), 55 N. W. Rep. 607; *Shufeldt* v. *Flint & P. M. R. R. Co.* (Mich. 1893) *Id.* 1013; *Banning* v. *Chic. R. I. & P. Ry. Co.* (Iowa, 1893) 56 N. W. Rep. 277; *Tucker* v. *N. Y. C. & H. R. R. R. Co.* 124 N. Y. 308; *Fowler* v. *N. Y. C. & H. R. R. R. Co.* 74 Hun. 141.

In *Merrigan* v. *B. & A. R. R.* 154 Mass. 189, 191, the jury were instructed:

"If he approaches a crossing where there are gates which by their shape and appearance indicate to him that it is the custom to shut them when trains pass, or that they are there for the purpose of being shut when trains pass, he may take that fact into consideration on the question of how much he himself must look, but it does not excuse him from looking. He must look out for himself, and has no right to rely wholly upon the gates. On the question of how far he shall look, and to what extent he shall look, he may properly take the existence of the gates into consideration. . . . If he looked, he must be held to have seen that which was plainly to be seen where he looked, . . . there being no suggestion of a defect of vision on his part; and if, seeing the engine approaching the highway, he chose to start across and take his chances, the damage must rest where it falls, and is in no way attributable to the railroad corporation in such manner that he can recover of them for such damage."

This plaintiff was in no way endangered, or embarrassed, or confused by any negligent act or omission on the part of defendant; she had thus no occasion for any sudden election between a threatened danger and possible escape; there was no emergency which called for haste; but, solely of and by reason of her own unprompted, voluntary and heedless disregard of plainly audible signals, and more distinctly visible and unmistakable evidence of an approaching train, she recklessly encountered the desperate risk she could not have been ignorant of.

SITTING: WALTON, EMERY, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

WISWELL, J. This case comes to the law court upon a report of the plaintiff's testimony with the stipulation that, if upon this testimony the action can be maintained, it shall be sent back for trial, otherwise a nonsuit is to be ordered.

About nine o'clock on the evening of July 17th, last, the plaintiff, a young woman of nineteen years of age, while walking on Main street, in the city of Biddeford, across the railroad tracks of the defendant corporation, was struck by a locomotive attached to a regular train on that road, and sustained certain injuries.

In order for her to recover for these injuries, it is incumbent upon her to prove negligence upon the part of the defendant corporation, and that no negligence upon her part contributed to the accident.

It is admitted that this crossing was near the compact part of the city of Biddeford, consequently the running of the train across this street at a greater speed than six miles an hour, unless there was either a gate or a flagman at the crossing, would be in violation of chap. 377, Laws of 1885, and in and of itself negligence. Although gates were maintained at this crossing, upon the night of the accident they were in temporary disuse because of work being done at that particular place, and were left open. And although a flagman was stationed at the crossing, a jury might be authorized to come to the conclusion from the evidence before us, that at the time and just before this train passed, he was not in a position to do the duty required and expected of him in warning travelers of an approaching train. Witnesses for the plaintiff have estimated the speed at which this train was running at from thirty to thirty-five miles an hour. So that as to the first proposition, which is necessary for the plaintiff to prove, we think there was sufficient evidence to entitle her to go to the jury.

But it is equally as important and necessary that the plaintiff should prove that there was no negligence upon her part which contributed to the result. In our opinion she has not only failed to do this but has shown an entire absence of all care.

A railroad track across a street or highway is a recognized place of danger. No person should cross it without taking such precautions as experience has shown are necessary in order to do so with safety. The standard of care required is such as ordinarily careful and prudent persons would exercise, having in view all the known dangers of the situation. This court, as well as the courts of most other states, has gone further than to establish a general standard of care required of a traveler in crossing a railroad track, and has laid down the rule that it is negligence *per se* for a person to cross a railroad track without first looking and listening for a coming train. *Chase* v. *Me. Cent. Railroad Co.* 78 Maine, 346.

The plaintiff was in the full possession of her senses of sight and hearing, and yet she says herself that she neither looked nor listened for an approaching train. If she had exercised the slightest care and had listened for a single moment, the noise of the rapidly approaching train would have given her ample warning; or, if she had looked before she had arrived at the track, she could have seen the train for a great distance, as she testifies upon cross-examination.

While the testimony gives no distances, the plan which is made a part of the case shows that while the plaintiff was walking along Main street toward the track, for a distance of at least eighty feet before coming to the track upon which this train was running, she had a plain view of the track in the direction from which it was coming for a great distance, obstructed only by a small gate-house which could only have shut off the view of a small portion of the track at any one time.

But the plaintiff's counsel, while admitting the general and well-established rule as to the amount of care required of a traveler in crossing a railroad track, and the particular duty in such a case of looking and listening, contends that the open gates at this crossing, where gates had long been maintained, relieved the plaintiff from the exercise of the care which would otherwise have been required. *State* v. *B. & M. Railroad*, 80 Maine, 430, and *Hooper* v. *B. & M. Railroad*, 81 Maine, 260, are relied upon in support of this proposition.

It is undoubtedly true that the fact of open gates is a circumstance which the traveler may very properly take into consideration; a person of ordinary care would do so to some extent, but it does not relieve the traveler from all care. As was said by Chief Justice PETERS in *State* v. *Railroad*, *supra*, "while the neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculations for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary."

Again it is said in that opinion: "Of course, full reliance cannot always be placed on an expectation that a railroad company will perform its duties, when there is any temptation to neglect them, because experience teaches us that it would not be practicable to do so. But such an expectation has some weight in the calculation of chances, greater or less according to the circumstances."

In both of the cases cited, the travelers were driving in a carriage, the view of the track was obstructed and the court held that a jury might be authorized in finding that the person injured, in each case, did look and listen. Here the plaintiff was walking, the view of the track was generally unobstructed, and the plaintiff testifies that she neither looked nor listened.

The weight that should be given to the negligence of a railroad company, in not properly operating its gates, depends to a very marked degree upon the circumstances of each case. A person approaching a railroad-crossing, in a carriage, with a view of the track obstructed, might, in the exercise of ordinary care, be led to rely upon the upright arms of a gate until it was too late to control his horse or to turn him aside; but it is difficult to see how a person walking, with a sufficiently plain view of the track, could be thus misled to such an extent as to come into collision with a rapidly moving train.

It is further contended in behalf of the plaintiff that this is a question which should be passed upon by a jury. Ordinarily the

question of due care and of negligence is for the jury. This is necessarily so when the facts bearing upon these questions are in dispute, or even when the facts are undisputed and intelligent and fair-minded men may reasonably differ in their conclusions. But it is not true where the facts are undisputed, and there is no evidence, or the evidence is too slight or trifling, to be considered by a jury. In such cases it is not only proper but it is the duty of the court to order a nonsuit. *Elwell* v. *Hacker*, 86 Maine, 416; *Railroad Co.* v. *Hefferan*, N. J. L. Atlantic Reporter, Vol. 30, p. 578.

In this case a jury would be authorized to come to only one conclusion, that the plaintiff was guilty of negligence which contributed to the accident.

Plaintiff nonsuit.

ANDREW G. RING, and another,

vs.

JAMES P. WALKER, and another.

Penobscot. Opinion May 10, 1895.

Deed. Easements. Exceptions and Reservations. Log Sluice.

An easement that is strictly appurtenant to other land of the grantor is incapable of existence separate and apart from the particular land to which it is annexed, there being nothing for it to rest upon.

But an easement that is not appurtenant to other land, such as may be held or conveyed independently by the owner of it, and without reference to other land of the grantor, may be regarded as a right or interest capable of being transmitted by deed.

The fact that the language of an exception or reservation in a deed contains no words of inheritance, such as "heirs," is not necessarily the criterion by which to determine whether the rights thus excepted, or reserved, are for the life of the grantor only.

The distinction between an "exception" and a "reservation," is frequently obscure and uncertain, and the two expressions have to a great extent been indiscriminately employed.

Whether a particular provision is intended to operate as an exception or reservation is to be determined by the character rather than by the particular words used.

A permanent easement, which may be construed as an "exception" from the thing granted, needs no words of inheritance.

The following language appeared in deeds from a grantor to his grantees, viz: "Reserving, however, the right of erecting a log sluice and flume between my mill and the mills of said grantees, and of planking against their said mill to form one side of said log sluice and flume." "Also excepting and reserving the right of running logs through the premises from the river and of erecting and maintaining a log sluice from the mill pond parallel and contiguous to the said granted mill and the said Treat's Mill about five feet in width on the east side of said granted mill." *Held;* that this language, taken in connection with the facts and circumstances surrounding the case, constituted an exception rather than a reservation; that it was not a mere personal right, or easement in gross, but an interest retained in the grantor which he could legally convey; and which was good without words of inheritance being mentioned in the exception. It was a right inheritable and transferable and not one limited to a lifetime.

The same rules of construction apply to a reservation or exception in a deed as to an express grant.

And a grant of a principal thing carries with it everything necessary for the beneficial enjoyment of that which was granted.

In the case at bar, the right reserved was to erect and maintain a sluice five feet wide, and to plank on to the side of one of the mills to form one side of the sluice. When the mills were burnt, it was found "necessary" to lay a foundation ten feet wider than the original sluice in order to support a sluice of the width mentioned in the exceptions in the deeds. *Held;* that in doing this the defendants could not be held in trespass, as they did no more than was reasonably necessary for the enjoyment of their rights.

AGREED STATEMENT.

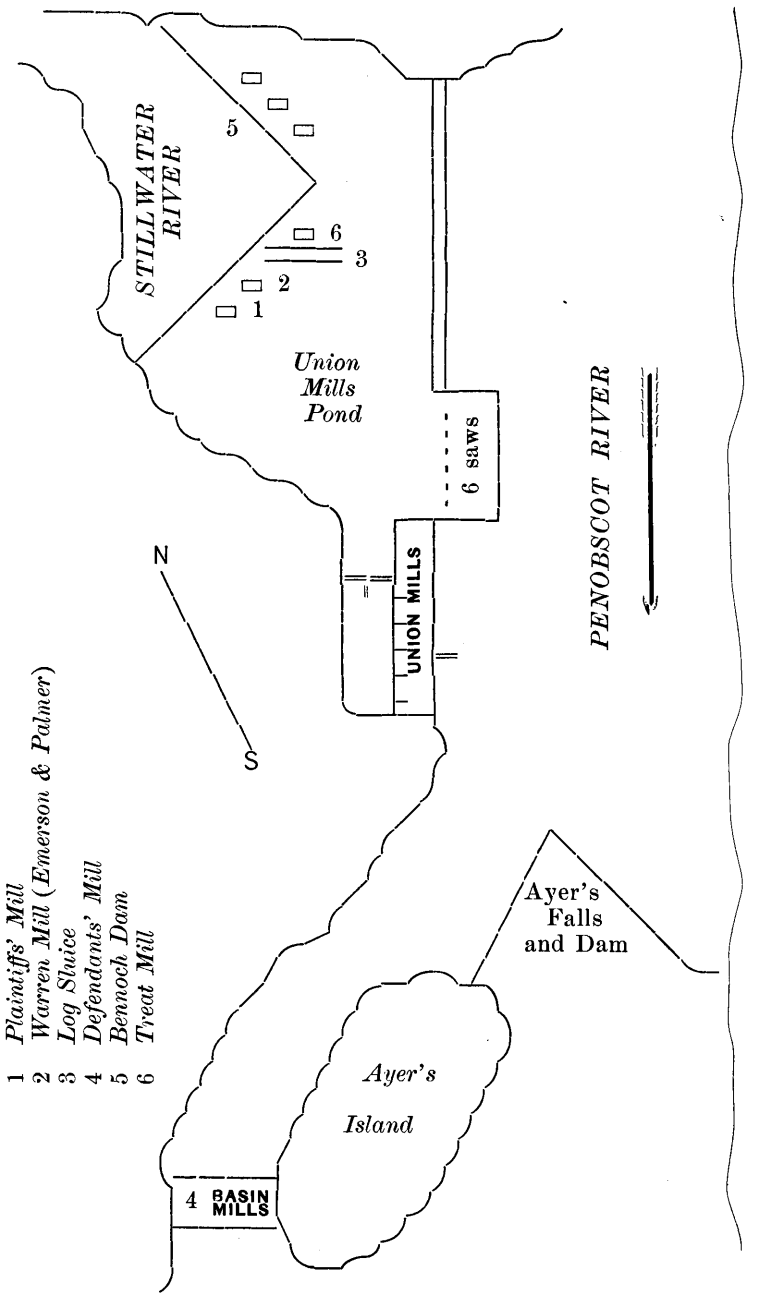
The case is stated in the opinion.

C. A. Bailey, for plaintiffs.

This right to a sluice was appurtenant to the lower property, not by virtue of anything in the reservation itself, but by legal intendment from its situation and relation to that property. But a way appurtenant to a particular lot cannot be used for any other. *Davenport* v. *Lampson*, 21 Pick. 72; *French* v. *Marston*, 4 Foster, 440; *Mendell* v. *Delano*, 7 Met. 180; *Green* v. *Canny*, 137 Mass. 64; *Moulton* v. *Faught*, 41 Maine, 298; *Dennis* v. *Wilson*, 107 Mass. 593.

Defendants are using this sluice to carry logs to Basin Mills, on a lot a mile below, on land never owned by Emerson, and to which this easement is not and cannot be appurtenant.

The reservation was made for the use of saw mills that might be built on the lower privilege, and resembles *Blake* v. *Clark*, 6 Greenl. 436, and *Moulton* v. *Trafton*, 64 Maine, 218. No


1 Plaintiffs' Mill
2 Warren Mill (Emerson & Palmer)
3 Log Sluice
4 Defendants' Mill
5 Bennoch Dam
6 Treat Mill
STILLWATER RIVER
5
6
3
2
1
Union Mills Pond
6 saws
UNION MILLS
N
S
PENOBSCOT RIVER
Ayer's Falls and Dam
Ayer's Island
4 BASIN MILLS

mills have stood on the lower mill site since 1876. Plaintiffs now own both the upper and lower properties — the servient and dominant estates. The easement would be merged if it had not ceased to be. The Emerson reservation is functus.

Mayo's reservation "as now had and enjoyed" of sluicing logs through the pond to the Basin Mills, "to said Mayo or his assigns," creates an easement in gross. *Amidon* v. *Harris*, 113 Mass. 59. As reserved by Mayo it was not appurtenant so long as he retained the right and did not own the Basin Mills. It was for his life only. *Curtis* v. *Gardner*, 13 Met. 457; *Sedgwick* v. *Laflin*, 10 Allen, 430; *Buffum* v. *Hutchinson*, 1 Allen, 60-61; *Dennis* v. *Wilson*, 107 Mass. 593; *Bean* v. *French*, 140 Mass. 229. Mayo died in 1876, and the right expired with him. Not an exception. *Ashcroft* v. *Eastern R. R. Co.* 126 Mass. 196.

The reservations below do not name any particular point, place or property, in connection with which the right reserved is to be exercised. They are purely easements in gross, to be exercised as the grantor will. Such easements have nothing to lean upon but themselves. They have not the advantage of a *terminus ad quem*.

But the Mayo reservation is of the right "as now had and enjoyed." The case finds that the mills which existed when that log sluice was built, and which supported it on either side were destroyed by fire; and that defendants have since entered upon the premises and built a structure fifteen feet wide, overlapping the space reserved for the old sluice five feet on either side — that is, occupying five feet of the old Emerson mill site, not before used for a sluice, making ten feet or more of that privilege taken, which is the trespass complained of in the first count of the writ; and five feet of the Treat privilege, which is the trespass complained of in the second count.

The sluice was then the necessary passage way for logs to the Union Mills below — Mayo supperadded this easement in favor of the Basin Mills — but, as we have said, it was subject to the limitations of that sluice way, no right of constructing some

other sluice, however necessary it might become, was in that reservation. *Hoskins* v. *Brown*, 76 Maine, 70.

When the grantor adds words "as now or heretofore used by me," or words of similar import, the inquiry is not as to what is necessary but what is in use at the time, and it is to the use and not to the necessity that the evidence should be directed.

If it becomes impossible to exercise a right reserved, the easement is extinguished. *Ballard* v. *Butler*, 30 Maine, 94; *Hancock* v. *Wentworth*, 5 Met. 446.

F. A. Wilson and C. F. Woodard, for defendants.

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

FOSTER, J. This is an action of trespass, brought to determine the legal rights of the parties in relation to a log sluice through what is called the Bennoch dam on the Stillwater river at Orono, and the sluicing of logs through the same.

The plaintiffs are the owners of all the mills and mill privileges on that dam on the west side of the river. The defendants are the owners of Basin Mills, so-called, on the Penobscot river, about a mile below the junction of the Stillwater with the main Penobscot river.

The log sluice is through and over the plaintiffs' premises, and is maintained and used by the defendants to get their logs, coming down the Stillwater river, through the plaintiffs' premises, and on toward their own mills below — about one mile from the Bennoch dam.

The plaintiffs deny the right of defendants to encumber their property with this sluice, or to drive logs through their premises.

The defendants claim this right, not by reason of any public right or use of the stream, but by virtue of a right vested in them under certain deeds of conveyance whereby this right has been reserved to them and those under whom they claim.

In order to obtain a proper understanding of the case, and as bearing upon the legal rights of the parties, it becomes necessary to state, somewhat at length, the following facts:

In 1829, William Emerson was the owner of two mill sites on the Bennoch dam, and also another mill site or privilege a little lower down the Stillwater river and extending to its junction with the Penobscot river. On October 20, 1829, he conveyed to Nathaniel Treat and others one of these mill sites, and in his deed, after a description of the premises, is the following: "Reserving, however, the right of erecting a log sluice and floom between my mill and the mills of said grantees, and of planking against their said mill to form one side of said log sluice and floom."

On November 1, 1830, he conveyed to John Warren and another the other mill site on this dam, and in his deed conveying the same was the following: "Also excepting and reserving the right of running logs through the premises from the river and of erecting and maintaining a log sluice from the mill pond parallel and contiguous to the said granted mill and the said Treat's mill, about five feet in width on the east side of said granted mill."

On June 15, 1833, the said Emerson conveyed to R. M. N. Smyth the mill privilege lying lower down the Stillwater, and in his deed conveying this privilege appears the following: "Also hereby quitclaiming all my right of running logs through the premises conveyed to Warren from the river above, and of erecting and maintaining a log sluice from the mill-pond about five feet in width on the east side of said Warren's mills, said sluice to be parallel with and contiguous to said Warren's mills and Treat's mills."

In the year 1834, said Smyth built a log sluice through the Bennock dam between the Warren and Treat mills according to the grant of the right in Emerson's deed to him. This sluice was wholly within the bounds of the premises conveyed by Emerson to Warren and another, except that the easterly side of it was formed by planking against the Treat mill. This sluice was used by the defendants and those under whom they claim by putting logs through it and running them to the Basin Mills from 1854 to the present time.

While the two mills stood, the log sluice was between them

and was planked up against each, the space being about five feet in width. In 1887, after these mills were burned and could no longer support the sluice, the defendants, against the protest of the plaintiffs, put in a log foundation about fifteen feet wide and extending five feet each side beyond the original sluice on to land which had heretofore been covered by the mills, and this structure has been continued by them ever since with the sluice resting upon it. The interior width of the sluice is now about the same as when the mills were standing, or about five feet. The rest of the fifteen feet now occupied by the sluice is necessary for the foundation to support the walls of the sluice since the mills or their foundation were destroyed.

The trespass complained of is in relation to the five feet upon each side of the original sluice, in building and maintaining the foundation which is necessary to support the sluice.

The question involved is whether or not the defendants have the right to use and maintain this sluice.

The plaintiffs have the same comprehensive ownership that Emerson had before he parted with any of his mills or mill privileges, excepting such rights as the defendants may have.

The Basin Mills were never owned by Emerson. They were erected by said Smyth on a lot about a mile below the Bennoch dam. There is nothing in the case to show in what year these mills were erected, although it must have been long after Smyth's purchase from Emerson of the other privilege, and long after the sluice was built.

In 1845, Courtlandt Palmer of New York, became the owner of the Basin Mills property, and he and his brother after him continued to own the same, with Gideon Mayo of Orono, as resident agent, until sold to Samuel Veazie April 27, 1863.

August 1, 1870, the heirs of Veazie conveyed the Basin Mills property to James Walker, the defendants' ancestor under whom they claim.

On January 22, 1852, the title to the Warren mill, subject to the exceptions and reservations in Emerson's deed of November 1, 1830, came through sundry conveyances to said Gideon Mayo, who was at that time the resident agent of the Basin

Mills property and of its owners. At about the same time Mayo became the owner of the other mill privilege and water rights lying between Bennoch dam and the Basin Mills, and through which the sluice extended for the purpose of conveying logs through the Bennock dam to Basin Mills.

On May 1, 1860, Mayo conveyed the Warren mill and privilege to one B. B. Farnsworth and another, closing the description as follows: "Being the same premises conveyed by William Emerson to James Huse and Nathaniel and John Warren, November 1, 1830, . . . together with all the other privileges and appurtenances of said mill and water power conveyed by said Emerson's deed, and subject to all the reservations and conditions thereof,"—but, "Reserving, however, the right as now had and enjoyed of sluicing logs through the pond to the Basin Mills to said Mayo or his assigns."

On June 9, 1862, Mayo conveyed to Palmer, who then owned the Basin Mills, the following: "Rights of flowage of dam on Ayer's Falls near the mouth of Stillwater river; also the log sluice and all rights, privileges and appurtenances connected with and belonging to the same, commencing at the Bennoch dam, so-called, and running thence through the Union mills' pond into the Basin."

In Palmer's deed to Veazie of the Basin Mills property those same rights were transferred to the said Veazie, and by his heirs to Walker, defendants' ancestor, in which deed appears this clause: "Ninth. Also the log sluice commencing at the Bennoch dam, so-called, and running thence through the Union mills' pond into the Basin, with all the rights and privileges thereof, and the right to maintain the same."

Now the contention of the plaintiffs is, that the reservations or exceptions which were made in and by the deeds of William Emerson to Warren and another and to Nathaniel Treat and others, in and of themselves, conferred no right upon anybody to build and maintain a sluice at the place designated for the purpose of putting logs through the same and thence to the Basin Mills; that the rights secured by these reservations or exceptions, being without words of inheritance, should be held as an ease-

ment in gross limited to the lifetime of the grantor, or, at most, as an easement appurtenant to the other mill privilege owned by Emerson at the time of making these conveyances, lower down on the Stillwater and subsequently conveyed by him to said Smyth.

If these exceptions and reservations are to be considered as strictly appurtenant to the lower mill privilege, they would, of themselves, confer no right to the defendants or their predecessor in title to put logs through this sluice to the Basin Mills. For an easement that is appurtenant is incapable of existence separate and apart from the particular messuage or land to which it is annexed, there being nothing for it to rest upon. But if these rights and privileges were such as Emerson could convey independently of his lower mill-site privilege then owned by him, then it follows that they were conveyed by him to Smyth, and through Smyth, as well as Mayo, and have come to these defendants.

It will not be necessary to consider whether these rights under other and different circumstances might or might not be held to be appurtenant to this other mill site or privilege, inasmuch as we think they were such as Emerson had a right to convey independently of such privilege, either as an exception of a part of the thing granted, or, an interest in land for profit, commonly termed in the books, profit *a prende in alieno solo*, as in *Engel* v. *Ayer*, 85 Maine, 448.

The fact that the language of the reservations and exceptions contains no words of inheritance, such as "heirs," is not necessarily the criterion by which to determine whether these rights were for the life of the grantor only. It is a well-settled rule of the common law, it is true, that to create an estate of inheritance in land by deed to an individual, it is necessary, as a general rule, to use the word "heirs," and that no other words will supply the place of that. *Curtis* v. *Gardner*, 13 Met. 459. But this rule is not applicable and has never been properly applied to an "exception" in the correct sense of the term, to an easement appurtenant to other land of the grantor, or to a right of profit in land. *Engel* v. *Ayer*, *supra*, and cases cited.

The distinction between an "exception" and a "reservation" is frequently obscure and uncertain, and has not always been observed, and the two expressions have to a great extent been indiscriminately employed. Moreover, a reservation is often construed as an exception in order that the obvious intention of the parties may be subserved. *Winthrop* v. *Fairbanks*, 41 Maine, 307; *Smith* v. *Ladd*, *Id.* 316; *Bowen* v. *Conner*, 6 Cush. 132. Whether a particular provision is intended to operate as an exception or reservation is to be determined by the character, rather than by the particular words used. *Perkins* v. *Stockwell*, 131 Mass. 529, 530.

As the technical words of inheritance were not used in the reservations and exceptions mentioned in the deeds from Emerson to Warren and Mayo, it by no means follows that the interest or easement created thereby did not extend beyond the lifetime of the grantors. If, in construing the reservations in question, we lay out of view the technical rule, and take into consideration the intention of the parties as disclosed from the facts and circumstances attending the transactions, as well as the objects to be accomplished, the language discloses a clear and unmistakable intention to except a perpetual right, inheritable and transferable, and not an easement in gross, or one limited to a lifetime.

The right to continue the use of the sluice was an almost absolute necessity, not only to the grantors, but to all subsequent owners of the premises. These rights were a part of the grantor's full dominion over the premises conveyed, and not, in effect, to be conferred on them by the grantees, as in *Ashcroft* v. *Railroad Co.* 126 Mass. 196. They were something which these reservations in effect excepted from the operation of the grant. In such cases the rule is well settled that a permanent easement may be made without words of inheritance. *Engel* v. *Ayer*, *supra*.

In *Kennedy* v. *Scovil*, 12 Conn. 326, the deed contained these words—"Always provided that this deed is given on condition that the grantors are to have and retain the privilege of conveying water from said dam similar to the one now in use," etc.,

without words of inheritance or limitation. The court said: "What did the parties intend by the reservation in question? And for the purpose of ascertaining the intention, it is proper to take into consideration the condition of the property, and the circumstances of the parties in relation thereto. . . . The objection is that the use is reserved to them without naming heirs and assigns. . . . It is true that the right is reserved to them without words of inheritance, and without naming their assigns. But it becomes material to inquire for what purpose the reservation was made."

The rule that the intention shall prevail over mere words is sustained by authority and good sense. In adopting and applying this rule, courts have frequently in effect treated such "reservations" as if they had been "exceptions" in the proper sense of the word. As before stated, the words "reserve" and "reserving," and "except" and "excepting" in deeds are often used interchangeably, and it is oftentimes difficult to determine which was intended except by a reference to the subject matter, and the surrounding circumstances. *Barnes* v. *Burt*, 38 Conn. 542. And this depends more upon the nature and effect of the provision itself than upon the words employed. *Gale* v. *Coburn*, 18 Pick. 397, 400. A way, or a right of way, reserved has often been treated as if it had been "excepted" out of the grant, and on principle we see no reason why this should not be done in the present case to effectuate the plainly manifested intent of the parties. *Winthrop* v. *Fairbanks*, *supra*; *Smith* v. *Ladd*, *supra*. In *Bowen* v. *Conner*, 6 Cush. 132, Shaw, C. J., says: "Upon principle it appears to us that this right plainly intended to be secured to the plaintiffs, can be legally secured in the manner adopted in this deed, treating the right secured as an 'exception.'"

In *Winthrop* v. *Fairbanks*, *supra*, it was said "that in giving constructions to instruments in writing, the intention of the parties is to be effectuated, and if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated. Hence, the distinction between an exception and a reservation

is so obscure in many cases, that it has not been observed; but that which in terms is a reservation in a deed is often construed to be a good exception, in order that the object designed to be secured may not be lost." *Wood* v. *Boyd*, 145 Mass. 176, 179; *Stockwell* v. *Couillard*, 129 Mass. 231, 233.

Can there be any doubt that, in the light of the facts stated, it was the intention of Emerson and so understood by his grantees, to retain a permanent easement or interest in the premises granted as distinguished from a mere easement in gross, temporary and personal? His subsequent conveyance of this easement to Smyth is indicative of the intention with which it was created. Moreover, in his deed to Warren and another the language used is not only "excepting and reserving" the right, but of "erecting and *maintaining*" the sluice.

Whatever may be said as to the intention of Emerson in reference to excepting these rights from his grant, with still greater force may it be applied to the conveyance from Mayo wherein he conveys to Farnsworth "subject to all the reservations and conditions," named in Emerson's deed, and "reserving however the right as now had and enjoyed of sluicing logs through the pond to the Basin Mills to said Mayo or his assigns."

The right as then had and enjoyed is the same which the defendants and their predecessors have exercised. This right was not only to Mayo but to his assigns. And here in ascertaining the intention of the parties, the circumstances of the case are to be taken into consideration,— the use made of the property,— the condition as well as the situation of the Basin Mills property and its dependence upon this right to obtain a stock of logs.

With all these facts and circumstances considered, the "reservation" should be considered in the nature of an exception, retaining in the grantor something out of the thing granted which remained in him, a right inheritable and transferable, not a personal easement limited to a lifetime, nor one strictly appurtenant to other property of the grantor and existing only in relation to it,— a right which was subsequently conveyed by him to the owners of the Basin Mills property by his deed to

Palmer of June 9, 1862, wherein he conveyed the log sluice, and all rights, privileges and appurtenances connected with and belonging to the same, commencing at the Bennoch dam and thence running through the Union Mills pond into the Basin.

As a reservation, in the strict sense of the term, it would have died with the grantor; but the necessities of the Basin Mills property would still continue notwithstanding his death. What reason, therefore, in view of that necessity should the parties have had in making the existence of this easement dependent upon his life, and not upon the continuance of the necessity so long as that might last, and whoever might become the owner of the Basin Mills?

It might afford some light upon the intention of the parties were we to consider the use made of this sluice, not only by the predecessors in title of the defendants, but of all parties affected by such use and owning the property through which it ran.

From 1854 down to 1887, when the Warren and Treat mills were destroyed by fire, this sluice was used in the same manner as it had been by the defendants' predecessors, without any question on the part of anybody.

As was remarked in *Smith* v. *Ladd*, *supra*, "the intention of the parties to the deeds containing the reservations mentioned is too manifest to be misunderstood." *Moulton* v. *Trafton*, 64 Maine, 218.

The case finds that the mills which existed when the log sluice was built, and which supported it on each side, were destroyed by fire in 1887, and that the defendants have necessarily had to build a foundation about ten feet wider than the original sluice, overlapping the space reserved for the old sluice five feet on either side, and this is the trespass complained of.

The justification which they present is that, in the original reservation or exceptions of Emerson, the right retained by him was to erect and *maintain* a sluice, and that it has become necessary, as the case shows, to take this amount of space, since the destruction of the mills, to "maintain" the sluice.

It is undoubtedly familiar law that the same rules of construction apply to a reservation or exception in a deed as to an express

grant. *Blake* v. *Madigan*, 65 Maine, 522, 529; *Ashcroft* v. *Eastern Railroad*, 126 Mass. 196, 199.

Moreover, it is an established rule of construction that the grant of a principal thing shall carry with it everything necessary for the beneficial enjoyment of that which is granted. *Hammond* v. *Woodman*, 41 Maine, 177; *Gray* v. *Water Power Co.* 85 Maine, 526, 530; *Butler* v. *Huse*, 63 Maine, 447, 453. Thus, the grant of a "mill site" conveys by implication the water power, and the right to maintain a dam for the beneficial appropriation of the water. *Stackpole* v. *Curtis*, 32 Maine, 383. So where the use of a thing is granted, everything essential to that use is granted also, and there is an implied authority to do all that is necessary to secure the enjoyment of such easement. *Pomfret* v. *Ricroft*, Wm. Saund. 323, note 6; *Prescott* v. *Williams*, 5 Met. 429; *Prescott* v. *White*, 21 Pick. 341; *Warren* v. *Blake*, 54 Maine, 276, 286.

The case of *Prescott* v. *White*, *supra*, was where the owner of a mill to which there had been attached a raceway or artificial canal for conducting off the water, and without the free and unobstructed current of which the mill could not be worked, and such canal passed through the land of another, it was held that the owner of the mill had the right to enter upon the land through which the raceway passed and to clear out the same, doing no unnecessary damage. The language of Shaw, C. J., in delivering the opinion of the court is this: "When the use of a thing is granted, everything is granted by which it may be enjoyed. It follows as a necessary consequence, that the non-appearing grant carried with it to the grantee the right to do all necessary and proper acts to keep the raceway in a condition fit for the purposes for which it was intended. If it passes through the grantor's land, it carries an implied authority and license to enter upon the land to examine and clear the canal in a reasonable and proper manner, and of what is reasonable, the usual and customary mode is good evidence." As bearing upon this question the following authorities may be cited: *Richardson* v. *Bigelow*, 15 Gray, 154, 157; *Baker* v. *Bessey*, 73 Maine, 472,

478; *Prescott* v. *Williams*, 5 Met. 429; *Hammond* v. *Woodman*, 41 Maine, 177, 203.

It is a rule of law that the one who enjoys the benefit of an easement in the premises of another must be at the expense of maintaining it. Easements impose no obligation, as a general rule, upon those whose lands are thus placed in servitude, to do anything. *Taylor* v. *Whitehead*, 2 Doug. 745; *Richardson* v. *Bigelow*, 15 Gray, 154.

In the present case, the destruction of the mills which formed one of the chief supports of the sluice was in no way attributable to the defendants or their predecessors in title. Nor is there any intimation, from the facts disclosed, that in building the present foundation anything more was done than was reasonably necessary to support the sluice, which is of the same interior dimensions as that mentioned in the deeds to which we have referred, or that it was done in an unreasonable manner, (*Richardson* v. *Bigelow*, 15 Gray, 154, 157,); but, on the contrary, the case shows that the extra five feet in width upon each side were "necessary for the foundation to support the walls of the sluice since the mills or their foundations were destroyed." No illegal invasion upon the property of the plaintiffs is shown.

Judgment for the defendants.

MARY E. STEVENS *vs.* JONATHAN B. GORDON, appellant.

Kennebec. Opinion May 10, 1895.

Trespass. Trover. Possession. Title in Third Party. Deed. Way.

In an action of trover for the value of grass cut from that side of a highway next to plaintiff's farm, the question does not necessarily involve the legal title to the land, but only the possession.

Mere possession of land is sufficient to sustain an action of trespass *quare clausum*, against a person having neither title nor possession; so of trover for the value of grass cut from such land.

The possession of personal property carries with it the presumption of title and enables the possessor to maintain trover against any person except the rightful owner.

And it is no defense in such action to set up title to the land in some third

person unless the defendant can justify his acts by authority from such party.

A motion for a new trial cannot be considered when there is not a full report of the evidence.

ON MOTION AND EXCEPTIONS.

The plaintiff having obtained a verdict in the Superior Court, for Kennebec county, in this action, which came into the court on appeal from a trial justice, moved for a new trial and also took exceptions.

The case appears in the opinion.

A. M. Goddard, for plaintiff.

Loring Farr, for defendant.

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

FOSTER, J. This is an action of trover for the value of a small quantity of grass grown on the side of the road running between the farms of plaintiff and defendant, and which was cut and hauled away by the defendant. The title to the grass is the question in controversy.

The case comes before us on exceptions and motion for a new trial.

The motion cannot properly be considered, inasmuch as from an inspection of the evidence as reported it is not full and complete, and the certificate of the stenographer shows that it is only a portion of that given at the trial.

The exceptions relate to the admissibility of certain evidence, and to statements of the presiding judge in his charge. As bearing upon these exceptions, the case shows that a rangeway, eight rods wide, running east and west and laid out on the plan of the original proprietors of the Kennebec Purchase, at one time separated the respective farms now owned by plaintiff and defendant.

The road which now divides these farms was laid out four rods wide, taking the north half of the rangeway.

The plaintiff introduced in evidence a warranty deed which

bounded her land "on the south by the road" in question. By the terms of this deed the grant extended to the center of the road. *Oxton* v. *Groves*, 68 Maine, 371; *Low* v. *Tibbetts*, 72 Maine, 92. Being a warranty deed, the plaintiff's title, in the absence of evidence to the contrary, is presumed to be co-extensive with the grant, or to the center of the road.

The grass sued for was cut on the northerly side of this road, and upon land to which the plaintiff had *prima facie* title by deed.

But the defendant contends that the plaintiff's grantor owned only to the north line of the road and could not give title to the center of it; and in support of this contention puts in evidence two deeds in the chain of plaintiff's title running to previous owners of the plaintiff's lot, wherein the road was excluded.

The mere exclusion of the road in these deeds does not of itself rebut the plaintiff's *prima facie* title so as to defeat this action, for the plaintiff claims title to the land over which this road was laid, by adverse possession acquired by the plaintiff's predecessor in title long prior to the laying out of the road.

The evidence shows that one Swanton, who was a predecessor in title, before the road was laid out or built had occupied and cultivated the entire width of the present road, and that what is now the road was included in his field; and that the dividing line between him and the defendant's grantor was where the south side of the road now is; and that the wall along the north line of the road was built by Swanton after the road was constructed.

Such being the position of the plaintiff, it was allowable for her to show that Swanton and all his successors in title had openly, notoriously and peaceably possessed, cultivated and enjoyed the produce of the north side of this road, not however, interfering with the general rights of the public, until the occurrence in 1892, which is the subject of this suit.

The plaintiff had the right to show possession, which is some evidence of title, and in the absence of all other is evidence enough of title. *Brookings* v. *Woodin*, 74 Maine, 222.

This evidence of uninterrupted and undisputed possession,

cultivation and improvement for so long a period of years had an important bearing from the fact that the *locus* is directly in front and in plain view of defendant's house. He admits knowledge of these acts of the plaintiff and her predecessors in title, and that until 1892 he neither questioned their right nor asserted any in himself.

This action of trover does not necessarily involve the legal title to the land, but only the possession. Mere possession of land is sufficient to sustain an action of trespass *quare clausum* against a person having neither title nor possession. *Brookings* v. *Woodin*, *supra*. The plaintiff being in possession of the land, as the evidence shows, could have maintained trespass against any person who could not show a better title. So the possession of personal property carries with it the presumption of title and enables the possessor to maintain trover against any person except the rightful owner. *James* v. *Wood*, 82 Maine, 173, 177, and cases cited.

The plaintiff was in possession of the land and had the choice of actions, trespass *quare clausum*, or trover for the value of the grass severed from it.

Nor could it have availed the defendant to set up title to the land in some third person unless he could justify his acts by authority from such party. *Fiske* v. *Small*, 25 Maine, 453. This he did not attempt to do.

Therefore, as all the excluded deeds were offered, not for the purpose of proving title in the defendant, or in any person under whom defendant claimed to justify his acts, but for the purpose of showing title in a stranger, they were properly excluded.

The answer to the question propounded to Joseph H. Williams as to what land passed under the description "rest and residue," in some of the above named deeds, was rightly excluded. It was in relation to deeds that were irrelevant to the case. If the deeds were not admissible the question was of no importance. Moreover, there being no latent ambiguity in the deeds, they were not subject to explanation by parol testimony. If there was any ambiguity it was patent, and an examination of the deed to which the question related shows that it could have been

readily removed by an examination of the other deeds referred to therein. They should have been produced or accounted for before any oral testimony would have been admissible.

There are numerous exceptions taken to certain detached portions and sentences from the charge of the presiding judge. It is unnecessary to consider each one separately. A part of them relate to the question of title by adverse possession, — a title acquired prior to the location of the road in question, and taken in the connection in which they stand, there does not appear to be anything objectionable in them. These instructions were as favorable to the defendant as he could expect. The defense was allowed great latitude in the introduction of evidence tending to show title to the land in a stranger, and under whom there was no pretense that the defendant could justify. Upon this point the judge said: "The introduction of a deed which would simply negative the fact that she or her immediate predecessor in title owned to the center of the road, or in other words, proving negatively by a single deed that she did not by that deed get the title, would not be sufficient to dispossess her of the title. But it must be by clear and absolute proof of title in another party." This certainly was more favorable to the defendant than he was entitled, especially when not justifying or claiming under such other party. Again, the exception to the remark of the court, that "both counsel in argument claimed that the road was laid out upon the northern side of the rangeway," cannot be sustained. If the position of counsel was not correctly stated by the court, attention should have been called to it at the time, that the court might have corrected it.

Nor is there anything in the other exceptions which requires any extended consideration. We see nothing in them that requires any revision at the hands of this court.

Motion and exceptions overruled.

FRANCES A. HALL, appellant,

vs.

ARTHUR C. PERRY.

Knox. Opinion May 14, 1895.

Will. Testamentary Capacity. Evidence. Expert.

To establish a will, contested on the ground of the want of testamentary capacity it must appear that the testatrix was a person of "sound and disposing mind;" that she had mental capacity sufficient to enable her to understand the business in which she was engaged. A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds. It exists when the testator can recall the general nature, conditions and extent of his property, and his relations to those to whom he gives as well as to those from whom he withholds his bounty. There must be active memory enough to bring to mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them and form some rational judgment in relation to them.

But mere intellectual feebleness must be distingushed from unsoundness of mind. A person may be incapacitated by age and failing memory from engaging in complex and intricate business, and yet be able to give simple directions for the disposition of property by will. Great age may raise doubt of capacity so far as to excite the vigilance of the court, but it not only does not constitute testamentary disqualification, but rather calls for the protection and aid of the court to further its wishes. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due his infirmities.

In this case a woman, seventy-eight years of age, made a will giving her homestead to her adopted son. The will was contested by her daughter and only child. *Held*, that after a careful examination of all the evidence, it is the opinion of the court that the mental capacity of the testatrix was not devoid of any element requisite to make a valid will. The internal evidence afforded by the will itself is not only no impeachment of her testamentary capacity, but rather a confirmation of it. The leading provision of the will in which she gives the homestead to her "adopted son" appears to have been in conformity with a desire which she had long cherished, and a purpose which she had declared, long before the execution of the will. She may have been childish, changeable, impatient and sometimes inconsiderate; her judgment in relation to the value of property may not have been the most reliable and her mind may not have been vigorous enough to grasp all the features of a complicated transaction; but all this may be said of multitudes of elderly people whose competency to manage simple and ordinary kinds of business is never questioned by their acquaintances.

It is proper for the family physician to express an opinion upon the actual condition of his patient's mind, but not competent for him to give an opinion upon the direct question of her capacity to make a will. An expert should not be required thus to invade the province of the court and jury. Capacity to make a will, or what in any case shall be the standard of legal capacity, is a question of law.

ON REPORT.

The case appears in the opinion.

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

A. A. Beaton and R. R. Ulmer, for appellee.

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

WHITEHOUSE, J. This is an appeal from the decree of a judge of probate approving and allowing the will of Margaret B. Perry, of the following tenor.

"Know all men by these presents, that I, Margaret B. Perry of Rockland, Knox County, Maine, being weak in body but of sound and perfect mind and memory, do make, publish and declare this my last will and testament, and herein dispose of all my worldly estate in manner following, to wit:

"First: I order and direct my executor hereinafter named, to pay all my just debts and funeral charges, as soon as may be after my decease.

"Second: I give and devise to my adopted son, Arthur C. Perry, for, and during the term of his natural life, the homestead upon which I now live, situate on Ocean street, in the city of Rockland, Maine, to have and to hold the same to him and his assigns, with all the appurtenances thereto belonging, for and during the term aforesaid. And I request the said Arthur C. Perry, if ever disposed to sell his right in the house and lot aforesaid, to give the first refusal of the same to my daughter, Mrs. Hezekiah Hall.

"Third: I give and bequeath to my daughter, Frank, wife of Hezekiah Hall, the sum of three hundred dollars. ($300.00.)

"I also give and bequeath to my said daughter, Frank, the furniture now in the parlor bed room, in my said house, together with the carpet now on the parlor floor of said house.

"Fourth: I give and devise to my grand-daughter, Emma Perry, one of the children of said Arthur C. Perry, the reversion of the said house and lot, hereinbefore devised for life to said Arthur C. Perry. My intention being that on the death of said Arthur C. Perry, that said house and lot shall go to said Emma Perry, should she then be living. If she should not be living then I devise said reversion to the heirs of the said Arthur C. Perry.

"I also give and bequeath to the said Emma Perry the furniture now in the front chamber in my said house.

"Lastly: I give, bequeath and devise to my said adopted son, Arthur C. Perry, his heirs and assigns forever, all the rest, residue and remainder of my estate, real, personal or mixed, wherever found and however situated; and I do hereby appoint the said Arthur C. Perry, sole executor of this my last will and testament, hereby revoking all former wills by me made."

One of the reasons originally assigned for the appeal, was that the will was the result of undue influence on the part of Arthur C. Perry, but it is not seriously urged that there is sufficient evidence to establish this ground of appeal as an independent proposition.

The principal contention now is that the testatrix was not of sound and disposing mind at the time of the execution of the will admitted to probate. This objection is also duly set forth in the reasons of appeal, and the question is now to be determined by the law court, without the aid of a jury trial, upon the evidence adduced at the hearing before the judge of probate, or so much thereof as may deemed legally admissible, with certain additional facts agreed upon by the parties and presented in the report as a part of the evidence.

The burden is upon the proponent to prove that the testatrix, at the time of the execution of the will, had mental capacity requisite to make a valid will. It is incumbent upon him to show that August 24, 1892, Margaret B. Perry was a "person of sound and disposing mind;" that she had a mind sound enough properly to devise and bequeath her property; that she had

mental capacity sufficient to enable her to understand the business in which she was engaged when she made the will.

A "disposing mind" involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds; and a disposing memory exists when one can recall the general nature, condition and extent of his property, and his relations to those to whom he gives, and also to those from whom he excludes, his bounty. He must have active memory enough to bring to his mind the nature and particulars of the business to be transacted, and mental power enough to appreciate them and act with sense and judgment in regard to them. He must have sufficient capacity to comprehend the condition of his property, his relations to the persons who were or should have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their obvious relations to each other, and be able to form some rational judgment in relation to them. See *Robinson* v. *Adams*, 62 Maine, 369; *Barnes* v. *Barnes*, 66 Maine, 286; *Delafield* v. *Parish*, 25 N. Y. 9; 1 Red. on Wills, 121-135; Schouler on Wills, § 68.

But mere intellectual feebleness must be distinguished from unsoundness of mind. The requirement of a "sound and disposing mind" does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age, and failing memory, from engaging in complex and intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposition of property by will. Great age may raise doubt of capacity, so far as to excite the vigilance of the court, but it does not alone constitute testamentary disqualification. On the contrary, as stated in *Maverick* v. *Reynolds*, 2 Bradf. Sur. Rep. 360: "It calls for protection and aid to further its wishes, when a mind capable of acting rationally, and

a memory sufficient in essentials are shown to have existed, and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness."

When the mental capacity of Margaret B. Perry is subjected to these recognized and familiar tests, it is the opinion of the court, after a careful examination of the evidence reported and of the elaborate arguments of counsel, that it was not devoid of any element requisite to make a valid will. The internal evidence afforded by the will in question executed by her August 24, 1892, is not only no impeachment of her testamentary capacity, but rather a confirmation of it. The leading provision of the will in which she gives the homestead to her "adopted son," Arthur C. Perry, during his life, and the remainder to his daughter, whom she mentions as her "grand-daughter, Emma Perry," appears to have been in conformity with a desire which she had long cherished, and a purpose which she had explicitly declared long before the execution of the will. It is the uncontradicted testimony of two witnesses that, two years and a half before the will was made, she stated to them that she "intended for Arthur to have the house," and that it was her husband's wish that Arthur should have it when they were done with it. Nor is there anything in the evidence tending to show that the disposition of her property according to the terms of this will was unreasonable or unnatural. It nowhere appears that the "adopted son" was in any respect unworthy of the benefit bestowed upon him; and it may properly be inferred from the evidence that, as her daughter, Mrs. Hall, was happily married and provided with a comfortable home, the testatrix considered her situation in life so fortunate as to place her beyond any need of her mother's bounty. The request that Mrs. Hall should have the refusal of Arthur's right in the house in the event of a sale, with the bequests to her of the parlor furniture and the sum of three hundred dollars, was a kindly remembrance, apparently evincing not only natural affection, but a sense of justice towards her daughter. And all the provisions of the will, examined without the aid of extrinsic evidence, would seem to indicate an active

memory on the part of the testatrix and a rational comprehension of the condition of her property and her relations to the beneficiaries named in the will.

The physicial condition, manner of life and general conduct of the testatrix about the time of the execution of the will, and the particular circumstances attending it, all strengthen the proponent's view of her testamentary capacity. True, the will was made less than four months before her death, when she was nearly seventy-eight years old, with some of the infirmities of age upon her; but she was then living in her own house, and was deemed capable of managing her own household affairs, receiving such kindly assistance as might be rendered from time to time by her daughter, who lived next door, and by the school teacher who boarded with her for two years immediately preceding her death. She appears to have visited the office of the attorney, who drew the will, two or three times before it was executed; but it was drawn in accordance with directions given by her two weeks before, and again read to her in presence of the subscribing witnesses.

Two of these attesting witnesses give positive and unqualified testimony that they considered her of sound mind at that time, while the third, though not asked to state the opinion which he formed at that time, gives a circumstantial and detailed account of what transpired in his presence, from which it would appear that the conduct of the testatrix was entirely consistent, regular and natural.

The testamentary capacity of the testatrix being presumptively established, the proponent rested; and thereupon the contestant introduced eight witnesses, including the daughter who contests the will, her husband, and her sister-in-law, the most of whom had been intimately acquainted with Mrs. Perry for many years, and all of them during the later years of her life.

They represent her, respectively, as childish, forgetful and subject to dizzy spells; or as impatient, inconsiderate and unreasonable, as indicated by her urging Dr. Cole to hasten the removal of a sick niece from her house, by her exaggeration of the amount of labor she performed in her daughter's household,

and by her complaints that her aged sister, whose mind was very much impaired, "tired her all out;" as changeable, forgetful and liable to have "peculiar ideas," as instanced by her belief that Arthur Perry was able to hire a place at a large rental; as not sleeping well one night after talking with Arthur Perry; or as excitable, and subject to headache and dizziness; or as breaking down in consequence of the severe illness of her husband, eleven years before; or again as growing more feeble, childish and weak-minded during the last year of her life, her mind failing with her body. On cross-examination, however, one of these witnesses thought Mrs. Perry's condition was "about the same as other old ladies of her age."

The contestant, also, attaches great significance to the fact that, while there is in the will a bequest of "the sum of three hundred dollars" in favor of the daughter, in addition to the gift of the furniture in the parlor bedroom and of the parlor carpet, the schedule of assets appraised discloses a total value of one hundred and forty-one dollars and sixteen cents, of which only eleven dollars and sixty-six cents is money. Two of the subscribing witnesses to the will received the impression that she had three hundred dollars in some bank, but it appears from the testimony of the contestant and her husband, Captain Hall, that although the personal property inventoried all came into the possession of Captain Hall, and was found in his hands after the death of Mrs. Perry, no money or other property was found anywhere except that named in the inventory. It is, therefore, earnestly contended that Mrs. Perry was laboring under the delusion that she had three hundred dollars deposited in some bank, and attempted to bequeath that amount to her daughter, when in fact she was not possessed of a single dollar outside of the real estate devised to Arthur C. Perry and his daughter, valued at eight hundred dollars, and her household goods, and eleven dollars and sixty-six cents in money, appraised at one hundred and forty-one dollars and sixteen cents. It appears that her taxes were abated, and that her only means of support were derived from a pension of twelve dollars a month during the later years, and eight dollars a month during the earlier years

following her husband's death, with such sums as she may have received from boarders; and while it does not seem from the evidence highly probable that she had three hundred dollars in money at the time of her death, it is not conclusively established that she did not have it at the time she made the will. Again, it is not an extraordinary hypothesis to assume that she greatly overestimated the value of her household furniture and other personal effects, and believed that at least three hundred dollars would be realized from the sale of these after the specific bequests to the daughter and Emma Perry had been set apart. The apparent inconsistency is susceptible of other plausible explanations; but the existence of the discrepancy is not so indubitable that it can safely be accepted as conclusive proof of an insane delusion; and, in any event, its significance would not be so strong that it might not be overcome by the great weight of other evidential facts and circumstances tending strongly the other way.

Nor do we think that the testimony of Dr. Estabrook, who was called as the family physician of the testatrix, and allowed to give his opinion as an expert respecting her competency to make a will, is entitled to the weight which the contestant would give it. It appears that he was not consulted by her professionally for more than a year prior to the execution of the will; but he states that "she has been a feeble woman, suffering from uterine trouble peculiar to women," and was "in a feeble condition of mind." When required in direct examination to state if she had "sufficient intelligence to make a will," he says: "I don't know as I can; I am not quite prepared for it coming in that shape;" and when pressed to answer, assuming her condition to be as he had described it, and that she had undertaken to dispose of property that she did not possess, he properly replied in substance that he did not understand "what the condition of a person's mind should be to be rendered competent to make a will." The learned counsel thereupon stated some of the principal requisites of testamentary capacity and the witness answered: "If she should give away somebody else's property, or property that was not her own, I should say she was not

competent." The counsel then said: "The question is, taking all these things into account, with your knowledge of her, her condition when you saw her, what the witnesses say of her loss of memory, her increased impatience, her treatment of her daughter, and her frequent dizziness, now, whether taking all those facts into account, she had such competency as I have described, and was capable of making a will?" Ans. "I think not."

It is plain, however, that if the element of "giving away property not her own," be eliminated, there are no facts stated by this witness in his description of Mrs. Perry's physical and mental condition, that will warrant his conclusion that she did not have mental capacity to make a will.

But though the witness was authorized as a family physician to express an opinion upon the actual condition of his patient's mind (*Fayette* v. *Chesterville*, 77 Maine, 28), it was not competent for him to give an opinion upon the direct question of Mrs. Perry's capacity to make a will. A question calling for a direct expression of opinion from an expert, whether a testator had "sufficient intelligence," or "mental capacity," or was "competent" to make a will, is not the appropriate form of inquiry, to elicit opinion evidence which will most satisfactorily enlighten and assist the court and jury in determining that issue. An expert should not be required thus to invade the province of the court and jury. What is sufficient capacity to make a will is not simply a question of fact; it is rather a conclusion which the law deduces from certain facts proved or admitted as premises. As stated by the court in *Fairchild* v. *Bascomb*, 35 Vt. 398: "A witness may not correctly apprehend the rule of law, and if he uses such expressions, may be misled himself, or may mislead the jury. Hence the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter;" or to use the language of the court in *Crowell* v. *Kirk*, 3 Dev. 358, "to state the degree of intelligence or imbecility the best way he can." So in *Kempsey* v. *McGinnis*, 21 Mich. 123, the

court by Christiancy, J., use this language: "Capacity to make a will, or what in any case shall be the standard of legal capacity, is always a question of law. The physical or mental condition from which that capacity may be deduced, is a question of fact which may be shown by evidence of physical or mental manifestations, and the opinions of professional witnesses as inferences of fact thereon. There has been some looseness in the courts in permitting opinions to be given upon a testator's capacity, . . . but that mode of putting the question is objectionable."

In *May* v. *Bradlee*, 127 Mass. 414, it is said the court "might properly refuse to allow the question to be put in that form, because it called for an opinion upon a mixed question of law and fact, and not upon a question of medical science only. What degree of mental capacity is necessary to the making of a will is a question of law, which was not to be determined by the witness, and as to which he could not be assumed to be informed, unless the legal requisites of testamentary capacity were stated in the interrogatory, or otherwise explained to him." But it is obvious that even with such an explanation, incomplete as it would ordinarily be, when hastily given under such circumstances, a medical expert could not instantly grasp and fully appreciate, all of the legal requisites of testamentary capacity, and that form of inquiry would still be objectionable. The more simple and better form of inquiry "relates to mental soundness or unsoundness, with reference as near as may be, to the particular act or kind of act in dispute." Schouler on Wills, § 208. See also Lawson on Expert and Op. Ev. 137, Case IV.

But the proponent presents in rebuttal nine witnesses, neighbors and friends of Mrs. Perry, and with one exception all disinterested and not related to either of the parties.

Their combined testimony covers a period of nearly thirty years prior to her death, and comprises the condition, conduct and habits of life of Mrs. Perry in their varied relations with her of a business and social character during all this time. They discovered no material change in her appearance or manner, and no peculiarities in her conversation or conduct. One

witness set out blackberry bushes in her garden late in the fall after the will was made in August; she waited upon him, "got the things" for him, and directed him how to perform the work, and he followed her directions. None of them observed anything "particular" or "peculiar" in her habits not characteristic of other ladies of her age and experience in life. She may have been more forgetful of the present than of the past, and may frequently have forgotten what she had just before said or done. She may have been childish, changeable, impatient and sometimes inconsiderate; her judgment in relation to the value of property may not have been the most reliable, and her mind may not have been vigorous enough to grasp all the features of a complicated transaction; but all this may be said of multitudes of elderly people whose competency to manage simple and ordinary kinds of business is never questioned by their acquaintances and friends. "Weakness of memory, vacillation of purpose, credulity and vagueness of thought, may all consist with adequate testamentary capacity under favorable circumstances." Schouler on Wills, § 70. "It is one of the painful consequences of extreme old age," says Chancellor Kent, "that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due his infirmities." *Van Alst* v. *Hunter*, 5 Johns. Ch. 148.

Appeal dismissed. Decree of probate court affirmed.

JOHN BIRD COMPANY *vs.* FRANCES E. HURLEY.

Knox. Opinion May 21, 1895.

Partnership. Husband and Wife.

Much more evidence is necessary to establish the existence of a business partnership between husband and wife, than between persons not in that relation.

Acts of a wife in assisting or advising her husband in business, such as keeping the books, making purchases and sales, examining, paying or contesting bills, advising for or against particular transactions, etc., and her frequent use of pronouns in the possessive case, when speaking of the business, are

not of themselves sufficient to establish her actual partnership interest against her explicit denial.

ON MOTION.

Assumpsit on an account annexed to the writ, in which the balance claimed is $552.19.

The action was originally against William P. Hurley and Frances E. Hurley, co-partners under the firm name of the Rockland Lime Company. The defendant, William P. Hurley, having been adjudged an insolvent debtor, and the insolvency proceedings being still pending, the plaintiff discontinued as to him.

Frances E. Hurley, the other defendant, pleaded the general issue, and filed an affidavit in due form denying the co-partnership.

The case is stated in the opinion.

C. E. and A. S. Littlefield, *Mervyn Ap Rice*, with them, for plaintiff.

W. H. Fogler, for defendant.

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

EMERY, J. Some person or persons were carrying on a lime-burning and general store business on certain premises in Rockland, under the business name or style of the "Rockland Lime Company," at the time the plaintiff sold to him or them the bill of goods sued for in this action. William P. Hurley was admittedly carrying on that business under that name, either alone or with a partner or partners. He ordered these goods for use in the business, and they were charged upon the plaintiff's books to the "Rockland Lime Company." Afterward, William P. Hurley, upon petition of the plaintiff and other creditors, was adjudged an insolvent debtor, and his business affairs were wound up in the Insolvency Court. The plaintiff's claim there was the same as sued for here, and was duly proved against William P. Hurley in that court. Later still, the plaintiff claimed to have discovered that one Frances E. Hurley, a woman, was in fact a partner with William P. Hurley in the

business, at the time the latter ordered the goods, and this suit is brought against her as such partner.

It nowhere appears in the evidence that the plaintiff, or its selling agent, at the time of the sale, supposed Frances E. Hurley to be a partner in the business, or sold the goods upon her credit. Whatever testimony was offered in support of that proposition was ruled to be incompetent. It had not been shown that any of the plaintiff's agents at this time of the sale were informed of any circumstances tending to prove her partnership interest. The plaintiff, therefore, could recover only by proving that Frances E. Hurley was in fact such partner.

The evidence introduced by the plaintiff upon this issue of actual partnership, tends to prove many and various circumstances, notably acts and declarations of Frances E. Hurley, which are claimed by the plaintiff to be sufficient to establish her partnership interest. She was the owner of the real estate used in the business. She mostly kept the books. These books showed a personal expense account of William P. Hurley, and one of Frances E. Hurley. She was often about in the store, on the wharf, and at the kiln. She often expressed her opinion as to the expediency of different transactions in the business. She personally directed matters at times, as by ordering material for the business, or selling the product. She occasionally questioned bills presented, and assumed to adjust claims for or against the business. She was personally urgent that there should be a union of the lime-burners. She indorsed with her individual name several notes given in the business. She often signed the business name to letters, checks and receipts, sometimes with her initials added, and sometimes without. She commonly, if not always, when speaking in or of the business, used the first person singular or plural, but there was no evidence that she ever said she was a partner, or said that she had any direct pecuniary interest in the business. It may be fully conceded, however, that enough circumstances, in kind and quantity, were shown to amply prove that Frances E. Hurley had a partnership in the business, in the absence of

any other relation between her and William P. Hurley which would equally well explain all these circumstances.

But Frances E. Hurley was all this time the wife of William P. Hurley, who admittedly was engaged in the business, and who had purchased these goods. We think that all she is shown to have said and done as to the business may have been evoked by a strong, but exclusively wifely, interest in her husband's affairs. Her various expressions of interest, and even proprietorship, were no more than are commonly used by farmers' wives when speaking of the farm or dairy. As his wife, she was naturally interested in his business conduct and success. This interest would be excited, not only by wifely sympathy, but also by the fact that her own well-being would be affected by his business success or failure. If she was, as appears in this case, a woman of energy and business capacity, she would naturally advise, check and assist her husband, and even carry on more or less of the work herself. All that she did in this way would not alone raise a presumption that she was in his regular employ, and entitled to salary or wages. *Holmes* v. *Waldron*, 85 Maine, 312; nor any presumption that she was entitled to a share of the product. *Sampson* v. *Alexander*, 66 Maine, 182; *Berry* v. *Berry*, 84 Maine, 545.

The law cherishes the marriage relation. It recognizes the deep interest the wife should, and does, take in the business carried on by the head of the family. It regards and commends this interest as arising naturally from marital affection and duty rather than from any partnership in the business. This wifely interest is essential to the completeness of the marriage relation. Its quick and ample manifestation should not be restrained by any fear of danger therefrom to the wife or her separate estate.

Frances E. Hurley was a witness, and she explicitly and emphatically denied any partnership interest. Against her denial, the plaintiff's evidence falls far short of proving that she was a partner.

In Massachusetts, in 1861, under statutes generally similar to our present statutes, it was held that a business partnership between husband and wife was not contemplated by the statute,

and could not be formed so as to bind the wife. *Lord* v. *Parker*, 3 Allen, 127. But as this question was not raised nor argued here, we do not consider it.

Motion sustained. Verdict set aside.

WILLIAM S. GRANT, in equity,

vs.

WILLIAM W. BRADSTREET, and others.

Kennebec. Opinion July 18, 1895.

Equity. Will. Trust ex maleficio. Evidence.

The respondent, W. B., promised his brother, P. B., that if the brother would refrain from making a will and thus leave the respondent, as heir and next of kin, the sole inheritor of all his brother's estate, he, the respondent, would pay a certain annuity out of such estate to a certain relative of the two parties. *Held*; That such a promise, if acted upon, may be enforced in equity, the court abiding by the case of *Gilpatrick* v. *Glidden*, 81 Maine, 137.

The promise, however, must be proved by clear and convincing evidence, especially where the proof is oral and not in any part written.

The ground upon which equity obtains jurisdiction in such a case is that it would be a fraud for a party to avoid such a contract merely because it is not attended with the usual legal formalities, when the promise may be as certainly and safely proved in equity without such formalities.

In no ordinary case would the court be satisfied to rely on the oral evidence of one witness as sufficient to establish such an alleged promise, especially against the positive denial of the respondent, unless the testimony of the single witness be supported by a considerable amount of direct or indirect corroboration.

It was admissible for the complainant to show, in support of such a promise, that the donor shortly before his death and prior to the occasion when the promise was made, said to another person that he should direct the respondent to make a donation to the complainant; and such testimony has a very strong probative force, in aid of other evidence to prove the complainant's contention.

Gilpatrick v. *Glidden*, 81 Maine, 137, affirmed.

IN EQUITY.

On appeal and exceptions by defendants.

This was a bill in equity in which the plaintiff claimed that the late Peter G. Bradstreet of Gardiner, Maine, died intestate,

but before his death instructed his brother, William W. Bradstreet, who in case of such intestacy would be the sole heir to the property of the deceased, that an annuity of one thousand dollars annually to be paid according to the terms set forth in the bill in equity was given to the plaintiff out of the property of the intestate's estate, and that the defendant, Bradstreet, promised the deceased that if he would refrain from making any will he would see this annuity paid to the plaintiff out of the estate of the deceased; that in consequence of such promise the deceased did refrain from making his will, but that the said defendant, notwithstanding his promises has fraudulently refused to pay the annuity aforesaid. This bill in equity was brought against the defendant and the administrators of Peter G. Bradstreet to compel such payment.

All these allegations were denied by the defendants. An issue of fact was framed at the request of the plaintiff and submitted to a jury, who found for the plaintiff upon the issue submitted. The issue submitted was as follows:

"Did William W. Bradstreet promise Peter G. Bradstreet that if he, the said Peter, should die intestate, and he, the said William W., should succeed to the said property as the sole heir and next of kin, then he, the said William W., would, out of said property, pay to the plaintiff the sum of one thousand dollars a year during the natural life of the said plaintiff, in quarterly payments of two hundred and fifty dollars each, the first payment to be made December 1, 1889, and thereafterwards every three months? Answer. Yes."

(Bill) To the Supreme Judicial Court, in equity:

William S. Grant of Aberdeen, in the State of Washington, complains against William W. Bradstreet of Gardiner, in the county of Kennebec, and State of Maine, and also against Weston Lewis and Everett L. Smith, both of said Gardiner, administrators upon the goods and estate of Peter G. Bradstreet, deceased, late of said Gardiner, and says:

1. That on the thirteenth day of September, A. D., 1889, Peter G. Bradstreet was a resident and inhabitant of said Gardiner and possessed of a large estate, the amount of which the

plaintiff is unable to state, but he is informed and believes that said Peter was then possessed of real estate of the value of fifty thousand dollars and personal property of the value of, at least, two hundred and seventy-five thousand dollars.

2. That on said thirteenth day of September the said William W. Bradstreet was the brother of said Peter, and inasmuch as the said Peter had had no issue and then had no wife, father, mother, sister, nieces, nephews, grand-nieces, grand-nephews or brothers other than the said William then alive, the said William W. was then his expectant heir-at-law and next of kin, and in the event of the death of said Peter would have succeeded to all of his real estate in the State of Maine, and to all of his personal property.

3. That on the said thirteenth day of September the said Peter was suffering from a mortal sickness and was then conscious of the fact that he could not recover therefrom and that his death must soon take place. When so conscious and apprehensive of his early death, the said Peter on said thirteenth day of September gave to the said William W. directions as to what he desired the said William W. to do with his property in case he should die intestate and the said William should succeed to the same as sole heir-at-law and next of kin. And the plaintiff says he is informed and believes that the said William W., among other things, promised the said Peter and gave him to understand that if he, the said Peter, should die intestate and he the said William W. should succeed to the said property as sole heir and next of kin then he, the said William W., would out of said property pay to the plaintiff the sum of one thousand dollars a year during the natural life of the said plaintiff, in quarterly payments of two hundred and fifty dollars each, the first payment to be made December 1, A. D., 1889, and thereafterwards every three months as aforesaid.

4. And the said Peter, relying on the aforesaid promise and undertaking of the said William W., thereafterwards refrained from making a will, and on the seventeenth day of September, A. D., 1889, died intestate, leaving, as the plaintiff is informed and believes, real estate of the value of fifty thousand dollars

and personal estate of the value of at least two hundred and seventy-five thousand dollars; to all of which real estate the said William W., then succeeded as sole heir at law, and to all of which personal property, subject to the payment of the funeral charges, expenses of last sickness, debts and expenses of administration, the said William W. then became entitled as sole next of kin.

5. At a term of the probate court held at Augusta, within and for said county of Kennebec, on the second Monday of October, A. D., 1889, Weston Lewis and Everett L. Smith were duly and legally appointed administrators upon the goods and estate of the said Peter G. Bradstreet, and thereafterwards accepted said trust and qualified by giving bonds as the law directs. Although more than two years have elapsed since said appointment and qualification, the said administrators have filed no inventory and no account. But the plaintiff says he is informed and believes that the said administrators have paid large sums of money and delivered large amounts of securities to the said William W., on account of his distributive share of said estate, in all amounting to one hundred thousand dollars, and that after the payment of all debts and lawful charges there remains in the hands of said administrators personal property of the value of at least one hundred thousand dollars, to all of which the said William W. is entitled by law as next of kin.

6. The plaintiff says that the said William W., succeeded to all of said real and personal estate charged with the trust of paying to the plaintiff the sum of one thousand dollars a year in the manner and at the time aforesaid, and that he obtained and accepted title and right to the same subject to the fulfilment and performance of said trust and now holds the same, and will hold said property now in the hands of said administrators with the trusts imposed thereon by reason of the aforesaid promise and undertaking of him, the said William W.; yet the plaintiff says that he has requested the said William W., to pay to him the amounts so by said William W., to be paid as aforesaid quarterly from and after December 1, A. D., 1889, but the said William W., has refused so to do and further refuses to fulfill said trust

in the future or to make the plaintiff any payment thereunder now or in the future.

The plaintiff prays as follows:

1. That it may be declared that all of the estate of said Peter G. Bradstreet by said William W. Bradstreet, heretofore or hereafter received, and all of said estate in the hands of the administrators thereof to which the said William W. Bradstreet is now or may hereafter be entitled as sole heir and next of kin, is and shall be charged with a trust in favor of the plaintiff for the payment to him of the sum of one thousand dollars a year, in quarterly payments, beginning December 1, 1889, with interest on all overdue payments, to the date of the decree herein and thereafterwards during the natural life of the plaintiff.

2. That the said William W. Bradstreet may be decreed to pay to the plaintiff the several sums due to him under the aforesaid trust, being two hundred and fifty dollars due December 1, A. D., 1889, with interest thereon and a like sum with interest thereon at the end of each period of three months thereafter.

3. That it may be decreed that the plaintiff is entitled to have paid to him out of the estate of Peter G. Bradstreet, received and to be received by the said William W. Bradstreet, the sum of one thousand dollars a year in quarterly payments of two hundred and fifty dollars each, beginning December 1, A. D., 1889, for and during the natural life of the plaintiff, with lawful interest on such of said payments as are now overdue.

4. That the defendant, William W. Bradstreet, may be ordered and decreed to execute such deed or deeds of covenant and give such security for the performance thereof as shall insure to the plaintiff the payment of the aforesaid annuity of one thousand dollars a year, in the manner and at the times aforesaid, for and during the natural life of the plaintiff.

5. That the defendants, Weston Lewis and Everett L. Smith, may be enjoined and restrained from making any further payments from the estate of Peter G. Bradstreet, to the said William W. Bradstreet, until the said William W. Bradstreet shall perform the trusts hereinbefore set forth and as shall be by this Honorable Court declared.

6. That for the purposes all necessary or proper accounts may be taken, inquiries made and decision given, and that the plaintiff may have his costs of this suit.

7. That the plaintiff may have such further or other relief as the nature of the case may require and to this Honorable Court shall seem fit and proper.

Wherefore, the plaintiff further prays that each of said defendants may be required to make full, true and perfect answer, but not upon their oaths, answers under oath being hereby specially waived, to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated and they were severally and distinctly interrogated in relation thereto.

And further that this Honorable Court will issue its temporary injunction commanding the said Weston Lewis and Everett L. Smith to make no further payments of money or deliveries of property from the estate of said Peter G. Bradstreet, to the said William W. Bradstreet, his heirs, executors, administrators, attorneys, agents or assigns, during the pendency of this complaint; etc.

William S. Grant.

Dated November 2, A. D., 1891.

Heath and Tuell, complainant's solicitors.

(Exceptions.)

As bearing upon the issue submitted to the jury, the plaintiff introduced as a witness one William G. Ellis, who testified as follows:

"Q. Now whether or not shortly before the death of your cousin, Peter Bradstreet, you had a conversation with him in regard to William Grant, and if so, when was it? A. It was the Friday week before he died Tuesday, that is eleven days before.

"Q. State what the conversation was? (Objected to and admitted subject to exception.) A. He said he was going to tell William Bradstreet to look out for Peter Grant and William Grant and Eliza.

"Q. Did he state the amounts or sums? Was the statement any more specific than you have given it? A. No, I had no other talk with him after that in regard to that."

To the admission of this evidence the defendants seasonably excepted. Upon the testimony of Miss Fairbanks, the presiding justice charged the jury in part, as follows:

"Did she hear what she says she did? And if she did, what was the nature of that transaction? Was it the intention of Peter Bradstreet to leave it entirely to the discretion of William whether he should have it or not? or was it a request, like all the others, which William had cheerfully assented to and offered to carry out, if no will was made? As bearing upon this proposition, what was the real intention of the parties, if you find there was a reference made to the name of William Grant, as testified to by this witness? The testimony of William Ellis was received of what he heard Peter say eleven days before that, tending to illustrate the intention and characterize the reference to the name of William S. Grant, if made as claimed by Augusta Fairbanks. William Ellis says that eleven days before Peter Bradstreet said to him: 'I am going to tell William to look out for Eliza and Peter and William Grant.' You will have a right, I say, to consider that as tending to illustrate the nature of the transaction which Augusta Fairbanks testifies to. Would it tend to show that he was going to tell him to do it, as he did the others? or was he to leave it entirely to his discretion, and he might do it or not, as he saw fit? It would have some tendency to illustrate the nature of that transaction. This class of testimony in kindred inquiries is uniformly received. Questions often arise with reference to gifts made in contemplation of death, gifts of personal property which may be absolutely delivered at the time. Questions arise whether a given transaction, claimed to amount to a perfected gift, was or not intended as an absolute gift by the alleged donor; and in reference to such inquiries his previous declarations and letters written by him showing an intention to make provision for the alleged donee have uniformly been received. So, here, after hearing the testimony of the defense, to which I shall more particularly

call your attention,— after hearing the testimony of William Bradstreet as to what he said to his brother when first they had their interview in regard to these bequests, when he said that he told him he would do whatever he wished him to do, provided no will was made to interfere, you have a right to inquire what was the relation of those parties, what was the state of mind of Peter Bradstreet in regard to his brother. Did he have the utmost confidence that his brother would carry out any such request,—so that in his mind any request of his was substantially the same as a gift? If you find that to be so, then I say to you you would have a right to consider this evidence of William Ellis as having some tendency to establish the issue in this case, if you believe it to be true; because the situation would be closely analogous to the case of an ordinary gift depending wholly upon the express wish of the alleged donor.

It would have no necessary tendency, of course, in an ordinary case, to show that the conversation did take place; because a person may express a desire or intention to do a thing and entirely change it within the next eleven days; but when you find, if you do find, that the relation between them was such that any wish expressed by Peter Bradstreet would be carried out, and was so understood by the parties, fully and freely, as fully as could be expressed, that there was that confidential relation between them, you would have a right to consider this as having some tendency to show what the intention of Peter Bradstreet was. But, as I say, what tendency it does have is entirely for you, or what probative force it shall have is entirely for you, because parties have a right to change their minds, and may have done so."

To this portion of the charge the defendants seasonably excepted.

After the verdict of the jury, the presiding justice without argument ordered a *pro forma* decree for the plaintiff and the defendants filed exceptions, and also seasonably appealed from the *pro forma* decree.

H. M. Heath and O. A. Tuell, for plaintiff.

Counsel cited: *Towles* v. *Burton*, Rich. Eq. 146, S. C. 24

Am. Dec. 409, note p. 413; *Strickland* v. *Aldridge*, 9 Ves. 516; *Thompson's Lessee* v. *White*, 1 Dallas, 424, S. C. 1 Am. Dec. 252, note p. 258; *Browne* v. *Brown*, 1 H. & J. 430; *Gilpatrick* v. *Glidden*, 81 Maine, 137, p. 156. The English cases approved in *Gilpatrick* v. *Glidden*, go much further than our case. *Hallowell National Bank* v. *Marston*, 85 Maine, 488, in principle requires the sustaining our legal contention.

Orville D. Baker and L. C. Cornish, for defendants.

The plaintiff must prove fraud as the only basis on which he can recover; that is, that the defendant, William Bradstreet, solemnly promised his dying brother that he would pay the plaintiff an annuity of one thousand dollars, but after his brother's death he deliberately violated that promise in fraud of the plaintiff. To establish such fraud the plaintiff must prove clearly three propositions:

1. That failing any promise the deceased purposed to leave a formal will and by it to secure the plaintiff's annuity.

2. That, with a view to prevent the making of such a will, the defendant promised to see this annuity paid.

3. That the deceased, induced by such promise on the part of the defendant, refrained from making the will which but for such promise he would have made.

The advisory verdict given by the jury bears solely on the second of these three propositions, namely, whether or not any promise was made by the defendant to pay this annuity to the plaintiff.

The deceased was not influenced to refrain from making a will by any promise of the defendant.

It is not disputed that if the deceased intended to leave a will at all, and the defendant's promises, if made, induced him to forego the making of such will, then equity will afford the plaintiff relief; but the defendant claims that the undisputed evidence here shows that the deceased deliberately purposed not to leave a will under any circumstances; so that his not leaving a will was the result of a settled purpose on his part, and was not affected by anything the defendant promised or failed to promise, and that such a case would not fall within the rule es-

tablished for this State by *Gilpatrick* v. *Glidden*, 81 Maine, 137. As a matter of law, we submit that the burden is on the plaintiff to show not only that the deceased requested, and the defendant promised that the plaintiff's annuity should be paid, but, also, that without such promise a will would have been made, which would legally secure this annuity, and that the absence of such will was the direct consequence of the defendant's promise.

As to the decree in this case, it is clearly stated in the exceptions as signed by the presiding justice, and by the decree itself, that this was rendered wholly *pro forma* without argument by either counsel, and simply as another form of bringing the matter before the law court practically on report, so that they are to consider the case precisely as if presented to them in connection with the jury's verdict for a decree at *nisi prius*.

The defendant is, therefore, entirely unprejudiced by this decree, and the burden is still on the plaintiff to establish to the law court his right to his decree, with such aid as the verdict may bring to the conscience of the court.

As to the effect of the verdict upon this branch of the case, it is a well-settled principle of equity, which needs no citation of authority, that such verdict does not bind the court in the same way as the verdict of law, namely, to be sustained unless manifestly against the weight of testimony, but the verdict itself, together with the evidence, is all addressed to the good sense and conscience of the court; and it is for them to say not whether they approved or disapproved of the verdict, but whether the whole evidence in the case, with the verdict included, gives them such satisfaction upon the facts as would establish the plaintiff's case.

The testimony of Ellis must be excluded from consideration, and the verdict of the jury, being based in part upon illegal evidence, cannot be considered at all by the court.

The testimony of Ellis states that in a conversation with Peter Bradstreet, the deceased, held eleven days before he died, Peter said to him that "he was going to tell William Bradstreet to look out for Peter Grant and William Grant and Eliza."

Now, the defendant claims that this evidence shoots wholly wide of the point to be proved, and is not admissible on any legal theory.

The sole issue for the jury was whether the defendant did or not promise the deceased that the plaintiff, William Grant, should receive an annuity out of Peter's estate. This promise if made, at all, was made on Friday, the 13th of September, 1889. There is no pretense on the plaintiff's part or in the evidence that such promise was made at any other date, but the alleged conversation with Ellis took place just one week before, namely, Friday, September 6th, and, at most, was only an expression of a then existing intention on the part of the deceased to make some provision for the plaintiff, or rather to tell the defendant to make some such provision. The only condition under which such evidence could be legally receivable is where the point to be proved lies not in the acts done or communicated by the deceased, but solely in the intent with which they are done or communicated.

The degree of proof necessary: It is submitted that in a case like this, addressing itself to the equity of the court, and practically creating a will where the deceased has purposely refrained from making one, the burden of proof rests strongly upon the plaintiff, and all necessary facts must be shown by clear and convincing proof which shall leave a moral certainty in the minds of the court. Such a case, we submit, demands much more than a mere assertion of a single witness who had no interest to remember, contradicted by the evidence of the party whose duty it was to know, and unsupported by a single collateral fact or witness.

Now, in the case at bar, where the plaintiff has produced no written wish of the testator, will not the court require, if not the same formality, at least the same overwhelming certainty of proof as the common statutes of the land require, even when the testator's own hand has fixed his wishes in writing?

The doctrine of *Gilpatrick* v. *Glidden*, is at best a somewhat daring innovation from the common law. It creates or radically alters a will of a man after he is dead, and on merely oral proof

distributes his property in a way different from that established by his own probated will, or by the laws of the land. The smallest safeguard which the rights of property and of the dead can demand is that in applying this somewhat dangerous doctrine the court should feel sure of the facts on which it is asked to act.

The plaintiff here has offered the testimony of a single witness, Augusta Fairbanks, opposed by the solemn statement of the old man, who was charged with the trust, and who is admitted by the testimony to have carried out scrupulously and even liberally every other trust committed to him by his brother.

In *Gilpatrick* v. *Glidden*, the testimony on the facts was practically undisputed, plaintiffs introducing witness after witness, in the neighborhood of a dozen, in all, and the defendant introducing one witness only, and she virtually confirming the very trusts claimed by the plaintiffs.

In *Gilpatrick* v. *Glidden*, the plaintiffs had the testimony of a trusted adviser, who was especially called in by the deceased and the defendant for the purpose of consulting as to the agreement of the plaintiff, and sought to prove by a witness whose attention was especially charged with the subject matter of the interview.

In the case at bar, the plaintiff produces no evidence from any one called in as an adviser or charged by the deceased with any responsibility of remembering.

In *Gilpatrick's* case the plaintiffs produced next the testimony of the scrivener who was called in to draft the will and who heard the agreement repeated by both parties in his presence at the time the will was signed.

In the case at bar, the plaintiff produces no single witness who was even present in the same room at the time of the alleged agreement, but only one who at most was merely an eaves-dropper in another room, who overheard scraps of a conversation not intended for her ears concerning people whom she had never seen and touching matters as to which she had no duty to perform.

In *Gilpatrick* v. *Glidden*, the plaintiff produced witness after witness who testified to the repeated declarations of the

defendant admitting the trust in the precise terms claimed by the plaintiff; in the case at the bar, the plaintiff has produced no witness to testify to any declaration ever made by this defendant that any trust was declared in favor of the plaintiff.

In *Gilpatrick* v. *Glidden*, the plaintiff proved the actual making and signing by the defendant of a writing which if it had not afterwards been lost or destroyed, would have been an execution of the trust claimed. In the case at bar, the plaintiff has produced no evidence of this nature.

Against the testimony of Augusta Fairbanks, therefore, we set: (1) The clear and emphatic memory of the defendant that the plaintiff's name was never mentioned to him by his brother as an object of bounty. (2) The contemporaneous and original evidence of the memoranda themselves which contain a rough sketch of every other legacy contemplated by the deceased but are significantly silent as to the plaintiff. (3) The witness Fairbank's lack of opportunity or interest or duty to hear or remember. (4) The complete absence of any memoranda by her which might refresh her recollection. (5) Her complete and uniform inaccuracy as to the terms of every trust which she partially heard, and her complete forgetfulness of the other trust and subjects which were in fact spoken of by the deceased. (6) The admission of Miss Fairbanks to Joseph Bradstreet, now dead, that she had very likely confounded the name of Peter Grant, an actual legatee, with that of William Grant, an imaginary one. (7) The after-conduct of the defendant himself and the scrupulous zeal with which he more than executed every other trust which his brother committed to him. What possible motive had he for violating and fraudulently suppressing this trust alone?

SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, WISWELL, STROUT, JJ.

PETERS, C. J. On the trial of this cause in equity the jury found, as a matter of fact, that the respondent, William W. Bradstreet, verbally promised his brother, Peter G. Bradstreet, during the last sickness of the latter, and but a few days before

his death, that, if Peter should die intestate, leaving him, William, as his sole heir and next of kin to succeed to all of Peter's estate, he would pay, out of the estate so to be inherited by him, to William S. Grant, the complainant, one thousand dollars annually during the complainant's natural lifetime.

That such a promise, if fully and absolutely proved, may be enforced by a court of equity as a charge upon the estate of the intestate, however hazardous or impolitic such a precedent may to some minds seem to be, is an established doctrine in this State, as carefully elucidated and maintained in the late important case of *Gilpatrick* v. *Glidden*, 81 Maine, 137. Evidently, the risk of accepting and acting upon such doctrine consists mainly in the temptation which judges and juries are subjected to through sympathy or misunderstanding to allow these irregular dispositions of property to be established upon untrustworthy and insufficient evidence.

Therefore, when those legal formalities which are usually observed for conveying or transmitting property are to be dispensed with in favor of equitable rules on the subject, the facts upon which the equitable superiority is to be allowed should be established by clear and indubitable evidence. And this requirement applies with great force in the present case, where the complainant's claim could be legally proved only by a will signed by the donor and attested by three witnesses, whilst it is proposed to be equitably proved mainly by the testimony of a single witness without being evidenced by any writing whatever. Equity herself assures us that in such a case the evidence must be strong and certain enough to produce conviction in every reasonable mind. The very ground upon which equity obtains jurisdiction in this class of cases is the plea set up by her that it would be unjust and fraudulent to require that parol gifts shall fail of effect merely for want of legal formalities to uphold them, when in equity procedure the necessary facts can be just as surely though differently proved. The argument in behalf of the equitable jurisdiction is that the only object of strict legal forms is to attain a high degree of certainty in such important matters, and that just as much certainty can be assured in equity as by the legal requirements.

Whether the evidence adduced in support of this claimant's case can stand the test, which we make the standard for judging this case and all such cases, is the question here. The complainant is obliged to rely greatly on the testimony of Augusta Fairbanks, who undertakes to reproduce the substance of a part of a conversation between the two Bradstreets which she overheard when in a room adjoining the one they were in at the time referred to. Most of the circumstances attending the situation of the parties at the time are not disputed.

The interview between the brothers took place Friday forenoon, September 13, 1889; Peter's death occurring on the Tuesday next afterwards. William was then seventy-two years old. Peter was the elder of the two, and never was married. He died intestate, leaving his brother the inheritor of all his property. They had been partners in business for nearly a lifetime, and had acquired large estates both jointly and individually. They had the confidence of the community as business men, and each had an unlimited confidence in the integrity and business ability of the other. The complainant was a second cousin of Peter Bradstreet, as also was Peter Grant, whose name will appear hereafter. Another prominent figure in the sketch was Eliza Ferguson, who had been a faithful and trusted housekeeper for Peter Bradstreet for many years.

Miss Fairbanks, the witness, a resident of West Gardiner, and evidently a person of mature character and of more than ordinary intelligence and education, for one in her station in life, commenced to do house-work for Peter in February, 1889, continuing in that employment exclusively, until Peter was taken sick, about three weeks before his death, when she took charge of him as his nurse and continued in that capacity until he died. On the morning of the day in question, William came to his brother's room, as he was in the daily habit of doing, and left word that his brother should see no callers that morning as he was to do some business with him, which would require all his brother's strength. Miss Fairbanks, thereupon, bolstered up the sick man with pillows under his head in readiness to see William, and she then retired to her own room in the rear of the sick-

room, not seeing William when he came in the room nor during the time he was there, but hearing him. She left the doors open between the two rooms so that she could hear if she should be called for anything, and was lying, during the conversation between Peter and William, on her back upon her own bed for the purpose of obtaining rest.

The house is an old-fashioned two-story dwelling facing the Kennebec river in the city of Gardiner, with four rooms both above and below, and Peter's bed was in the south-east corner of the front room up stairs, the corner farthest off from the passage-way between his room and the room of Miss Fairbanks. Her bed was in the south-west corner of her room, in the rear of his, being the corner of her room the most distant from such passage-way. So that the whole distance between the two beds was the greatest attainable in the two rooms, excepting that neither bed was exactly in a corner, as a space was left between the bed and the walls in either room wide enough to allow a person to get around the beds. The rooms were of rectangular shape, his measuring fifteen feet four inches by fourteen feet one inch, and hers measuring fifteen feet four inches by twelve feet ten inches. The space or passage-way between rooms measures about three feet in length. A light-stand in his room, mentioned in the testimony, was about three feet by eighteen inches.

The foregoing statement leads up to the testimony of Miss Fairbanks touching the main issue in the case, and we quote from her direct examination:

"Q. Just before William returned to the room did Peter give you any directions as to where to go or what you should do? A. Yes, sir, he did.

"Q. In consequence of the directions that you received from him then what did you do and where did you go? A. I went into my room and laid down on the bed, ready if he called me to go in, as I expected he would.

"Q. While you were lying down on the bed who came into Peter's room, if anybody? A. William Bradstreet.

"Q. And what, so far as you know, did he first do when he went into the room? A. First, I remember of his moving a stand out and heard him handling paper on the stand, and he sat down and talked with Peter Bradstreet for sometime. I heard him call several names, but I did not hear the first part of the conversation because I did not interest myself in it; I could not repeat it.

"Q. What was the first conversation that you recollect and that you noticed? A. First, I heard them talking about having Mr. Ellis come down that day, telegraphing for him to come down. That is the first thing I remember of their saying.

"Q. What next do you recollect? A. Then the next I took notice of was when he spoke of Miss Ferguson, providing for Miss Ferguson. Knowing her I was interested in the talk and noticed what was said.

"Q. What did you hear said about Miss Ferguson? A. I heard the request that Peter Bradstreet made, what they decided on, the amount to be left her, and the way it should be left, and heard considerable talk made in regard to her. Peter Bradstreet was very anxious that she should be provided for. (Objected to.)

"Q. State the substance of what you can recollect that Peter said about Eliza Ferguson? A. I cannot repeat the conversation of both. He said he wished her to have an income, a quarterly income of four dollars a week, and he proposed some way that it should be left her, and something was said about its being left to her in trust, a certain income being drawn from a certain amount, and that he wanted a special provision made for her; spoke of certain amounts, and finally decided on a certain amount.

"Q. What was the amount they finally decided upon? A. Eighteen dollars a week. Took several amounts and he finally decided on eighteen dollars a week — special provision made for her.

"Q. What was said next? A. After they talked about that — it was some little time — Peter Bradstreet said he wanted to provide for William Grant; said perhaps he had better leave it to him the same way he did for Eliza, pay it to him quarterly.

"Q. What did William say to that? A. He thought it was a good idea and agreed to it,—seemed to think as he did about it, that it had better be paid in that way, and Peter said William Grant he would leave a thousand dollars a year, payable quarterly, commencing the first of December.

"Q. What did William say in the talk? A. They spoke of what this income should be taken from, and from their conversation he agreed to carry out the request.

"Q. State as nearly as you can just what William said, not the exact words, but the substance of it, as you can best recollect it? A. The exact conversation I did not remember, but I knew what they meant when they were talking and understood it at the time they were talking. I heard it at the time but I forget the exact conversation between them.

"Q. Do you mean to say you have stated the substance of it as you recollect it? A. Yes, that is the substance. The exact language I do not undertake to recall.

"Q. Was anyone talked about after completing the talk about William Grant? A. Then he said he wanted to provide for Peter Grant, and thought he would leave that in the same way he did Mr. William Grant's. He said he wished to give him five hundred dollars a year, payable quarterly, commencing the first of December.

"Q, What did William say in respect to that? A. He thought favorably of it and agreed to carry out the request.

"Q. Was anything said in the conversation about this being safe? What was there about that? A. Yes, when providing for Miss Fergurson. He said he wanted her provided for so that nothing ever would happen that she would be dependent, and he proposed some way that it should be left to her, or William spoke of some way that it should be left to her, and Peter Bradstreet seemed to feel a little doubtful about it, and Mr. Bradstreet said it was safe, there never would be any trouble or danger; that she was safely provided for, as safe as could be at all.

By the Court:

"Q. How much did you say was agreed upon for her? A. Four dollars a week, her regular income at first.

"Q. What about the eighteen dollars? A. That seemed to be a special provision made for her.

Direct:

"Q. After this did you have any talk yourself with Peter about William? A. No. I also never had any talk with William Bradstreet about it.

"Q. And after Peter's death did you have any communication of any kind with the plaintiff, Mr. Grant, in regard to the matter? A. No, sir.

"Q. How long after his death before you spoke of it to anybody? A. The first of November, I spoke of it first.

"Q. When in November? A. It was the first week in November, I could not state the date. It was in 1889, about six weeks after he died.

"Q. Now do you know what the relations were existing between Peter Bradstreet and William Grant, or did you know, during the life of Peter Bradstreet? (Objected to and admitted.) A. I did in a measure know.

To Mr. Baker: William Grant was not at the house at any time when I was there.

"Q. State from whom your information came in regard to their relations? A. Mr. Peter Grant." (Peter Bradstreet?)

We quote also from the cross-examination of Miss Fairbanks:

"Q. Then what did you hear next? I heard him move a stand out and rattle paper on the stand, and sit down and get up.

"Q. Where was this stand kept that you speak of? A. Right next to the chair. From the hall door to the door of my room was a commode and the stand and a chair.

"Q. That would be along the north wall of the sick room? A. Yes, sir. I heard him move the stand from there out towards the center of the room.

"Q. You could distinguish the direction in which it was moved by your mere sense of hearing? A. No, I could not tell just the direction, but it was moved out.

"Q. How much of a stand was that? A. Two feet wide and three feet long. It was just a light-stand.

"Q. Now after you heard the stand moved out, as you say, towards the center of the room, you heard the rattling of paper did you? A. Yes, sir.

"Q. What sort of sound of paper, newspaper or writing paper, or what? A. It was writing paper that is always on the stand there.

"Q. Ordinary note paper in size, or what kind of paper? A. I could not say what kind of paper; I don't remember. I heard the paper being rattled.

"Q. And that was just before you heard the stand moved was it? A. Yes, sir.

"Q. Was there pen and ink there in the room to do this writing with which you speak of? A. I don't think there was.

"Q You were not requested to bring any and did not bring any? A. No, sir, not at that time, not while William Bradstreet was there.

"Q. Then did you hear the sound of writing after you heard the paper rattle and the stand moved out? A. I did after a while, but not directly after.

"Q. How loud a noise was this sound of writing that you heard, quite distinct and loud? A. No, loud enough so I could hear it. I heard it during his interview with him.

"Q. Across your room and through the passage way and across his room you heard readily the sound of writing? A. Yes, sir.

"Q. Was it writing with a pen or pencil that you heard? A. I don't think it was with a pen and ink.

"Q. You could distinguish at that time and noted it that this sound of writing you heard was pencil writing? A. No, it was not from the sound that I judge from.

"Q. It did not make a sound as of pen and ink you say? A. I did not judge from the sound that I heard.

"Q. I did not ask you that, but simply whether it did make the sound of pen and ink writing? A. I don't remember about that; I don't remember what I judged from.

"Q. But you heard the sound of the writing? A. Yes, sir.

"Q. And that was distinct? A. Yes, sir.

"Q. And you concluded it was lead pencil writing? A. I didn't think anything about it at the time, whether lead pencil or what it was.

"Q. If you didn't think anything of it at the time, when did it afterwards become important for you to remember? A. In thinking it over I judged it was lead pencil, because—

"Q. I don't ask you your reasons, but simply when it first came into your mind to distinguish between the sound of pen and pencil in writing in that room; how long after was it? A. I don't remember; sometime after. I had occasion to think of it, and from certain reasons I judged it was a pencil.

"Q. How long a time did you hear the sound of this writing of pencil across those two rooms and passage way? A. At different times during the time he was there.

"Q. And was this sound of lead pencil writing usually followed by the rattling of paper? A. Yes, sir.

"Q. And those different noises, the man sitting down and writing with a lead pencil, you distinguished while you were lying on the bed across the two rooms and passage way, did you? A. Yes, sir. . . . .

"Q. Did you hear writing done during the conversation as to the Grants, or either of them? A. I could not say that I remember any special time that I heard it, but I heard it after that several times.

"Q. Either during or immediately after the conversation that you thought you heard with reference to William Grant, the plaintiff here, did you hear this sound of writing and the rattling of paper? A. I presume I did; I could not say for certain; but I heard it directly after that. I heard the writing all the time, or occasionally during the interview.

"Q. So that the sounds of writing ran right along with the conversation? A. O, no; the writing was at different times in the conversation."

It certainly gives weight to her testimony that Miss Fairbanks in the foregoing sketch of important events, shows her possession of a strong intelligence, and it adds still more weight to her statement that her character for integrity cannot reasonably

be questioned. Upon the most careful scrutiny of all the evidence no motive is seen that would be likely to induce her to suppress or pervert the truth. She stood virtually in the attitude of a stranger to all the parties interested in her testimony. The most that can fairly be urged against the literal truthfulness of her narrative is that in her description of the movements in the sick room she possibly may have been unconsciously led into some exaggeration of certain of the less important particulars, influenced as she naturally would be by her own inferences as to the purposes of such a meeting.

And, still, we should be averse to accepting her testimony, or that of any other single witness, upon which to establish such an important result as the complainant claims, unless the testimony of the single witness be supported by a considerable amount of direct or circumstantial corroboration. Such a heavy structure may not be so safely sustained by a single column, however sound its material may be, as it would be with the aid of other even much less substantial supports. And especially should this caution be adhered to in the present case in view of the positive denial of the complaint's contention by the principal respondent, the only other living witness who was present on the occasion described by Miss Fairbanks. Happily, however, the present case discloses important evidence in corroboration of the story of the principal witness for the complainant.

William G. Ellis, a second cousin of the Bradstreet brothers, and also of the complainant, testifies that Peter Bradstreet just eleven days before his death, and that would be just a week before the interview testified to by Miss Fairbanks, told him at his bedside that he should tell his brother William to look out for William Grant, Peter Grant and Eliza Ferguson. Ellis further testifies that the relations between Peter Bradstreet and William Grant (complainant) were very friendly and that he had written during the last few years of Peter's lifetime many letters from Peter to him. That Ellis correctly reports what Peter said to him is not questioned, but it is contended by the defense that the evidence is not admissible. We are confident that the evidence was not only admissible, but that it has great

probative force as clearly indicating the disposition and intention of Peter. It prevents the defense from setting up any argument of improbability. It would ordinarily take much less evidence to prove that an act has been done by a person if such person has previously expressed his intention and desire to do the act. A man is very likely to do any reasonable thing which his heart strongly inclines him to do, and especially if the performance of the act imposes no unwilling burden or responsibility upon himself. These propositions are very strong in the present case because the circumstances are exceedingly favorable for their application. There seems to be an unnaturalness in a gift from Peter Bradstreet to Peter Grant and none to William Grant, the one being as needy and deserving as the other, and William being with the donor evidently his favorite of the two.

Other corroboration of the testimony of Miss Fairbanks will be noticed when we come to an examination of certain papers introduced by the defendants as a part of their case.

The complainant invokes in his behalf the favorable verdict of the jury, and inasmuch as the question submitted to that tribunal was not in its nature difficult or involved, but consisted of the simple proposition whether the witness for the complainant heard, as she said she did, a direction from the one brother to the other to make the alleged pecuniary provision for the complainant, we think that the conclusion arrived at by the jury on that question should have great weight at our hands. And of still more consequence is the verdict to our minds because it has been virtually approved by a decree in affirmance of it by the presiding judge.

We notice on the record that the counsel consented that the decree filed by the court should be regarded as merely formal, a proceeding which, if full effect be given to it, deprives the sitting justice of any opinion at the hearing in the first instance and by statutory provision of any vote at the appellate hearing, still we cannot very easily free our minds of the conviction that the learned justice, who so generously allowed the case to pass by him without more than a formal assent to the verdict of the

jury, never would have filed such a decree in such a case if he thought it to be wrong upon the law and evidence.

William W. Bradstreet, the principal respondent, testifies that he used no light-stand in his interview with Peter, and no writing materials beyond two bits of paper, writing upon them with a pencil there and immediately afterward partially with pen and ink, and that he sat at the time by Peter's bed-side, making just as little conversation with him as they could get along with. And he produces from his possession, in confirmation of his statement, two small papers which read as follows:

(Defendants' exhibit 2.)

"*Sept. 11-1889*

Peter wants Ben M. Bradstreet to have $5000.00 right out

Eliza to have an income of $4 to 18 per week as she may need for her support and comfort. commence 1st week Decr.

P. Grant say $5 to 10 per week

Wm Peacock $100.00 right out

W. G. Ellis $10.000

P. Grant 500 per year & if necessary up to $1000

"W. Lewis has $5.000 East Side R R bonds in his hands belonging to P. G. B.

"1100 Gardiner N Bk stock in P G Bs name belonging to the daughter of Uncle Chas Bradstreet cannot be transferred to him without the consent of his daughters

"Bills of sale of vessels from Geo. C. Morrell to P. G. B. not signed

"Sept. 13-1889

"Peter told me this morning that whenever Jos or Fred had approached him in regard to the Roach River land he always avoided saying anything that might affect my rights & also said that he had no reason to changed his opinion which he had namely that Father furnished his part of the money for his interest in the land W. W. B."

(Part italic is in pencil, other in ink)

(Defendants' exhibit 3.)

"1100 Gardin Bk Stock in P G. B name belongs to uncle Chas daughters cannot be transferred to uncle Chas with the consent of his daughters

P Grant 500 per year more up to 1000

1st week in Decr.

$5000. East side R. R. bonds in W. Lewis hands

Eliza 4 up to 18 per week 1st week in Decr

W. G. Ellis 10

1, oz sub Nitrate of Bismuth" (a)

(a) All in pencil except last item

Defendants' Ex. 3 is made on an envelope directed to "Mr. W. W. Bradstreet Gardiner Maine"

Printed on envelope "Return to Brewster, Cobb & Estabrook, Boston, Mass., If not delivered within 5 days."

Post mark "Boston Mass. 1889"

One of these papers, as before indicated, is a letter envelope which had been previously used as such, and the other, of about the same size, is evidently a leaf from a small pocket memorandum book. The two pieces have the appearance of having been used together, the items commencing upon one and being continued on the other. Mr. Bradstreet's memory had become very confused and unreliable at the time of the trial, and he seemed unwilling or unable to state any details or particulars without being guided by the papers above transcribed. Still, he says he could at any time have told the names of those who were to be the recipients of Peter's bounty and the amounts they were to have.

Each side in the controversy claims favorable inferences to itself from these papers. They are the only written memoranda produced, and even these so far as in ink were not written at the bedside of the sick man but at some other place soon afterwards. They indicate on their face that William Bradstreet had not a methodical memory and that he did not confidently rely on such memory as he had.

Bearing in mind that Miss Fairbanks testified before these papers were produced, and at a time when she had not known

or heard of them, it will be noticed how completely in some respects, and partially in other respects, her testimony is sustained by them; the principal and important difference between the papers and her testimony being that the former nowhere thereon contains the name of William Grant. She understood that Peter Grant was to have five hundred dollars per year, while Bradstreet gets it upon the papers that he was to have that sum, and up to one thousand dollars if necessary. She says Eliza was to have four dollars per week and eighteen dollars per week besides if she needed it. He gets it four dollars up to eighteen dollars a week, according to her necessities; not a strange difference of understanding that matter.

In other particulars her statements are in closer accord with the items appearing on the manuscripts, and sometimes substantially if not exactly coincident with them. She says Peter was anxious that there should be no failure in the provision for Eliza, and that he several times repeated his wishes in regard to it. Does not William, perhaps unconsciously to himself, transcribe the same idea in his own words when he adds to the gift to Eliza, the words, "for her support and comfort?" The witness says there was considerable talk over the question of creating trusts for the security of the gifts to be made, and while the word trust does not appear on these papers it is implied by them; and William subsequently created trusts of the kind that was talked about. She says Eliza was to have an income payable quarterly, commencing first week in December, and the papers disclose as much in a very brief way, and the trusts were created by William accordingly. She says that Ellis was to be immediately summoned by telegraph, and it appears that he was sent for and that he came; also that he was to be the recipient of ten thousand dollars of Peter's bounty, and these papers as well as other evidence prove that to have been true.

It is urged against the consistency of Miss Fairbanks' testimony that, while these memoranda do show that other subjects besides those named were talked over in the interview between the brothers, she does not recollect any of them. But she says

that other matters were talked about and that she does not remember them for the reason that they were of no interest to her. She did not then personally know William Grant, and only knew of him through the regard manifested by Peter Bradstreet for him in the frequent conversations with her about the family. There is no doubt whatever in our minds that she heard much of a conversation or of conversations between Peter and William concerning the distribution of Peter's property. She told the story of it to different reputable persons soon after Peter's death when she had neither seen the complainant nor received any communication from him, he then as now residing in a distant state.

The question finally for our determination seems to be whether Miss Fairbanks or William Bradstreet makes the mistake as to a direction by Peter Bradstreet for the payment of an annuity to the complainant, William S. Grant. Hers would be a mistake of commission — an imaginary recollection, his one of omission. She is in no way interested as a witness. He is deeply interested as a witness and party. No class of men know better than judges how much interest may unconsciously warp an honest mind. It would not be at all surprising if the respondent, who relied so much on written notes to guide him, and who made such brief ones for his purposes in these matters, through forgetfulness and mistake, honestly omitted to take down the name of William Grant when it should have been upon his memorandum. It will be noticed that the name of "P. Grant" appears three times on the papers produced by Mr. Bradstreet, and twice on one of them. May it not be that the letter "P" was at least once written when the letter "W" was intended?

We are not unmindful of the frequent cautions which have been expressed by courts in relation to the weight to be given to the evidence of verbal declarations. But in the present instance we do not see that the caution is applicable. The defense does not take the position that the conversation was heard but misunderstood, but that such a conversation was not heard. Had the respondents taken the position, and it were supported by evidence,

that although William Grant's necessities were discussed and the conclusion was against an allowance to him, or that at first an allowance was determined upon and afterwards retracted, or, if any explanation were given why he was named by Peter as an object of his bounty and his name should be omitted from the final list, we should have been strongly inclined to accept any such explanation as not inconsistent with the account of the interview given by Miss Fairbanks. But the proposition of the defense, and really also the substance of William Bradstreet's testimony, was to the effect that the name of William Grant was not even mentioned by Peter in the presence of his brother William in any interview shortly prior to Peter's death. Upon that issue we feel clear that the contention of the defendants cannot be sustained.

Among other matters in evidence for the defense, of no material consequence on the present issue, is the testimony of Joseph E. Bradstreet to the effect that, in a conversation with Miss Fairbanks, she said she may have got names mixed and she would not swear that she heard William Grant's name mentioned in the interview testified to by her. This impresses us as a reckless and unreliable statement designed by the witness for purposes of his own. Miss Fairbanks indignantly denies it and explains what she did say. Mr. Cornish, of counsel for the respondents, heard the conversation testified to and could have given his recollection of it but saw fit not to do so. It does not appear that she made any doubtful or equivocal statement to any other person, even to the wife of Joseph E. Bradstreet, to whom she first told her story.

The complainant offered himself as a witness and upon the objection of the defense, whether correctly or not, was excluded from testifying.

Although we have hesitated for some time to announce our conclusion in this case, for fear of some possible error on our part, and because of the high degree of proof required in such a case, still our constantly increasing belief that the verdict of the jury was a just one, and authorized by the proof, requires us to sustain the bill. No other result would be satisfactory.

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An Act to amend section eleven of chapter two hundred and seventeen of the Public Laws of eighteen hundred and ninety-three, relating to Justices of the Supreme Judicial Court.

CHAPTER 140.

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

Section eleven of chapter two hundred and seventeen of the public laws of eighteen hundred and ninety-three, is hereby amended by striking out the word "or" in the third line of said section and after the word "rulings" in the third line by inserting the words "and findings," so that said section as amended, shall read as follows:

"Sect. 11. No justice of the supreme judicial court shall sit in the law court upon the hearing of any cause tried before him, in which any of his rulings and findings are the subject of review, nor take any part in the decision thereof."

Approved March 25, 1895.

ERRATA.

Page 271, line 23, for c. 1840, read 140.
Page 565, line 8, insert "the defendant" before "moved."