REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By CHARLES HAMLIN,
REPORTER OF DECISIONS.

MAINE REPORTS,

VOLUME LXXXVIII.

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1896.

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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, 1895.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May. SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, and WISWELL, JJ.

EASTERN DISTRICT, at Bangor, Third Tuesday of June. SITTING: PETERS, C. J., FOSTER, HASKELL, WHITEHOUSE, WISWELL and STROUT, JJ.

WESTERN DISTRICT, at Portland, Third Tuesday of July. SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, WISWELL, and STROUT, JJ.

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

OLIVE O. ROBINSON, appellant from decree of JUDGE OF PROBATE.

Androscoggin. Opinion May 14, 1895.

Tenants by entirety. Husband and Wife. Will. R. S., c. 61; Stat. 1844, c. 117.

The rule of the common law, by which a devise or grant to husband and wife made them tenants by the entirety, no longer prevails in this State since the Stat. of 1844, c. 117.

Tenancy by the entirety had its origin in the marital relation, and was founded on the legal fiction of the absolute oneness of husband and wife. Modern legislation has abrogated this theoretical unity, and secured to the wife a distinct and separate right to acquire and enjoy property to her sole use and benefit, and free from the control of her husband.

By the residuary clause in his will, a testator gave his daughter and her husband the residue and remainder of his estate "in equal shares and proportions, and so to their respective heirs and assigns forever." The husband died before the testator leaving a minor son and wife surviving. *Held:* that the daughter does not take the whole as tenant in the entirety, but takes only one-half of the residuary estate, and that the other half should be distributed among the heirs of the testator.

ON EXCEPTIONS.

The case appears in the opinion.

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

At common law a devise or grant to husband and wife created a tenancy by the entirety and the survivor took the whole, and

this rule has been adopted in this state, notwithstanding R. S., c. 73, § 7. *Harding* v. *Springer*, 14 Maine, 407. So recognized in *Stetson* v. *Eastman*, 84 Maine, 366.

And in those states where the greatest advances have been made by statute and by judicial decision in abolishing joint tenancies, tenancy by the entirety has been generally preserved, notwithstanding acts enlarging the rights of married women. *Pray* v. *Stebbins*, 141 Mass. 219; S. C. 55 Am. Rep. 462; *Bertles* v. *Nunan*, 92 N. Y. 152; S. C. 44 Am. Rep. 361; *Rogers* v. *Benson*, 5 Johns. Ch. 431; Note, Law Ed.; *Marburg* v. *Cole*, 49 Md. 402; S. C. 33 Am. Rep. 266, Note 269; *Buttlar* v. *Rosenblath*, 42 N. J. Eq. 651; S. C. 59 Am. Rep. 52; *Carver* v. *Smith*, 90 Ind. 222; S. C. 46 Am. Rep. 210; *Hulett* v. *Inlow*, 57 Ind. 412; S. C. 26 Am. Rep. 64, Note; see also note 10 Am. St. Rep. 9; *Baker* v. *Stewart*, 40 Kan. 442; S. C. 10 Am. St. Rep. 213; *Harrison* v. *Ray*, 108 N. C. 215; S. C. 23 Am. St. Rep. 57.

Only three states in which the law of tenancies by the entirety has been recognized, seem to hold a contrary view — Iowa, Illinois and New Hampshire.

If we may assume, without discussion, that it was the intention of the testator to create a tenancy in common by the residuary clause of his will, and that the words "in equal shares and proportions" were intended to make certain that intention, still that intention must be governed by "the fundamental laws which establish and secure the rights of property." *Ramsdell* v. *Ramsdell*, 21 Maine, 293.

We contend upon reason and authority that such an intention cannot control the rule of a tenancy by the entirety and so convert the estate into a tenancy in common; that husband and wife cannot at common law, by any words in a grant to them during coverture, be made either joint tenants or tenants in common, for the reason that according to the principles of the common law, they are incapable of so taking, husband and wife being considered as one person.

An estate by entirety is not founded upon the notion of a joint tenancy, but upon the marital relation and upon the legal theory

of the absolute oneness of husband and wife. *Stelz* v. *Shreck*, 128 N. Y. 263; S. C. 26 Am. St. Rep. 475.

Counsel also cited: *Dias* v. *Glover*, Hoff. Ch. 71; *Bramberry's appeal*, 156 Pa. St. 628; S. C. 36 Am. St. Rep. 64; *Jackson* v. *Stevens*, 16 Johns. 115; *Barber* v. *Harris*, 15 Wend. 617; *Den* v. *Hardenbergh*, 5 Halsted, 42; S. C. 18 Am. Dec. 371, and note p. 384, in which it appears that Preston on Est. and Abst. is not supported by any case prior to the views he holds.

Same rule applies to personal property. 3 Jar. Wills, 2, citing *Atchison* v. *Atchison*, 11 Beav. 485; *Pike* v. *Collins*, 33 Maine, 38; *Bramberry's appeal*, *supra*; *Draper* v. *Jackson*, 16 Mass. 480; *Craig* v. *Craig*, 3 Barb. Ch. 77, 104; *Cowper* v. *Scott*, 3 P. Wms. 121.

Was the intention of the testator to give the residuary estate to Mr. and Mrs. Robinson collectively, and not to give it to them in case Mr. Robinson lived, but to give it differently in case he died? The testator could not have intended to say, "I will give this property to my daughter, Olive, and her husband, and thus each will have the benefit derived from the possession of the share by the other, *but* in case Judyer dies before my death, I will leave it so my heirs will take one-half." Such an intention would be self-contradictory; the second part would be largely repugnant to the first. The fact that the testator in this will made provision for his other children and the issue of deceased children helps the argument that he did not intend for them to have more in any event. *Mann* v. *Hyde*, (Mich.) N. W. Rep. 78.

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

WHITEHOUSE, J. This is an appeal from the decree of a Probate Court.

The executor of the will of Charles P. McKenny filed a petition under the provisions of R. S., c. 65, § 27, as amended by chapter 49 of the laws of 1891, asking for an order of distribu-

tion which would protect him in paying out the residue of the estate in his hands. This involved a construction of the following residuary clause in the will.

"The residue and remainder of all my estate of which I may die seized and possessed, both real and personal, not herein otherwise disposed of, I give, bequeath and devise the same to my son-in-law, Judyer Robinson, and my daughter Olive H. Robinson, wife of the said Judyer Robinson, in equal shares and proportions and so to their respective heirs and assigns forever."

Judyer Robinson died before the death of the testator, leaving a minor son, and a wife who is the appellant and the same person called Olive H. Robinson in the will.

The decree of the Judge of Probate required one-half of the residuary estate to be paid to the appellant and the other half to be distributed among the heirs of the testator; and this decree was affirmed by the justice presiding in the Supreme Court of Probate. The case comes to this court on exceptions to that ruling.

It is the opinion of the court that the ruling was correct and that the exceptions must be overruled.

It is contended by the learned counsel for the appellant that the residuary clause created a tenancy by the entirety, and that Olive O. Robinson is entitled to the entire residuary estate by right of survivorship. It is not controverted that the language employed by the testator must be construed as creating a tenancy in common if Judyer Robinson and Olive O. Robinson had not been husband and wife. (*Stetson* v. *Eastman*, 84 Maine, 366.) But it is argued that the rule of the common law by which a devise or grant to husband and wife constituted them tenants by the entirety, the survivor taking the whole, has never been changed in this state by the abolition of joint tenancies or the legislation enlarging the rights of married women respecting the ownership of property. It is accordingly contended that if the words "in equal shares and proportions" found in the residuary clause were advisedly employed for the purpose of making certain the intention of the testator to create a tenancy in common, this intention however clearly expressed cannot be

allowed to prevail against the early rule of the common law that husband and wife, being regarded as one person in law, are not competent to take either as joint tenants or as tenants in common under any form of grant or devise in fee made to them during coverture.

We are unable to concur in this view. The rule of the common law undoubtedly existed as claimed by the appellant. It is thus stated in 2 Black. Com. 181: "If an estate in fee be given to a man and his wife, they are neither properly joint-tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, *per tout et non per my*; the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." And it is true that prior to the act of 1844, c. 117, and subsequent legislation in this State securing to the wife the enjoyment of her separate estate, this common law rule was recognized by our court. *Greenlaw* v. *Greenlaw*, 13 Maine, 186; *Harding* v. *Springer*, 14 Maine, 407. But it is worthy of remark that no recognition of it or reference to it can be found in the cases reported in this State since the act of 1844, entitled "An act to secure to married women their rights in property."

A tenancy by entirety is *sui generis*. The right of survivorship gives it an apparent resemblance to joint tenancy, but as already seen it differs from a joint tenancy in important particulars. All the authorities agree that it had its origin in the marital relation and was founded upon the legal fiction of the absolute oneness of husband and wife. At the common law the legal existence of the wife was merged in that of her husband. Her legal identity was suspended or held in abeyance during the existence of the marriage relation. Substantially all her property was vested in the husband during coverture and her legal position was little better than that of a menial to her husband. Being but one person in the eye of the law, it was considered that they could not consistently have separate and conflicting property rights. Hence the rule that property con-

veyed to them during coverture should be held as an estate by entirety with the right of survivorship.

But the universal tendency of modern legislation has been to abrogate this theoretical unity of husband and wife, to recognize and maintain the legal identity of the wife and secure to her a distinct and separate right to the acquisition and enjoyment of property. By the law of this State, "A married woman of any age may own in her own right real and personal estate acquired by descent, gift or purchase; and may manage, sell, convey and devise the same by will without the joinder or assent of her husband." Since the act of 1844 above named, a husband by marriage acquires no right to any property of his wife. "She may receive the wages of her personal labor, not performed for her own family, maintain an action therefor in her own name and hold them in her own right against her husband or any other person." She is liable for her debts and torts and her property may be taken on execution therefor as if she were sole. She may prosecute and defend suits at law or in equity in her own name without the joinder of her husband, for the preservation and protection of her property and personal rights, as if unmarried. R. S., c. 61.

It is manifest that these statutes have wrought great modifications and radical changes in the relative property rights of husband and wife. In contemplation of law they are no longer one person, and their interests in property are no longer identical but separate and independent. Under these statutes the wife is invested with greater privileges and weighted with greater responsibilities and liabilities than before. The rule of the common law creating estates by entirety is irreconcilable with both the letter and the spirit of these statutes. It never rested upon a rational or substantial groundwork. It had its origin in feudal institutions and social conditions which were superseded centuries ago by the more enlightened principles of a progressive civilization. It is now repugnant to the American idea of the enjoyment and devolution of property and to the true theory of the marriage relation. "The reason of the law," says Lord Coke, "is the life of the law; and *cessante ratione*

lex ipsa cessat." The fictitious basis of this rule having been removed the rule itself must fail. To declare that there is no authority in the court to effectuate a clearly expressed and unmistakable intention of a grantor or testator, against such an antiquated and exploded dogma, would be a poor tribute to the creative power of the law and the original conceptions of justice in modern courts. The common law would ill deserve its familiar panegyric as the "perfection of human reason," if it did not expand with the progress of society and develop with new ideas of right and justice. "Considering the influence of manners upon law," says Chancellor Kent, "and the force of opinion which is silently and almost insensibly conducting the course of business and the practice of our courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society as well as of the footsteps of time."

These views are sanctioned by approved text-writers and courts of the highest respectability in England as well as in this country.

In his "Treatise on Estates," Mr. Preston makes the confident assertion, based upon his own cultivated reason rather than upon reported cases at that time, that: "In point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties as other distinct and individual persons would do." 1 Preston Est. 132. This is cited as authority for the following statement in 4 Kent, Com. 411: "It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture."

In his note to 2 Black. Com. 181, Judge Sharsword says: "But when an estate is conveyed to a man and woman who are not married together, and who afterwards intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage. There is nothing, therefore, in the relations of husband and wife which prevents them from being

tenants in common. There are great opinions in favor of the position that husband and wife may by express words be made tenants in common." So in 1 Washburn on Real Prop. 444, the author says: "It is always competent however, to make husband and wife tenants in common by proper words in the deed or devise by which they take, indicating such an intention."

In *Clark* v. *Clark*, 56 N. H. 105, it was held that a statute in that state enlarging the rights of married women, practically abolished tenancies by entirety between husband and wife; and the legal unity of husband and wife, as respects the holding of property and making of contracts by the wife, was obliterated.

In *Cooper* v. *Cooper*, 76 Ill. 57, it was held that under the "Married Woman's law" of 1861 in that State, an act having a scope and purpose similar to our own above cited: "No reason can be perceived and none is suggested why a married woman should not hold property thus acquired in fee, and as a tenant in common with her husband, precisely as she might with any other person."

In *Hoffman* v. *Stigers*, 28 Iowa, 307, the court say: "If no contrary intent is expressed in the conveyance to them or the instrument under which they hold, the husband and wife take as tenants in common, and not in entirety. At common law they were so completely and essentially one that they could not take by moieties. . . . But the doctrine always stood upon what was little more than the merest fiction; and as this by our legislation has measurably given way to theories and doctrines more in accord with the true and actual relations of husband and wife, the rule itself must be abandoned." See also *Wilson* v. *Fleming*, 13 Ohio, 68; *Whettlesey* v. *Fuller*, 11 Conn. 337; *In re Dixon*, *Byram* v. *Tull*, 42 Law Rep. (Ch. Div. 1889,) 306; *Warrington* v. *Warrington*, 2 Hare, 54.

Under the residuary clause in the case at bar, the appellant took only a moiety of the residue of the estate. As Judyer Robinson died before the testator, the devise and bequest to him lapsed, and the moiety of the residue which he would have taken if he had survived descended to the heirs of the testator.

Exceptions overruled.

HERBERT P. HIGGINS *v.* MILLARD L. HAMOR.

Hancock. Opinion May 16, 1895.

Way. Record. Jurisdiction. R. S., c. 18, §§ 14-19.

However faulty the record of county commissioners' proceedings in laying out a town way, if it can be reasonably inferred from the record, (1,) that a petition was presented to the municipal officers by one or more inhabitants of the town, or by one or more owners of cultivated land therein, asking for the laying out of the way; (2,) that the municipal officers neglected or refused to lay it out; and (3,) that some of the same petitioners within one year thereafter, presented to the county commissioners at a regular session a petition stating the above facts, and alleging that the neglect or refusal of the municipal officers, was unreasonable, the record is a sufficient basis for the procedure of the commissioners, as against collateral attack.

Held; that from the record in this case, the above jurisdictional facts can be reasonably inferred.

ON REPORT.

This was an action of trespass quare clausum for building a sidewalk over the plaintiff's land alleged to be outside the limits of the street.

It was admitted that the plaintiff is the owner of the land over which the sidewalk was built, and that the defendant, as road commissioner, built the sidewalk.

It was admitted that, at the date of the alleged trespass, the defendant, was a duly elected and qualified road commissioner and was acting as such within the scope of his authority and within the location of the way as laid out by the county commissioners; but it was denied that such location is valid or any justification for the defendant in the premises.

Defendant offered a record of the county commissioners locating the way, which was admitted by the court, subject to all legal objections.

Thereupon, the case was withdrawn from the jury and reported to the law court with the stipulation that, if the records introduced show the existence of a way sufficient to justify the defendant in making a sidewalk within the limits described therein, judgment should be entered for the defendant, other-

wise the action is to stand for trial upon the other defenses set up in the defendant's brief statement.

(Record of County Commissioners.)

"State of Maine. Hancock: At the Court of County Commissioners begun and held at Ellsworth, within and for the County of Hancock, on the Fourth Tuesday of January, it being the twenty-seventh day of said month, A. D., 1880.

"Present: William L. Guptill, Esquire, Chairman. John Hopkins, Esquire, Associate. Newell Coolidge, Esquire, Associate. H. B. Saunders, Clerk.

"Isaac B. Desisle *et als.* Pet. for Road in Eden, at Bar Harbor.

"Respectfully represent, Isaac B. Desisle and seven others, inhabitants of the town of Eden, that a town way, beginning at or near a Balm of Gilead nearly in front and Easterly from the 'Grand Central,' and running Northerly to the Southern line of Tobias Roberts' land near his cottage in said town, would be of great public convenience for the use of said town: Wherefore your petitioners pray that the same may be duly laid out as by the statute is provided.

"Dated at Eden this twenty-sixth day of July, A. D., 1879.

"This petition was entered at the April Term, 1879, when and where it was considered by the commissioners that the petitioners were responsible and that they ought to be heard touching the matter set forth in their petition, and therefore order: That the commissioners meet at Isaac B. Desisle's on Tuesday, the twenty-third day of September next, at nine of the clock in the forenoon, and thence proceed to view the route mentioned in said petition; immediately after which view a hearing of the parties and witnesses will be had at some convenient place in the vicinity, and such other measures taken in the premises as the commissioners shall judge proper. And it is further ordered that notice of the time, place and purpose of the commissioners' meeting aforesaid, be given to all persons and corporations interested, by serving an attested copy of this petition and this order thereon upon the clerk of the town of Eden and by posting up attested copies as aforesaid in three public places in said

town thirty days at least before the time appointed for said view and also by publishing the petition and this order thereon three weeks successively in the Ellsworth American, a public newspaper published in Ellsworth, in the County of Hancock, the first publication to be thirty days at least before the time of said view, that they may then and there attend and be heard if they think fit."

The petition was then continued to the October Term, 1879, when and where the commissioners appeared and presented in court their report in the words following, to wit:

"State of Maine. Hancock, ss. Whereas, Isaac B. Desisle and seven others, inhabitants of the town of Eden, by their petition made to the court of county commissioners at their regular sessions holden at Ellsworth, within and for said County, on the first Tuesday of July (April adjourned term), A. D., 1879, represent: That a town way, beginning at or near a Balm Gilead nearly in front and Easterly of the 'Grand Central' and running northerly to the Southern line of Tobias Roberts' land, near his cottage at Bar Harbor, in the town of Eden, would be of great public convenience, that the selectmen of said town after notice and hearing of parties have unreasonably refused to lay out such way. Wherefore, your petitioners considering themselves aggrieved by such refusal pray that your Honors would agreeably to law in such cases, made and provided, view the route and locate said road if in your judgment the public convenience and necessity require it, and as in duty bound will ever pray.

"Dated at Bar Harbor, in the town of Eden, this fourth day of August, A. D., 1879.

"And whereas at the April adjourned term of said Court, A. D., 1879, it was considered by the commissioners that the petitioners were responsible and that they ought to be heard touching the matter set forth in their petition, and therefore order "that the commissioners meet at Isaac B. Desisle's on Tuesday, the twenty-third day of September next, at nine o'clock in the forenoon, and thence proceed to view the route mentioned in said petition; immediately after which view a hearing of the parties and witnesses will be had at some convenient place in the vicin-

ity, and such measures taken in the premises as the commissioners shall judge proper.

"And it is further ordered: That notice of the time, place and purpose of the commissioners' meeting aforesaid be given to all persons and corporations interested, by serving an attested copy of the petition, and this order thereon upon the clerk of the town of Eden and by posting up attested copies as aforesaid in three public places in said town thirty days at least before the time appointed for said view, and also by publishing the petition and this order thereon three weeks successively in the Ellsworth American, a public newspaper published in Ellsworth, in the County of Hancock, the first publication to be thirty days before the time of said view that they may then and there attend and be heard if they think fit.

"In accordance with the foregoing order the undersigned met at the time and place and for the purpose above specified and it appearing that notice had been given agreeably to said order, by serving an attested copy of the petition and order of court thereon upon the clerk of the town of Eden, and by posting up attested copies of the same in three public places in said town thirty days at least before the time appointed for said view, and also by publishing an attested copy of the petition and order three weeks successively, in the Ellsworth American, a public newspaper published in Ellsworth, in the County of Hancock, the first publication being thirty days at least before the time appointed for said view; proceeded to view the route set forth in said petition, after which view a hearing of the parties and witnesses was had at a convenient place in the vicinity, and after due consideration thereon being had, do adjudge that a road over said route will be of common convenience and necessity.

"Beginning at a Balm of Gilead tree nearly in front and Easterly from the Grand Central Hotel, thence running North 9½ degrees East, 19½ rods to North West corner of R. Sproul's store, thence North 7 degrees East 40 rods to a stake near the North West corner of Tobias Robert's dwelling house. Said line to be Eastern line of said road, and said road to be three rods wide.

"Ellsworth, Oct. 22nd, 1879.

"Which report being seen by the court and due deliberation thereon being had, was accepted by the court, and it was further ordered by the court that the original petition on which the foregoing proceedings are founded be continued to the next regular session of this court, to wit, the January Term, 1880. And now at this term the court order that the proceedings on the original petition be closed.

Attest: H. B. Saunders, Clerk."

W. P. Foster and C. H. Wood, A. W. King, with them, for plaintiff.

The record before the court does not show in and of itself, and without the aid of any inference, that the necessary jurisdictional facts existed to authorize the commencement of the proceedings by the commissioners; and, therefore, the proceedings in laying out the way were void, and afford no justification to the defendant for the acts complained of. *Small* v. *Pennell*, 31 Maine, 267; *Goodwin* v. *Co. Com.* 60 Maine, 328; *Bethel* v. *Co. Com.* 42 Maine, 478; *Hayford* v. *Co. Com.* 78 Maine, 156.

It would appear that the petition, ante p. 28, was addressed to the county commissioners. The record shows that it was upon this petition that notice was given and the action of the commissioners based. But the petition does not state any of the essential jurisdictional facts. If the proceedings of the commissioners were based upon this petition then they are void for want or jurisdiction. The petition referred to on page 28, is not sufficient to give jurisdiction to the commissioners. It does not state that any petition had before been made to the selectmen, by any one. It does not show that the selectmen had unreasonably refused to lay out the way within one year prior to the petition to the commissioners. Both these facts are essential.

It should appear that the petitioners to the commissioners were the same persons, or at least some of the same persons, who had before petitioned the selectmen. There is nothing in

the record to show that it was adjudged by the commissioners that there had been an unreasonable refusal by the selectmen. This is essential. *Pownal* v. *Co. Com.* 8 Maine, 271; *State* v. *Pownal*, 10 Maine, 24; *Goodwin* v. *Co. Com.* 60 Maine, 328.

The time has passed for the plaintiff to bring certiorari. However defective the doings of the commissioners are, the plaintiff must submit, provided they had jurisdiction. In deciding this question of jurisdiction upon the record presented here the plaintiff should have the benefit of a strict construction of the record.

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

While the county commissioners' record does not in all respects conform to the statute, it at least shows these things: that they, by virtue of a written application made to them setting forth that the selectmen of the town of Eden after notice and hearing of parties had unreasonably refused to lay out the way, gave all and the same notices required by the statute, went on to the ground at the time appointed, heard the parties, laid out the way and made their return describing it, which return was filed and recorded as required by law. There are some omissions and inaccuracies in their return, but these are either entirely unimportant,— mere violations of directory statutes,— or if important are defects that can only be taken advantage of by certiorari. Many of the alleged defects, such as failure to assess damages, to return a plan, to erect monuments, etc., are unimportant. They would not have been fatal even if the plaintiffs had proceeded by petition for writ of certiorari. *Howland* v. *Co. Com.* 49 Maine, 143.

The only defect open to proceedings on certiorari, is the failure on the part of the commissioners to make return of their adjudication that the selectmen had unreasonably refused to lay out the way. The petitioners set out this fact and the commissioners must have so adjudicated; but the record does not show it. Unless amended this would have been fatal upon certiorari. But this proceeding is an action of trespass against a duly qualified town officer acting under the decree of the court of county commissioners; and whatever might be said if this decree had

been attacked directly, it cannot be impeached collaterally. In this respect the acts of county commissioners differ from those of selectmen. The selectmen of towns are not a court. Their acts may be attacked collaterally. An officer exercising authority under them must show that their proceedings are correct; but it is otherwise with county commissioners' decrees. *Robbins* v. *Lexington*, 8 Cush. 292; *Old Colony R. R. Co.* v. *Fall River*, 147 Mass. 459, and cases; *Goodwin* v. *Hallowell*, 12 Maine, 271; *Fisk* v. *Briggs*, *Ib.* 376; *White* v. *Co. Com.* 70 Maine, 317.

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

EMERY, J. The County Commissioners of Hancock County undertook to lay out a town way or street in the town of Eden. They had authority to do this, if (1,) a petition was presented to the municipal officers of Eden by one or more of the inhabitants of the town, or by one or more of the owners of cultivated lands therein, asking them to lay out the way; (2,) the municipal officers neglected or refused to lay it out; and (3,) the petitioners, or some of them, within one year thereafter, presented to the County Commissioners, at a regular session, a petition stating the above facts, and that the neglect or refusal of the municipal officers was unreasonable. R. S., c. 18, §§ 14-19.

The record of the County Commissioners is confused and faulty; but we think it can be reasonably inferred from what record there is,— (1,) that Isaac B. Desisle, and seven others, inhabitants of the town of Eden, on the 26th day of July, 1879, petitioned the municipal officers of Eden to lay out the way; (2,) that the municipal officers neglected or refused; (3,) that the same Isaac B. Desisle and seven others, the original petitioners, on the 4th day of August, 1879, presented to the County Commissioners, at an adjourned session of their regular April, 1879, session, a petition stating that they were inhabitants of the town of Eden; that they had petitioned the municipal officers of Eden to lay out the way; that the municipal officers had unreasonably neglected and refused to do so. From

this point onward the sufficiency of the proceedings to resist collateral attack is not questioned.

No appeal was taken by any person. No one has ever sought to have the proceedings and judgment of the Commissioners quashed by writ of certiorari. It is common knowledge that the way was opened and has become one of the principal streets of Bar Harbor.

Although this record and judgment of the County Commissioners might, perhaps, have given way, if attacked by direct process along the lines of their faults, we think they have sufficient foundation and substance after these years to withstand a collateral attack. *White* v. *County Commissioners*, 70 Maine, 317.

Judgment for defendant.

MARY E. LIBBY, and others, in equity,

vs.

GEORGE D. CLARK, and another.

Cumberland. Opinion May 18, 1895.

Equity. Equitable Mortgage. Advances.

Where a deed absolute in form is held for security only, the fact may be proved by parol.

So long as the instrument is one of security, the borrower has a right to redeem upon payment of the loan.

A mortgagee after foreclosure took possession of the premises and allowed the mortgagors with the aid of their son to manage the property until it should work itself clear by the payment of regular installments upon the principal and interest. This arrangement continued until the full pay was tendered the mortgagee, the funds for which were obtained by the son on another mortgage of the same property, he having procured the title thereto by a deed from the mortgagee. Prior to this last named deed the mortgagors had contributed towards the payment of the regular installments, but had ceased doing so, and the son continued making them until he procured the deed to himself. Upon a bill by the heirs to redeem, in which the validity of the last mortgage was admitted and affirmed, *held;* that if the son had had no interest in the property, no equity, he would take nothing under his deed as against the mortgagors, and the original mortgage in equity would have been discharged

by the payment of the mortgage in full; but inasmuch as he had an interest in the property arising from the payments made by him, he had an equity that worked a consideration for the deed to him in whatever form it might be; and that although absolute in form he held the deed as security only for his advances and expenses on account of the property.

Held; that upon payment of such advances and expenses, redemption may be had.

ON REPORT.

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

The case appears in the opinion.

F. C. Payson, H. R. Virgin, and H. M. Davis, for plaintiffs.

B. D. and H. M. Verrill, for defendants.

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

HASKELL, J. The Portland Savings Bank held a mortgage from Mary Ann and Elliot F. Clark on certain real estate on Grove street, in Portland, to secure the sum of $10,900 that fell due in March, 1875. Foreclosure was commenced in April, 1877, and redemption expired in April, 1878. Meantime the mortgagors deposited, in sums of fifty dollars each, three hundred dollars and the same was entered on an existing account, entitled: "Bank book of Mrs. Mary Ann Clark, deposited by Elliot F. Clark on account of mortgage of Grove street property." June 18, 1878, after the time for redemption had elapsed, thirty-five dollars more were deposited upon the same account. In the following October, the Bank, George D. Clark, one of defendants, and his parents, Mary Ann and Elliot F. Clark, consummated an arrangement whereby the balance on the bank book, $610.37, was applied to the payment of interest on the mortgage notes, and the Bank and George signed the following writing:

"Memorandum of agreement between the Portland Savings Bank and George D. Clark in reference to the property on the corner of Portland and Grove streets, Portland, belonging to the bank, formerly under mortgage to the bank from E. F. Clark and wife.

"George D. Clark pays one thousand dollars in cash for lot numbered twelve on plan recently made by Edward C. Jordan, and to be recorded in the Cumberland Registry of Deeds, and pays taxes for 1878 on the whole property. Said Elliot F. Clark and wife receipt for the money on deposit in the Bank. George D. Clark is to hold possession of the remaining property so long as he shall pay the Bank seventy-five dollars a month from the date hereof, and shall keep the premises insured at his own expense for at least ten thousand dollars in the name of the Bank. The Bank pays all taxes after this date except as above."

At the bottom was added in pencil by the treasurer of the Bank:

"That provided George D. Clark shall pay the principal sum with interest accrued at six per cent to date and interest on same, he shall have a quitclaim deed of the property, and fix price on separate lots and moving small houses on street."

At the same time Mary Ann and Elliot F. Clark signed and delivered to the Bank: "Portland, October 23, 1878. Received six hundred and ten and thirty-seven and one-hundredths dollars, being amount in full, which amount is to be applied to paying interest on property on Grove street."

The treasurer of the bank testifies that, prior to the above agreement: "Mr. Elliot F. Clark came to the office in company with a man I had known as a boy but not by name, and said he was satisfied he should be unable to redeem the property himself or to do anything at all in that direction, and he had made arrangements with his son, George D. Clark, to redeem the property or purchase it for him. That George was to carry it for his wife and himself, and that George had always helped him, and he had received no help from any other members of the family, and wished him to receive what benefit accrued. That Elliot F. Clark should collect the rents and deposit them on the Bank book, and Mr. George D. Clark was to make up the balance of seventy-five dollars a month, which was to be paid under this agreement." Thereupon the board of managers of the Bank, on the day before the above memorandum was signed, voted, "That the Treasurer be authorized to quitclaim the lot

of land forty feet by one hundred feet, with the two-story wooden building thereon, to George D. Clark, situated on Grove street; provided Elliot F. Clark and his wife shall turn over to the Bank the sum of $595.50 now standing on Bank book in name of Mary A. Clark, and shall pay the taxes for 1878, and that said Clark shall have and enjoy possession of the property formerly belonging to Mary Ann Clark and Elliot F. Clark so long as he shall pay the sum of seventy-five dollars per month out of which the Bank shall pay the taxes hereafter accruing."

In execution of the agreements above stated, George D. Clark entered into possession of the property and made his father agent to collect the rents and deposit them in the bank while he, from other sources, provided the balance called for by the agreement. This continued until the father died in 1880, when the bank made a new arrangement with George for redeeming the property of the following tenor:

"You are hereby appointed agent of this Bank to collect the rents and have in sole charge the property on the corner of Grove and Portland streets, being all the property this Bank now owns, formerly the property of Elliot F. Clark and wife. This agency shall exist for three years provided you shall pay sixty dollars every month and keep the buildings insured in the name of the Bank for $8000.00 and make all necessary repairs without charge to this Bank; — should you or your heirs, executors or administrators effect sale of this property, all sums received for such sale over and above the sums advanced by this Bank on the property, with six per cent interest, shall be paid to you; and any partial sale or sales of parts of the property shall be credited on account until the cost of the property, with interest as above, shall be satisfied, when this Bank will quit-claim to you or your heirs, executors, administrators, or assigns, the remaining parcels of land."

This arrangement substantially continued until 1891, the mother meantime having died, when the bank conveyed the premises, by warranty deed, to George for the expressed consideration of $7,150.54, and he at the same time mortgaged the same to the Union Mutual Life Insurance Company to secure

a loan of $6000, and thereafterwards claimed to hold the equity in fee. These plaintiffs, however, contend that he holds the estate as security merely, and that they are entitled to redeem from him the equity of the Insurance Company mortgage, which they affirm as valid inasmuch as the loan secured thereby was applied to the bank's debt against the property; and that is the purpose of this bill.

The record title shows a fee in George D. Clark. The Insurance Company is a bona fide mortgagee and takes a valid mortgage. But while Clark's title appears to be absolute, it may be shown to be held for security only, if such be the real truth of the case. *Rowell* v. *Jewett*, 69 Maine, 293; *Stinchfield* v. *Milliken*, 71 Maine, 567; *Lewis* v. *Small*, 71 Maine, 552; *Reed* v. *Reed*, 75 Maine, 264; *Jameson* v. *Emerson*, 82 Maine, 359.

The memory, sometimes moulded by self-interest, sees the more clearly as time runs on; but the logical inference from undisputed facts always shows true.

In 1875 the mortgage fell due. In 1877, interest fell in arrears and foreclosure was begun. Meantime rents were paid to the bank on account of mortgage on Grove street property. After redemption expired, the mortgagors took their son George to the bank, with the hope of saving their property and their home, and it was agreed that by his aid, and the application of the mortgagor's deposit to the mortgage debt, further time should be given. That is, George was to pay $1000 for lot No. 12, and seventy-five dollars a month. That he might do this, the Bank gave him possession of the property, and so long as he paid the seventy-five dollars a month and kept the premises insured, he might keep the possession; and when he should have paid "the principal sum with interest accrued and interest on same" he should have a deed of the property. Why should possession be given to George until he should pay "the principal sum with interest" if he were not to redeem? Could it have been the intention of the bank that, after he should have paid in a large part of "the principal sum with interest," and failed to pay more, his right of redemption should cease, and that he should lose what he had paid voluntarily without any obligation

on his part to do so? He did not promise to pay seventy-five dollars a month or any other sum. He was permitted to do so until "the principal sum with interest" should be paid. What is that but redemption? "So long as the instrument is one of security the borrower has a right to redeem upon payment of the loan." *Linnell* v. *Lyford*, 72 Maine, 283.

But it is said that the arrangement was with George, the parents' rights having been absolutely foreclosed. Let us see. The value of the property was greater than the mortgage debt. After supposed foreclosure, if the parents were to have no interest, why should they pay upon the mortgage debt $610.37 of their own money then in the bank? The treasurer says: "That money was not our property until a settlement was made with them." Why should George, after taking a deed from the bank of lot 12, take a warranty deed of the same lot from the parents? Why, in two days after the agreement with the Bank, wherein George was to pay taxes for 1878, should he take a note from his father and mother for these very taxes? Why should he take a mortgage of this very property from his father to secure this note? And why, in 1884, should he write: "Brother Gus, I do wish you would look round and see if Charles Woodman or some one else will buy all of that property. I do want to get out of it and I meant to, so now I had rather let some one else have it besides the Saving Bank. The property owes about ten thousand dollars, of course we want to get more for it, but if I can't it will go for the bill what it owes. I am tired of lugging it and am going to get out of it just as soon as I can. Please see if you can't find some one that will buy it. I do wish we could get fifteen thousand dollars for it, but it will go just as soon as I can get rid of it. I am afraid if they take it I can't get my money out of it." Is it not for the plain reason that he engaged "to redeem the property" and to "carry it for his father and mother," as the treasurer of the bank says the father told him was the arrangement when he first brought George to the Bank?

The upshot of the transaction amounted to this. The Bank, as mortgagee, took possession, and allowed the mortgagors,

with the aid of their son, to manage their property until it should work itself clear, if seventy-five dollars a month and insurance, afterwards reduced to sixty, should be paid upon "the principal sum with interest." This arrangement continued until full pay was tendered the bank. Its mortgage was then redeemed, partly by the money of George and partly by the money of the mortgagors, and the bank's apparent fee was conveyed to George. If George had had no interest in the property, no equity, the conveyance to him from the bank would have given him no real title as against the mortgagors, and the mortgage, in equity, would have been discharged; but, inasmuch as he had an interest in the property on account of the payments that he had made to the bank, he had an equity that could work a consideration for the conveyance to him in whatever form it might be.

Now, the bank, apparently holding a foreclosed mortgage, conveyed the property to George, who thereby apparantly took a fee, but really only a security for his advances. It was in his power, however, to destroy the equity by conveyance to a bona fide purchaser. This he did by giving a mortgage to the Insurance Company for a loan with which to redeem the bank mortgage, retaining an equity of redemption to secure himself for advances and expenses on account of the property. Upon the payment of these, redemption may be had.

The plaintiffs and defendants are all children and heirs of the mortgagors, and have inherited equal shares in the premises now held by the defendant, George D. Clark. Upon payment to him for advances and expenditures, including interest, the property should be divided equally among the parties to this suit.

Let a master take an account, and the equity of redeeming the Insurance Company mortgage be sold, and the proceeds be applied, first, to the payment of costs of this suit, second, to any claim found due George D. Clark, and, third, let the balance be divided equally among all the parties to this cause, share and share alike.

Decree accordingly.

MATTHEW S. GOODRICH, and another.

vs.

CITY OF WATERVILLE.

Kennebec. Opinion May 21, 1895.

Physicians. Contract. Towns. R. S., c. 3, § 36.

All persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers.

When a town or city has already provided for the medical treatment of its sick paupers, by the election of a town or city physician, and he is ready and willing and competent to attend a sick pauper, so that no necessity exists for employing any other, it is undoubtedly the duty of the overseers of the poor to call him, when one of the paupers under their care is sick and in need of medical treatment.

In such a case the overseers have no authority to employ any other; and, if others are employed, they are chargeable with notice that they will have no right to call upon the town or city to compensate them for their services.

It is provided by statute, R. S., c. 3, § 36, that: "No member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof." *Held*, that one of the plaintiffs being a member of the city council, no action can be maintained to recover for medical services rendered by his firm to a pauper of his city.

It is a contract in which a member of the city government is directly interterested, and for that reason is void by the statue.

AGREED STATEMENT.

This was an action wherein the plaintiffs, M. S. Goodrich and Fred E. Withee, co-partners in the business of physicians and surgeons in Waterville, seek to recover for professional services and medicine, an amount of forty-one dollars and fifty cents, the same having been furnished to a woman pauper of said Waterville. The principal part of the services and medicine were furnished to the pauper by Dr. Withee, he having been first employed to attend the pauper while Dr. Goodrich was away out of the city; but during their employment Doctor Goodrich called upon her once or twice and knew that he and Dr. Withee were rendering her medical attendance on account of the city, at the request of the overseers.

It is admitted that the services were rendered at the request of

the overseers of the poor. It is also admitted that, at the same time, the city had a city physician who might have been called to treat the patient, but that for some reason the overseers called the plaintiffs, and he was not called as he might have been if the overseers had seen fit to call him.

It is also admitted that Dr. Goodrich was at the time a member of the common council of the City of Waterville.

It was agreed that the plaintiffs were to recover the full amount of the bill, unless the fact that Dr. Goodrich was a member of the city government, at the time these services were rendered, bars the recovery under the statute; or unless the overseers of the poor exceeded their authority in employing the plaintiffs when the city had a regularly elected city physician.

W. T. Haines, for plaintiffs.
F. W. Clair, for defendant.

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

WALTON, J. This is an action to recover for medical attendance upon a pauper. Payment is resisted upon the ground that the plaintiffs were not legally employed.

It appears that, at the time when the services sued for were rendered, the city had a regularly and legally elected city physician, who was being paid a salary for medical attendance upon all its paupers, and who might have been called to treat the pauper, but that, for some unexplained reason, the overseers of the poor did not see fit to call him, and employed the plaintiffs. It also appears that, at the time of the employment of the plaintiffs, one of them was a member of the city council. And it is claimed that under these circumstances, the employment of the plaintiffs was unauthorized and illegal.

We think the defense must be sustained. It is true that overseers of the poor may, when necessary, provide for the medical treatment of the paupers under their care. But when a town or a city has already provided for the medical treatment of its sick paupers, by the election of a town or city physician, and he is

ready and willing and competent to attend a sick pauper, so that no necessity exists for employing any other, it is undoubtedly the duty of the overseers of the poor to call him, when one of the paupers under their care is sick and in need of medical treatment. And, in such a case, we think they have no authority to employ any other; and, if others are employed, that they are chargeable with notice that they will have no right to call upon the town or city to compensate them for their services. All persons acting under the employment of town or city officers must take notice at their peril of the extent of the authority of such officers.

And, again, it has been wisely enacted that "no member of a city government shall be interested, directly or indirectly, in any contract entered into by such government while he is a member thereof." R. S., c. 3, § 36. And the statute cited declares that all such contracts shall be void. If the employment of the plaintiffs did not create such a contract, then, of course, their action is not maintainable; for such a contract is the cause of action, and the only cause of action declared on. If it did create such a contract, it was one in which a member of the city government was directly interested, and, for that reason, one which the statute cited declares shall be void; and, being thus made void, of course no action can be maintained upon it. We think this, also, is a valid ground of defense. The statute makes no distinction with regard to the character of the contract. It may be to build a city hall or open a street or construct a bridge or take charge of a sick pauper. All are alike illegal and void. The statute makes no distinction.

Plaintiffs nonsuit.

SARAH A. SAWYER, Administratrix,
vs.
JARVIS C. PERRY, and others.

Knox. Opinion May 28, 1895.

Negligence. Death. Pleadings. Stat. 1891, c. 124.

The remedies provided by Stat. 1891, c. 124, entitled, "An Act to give a right of action for injuries causing death," are limited to cases where the person injured dies immediately.

Held; that the legislature intended by this act to extend the means of redress to a class of cases where none existed before; and not to give two actions for a single injury,—one for the benefit of the decedent's estate and another for the benefit of his widow and children or next of kin.

In an action to recover damages for negligently causing the death of a person, the declaration averred that the decedent lived about an hour, and in its original form was simply a common-law action based on the alleged negligence of the defendant. The writ was amended by an allegation that the action was brought for the benefit of the widow of the deceased. *Held;* that the amendment changed the character of the action, and was, therefore, demurrable.

In its original form, the damages, if any are recovered, will belong to the estate of the deceased. In its amended form they will belong to the widow; and the amendment changes the rule by which the damages are to be assessed.

While other courts, and some writers of text books have used indiscriminately the word instantaneous and immediate, they do not, in this class of cases, mean precisely the same thing. An instantaneous death is an immediate death; but an immediate death is not necessarily and in all cases an instantaneous death.

ON EXCEPTIONS.

This was an action upon the case to recover damages alleged to have been sustained by reason of the negligence of the defendants, and resulting in the death of Ralph S. Sawyer, the plaintiff's intestate.

The plaintiff moved to amend her declaration by inserting near the close thereof the words, "this action is brought for the benefit of said Sarah A. Sawyer, widow of said intestate, said intestate having died without children," and also the words "and as the person for whose benefit this action is brought," which amendment was allowed by the presiding justice, against the objection of the defendants, and was thereupon made.

To the declaration so amended the defendants then filed a general demurrer, which was duly joined, all of which was during the return term of said action. The presiding justice sustained the demurrer so filed to the amended declaration and the plaintiff thereupon seasonably excepted to the ruling sustaining the demurrer as aforesaid.

It was stipulated by the parties that if the plaintiff's exceptions should be overruled by the law court and the plaintiff shall thereupon desire to again amend her declaration by striking out the amendment which was allowed by the presiding justice as aforesaid, the plaintiff should have the right to do so without the payment of costs.

The declaration, as amended, was based upon the following statute:

Chapter 124, Laws of 1891.

"An Act to give a right of action for injuries causing death."

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony.

"Section 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then to her and them equally, and, if neither, of his heirs. The jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, provided, that such action shall be commenced within two years after the death of such person."

True P. Pierce, for plaintiff.

A. A. Strout, C. A. Hight, and J. W. Symonds, for defendants.

Counsel argued: The statute of 1891 should be construed in accordance with existing rulings of our court, to apply only to cases of instant death; and as it appears in the declaration in this case that Sawyer lived after the injury and acquired a common-law right of action, which has survived to his administratrix, we say that the case is not one which may be maintained under the 1891 statute; and as this declaration is also bad at common law, we contend that the exceptions should be overruled and the demurrer sustained.

There was no real defect in the common-law action, which survived. So far as that action went it was well enough. It gave a substantial remedy in nearly every case to which it applied. The real defects, which required new legislation, were defects in the remedy provided for cases which were not covered by the survival statute. In other words, the indictment remedy for cases of instant death was the defective spot in the existing body of law. In the first place, this indictment statute, giving a remedy in cases of instant death, was defective in that it restricted the remedy to cases where the wrong was done, either by a transportation company, or by its servants. There was need of a general remedy against all wrong-doers. With the growth of manufacturing interests a remedy for instant death had become fully as necessary in factory cases as in railroad cases. There was no reason why the remedy should not be against all wrong-doers. In the second place, the indictment statute had been so construed as to allow no remedy whatever to employees in cases of instant death resulting from the master's negligence, even though the master was a railroad or common carrier. *State* v. *M. C. R. R.* 60 Maine, 490. There was need of new legislation to cure this defect. There was no reason why the master should not be liable, in cases of instant death, as he was liable in cases where the death was not instantaneous. In the third place, the remedy by the indictment process was

exceedingly inconvenient in form, and it was different in form from what it was in substance; being in form a criminal action, while in substance it was really a civil proceeding. *State* v. *Grand Trunk R. R.* 58 Maine, 182. There was need of new legislation to do away with such inconvenience, and to give a remedy by civil action.

The law of 1891 cures these defects as if it were especially aimed at them. It gives a general civil remedy against all wrong-doers and in favor of all persons who have been wronged, no matter whether the person was an employee of the wrong-doer or not. The old defect of having an inconvenient form of remedy is also cured, the statute providing a general civil remedy in as convenient a form as possible.

It seems to be perfectly clear that what the legislature did in forming this act of 1891 was to look at the body of law previously existing, to note the defects in our indictment process to recover for instant death, and to work this indictment process over into a civil action of a more general nature. They found a general form for their new statute in Lord Campbell's Act, which had been adopted by many states in this country; they did not, however, adopt this statute and lose sight of the indictment statute entirely, but in naming the persons for whose benefit the action was to be brought, they followed the wording of the old indictment statute. They also fixed the maximum amount that could be recovered in the action at five thousand dollars, taking this amount evidently from the old indictment statute, thus showing conclusively that the new law was merely a reconstruction of the old for the purpose of covering defects; and if the legislature were merely working over the old law, it is hardly reasonable to presume that they lost sight of the rulings of the court, which declared that it would be absurd to apply the old law to any cases other than those of instant death, and it is fair to presume that, if they intended to do away with these old rulings, they would have expressed the intention to that effect explicitly in the new statute which they did not do.

SITTING: WALTON, EMERY, HASKELL, WISWELL, STROUT, JJ.

WALTON, J. This is an action to recover damages for negligently causing the death of a person. The declaration alleges that Ralph S. Sawyer, while at work in the defendants' lime quarry, was killed by a stone which was negligently allowed to fall upon him.

The declaration avers that the decedent survived his injuries about an hour; and the suit, in its original form, was simply a common-law action, based on the alleged negligence of the defendants. But, by leave of court, the writ has been amended by inserting an allegation that the action is brought for the benefit of the widow of the deceased. This was an important amendment. It changed the character of the action. In its original form, the damages, if any had been recovered, would have belonged to the estate of the deceased. In its present form, the damages, if any are recovered, will belong to the widow of the deceased; and the amendment changes the rule by which the damages are to be assessed. The amendment, therefore, was important, and not a mere matter of form.

To this amended declaration, the defendants demurred. The object of the demurrer appears to have been to obtain a construction of the statute of 1891, c. 124, entitled, "An Act to give a right of action for injuries causing death."

The question argued is, whether the remedies provided by this statute (Act 1891, c. 124,) must not be limited to cases where the persons injured die immediately. It is the opinion of the court that they must. A similar statute has been so construed, and no reason is perceived why this statute should not receive the same construction.

In *State* v. *Maine Central Railroad*, 60 Maine, 490, the court held that a statute giving a right of action by indictment against railroad corporations for negligently causing the death of a person, and declaring that the amount recovered should be for the benefit of the widow and children of the decedent, must be limited in its application to cases of immediate death; and this decision was affirmed in *State* v. *Grand Trunk Railway*, 61 Maine, 114.

The court could not believe that the legislature intended to give two remedies for a single injury. It had become settled

law in this State that if a person was injured through the negligence of another person, or a corporation, and afterwards died of his injuries, redress could be obtained by his personal representative. But it had been held in Massachusetts (and the law was assumed to be the same in this State) that if the person injured died immediately, no redress could be had. And it was believed that it was the intention of the legislature to remedy this defect. Not to give a new right of action, where ample means of redress already existed; but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed. And it was believed that full effect would be given to the legislative intention by limiting the new right of action to cases where the persons injured died immediately.

So, in this case, we can not believe that the legislature intended by the act of 1891, c. 124, to give two actions for a single injury,— one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin. We think the legislative intention was to extend means of redress to a class of cases where none before existed. This class of cases was still large. There still existed a large class of cases in which redress for injuries resulting in immediate death could not be had. And we can not resist the conviction that it was the intention of the legislature to provide means of redress for this class of cases, and not to duplicate the wrong-doer's liability, and subject him to two actions for a single injury. Previous statutes of a similar character having been so interpreted, we can not resist the conviction that the legislature expected and intended that this statute should receive the same interpretation. Our conclusion, therefore, is that the Act of 1891, c. 124, applies only to cases in which the persons injured die immediately.

We do not say that the death must be instantaneous. We have never so held. Very few injuries cause instantaneous death. Instantaneous means done or occurring in an instant, or without any perceptible duration of time; as the passage of electricity appears to be instantaneous. It is so defined in Webster's Inter-

national Dictionary. And when we say that the death must be immediate, we do not mean to say that it must follow the injury within a period of time too brief to be perceptible. If an injury severs some of the principal blood-vessels, and causes the person injured to bleed to death, we think his death may be regarded as immediate though not instantaneous. If a blow upon the head produces unconsciousness, and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes, and then dies, we think his death may very properly be considered as immediate, though not instantaneous. Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical. But, in stating legal propositions, it is impossible to be too exact; and while other courts, and some writers of text books, have used indiscriminately the words instantaneous and immediate, and the adverbs instantaneously and immediately, we have not regarded them, in this class of cases, as meaning precisely the same thing, and have preferred to use the words immediate and immediately, as being more comprehensive and elastic in their meaning, than the words instantaneous and instantaneously, and better calculated to convey the idea which we wish to express. Of course, an instantaneous death is an immediate death; but we have not supposed that an immediate death is necessarily and in all cases an instantaneous death.

Read in the light of history,—that is, taking into account the then existing state of the law in this State, and the defects supposed to exist, and the presumed desire to remedy these defects, and not to change or alter the law in particulars where no change was needed,—our conclusion is that the statute of 1891, c. 124, entitled, "An Act to give a right of action for injuries causing death," was intended by the legislature to apply to cases where the persons injured die immediately. It not being averred in the plaintiff's declaration that her husband died immediately, but, on the contrary, it being therein averred that he survived about an hour, we think the declaration describes only a common-law right of action, in which the damages, if any are recovered, must be for the benefit of the decedent's estate generally,

and not for the exclusive benefit of his widow; and that, in its amended form, (declaring that the action was brought for the exclusive benefit of the widow of the deceased,) it was demurrable, and that the demurrer was rightfully sustained. Consequently, the exceptions must be overruled. But, as stipulated in the bill of exceptions, the plaintiff may again amend her writ by restoring it to its original form, without the payment of costs, and the defendants may plead anew.

Exceptions overruled.

FRANK E. BROWN, Petitioner for Mandamus,

vs.

DANA P. FOSTER.

Kennebec. Opinion May 29, 1895.

Elections. Mayor of Waterville. Casting Vote. Spec. Laws, 1887, c. 195.

The mayor of the city of Waterville, is not entitled by the city charter (Private and Special Laws of 1887, chapter 195), to vote with the aldermen and councilmen in joint convention in the election of a city clerk and city treasurer, besides having the casting vote in such election in case of a tie.

The argument in favor of the pretended prerogative on the part of the mayor rests upon an introductory clause in the city charter which declares that "the mayor, board of aldermen and common council shall constitute the city council;" it being further provided in a subsequent section of the charter that certain subordinate city officers, "shall be elected by joint convention of the city council." *Held;* that these general terms describing the mayor as a part of the city council are specifically and particularly defined in other and subsequent sections and clauses, by which it is made clear that it is only in the use of certain special powers, such as being a presiding officer, making appointments and exercising the veto power, etc., is he a part of the city council.

Also, that the section of the city charter which makes him the presiding officer over the board of aldermen and joint conventions of the city council expressly provides that he shall have, not a casting vote, but "only"—a casting vote.

The city charter uses the phrase "city council" in several instances in such a manner as to include the two boards but excluding the mayor,—thus recognizing the wise parliamentary principle which restricts the functions of a presiding officer to holding a balance of power between equally divided votes

of deliberative bodies in order to facilitate but not block their business; for breaking but not making a tie.

On exceptions.

This was a petition for mandamus to compel the defendant to deliver to the complainant all books, papers, records, etc., appertaining to the office of city clerk of Waterville, the complainant alleging that he was duly elected to that office, which allegation the defendant denied; the complainant further alleging that in the election of subordinate city officers in the city of Waterville, the mayor of said city could not participate except where each candidate had an equal number of votes.

In the hearing before the justice before whom the proceedings pended, the following rulings, findings and decrees were made:

1. That in the election of said subordinate officers, said mayor was not entitled to vote unless each candidate had received an equal number of votes.

2. That the vote cast by the mayor at the election of a city clerk on March 27th, A. D., 1895, was illegal.

3. That the peremptory writ of mandamus be issued.

To all which rulings, findings and decrees, the respondent took exceptions.

The case is stated in the opinion.

S. S. Brown, for petitioner.

Reuben Foster, and Dana P. Foster, W. C. Philbrook, for respondent.

Sitting: Peters, C. J., Walton, Emery, Foster, Haskell, Wiswell, JJ.

Peters, C. J. The only question sought to be settled by this proceeding of mandamus is whether the mayor of the city of Waterville is entitled by the provisions of the charter of that city (ch. 195, Pri. and Spec. Laws, 1887) to vote with the aldermen and councilmen in joint convention in the election of subordinate city officers, in the present case in the election of a city clerk, besides having the casting vote in such election in case of a tie.

The case comes to us upon exceptions to the ruling of the justice of this court who tried the action, and who decided that the mayor had no such right as was claimed and exercised by him, the learned justice making at the time the following oral observations in support of his conclusion:

"It appears that eleven members of the city council in joint convention voted for the petitioner, for city clerk, and ten for the respondent. Thereupon the mayor claimed the right to vote and did vote for the respondent who now claims that no person received a majority of all the votes and hence there was no election for city clerk.

"In determining the mayor's right to vote under these circumstances recourse must first be had to the city charter of Waterville. It is provided in section two of this act of incorporation that the 'mayor, board of aldermen and common council shall constitute the city council.'

"Section three provides that the mayor 'shall preside in the board of aldermen and joint meetings of the two boards but shall have only a casting vote.' It is further provided in the same section that the 'city council may elect the mayor to any city office and allow him a reasonable compensation for service rendered in such office,' while by section seventeen the aldermen and common council are declared to be ineligible to any office of profit or emolument the salary of which is payable by the city.

"Section six provides that 'all officers of the police and health departments shall be appointed by nomination by the mayor and confirmed by the aldermen. . . . All other subordinate officers shall be elected by joint convention of the city council.'

"These provisions of the charter must be construed with reference to the general policy of our law respecting municipal government and in the light of the familiar rule of construction that as the different parts of a law reflect light upon each other it should be so expounded, if practicable, as to avoid any contradiction or inconsistency and give some effect to every part of it.

"The provision that the mayor 'shall preside in the board of aldermen and joint meetings of the two boards but shall have

only a casting vote' is found in precisely the same language in every city charter in the State from its early history to the present time; and with the exception of the express mention of the mayor as one of those constituting the 'city council' of Waterville all the other provisions relating to the point under consideration are essentially the same in all other charters as in the Waterville charter. It has been the obvious policy of the State to provide in their charters for annual city elections and to give effect to the free voice of the people and insure the orderly continuance of the city governments by facilitating rather than obstructing the annual elections of officers; and it is understood to have been the uniform practice under all these charters for the mayor to exercise the right in joint convention to give only a casting vote for the purpose of breaking a tie and not for the purpose of making one. Such a practical interpretation which has been accepted as correct for nearly three-fourths of a century is entitled to respectful consideration in the decision of such a question.

"This view of the construction to be given the right to give 'only a casting vote' is strengthened by section thirty-four of chapter three of the Revised Statutes which declares that in the 'election of any city officers by ballot in the . . convention of the aldermen and common council in which the mayor has a right to give a casting vote if two or more candidates have each half of the ballots cast he shall determine and declare which of them is elected.' Here is a plain implication that the term 'casting vote' as used in this connection, is restricted to a vote thrown by the mayor as a presiding officer when the votes cast by the members are equally divided. It seems clear that if it had been the purpose of the Legislature to make such an important distinction between the Waterville charter and all others, as the respondent contends for, more explicit and unequivocal language would have been used than any found in this act. The mere mention of the mayor in connection with the aldermen and common council as of those constituting the city council is not sufficient to show such intention.

"It is plain also that no distinction was intended between the

'joint meetings of the two boards,' in which the mayor has 'only a casting vote,' and the 'joint convention of the city council,' for the election of officers; for it has not been suggested that 'joint meetings of the two boards,' are held for the transaction of any business worthy of mention, other than the election of subordinate officers.

"For these reasons it seems to be my duty to grant the petition and order the writ of mandamus to issue."

In the views expressed in this statement we fully concur.

The force of the argument in favor of this pretended prerogative of the mayor rests in an introductory clause in the city charter which declares that "the mayor, board of aldermen and common council shall constitute the city council;" it being further provided in a subsequent section of the charter that certain subordinate city officers "shall be elected by joint convention of the city council."

But while the first clause in very general terms describes the mayor as a part of the city council, the meaning of that declaration is found in other and subsequent clauses and sections which define with particularity just what part of the city council he shall be considered to be. Such subsequent provisions of the charter declare exactly what the powers of the mayor shall be, and in what manner the same shall be exercised. Nor does the clause in section two, which embraces aldermen and common councilmen within the composition of the city council, as well as it does the mayor, attempt to define or limit their powers or duties, but those also are left to be enumerated afterwards.

The charter confers various special powers on the mayor, among which is the power of appointment in many instances. He is so far a part of the city government that no legislative act can be passed by the other branches without his approval, unless by a vote of two-thirds of the members in each of such other branches of the government. It is in this sense, and to the extent of such powers as are specially committed to him, and no further, that he is a part of the city council. No other construction of the charter as a whole will make a consistent and sensible instrument of it.

In another respect may the mayor in a general if not a strict and technical sense be denominated some part of the city council, and that is because he presides over the meetings of the aldermen and over "the joint convention of the city council." But the section granting him that privilege expressly provides that in the business of such meetings he shall have, not a casting vote, but "only" a casting vote. This is a wise recognition of the parliamentary principle which allows a presiding officer the authority of holding a balance of power between equally divided votes of a deliberative body in order to faciliate but not to block legislation; or, as the justice presiding in this case expressed it, for breaking but not for making a tie vote.

It will be seen on an examination of the charter in question that the phrase "city council" is employed in several instances as evidently including the two boards and excluding the mayor. This idea pulsates throughout most of the provisions of the charter.

Exceptions overruled.

CHARLES H. REDINGTON, in equity, *vs.* MARTIN F. BARTLETT.

Kennebec. Opinion May 29, 1895.

Elections. Mayor of Waterville. Casting Vote. R. S., c. 4, § 55. Special Laws, 1887, c. 195.

Principle in preceding case applied.

IN EQUITY.

This was an appeal in equity, heard on petition, answer and testimony, brought to this court by the defendant as provided by R. S., c. 4, § 55, relating to contested elections. The following is the decree from which the appeal was taken:

"State of Maine. Kennebec, ss.: Supreme Judicial Court.

Charles H. Redington v. *Martin F. Bartlett.*

"And now, upon the fifteenth day of April, A. D., 1895, the above entitled case came on for hearing, before the Honorable WILLIAM P. WHITEHOUSE, Justice of said Court, and thereupon

after hearing the testimony of parties and witnesses and arguments of counsel, said justice determined and decided that the petitioner was duly elected to the office of city treasurer of the city of Waterville, as set forth in his petition."

To which determination and judgment the defendant appeals for the following reasons:

"1st. That the presiding justice, after objection on the part of the defendant, required Christian Knauff, witness for the complainant in the case, and mayor of the city of Waterville, to testify as indicated in the following question and answer.

"Question. For whom did you vote? (Objected to and admitted. Exception allowed.) Answer. I voted for Mr. Bartlett, of course, Martin F. Bartlett. My vote was counted with the other votes for city treasurer."

"2d. That by the charter of the city of Waterville the mayor of said city is entitled to participate in the election of subordinate officers, which he did in this instance, so that neither the complainant nor any other person received a sufficient number of votes to elect him to the said office of city treasurer."

Which appeal the said defendant prays may be allowed and approved as provided in R. S., c. 4, § 55.

C. F. Johnson, for plaintiff.

W. C. Philbrook, for defendant.

Counsel argued: (1st,) That the election of a city treasurer of Waterville, he being one of the subordinate officers contemplated by the charter, is to be performed by the city council of Waterville. (2nd,) That the mayor is, by the city charter, made a member of the city council. (3rd,) That as a member, even if he is the presiding officer, and making all due allowance for the restriction claimed in the charter that he has only a casting vote, he would still have the right, in elections, according to Cushing's Parliamentary Law, to vote with the other members. (4th.) That the provisions of R. S., c. 3, § 34, do not apply to the city charter of Waterville. (5th,) That by inference the ruling in *King* v. *Andrews*, 77 Maine, 224, sustains the position taken by the defendant. Counsel cited: 3 Am. & Eng. Encly.

Law, "casting vote;" 1 Bl. Com. p. 181, note in Sharswood's ed.; *Robertson* v. *Bullions*, 1 Kernan, 243.

Admission of testimony: *People* v. *Pease*, 27 N. Y. 45; S. C. 84 Am. Dec. note p. 272.

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

PER CURIAM.

Appeal dismissed.
Decree below affirmed.

RANDALL L. TAYLOR, and others, in equity,
vs.
JACOB J. BROWN, and another.

Franklin. Opinion May 31, 1895.

Will. Absolute Gift. Life-Estate.

A testator gave by will to his widow real and personal estate and in the same clause of his will added these words: "And at her decease what remains I wish to be equally divided between . . . children of my wife's sister."

Held; That an estate in fee passed to the widow in the property named; and if the testator intended a devise to his widow for life only and then a devise over to the children of his wife's sister, he failed to use appropriate terms to effectuate such an intention.

Where a testator makes an absolute gift and then expresses a wish as to how the donee may dispose of a portion of it before the donee's death, *held;* that the title to the property having been once given away cannot be regained by the hand that gave it away; and that however strong the language of recommendation or request may be, a trust will not be implied, if such a construction of the words will be repugnant to, or inconsistent with, other parts and positive provisions of the same will.

Copeland v. *Barron*, 72 Maine, 206, affirmed.

ON REPORT.

This was a bill in equity, heard on bill and answers and reported to the law court, to determine the title to the property named in the first clause in the will of Josiah A. Judkins, late of Farmington, viz: a construction of the first clause in the will

as to the devise and bequest to Sila Judkins, wife of the testator. The bill was brought by the plaintiff as executor of the will, who is an heir and legatee under the will, joined by all the other heirs and legatees, against the defendants who are named in the first clause of the will, and children of a sister of the testator's wife.

The case is stated in the opinion.

J. S. Wright, for plaintiffs.

J. C. Holman, for defendants.

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

PETERS, C. J. Josiah A. Judkins executed his will, containing this clause: "I will, devise and bequeath to my beloved wife, Sila Judkins, my home lot and buildings thereon, situated at West Farmington, near the depot, and known as the Davis stand, and also all my household goods, beds and bedding, and two hundred dollars in money; and at her decease what remains I *wish* to be equally divided between Jacob J. Brown and Nellie Washburn, children of my wife's sister."

There can be no doubt that a title of an estate in fee passed to the devisee in the property named. The question is whether that fee was so far limited to the lifetime of the devisee that there was a devise over of such of the devised estate as remained in existence and unexpended at her decease.

We think it clear that this case falls in the category of a long list of cases where it has been held that, if the testator intended a devise to one person for life and then a devise over to another, he or she has failed to use appropriate terms to effectuate such an intention. The trouble in many cases is that a testator seeks to accomplish two or more inconsistent purposes in one bequest. In the present case the testator makes an absolute gift, and then expresses a wish as to how the donee may dispose of a portion of the estate before her death. The title of property once given away cannot be regained by the hand that gave it. This principle will be found supported and variously illustrated by the doctrine declared in *Copeland* v. *Barron*, 72 Maine, 206, and

the cases there cited and examined. Later cases in this State are also to the same effect. The rule here applied sometimes operates harshly, no doubt, in defeating the real intention of testators; but it is a safer rule than one which for want of strictness would be attended in its application with all sorts and shades of doubt and uncertainty.

The rule is the same in equity as at law. However strong the language of recommendation or request may be, a trust will not be implied if such a construction of the words will be repugnant to, or inconsistent with, other parts of the same will, as by cutting down an absolute estate, first clearly given, to an estate for life. Mr. Perry (Perry on Trusts, 4th Ed. § 114,) quotes, in his very clear discussion of this principle, the statement of the rule as given by Lord Cottenham, in these words: "Though recommendation may in some cases amount to a direction and create a trust, yet that being a *flexible* term, if such a construction of it be inconsistent with any *positive* provision in the will, it is to be considered as a recommendation and nothing more." "The flexible term," says Mr. Perry, "must give way to the inflexible, if the two cannot stand together as they are expressed."

The parties may have fees of counsel for a reasonable amount according to the condition of the estate, to be determined by the justice who makes the final decree.

Decree according to the opinion.

SUSAN C. WARREN, and others, in equity,

vs.

WESTBROOK MANUFACTURING COMPANY, and others.

Cumberland. Opinion June 1, 1895.

Waters. Partition. Island. Equity.

Equity has jurisdiction to make partition of the use of water between opposite riparian proprietors when necessary to secure an equal use or enjoyment in their rights.

In the last decision of the court upon the rights of the parties to the use of the waters of the Presumpscot river for mill purposes, (86 Maine, 32,) it appeared that there were two channels, eastern and western, around an island,

flowing past the riparian parties at Saccarappa Upper Falls. The court there decided upon the issue then raised (1,) that a riparian ownership of three out of four shores of two channels upon the same river does not itself establish a right to use three-fourths of all the water of the whole river; and (2,) that where no statute, contract or prescriptive right is invoked, the court will not undertake to wholly or partially apportion the waters of the river between the two channels, but will leave the parties to accommodate themselves to the division made by nature.

In this proceeding other facts appear and further allegations are made under which the plaintiffs claim, among other things, that the increased use of the waters by the defendant renders the whole power insufficient for the mills of all the riparian owners; that unless they can be assured of the steady and regular use of their full, rightful proportion of the water power, they cannot profitably operate their mills and cannot venture to undertake further operations, by reason of the cloud thus thrown over their rights.

Held; that the controversy here relates solely to the use of the flow of the water for the propulsion of machinery, and that the Court can and should make such division of the use of the flow of water between the opposite riparian proprietors as will secure to each a use or enjoyment equal to his right.

Also, held; that the bill should be further amended in statement to present all claims of right in any part of the falls and waters arising from riparian ownership, contract, prescription, or any other source.

The prayer for relief should be amended to include a division of the use of the water in each channel and the whole river, and any other action of the court necessary to finally and completely adjust this controversy.

See *Same* v. *Same*, 86 Maine, 32. *Westbrook Manufacturing Co.* v. *Warren*, 77 Maine, 437.

ON REPORT.

This was a bill in equity, heard on bill and demurrers of the defendants severally; the parties stipulating that, if the demurrers were overruled, the defendants might answer further.

The bill prayed for a partition of waters, based upon the following facts:

The Presumpscot river, a non-tidal stream, as it flows through Saccarappa Village at the place called Saccarappa Upper Falls, forms an island about three hundred and fifty feet long, and one hundred and fifty feet wide. In forming this island, the river divides itself into two branches or channels; one flowing on the easterly side, and the other on the westerly side of the island. In each of these branches or channels, are falls affording valuable water power. A dam has been built across each channel. These dams are substantially in line with each other, and form with the island a continuous dam across the whole river. There are

several mills on the island, and other mills on each side of the main river opposite the island. The mills on the eastern mainland, and on the eastern side of the island, are supplied with water from the dam across the eastern channel. The mills on the western mainland, and on the western side of the island, are supplied with water from the dam across the western channel.

The plaintiffs, other than Mary Little Hale Dana, own the western side of the island, the land under the western channel, and the land on the west side of the river opposite the island. They also own the dam across the western channel and the mills supplied by it.

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

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

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

The complaint and prayer as stated in complainants' bill, are based on the following assumptions, viz: (1,) That the defendant is entitled to only one-fourth of all the water flowing to and through both channels; (2,) that the plaintiffs are entitled to three-fourths of all the water so flowing, and now desire and are planning to use it; (3,) that the defendant against the protest of the plaintiffs has been drawing out of the dam across the eastern channel, and using to turn his mill on the east side of that channel more than his one-fourth of all the water in the river.

Briefly stated, the case is this: The Presumpscot river at Saccarappa Upper Falls, is divided by a natural island, into two channels of approximately equal capacity, and the plaintiffs and defendants are the owners of all the land and water power at these falls.

The defendant company owns the land forming the easterly half of the eastern channel, and is entitled to the use of the water flowing naturally there; being one-half of the water flowing in such easterly channel.

The plaintiff, Mrs. Dana, owns in severalty the land forming the westerly half of the easterly channel, and all the plaintiffs together, by virtue of conveyances and contracts between themselves, own the water flowing naturally in that westerly half of the eastern channel as tenants in common.

That the whole river has been improved and used for many years by dams in each channel, and mills upon all the shores; and, until 1882, all the parties had used practically all the water they were entitled to; at that time (1882), the defendant company built upon its land, upon the easterly bank of the easterly channel, a large factory, and has since drawn and used much more water than it was entitled to, against the protests of the plaintiffs, who were thereby obliged to shut down their mills, in whole or in part, many times for want of water then flowing in the river and to which they were entitled, reducing the out-put and increasing the expense and preventing the otherwise successful operation of the mills, and such use of the water by the defendants, if persisted in, will cause great and irreparable injury to the plaintiffs.

To prevent such misuse of the water by the defendants and to secure to themselves their full and just share of the water for the future, they asked a decree of the court fixing the rights of the parties in the water, and water rights and power in said easterly channel, and dividing such water or regulating its use between the plaintiffs and the defendants according to their respective rights, ascertaining and determining the same by surveys, measurements or such other devices as are in proper and common use by hydraulic engineers for such purposes.

Hanno W. Gage and Charles A. Strout, for plaintiffs.

Warren and Brandeis, and *Warrens and Mason*, of the Boston Bar, also filed a brief on the same side.

J. W. Symonds, D. W. Snow and C. S. Cook, for defendants.

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

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

EMERY, J. This controversy is over the use for mill purposes of the waters of the Presumpscot river, where it flows in two channels, eastern and western, around an island past the riparian lands of parties at Saccarappa Upper Falls. It is of several years standing, and has been unsuccessfully brought before the court on two former occasions at least. It should now be authoritatively and finally adjusted, if within the power of the court upon the allegations in this or an amended bill. A full statement of the physical, hydrographic facts is given in the case, *Warren* v. *Westbrook Manuf'g Co.* 86 Maine, 32, to which reference is made.

When the controversy first came before the court, in the case, *Westbrook Manuf'g Co.* v. *Warren*, 77 Maine, 437, the now defendant alleged that it was entitled to use one-half of the water power of the river at those falls, and that all the other riparian owners, collectively, were not entitled to more than the other half. It did not seek to have the respective rights of the riparian owners in the water power determined, nor did it seek for any action of the court that would divide the use according to the right. Its demand was for a general injunction upon all the other riparian owners, against their using collectively more than half of the water power of these falls, and this without showing that the damages recoverable at law would not be full compensation for any injury sustained. The court held that, under the allegations, this demand could not be granted.

The controversy again appeared in the case above cited, 86 Maine, 32. In that case the defendants in the first case appeared as plaintiffs. They alleged that they owned lands and mills on

both the main-land and island side of the western channel, and also the dam across that channel; that one of them owned land and mills on the island-half of the dam across the eastern channel; that the defendant owned land on the main-land side of that channel, and also the main-land half of the dam across the channel. They further alleged that, by virtue of this riparian ownership of three out of the four shores of the two channels, they were entitled to use three-fourths of the sum of the waters of the two channels, or three-fourths of all the water of the whole river. They asked the court to divide the water of the whole river in that proportion, so that they could use three-fourths and the defendant only one-fourth. They based their claim for the desired judicial action exclusively upon their riparian ownership, above stated, and without invoking any statute, contract or prescriptive right.

The opinion was wearily long, but the only points decided were: (1,) that a riparian ownership of three out of four shores of two channels upon the same river, does not of itself establish a right to use three-fourths of all the water of the whole river; and (2,) that where no statute, contract or prescriptive right is invoked, the court will not undertake to wholly or partially apportion the waters of the river between the two channels, but will leave the parties to accommodate themselves to the division made by nature. Early in the opinion the court gave this cautionary notice: "It should be continually borne in mind that we are considering the legal rights and duties based on the situation of the parties, and unmodified by any statutes, grants, contracts or prescriptions. None of these latter matters are stated in the bill, and their possible modifying effects are not considered here."

This time the plaintiffs allege the various riparian ownerships substantially as before, and they now further allege that a dam (one across each channel) has existed under the successive riparian proprietors, in substantially the same place as the present dam, for one hundred years. They also allege that, for ninety years after the dams were built, one-half of the water of the river has flowed through each channel, and that the water

would continue to flow through the channels in that proportion but for the wrongful acts of the defendants; that prior to the year 1882, the defendants, and its predecessors in title, used less than one-half of the water power upon the eastern channel, and less than one-fourth of the whole power of the river, and that there was then sufficient power for the mills of all the riparian owners; that in the year 1882, the defendants greatly enlarged and increased its mills, and then began to use, and have persisted in using, and propose to use in the future, more than one-half of the water power on the eastern channel, and more than its due proportion of the water power of the river. They allege that this increased use by the defendants renders the whole power insufficient for the mills of all the riparian owners; that unless they can be assured of the steady and regular use of their full, rightful proportion of the water power, they cannot profitably operate their mills, and cannot venture to undertake further operations, by reason of the cloud thus thrown over their rights.

With these allegations, the plaintiffs ask the court to determine the right or proportional share of each party in the water power of the eastern channel, and to effect between the riparian owners upon that channel, such a division of the use of the water-flow as will enable each to profitably utilize his rightful proportional share.

The defendants demur generally to the bill, and argue that it is a disguised attempt to induce the court to undertake a division of the whole water of the river between the two channels, an undertaking which the court has once declined. It is evident, and is frankly admitted by the plaintiffs, that a decree dividing and regulating the use of the water in either channel, may substantially affect the water power in the other channel; and that, to do full justice, the court may find it necessary to deal with the whole matter of all the water power at these falls.

The controversy demanding our attention is solely over the use of the flow of the water for the propulsion of machinery. The underlying question is whether, upon the case now presented, the court has and should exercise the power to ascertain, define and mark out for each party the extent of his share or

right in the use of the common flow of the water; or, in other words, whether the court can and should make such a division of the use of the flow of water between opposite riparian proprietors, as will secure to each a use or enjoyment equal to his right.

The waters of a river, in flowing from its highland sources down to the sea, develop a force convertible into mechanical power. The amount of this force depends upon the volume and momentum of the flowing water. The momentum depends on the height or distance of the fall of the water. To increase this volume and momentum, and make them sufficient and available for propelling machinery, dams are constructed, which accumulate the water of the river in larger volume and at a higher level than are natural. Where one party owns the whole dam and the land on both sides of the river, he has the right to the entire usufruct of all the power of the water as it accumulates at his dam. Where one party owns the land on one side of the river, and another party owns the land on the opposite side, (their lands coming together under the river midway between the two banks) and each owns the half of the dam on his land, then neither party is entitled to have the whole power of the accumulated water applied to his machinery. Each party has only an equal right with the other. Each has a right to use one-half of that power; but whatever part of that half he does not use, the other party can freely use. There is no proprietorship in the water, but only a right in its use, and one riparian owner may use so much as the other is willing to let go to waste. *Pratt* v. *Lamson*, 2 Allen, 275.

When the power is sufficient, from the volume or head of water, to propel at all times all the machinery both parties have set up, there is no occasion for any controversy. When, however, the power has become so reduced, or the machinery so increased that, for all or part of the time, the whole power of the water will not drive all the machinery, then the parties must in some way make a division of this reduced power, or its useful-

ness to either will be destroyed. If each competes with the other in a race to first appropriate the limited power to his machinery, the accumulation and head of water will soon be dissipated, the efficient power of the water exhausted, and all hope of its restoration be destroyed.

In this State the opposite mill owners upon our thousands of water falls have usually made this division of the use of the water power by mutual agreement. The division has been effected in various ways; by fixing hours or days for the alternate use of the water; by fixing the number and area of gates to be used at different stages of the water; by fixing water-marks for the cessation of all use until the agreed head of water is again accumulated; and by various other devices. Our judicial reports show a happy scarcity of litigation of this kind, and thus testify to an intelligent and well-developed sense of justice and fairness in this important class of our people. On this particular water fall, however, (by reason, perhaps, of its peculiar character,) the opposite mill owners cannot agree upon any mode of dividing the now limited water power; and they disagree, also, as to their proportional rights in that power.

These differences having arisen concerning the use of an ancient and valuable water power, it would be a reproach to our jurisprudence, if the court did not possess and exercise the power to authoritatively adjust them. The alternative would be a destructive competition in the use of the water, until it was rendered valueless to the parties and to the community.

It is evident, also, that the power to be exercised by the court should be that of prevention, rather than that of redress. To make the water power of economic value, the rights to its use, and the division of its use, according to those rights, should be determined in advance. This prior determination is evidently essential to the peaceful and profitable use by the different parties having rights in a common power. To leave them in their uncertainty, —to leave one to encroach upon the other, — to leave each to use as much as he can, and leave the other to sue at law after the injury, — is to leave the whole subject matter to possible waste and destruction.

These considerations make firm ground for the exercise of the court's preservative and preventive jurisdiction in equity, as prayed for here. There are also abundant authorities. *Bardwell* v. *Ames*, 22 Pick. 333; *Ballou* v. *Hopkinton*, 4 Gray, 324; *Lyon* v. *McLaughlin*, 32 Vt. 423; *Adams* v. *Manning*, 48 Conn. 477; *Burnham* v. *Kempton*, 44 N. H. 78; *Lehigh Valley R. R.* v. *Society*, &c., 30 N. J. Eq. 145; *Frey* v. *Lowden*, 70 Cal. 550; *Paper Company* v. *Kaukauna Water Power Co.* 70 Wis. 659; *Arthur* v. *Case*, 1 Paige, 447; *Head* v. *Amoskeag Manuf'g Co.* 113 U. S. 9; *Lockwood Mills* v. *Lawrence*, 77 Maine, 297.

It is suggested that the peculiar physical features of this case are such, that the court cannot make a just and practicable division of the use of the water; that while the court may have the theoretical right, it has not the practical power to make the desired division. Whether this difficulty really exists, can be better determined after the parties have presented their evidence. If the plaintiffs cannot then make clear to the court the practicability of their request, it may be properly denied.

It is urged that, while the prayer of the bill is limited in terms to a division of the use of the water flowing through the eastern channel, the court's action, even if confined within that limited prayer will necessarily affect the flow in the western channel, and may thereby enable the riparian owners on that channel to secure or retain some water power they otherwise would not have. The chance of such a result should not deter the court from attempting to do justice. Indeed, it may be an additional reason for the court's exercising its power more comprehensively and completely. As the case is now presented, the two dams make with the island practically one dam, and have been maintained as such for a hundred years. Each dam has for that time operated to increase the head at the other dam, by presenting an obstacle to the escape of the water around the island when flowed back by the other dam. The desired head of water at each dam has been kept up by both dams. The whole water of the river has been kept back and accumulated by the joint effect of both dams. Each riparian proprietor upon

either channel has used his riparian rights as they have been enlarged or diminished, or otherwise modified, by these ancient dams. The owner of each end of the eastern dam may have acquired a prescriptive right in the continued maintenance of the other end. The owners of the dam across each channel may have acquired a similar right in the continued maintenance of the dam across the other channel. In like manner, the long existence and use of these dams may have so affected the flow of the water through the different channels, that the natural flow is no longer the rightful flow. *Murchie* v. *Gates*, 78 Maine, 300.

As the case is now stated, neither party seems to have a naked, natural, unmodified right, such as was considered and defined in the former opinion, 86 Maine, 32. Nor can the riparian owners upon either channel now successfully insist that they are in a state of nature, and totally independent of the riparian owners upon the other channel as to the flow, or use of the flow, of the water in their own channel. The interests of the riparian proprietors upon both channels now appear to be intertwined, if not amalgamated. Thus intertwined, the interest of each proprietor upon either channel spans the whole river across both channels. Each has an interest in the regulation of the whole flow of all the water, into whichever channel it may turn.

Under such circumstances, it may be that complete justice cannot be done, even between the opposite riparian owners upon the eastern channel, without determining the rights of all the parties upon both channels, and dividing among them the use of the whole flow of the river, according as their rights may finally appear.

In view of the matters suggested, as well as those directly alleged in the bill, and in view of the hitherto unsuccessful attempts of both parties to secure judicial relief from their embarrassments, we think the court should now attempt, after proper amendments, to adjust all the rights of all the parties in the whole water power in both channels, and to divide the use of the water power in each channel, so that each party may enjoy his full right in the premises. If this seems a departure

from the conservative course the court has hitherto pursued when asked to exercise its equity powers, as in *Jordan* v. *Woodward*, 38 Maine, 423; *Manufacturing Co.* v. *Warren*, 77 Maine, 437; *Haskell* v. *Thurston*, 80 Maine, 129; we think the exigencies of this particular case fully justify it.

The demurrers stricti juris must be sustained, since by inadvertence, no doubt, the plaintiffs have made contradictory statements of the title of the easterly half of the eastern channel. This error, however, can be easily cured by amendment. The bill should also be further amended in statement to present all claims of right in any part of these falls, and waters, arising from riparian ownership, contract, prescription or any other source. The prayer for relief should be amended to include a division of the use of the water in each channel, and in the whole river; and any other action of the court necessary to finally and completely adjust this controversy.

Demurrers sustained. Bill retained for amendment, and further proceedings. If amendments not filed within sixty days bill to be dismissed.

SAMUEL D. WARREN, and others,

vs.

WESTBROOK MANUFACTURING COMPANY.

Cumberland. Opinion June 1, 1895.

Waters. Riparian Owners. Pleading.

Where the plaintiffs in their writ declare that they are owners of lands and mills on both sides of the western channel of a river, divided into two channels by an island, and are also owners of the dam across the western channel; and that a third person, not a party to the action, is the owner of lands and mills on the western or island side of the eastern channel and is also owner of the west half of the dam across that channel; that defendant has opened, and kept open, sluices and gates in the east half of the dam across the eastern channel; it appearing that the plaintiffs do not allege any ownership or interest in the east half of the eastern dam, nor allege any riparian rights in the eastern channel, *Held;* that the plaintiffs base their right of action solely upon their riparian rights in the western channel; and that no

fact is stated from which the court can infer that the defendant has violated any legal duty, or exceeded its lawful rights.

It is not the case of letting water down upon a lower riparian owner in unnatural quantities, nor of flowing water back upon an upper riparian owner. See *Warren* v. *Westbrook Manufacturing Co.* ante, p. 58.

On exceptions.

The case is stated in the opinion.

H. W. Gage and C. A. Strout, *Warren and Brandeis*, with them, for plaintiffs.

J. W. Symonds, *D. W. Snow and C. S. Cook*, for defendant.

Sitting: Peters, C. J., Walton, Emery, Whitehouse, Wiswell, JJ.

Haskell and Strout, JJ., having been of counsel, did not sit.

Emery, J. This action at law arose out of the same general controversy that gave rise to the equity cases between some of the same parties, reported ante, page 58, and in 77 Maine, 437, and in 86 Maine, 32. Reference is made to those reports for descriptions of the situation.

The gist of the plaintiffs' declaration in this action is; that they are the owners of lands and mills on both sides of the western channel of the Presumpscot river at Saccarappa Upper Falls, and also owners of the dam across that channel; that a third person (not a party to this action) is the owner of lands and mills on the western or island side of the eastern channel, and is also the owner of the west half of the dam across that channel; that the defendant has opened and kept open sluices and gates in the east half of the dam across the eastern channel, whereby the plaintiffs' head of water in the western channel has been materially reduced. The plaintiffs do not allege any ownership or interest in this east half of the eastern dam, nor do they allege any riparian rights in the eastern channel. They base their right of action solely upon their riparian rights in the western channel.

They do not charge the defendant with widening or deepening the eastern channel; nor with removing or lessening any natural obstruction in that channel; nor with any interference with the

natural flow of the water in either channel. The gravamen of the offense as alleged is, that the defendant removed or lessened some artificial obstructions to the flow of the water in the eastern channel, obstructions not on any lands of the plaintiffs, but presumably on lands of the defendant.

In our former opinion, 86 Maine, 32, we stated that, in the absence of any modifying statute, contract or prescription, the rights and duties of the riparian owners upon these two channels were substantially as follows: The riparian owners on either channel were entitled to have flow through their channel so much of the water of the whole river as would naturally flow there and no more. They could not lawfully widen or deepen or otherwise improve their channel in such a way as to lessen the natural flow of water in the other channel. They were not bound to erect or keep up any dam or other artificial obstruction in their channel in order to increase or preserve the flow of water in the other channel.

In this declaration the act of the defendant in making openings through the east half of the eastern dam, an artificial obstruction, (presumably on its own property and admittedly not on the property of the plaintiffs) is stigmatized as wrongful and injurious; but no fact is stated from which the court can infer that the defendant thereby violated any legal duty, or exceeded its lawful rights. It is not a case of letting water down in unnatural quantities upon a lower riparian owner, nor of flowing water back upon an upper riparian owner.

Exceptions sustained.

WARREN P. NEAL, and another,
vs.
DAVID B. FLINT.

Hancock. Opinion June 1, 1895.

Sales. Incomplete Contracts. Collateral Agreement. Evidence.

Where the whole agreement in reference to the sale of property is embraced in a written bill of sale, parol evidence is inadmissible to contradict, vary or modify the contract which the parties have thus reduced to writing.

But if the original contract is verbal and entire, and a part only of it is reduced to writing and embraced in such bill of sale, it is competent to show that fact; or that there was a distinct collateral agreement, not inconsistent with the terms of the written stipulations of the parties, and which constituted in part the consideration of the written agreement, or operated as an inducement for entering into it.

This is an exception to the general rule which prohibits the introduction of parol evidence to contradict, vary or modify written contracts.

In such case the written contract is deemed to be only partially reduced to writing, and the collateral undertaking or stipulation exists in parol.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit for non-delivery of goods sold, and an independent and collateral, verbal guaranty on the part of the defendant that the goods and chattels, so sold and described, comprised all and the same that were at Winter Harbor in October, 1890, some seven months before the sale.

Plea was the general issue. The verdict was for the plaintiff.

In 1889 one Roderick Pendleton gave to the defendant as security for a loan, a mortgage of certain boats, canoes and appurtenances.

In the fall of 1890, the mortgage still subsisting, the plaintiff Neal being employed by Pendleton assisted in storing at Winter Harbor what remained of the boats, &c., some having been disposed of by Pendleton in disregard of the mortgage.

In November, 1890, the defendant began foreclosure, and in February, 1891, the time of redemption having expired, he instructed one Smith acting as his agent to take possession of them.

In the spring of 1891, the parties meeting in Boston, the defendant negotiated with the plaintiff, Neal, to sell him the property, and on May 15th, the defendant, in consideration of twenty-five hundred dollars in notes gave to the plaintiff, Neal, a written bill of sale.

On the following day the plaintiff, Neal, returned to Mr. Flint's house accompanied by Charles H. Wood and requested certain alterations to be made in the bill of sale. Some formal changes were agreed to, including the naming of a consideration and the insertion of special covenants of warranty, and a new bill of sale embodying these changes was then and there written by Mr. Wood, being copied from first bill of sale and such changes as Mr. Flint would permit, signed by Mr. Flint, delivered to and received by the plaintiff, Neal.

(Bill of Sale.)

"Know all men by these presents: That I, D. B. Flint, of Boston, in the County of Suffolk and State of Massachusetts, in consideration of one dollar and other valuable consideration paid by Warren P. Neal, of Steuben, Washington County, Maine, and Fred Shaw, of Gouldsboro, Hancock County, Maine, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer, and deliver unto the said Neal and Shaw, the following goods and chattels, namely, all the boats, canoes, sails, oars, paddles, fittings and fixtures of every kind — more or less — as the same now lie at Winter Harbor, in the care of Charles E. Smith, and which were covered by a mortgage from Roderick Pendleton to me, under date June 26, 1889, and recorded in the records of the town of Gouldsboro, also all boat-stages, houses and fittings as they now are at Bar Harbor, the same being free from all claims of all persons by, through or under me. Said mortgage having been foreclosed by my attorneys for breach of condition, and the said property coming to my possession by due process of law. Said Neal and Shaw assuming all liability for rents, wharfage, or charges from the first day of May, 1891. It being understood and agreed that one good boat, and one canoe, with all fittings for both and all in good

condition are reserved. To have and to hold all and singular the said goods and chattels to the said Neal and Shaw and their executors, administrators, and assigns, to their use and behoof forever. And I hereby covenant with the grantees that I am the lawful owner of the said goods and chattels; that they are free from all incumbrances, that I have good right to sell the same as aforesaid, and that I will warrant and defend the same against the lawful claims and demands of all persons, claiming by, through or under me. In witness whereof I, the said D. B. Flint, have hereunto set my hand and seal this 16th day of May, in the year one thousand eight hundred and ninety-one.

D. B. Flint. (L. S.)"

"Signed sealed and delivered in presence of Charles H. Wood."

The plaintiff immediately after took possession of the property.

But it appeared that between the time they were stored at Winter Harbor in the fall and the time of his taking possession in the spring, some of the property had been lost or stolen without the knowledge of either party to the suit.

Thereupon the plaintiffs claimed that they had bought and were entitled to all of the boats, &c., that had been stored in the fall, and brought this action.

The plaintiffs offered evidence of certain conversations between Neal and defendant and between Neal, Wood and the defendant, before and at the time of the execution of the second bill of sale.

This testimony was admitted subject to the defendant's objections. The testimony so admitted subject to the defendant's exceptions was as follows:

Warren P. Neal, one of the plaintiffs. (Direct.)

"Ques. Now at the first talk with Mr. Flint did you have any talk referring to what boats were there? Ans. Yes, sir.

"Ques. At the time of the talk, with reference to Pendleton's ownership of them, or to Pendleton's mortgage of them to Mr. Flint? (Objected to. Admitted. Defendant excepts.) Ans. Yes, sir.

"Ques. Now, then, won't you kindly state what conversation was had there between you in reference to the identification of the property? What was said there between you and Mr. Flint

about what property was there at Winter Harbor that you were buying?—(Objected to. Admitted. Defendant excepts.) Ans. Well, we talked about what I put in there in the fall.

"Ques. *By the Court:*—What did you say about what you put in there? Ans. He asked me if I wanted to buy the business, and I told him I did if I could pay for it all right. Then he asked me if I wanted to make him an offer for the business, in cash or notes, and how much. I told him that depended on what I got. I said, 'If I can have all Mr. Pendleton has given you a mortgage of it, it makes one thing, and if I have got to take just what I put in there, that is another.' I says, 'I had rather find out first, before I make you an offer, whether I can raise the money or not.'

"Ques. That is all there was said at that time? Ans. That is about all that I remember.

"Ques. How soon afterwards did you have another conversation with Mr. Flint? Ans. I went again in three or four days, perhaps a week afterwards, to see him. I was waiting to see a party that was coming through Boston, and then I was going to let him know what I could do about raising the money. As soon as I found out I went and told him I could not raise the money, but I could raise the notes for him if he would take these indorsements. I named the parties. He said he was going to Winter Harbor in a few days to look after his boats there, and when he got back he would let me know, and during his time down there he would see my mother and Mr. Shaw and see what they could do, and when he got back he would let me know.

"Ques. What, if anything, did he state about going to Winter Harbor, and his object in going there? (Objected to. Admitted. Defendant excepts.) Ans. He told me that he was going to Winter Harbor to see about the boats, and see if they were all right and everything; he hadn't been there since they had foreclosed, and didn't know what they had done and when he got back he would let me know, and I told him I would like to have him look the boats over. I told him I understood this sloop Eunie had been drifting around, full of ice, etc., and

full of water, etc. He said that couldn't be, for he had paid Mr. Sumner for hauling the boat out and taking care of her. He said he would go down and see, and when he got back he would let me know what kind of shape they were in.

"Ques. What next did you hear about it? Ans. When he got back from Winter Harbor he let me know and I went out to Commonwealth Avenue to see him.

"Ques. That was when he had got back from Winter Harbor? Ans. That was when he had got back.

"Ques. That was the third conversation? Ans. Yes, sir.

"Ques. 'What was it? Ans. I asked him how the boats were, and he said just as I left them in the fall. I asked him if the cat boats were covered up, and he said they were; that Mr. Smith took the boards off one and laid it on the wharf; that one the cat boat's halyards were off. I told him that didn't amount to much, only a dollar or two anyway. He said the boats were all right and in the care of Mr. Smith, and: 'I will assure you they are all right so far as he has had charge of them.'

"*Mr. Deasy:* This is all subject to our objection.

"*Witness*: Then I asked him if he saw my mother and Shaw, and he said he did. I don't know as I remember just the talk that he told me that they made with him, but there was something in relation to this boat business, about the notes, etc., and then he asked me to make him an offer for this business, that is, provided I could get these notes all right. ' He wanted me to make him two offers, one for the boats as I put them in there in the fall, and one for the boats he had a mortgage of and get what I could that Mr. Pendleton had sold. I told him that made a difference; if I could have what I put in there and they were all right and straight, why I would give him $2500 for what I put in in the fall. I said I had a list of what I put in and he said he had a list of the same. He didn't show me his and I didn't ask to see it. I told him if I could have all that he had a mortgage of I would give $2800; he made the remark that he didn't want to put Pendleton to any trouble because he had trouble enough. He said, 'It was the worst thing I ever done when I lent him the thousand dollars.' He says, 'I will take you at your $2500 offer.'

"*The Court:* Now, what was that offer? Ans. That was an offer for what I put in there in the fall, and had a list of.

"*The Court:* You told him that? Ans. Yes, sir.

"*The Court:* And that is what he said to you? Ans. Yes, sir.

"Ques. Now, to go back a moment, have you that list you made in October, 1890, of the boats and fittings, with you? Ans. Yes, sir. (Produces list.)

"Ques. This is the list that you took in October, 1890? Ans. Yes, sir.

"Ques. Of the Pendleton boats, etc.? Ans. Yes, sir."

Said list offered in evidence by counsel for plaintiff. (Objected to. Admitted. Defendant excepts.)

Charles H. Wood, called for the plaintiffs.

"Ques. Without asking detailed questions, will you state the circumstances of, and the wording of a conversation which took place in Boston, 1891, where Mr. Neal and Mr. Flint and you were present, as regards the sale of certain property from Mr. Flint to Mr. Neal? (Objected to as incompetent, irrelevant and immaterial. Admitted. Defendant excepts.) Ans. I went to Mr. Flint's house with Mr. Neal, at Mr. Neal's request, and a letter which I had received from down east from my brother-in-law, and we made known our business to Mr. Flint, and were taken by him to his office.

"Ques. Was that in his house? Ans. That was in his house, at 360 Commonwealth Avenue. I told him that I had been asked to come there by Mr. Neal, as well as my brother-in-law, Mr. Shaw, for the purpose of getting a proper bill of sale; that I did not think this writing he had given Mr. Neal hardly covered the ground, and that I would like to have some additions made to it. Then, after we made known our business, I think we went up stairs to an office. I remember of sitting down to a desk and I did the writing at the dictation of Mr. Flint. I suggested certain changes that we wanted in the bill of sale. The minor ones he permitted me to make. He allowed me to put in Mr. Shaw's name with Mr. Neal's as one of the

grantees, and he also allowed me to recite in the bill of sale a consideration, which was not in the paper which he had written without a blank and given to Mr. Neal. I called his attention after we had got those points adjusted, to the fact that the description was not very specific. I suggested that it was only very general, and he shook his head at once and said he couldn't make any changes of that kind. He said something to this effect —I don't remember the exact words, but to this effect, that, 'No,' he says, 'I can't put in any names or any articles.' He says, 'Mr. Neal knows more about that than I do.' And Mr. Neal spoke up at that point and says, 'Yes, Mr. Flint, I know what I put in there,' and Mr. Flint answered and says, 'Whatever you put in there last fall is there now.' And he simply refused to make any further additions to the bill of sale. I think he did allow me to put in the covenant which the blank called for of his title to it by the quitclaim, saying, I think he used the remark that he would not make any warranty deed of anything. I think he used that remark, and I remember also my calling his attention to the fact that this description was somewhat uncertain as it read in his bill of sale. He says, 'Everything will be all right.' I says, 'Yes, Mr. Flint, so long as you are alive I have no doubt but what you will carry out your agreement with Mr. Neal; I have no doubt any agreement you have made with Mr. Neal will be carried out, but,' says I, 'life is uncertain, and perhaps if it should pass into other hands, it might not be carried out as you and Mr. Neal have agreed.' I pressed the matter as much as I thought was becoming and he refused to make any changes and it was dropped at that point. I think I interlined in the original bill of sale — if I remember right I made one bill of sale, which has been shown here, and took Mr. Flint's original writing which he gave to Mr. Neal and made such interlineations as he permitted me to make. That is about all I can remember of the matter."

The counsel for the defendant requested the following instruction:

"If Mr. Neal, or Mr. Wood on Mr. Neal's behalf, requested Mr. Flint to specify in writing an agreement as to the quantity

of the articles, and Mr. Flint refused to do so and expressly stated that he would not warrant anything, and Neal closed the trade and accepted the bill of sale as written with that statement of Flint's, then Neal is thereby estopped from afterwards setting up any previous verbal warranty as to the quantity."

The presiding justice thereupon said: "Gentlemen, I give you that instruction, but I also say to you that the element in it which is controlling is whether or not the plaintiff accepted it in full satisfaction and compliance with his bargain."

The jury decided the issue in favor of the plaintiffs and assessed damages in the sum of one hundred and forty-two dollars and seventy-eight cents.

To the admission of the foregoing testimony and instruction given to the jury, the defendant took exceptions.

The issue, as submitted to the jury, by the presiding justice appears in the following portions of his charge:

"I now refer to the interview when the bargain is said to have been struck. The question for you is to determine what that bargain was. There was a bargain of sale at that interview; there was no sale, because the sale was not completed until later; but it is admitted by both sides that a bargain for sale was made. 'A bargain was struck,' in the language of the counsel for the plaintiff. Now, what was that bargain? The plaintiff, Neal, says that he had taken an account of what boats were there at Winter Harbor in a certain store house, or a storing place, that he had a list of them, and that he went to Mr. Flint to purchase them. He says that Mr. Flint wanted a proposition from him to purchase all the property that he had acquired under his mortgage, or to purchase only that which was stored there in the fall. That is what Mr. Neal says. He states that he offered to give the defendant, for all the property to which he took title under the Pendleton mortgage, the sum of $2800, and to give him $2500 for all that he had stored in the fall, and that Mr. Flint agreed to sell him all that were stored in the fall for $2500. . . . .

"Now, gentlemen, when two parties make a verbal agreement or trade that is to be reduced to writing, and the writing is afterwards made, that writing is conclusive of the transaction

and binding upon the parties, and they must be forever estopped and held by its terms and conditions. That rule applies in this case so far as that writing does cover the whole contemplated contract between the parties. . . . .

"So, gentlemen, determine, in the first place, what the trade was. You will determine whether the parties committed to paper the whole transaction, whether they substituted the written instrument for all the bargain they had previously made. If they did, the plaintiff cannot prevail. If they did not, and the bargain was to sell all that lay at Winter Harbor, and the defendant had distinctly agreed with the plaintiffs to sell them all that was at Winter Harbor, representing that at that time all the boats were there that were at Winter Harbor, guaranteeing them to be there, then the plaintiffs can recover. But I am bound to say to you that it is not necessary in order to hold a man by warranty for him to say, 'I warrant.' If I convey an article to you by a representation as to quality concerning which you have had no opportunity to discover, and my representation to you is of that character which leads you to believe it and to rely upon it as containing that quality, and you purchase, why then, gentlemen, the jury would have a right to say that I meant to warrant, and actually did warrant the article. . . .

"Well, gentlemen, when that last bill of sale was given, the defendant's attention was called to the imperfect description of these articles, and he was asked to add a list which would operate to convey those articles to the plaintiffs and he declined to do so. Now, what is the significance of that to your minds? If he had made his contract before to give a writing of that sort you will consider whether when the first writing was accepted and he was asked to put in a second writing and refused to do it, the plaintiff Neal went away submitting to that agreement, agreeing to take his rights under that bill of sale; or whether he went away without agreeing to it and without submitting to it, having done all that he could to get in all that the man had agreed to sell and had determined to enforce his contract against Mr. Flint and to have the property that was contained on his list."

J. A. Peters, Jr., and Charles H. Wood, for plaintiffs.

L. B. Deasy and A. W. King, for defendant.

The previous conversations having been reduced to a written contract, that contract in the absence of fraud is the best proof of their agreement, and it cannot be varied or contradicted by parol evidence. *Bell* v. *Woodman*, 60 Maine, 467.

The parties having reduced their contract to writing, their rights must be governed by and depend upon its terms as therein expressed, irrespective of any parol evidence of what was intended or what took place previous to or at the time of the making of the contract. *Grant* v. *Frost*, 80 Maine, 204.

The parties to a written contract have made it the authentic memorial of their agreement and for them it speaks the whole truth upon the subject matter. *McMaster* v. *Ins. Company*, 55 N. Y. 234. That a contemporaneous agreement of warranty cannot be engrafted by oral evidence on a written instrument is well settled in Massachusetts. *Boardman* v. *Spooner*, 13 Allen, 361.

In *Frost* v. *Blanchard*, 97 Mass. 157, the defendants sought to prove by parol a warranty of quantity in relation to goods conveyed by writing signed by both parties making no mention of warranty. The court say: "A previous or contemporaneous warranty cannot be engrafted by parol evidence upon a written contract. In our opinion the agreement merged all antecedent negotiations and stipulations, whether oral or written, and must be taken to be the complete expression of the entire bargain with each other, by which alone their rights and liabilities are to be determined."

Counsel also cited: *Keller* v. *Webb*, 126 Mass. 394; *Howe* v. *Walker*, 4 Gray, 318; *Dutton* v. *Gerrish*, 9 Cush. 89; *Libby* v. *Dickey*, 85 Maine, 367; *Stubbs* v. *Pratt*, *Id.* 429. Writing is not a bill of parcels as in *Hazard* v. *Loring*, 10 Cush. 268; and *Dunham* v. *Barnes*, 9 Allen, 354.

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

WISWELL, J., having been of counsel, did not sit.

FOSTER, J. The plaintiffs entered into negotiations with the defendant whereby he was to sell them certain boats, canoes, sails, oars, paddles, furniture and other fittings then stored at Winter Harbor. Two or three interviews were had in Boston, the defendant's place of residence, before the bargain was struck.

It became a question of fact at the trial what the contract was,— whether the bill of sale which the defendant gave to the plaintiffs embraced the whole contract between the parties, or whether there was a collateral agreement incidentally connected with the stipulations contained in the bill of sale and not in conflict therewith.

This was important as bearing upon the question of admissibility of evidence which was admitted, and to the admission of which exceptions were taken by the defendant. If the whole agreement in reference to the sale of the property was embraced in that bill of sale, then no parol evidence was admissible to contradict, vary or modify the contract which the parties had thus reduced to writing. But if the original contract was verbal and entire, and a part only of it was reduced to writing and embraced in the bill of sale, it was competent to show that fact, or that there was a distinct collateral agreement, not inconsistent with the terms of the written stipulations of the parties, and which constituted in part the consideration of the written agreement, or operated as an inducement for entering into it. *Bonney* v. *Morrill*, 57 Maine, 368, 373, and cases cited. See *Grant* v. *Frost*, 80 Maine, 202; *Bradstreet* v. *Rich*, 72 Maine, 233, 237, and cases cited. Brown on Parol Evidence, ch. XII, § 50, and cases cited. Stephen Evidence, Art. 90. Taylor Ev. § 1038.

The property in relation to which the contract was made had been stored the fall before at Winter Harbor. The plaintiffs claim that the defendant agreed to sell all the articles that were stored in the fall. On the other hand the defendant contends that the bargain was that he was to sell the plaintiffs what was at Winter Harbor on May 16th, the time when the contract was entered into, with no right to anything that might be missing from the articles stored the fall before.

The bill of sale contains no particular enumeration of the articles sold, the language being, "All the boats, canoes, sails, oars, paddles, fittings and fixtures of every kind, more or less, as the same now lie at Winter Harbor," &c. The plaintiffs' contention at the trial was that there was an oral promise, warranty or understanding on the part of the defendant to the effect that all the boats, etc., put into the boat-house at Winter Harbor by Neal, one of the plaintiffs, were there at the time of the execution and delivery of the bill of sale.

If such a promise or agreement was in fact made, were the plaintiffs entitled to the benefit of it under the rules of evidence? We think they were.

The contract or promise relied on was a collateral agreement incidentally connected with that which had been reduced to writing, and not inconsistent with it. The bill of sale was silent as to quantity. The words "as they now lie" refer to quality or condition rather than quantity and number. No part of the writing covered this collateral stipulation set up by the plaintiffs. Consequently evidence of it was admissible, and it was for the jury to determine whether it was proved or not. *Farwell* v. *Tillson*, 76 Maine, 227, 239.

The general rule is that parol evidence cannot be received to contradict or vary the terms of a written contract, and that when an agreement is reduced to writing it must be considered as expressing the ultimate intention of the parties to it, and therefore, in the absence of fraud, (*Prentiss* v. *Russ*, 16 Maine, 30,) parol evidence is not to be admitted to alter or modify the terms or legal effect of it. The parties having reduced their contract to writing, their rights must be governed by and depend upon its terms as therein expressed, irrespective of parol evidence of what was intended, or what took place previous to or at the time of making the contract.

But there are exceptions to this general rule which permit parol evidence of engagements collateral to, or independent of, the provisions expressed in the written agreement and not within its terms, although made at the same time and affecting the rights of the parties in relation to the subject matter of the writing. In such it is deemed only partially reduced to writing, and the

collateral undertaking or stipulation exists in parol. *Chapin* v. *Dobson*, 78 N. Y. 74; *Potter* v. *Hopkins*, 25 Wend. 417; *Lindley* v. *Lacy*, 17 C. B. (N. S.) 578 (112 E. C. L. 578); *Jeffery* v. *Walton*, 1 Starkie, 267 (2 E. C. L. 108); *Willis* v. *Hulbert*, 117 Mass. 151; *Nickerson* v. *Saunders*, 36 Maine, 413; *Goodspeed* v. *Fuller*, 46 Maine, 144; *Bradstreet* v. *Rich*, *supra*. In *Dorr* v. *Fisher*, 1 Cush. 271, 273, Chief Justice Shaw uses this language: "But a warranty is a separate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact, relating to the thing sold." Benj. on Sales, § 610.

Greenleaf thus expresses the exception to the rule: "Nor does the rule apply in cases where the original contract was verbal and entire, and a *part only* of it was *reduced to writing*." 1 Gr. Ev. § 284 a. And this court in *Bonney* v. *Morrill*, 57 Maine, 373, states it thus: "There is no rule of evidence which precludes the defendant from asserting and proving by oral testimony, any distinct and valid parol contract of the plaintiff, made at the same time and not reduced to writing, which is not in conflict with the written agreement and which undoubtedly operated as an inducement to the defendant to enter into it."

The exception to the admission of the testimony of Charles H. Wood cannot be sustained for the reasons already stated,— (1) It related to the alleged collateral agreement relied on by the plaintiffs; (2) To a conversation between the defendant and one of the plaintiffs which was first partially drawn out by defendant's counsel upon cross-examination of Neal. By the introduction of a portion of such conversation, although upon cross-examination, the other party had a right to the whole of it, and to prove what in fact the conversation was. *Williams* v. *Gilman*, 71 Maine, 21; *Oakland Ice Co.* v. *Maxcy*, 74 Maine, 294; *Mowry* v. *Smith*, 9 Allen, 67, 68.

The exception in relation to the requested instruction is not insisted upon. It was given as asked for with qualifications that were proper to prevent the jury from being misled as to the issue involved.

After a careful examination of the evidence we perceive no reason why the verdict should be disturbed upon the motion for a new trial. While it was more or less conflicting upon the vital points in controversy, it was sufficient upon which to found a verdict.

Exceptions and motion overruled.

EMERY and WHITEHOUSE, JJ., dissenting.

This contract of sale was evidenced by a written instrument which is not a mere bill of parcels or incomplete memorandum, but is a full, formal bill of sale apparently complete, and containing various stipulations. The opinion seems to hold that oral evidence should be received to add to these written stipulations an oral stipulation of warranty or guaranty concerning the property sold. From this we dissent.

While the cases cited in the opinion sustain the general proposition that independent, collateral stipulations may be shown by oral evidence in addition to those expressed in writing, they do not to our minds sustain the particular proposition, that an oral warranty or guaranty concerning the property sold, is a stipulation independent of and collateral to the contract of sale, and one which may be added by parol to those expressed in the writing.

The very purpose of writing out the various stipulations of a contract is to avoid disputes as to what stipulations were or were not in fact finally made. When a warranty or guaranty as to the subject matter of a sale is made during the negotiations for a sale, it becomes a part and a material part of the contract of sale. It is a stipulation that would naturally be expressed when the final terms of the sale are reduced to writing. If it be omitted from the written instrument made and adopted by the parties as the evidence of their contract, it should be held as finally omitted from the contract itself. We think the rule thus stated is fully sustained by the great weight of authority. We cite the following cases, and refer to the numerous other cases cited in these: *De Witt* v. *Berry*, 134 U. S. 306; *Seitz* v. *Brewers' Co.* 141 U. S. 510; *Van Winkle* v. *Crowell*, 146 U. S. 42;

Graham v. *Eisner*, 28 Ill. App. 269; *Rodgers* v. *Perrault*, 41 Kansas, 385; *Johnson* v. *Powers*, 65 Cali. 179; *Boardman* v. *Spooner*, 13 Allen, 361; *Frost* v. *Blanchard*, 97 Mass. 155; *Galpin* v. *Atwater*, 29 Conn. 93, 100; *Wilcox* v. *Cate*, 65 Vt. 478; *Thomson* v. *Gortner*, 21 Atlantic, Rep. 371 (Md.). In *Naumberg* v. *Young*, 44 N. J. L. 331, the court in an elaborate opinion reviewed the cases and in vigorous language affirmed the rule that an oral warranty or guaranty could not be added to a contract expressed in writing. Indeed, our own court has recognized and acted upon this rule. In *Storer* v. *Taber*, 83 Maine, 387, there was a written bill of sale less formal and less complete than the one in this case. The court said (p. 388,): "It was correctly ruled at the trial that the writing did not contain a warranty of soundness, and that none could be affixed to it by parol."

In *Osgood* v. *Davis*, 18 Maine, 146, it was held that an oral warranty of title could not be added to a written assignment of a stock certificate. The court cited as authority, *Powell* v. *Edmunds*, 12 East, 6, in which it was held that an oral warranty of quantity could not be added to the written conditions of a sale of timber.

To this wholesome rule we think the court should adhere. We deprecate any departure from it.

SOMERSET RAILWAY, in equity,

vs.

LEWIS PIERCE, and others.

Cumberland. Opinion June 1, 1895.

Equity. Railroad. Mortgage. Foreclosure. R. S., 1883, c. 51; R. S., 1871, c. 51, § § 49-53, 55, 56; Stat. 1876, c. 122; Stat. 1878, c. 53; Stat. 1883, c. 166.

July 1, 1871, the Somerset Railroad Company made a mortgage of its road and franchise to trustees to secure the payment of its bonds. The condition of this mortgage having been broken, and so continued for more than three years, the mortgage bond-holders in 1883, organized a new corporation,

under the statute, by the name of the Somerset Railway. This corporation, the complainant, took possession of the mortgaged property on the first day of September, 1883, and have ever since retained it, and operated the road. On the eighth day of July, 1884, complainant purchased, at execution sale, the equity of redemption from the mortgage, from which sale no redemption has been had. *Held;* that full title has thereby been acquired by the Somerset Railway; and that, under the statute, the complainant represents all the mortgage bond-holders, and its title to and possession of the mortgaged property enure to their benefit.

Also; that each mortgage bond-holder thenceforward became a shareholder in the property covered by the mortgage, in the proportion that his bonds bore to the whole issue secured by the mortgage, and the bonds themselves are paid to the extent of the value of the mortgaged property, full title to which passed to the Somerset Railway.

A large part of the bond-holders have exchanged their bonds for stock in the Somerset Railway, par for par, and are now stockholders; those who have not so exchanged, remain share-holders, and are entitled to receive from the earnings of the road, the same pro rata dividends as the stockholders,— if they decline to exchange their bonds for stock,—but the possession and operation of the railroad will continue in the Somerset Railway.

Held; that trustees under the mortgage should release and convey whatever legal title remains in them to the Somerset Railway on payment of any sums that may be due them for services or disbursements, and be perpetually enjoined from the further prosecution of their pending suits, and from interfering in any way with the title, possession or use, by the Somerset Railway, of any and all the property described in the mortgage of July 1, 1871, except so far as it may be necessary for them by suitable legal process, to enforce any lien, if any, which they may have upon the property, for the payment of such sums as may be found due them as such trustees.

See *Inhabitants of Anson, Petitioners*, 85 Maine, 79.

ON REPORT.

Bill in equity, heard on bill, answers and proofs.

The case is stated in the opinion.

Edmund F. and Appleton Webb; J. W. Symonds, D. W. Snow and C. S. Cook; J. H. and J. H. Drummond, Jr., for plaintiff.

D. D. Stewart; H. M. Heath and O. A. Tuell; F. M. Drew; L. Pierce; N. and H. B. Cleaves; Everett R. Drummond, for defendants.

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

STROUT, J. On the first day of July, 1871, the Somerset Railroad Company, having a charter for a railroad from a point near Carritunk Falls, in Solon, in the county of Somerset, to the town of Waterville, in the county of Kennebec, and being on that day possessed of franchises, and real and personal estate, for the purpose of building, equipping and operating such railroad, made a mortgage to Lewis Pierce, Daniel Holland and Stephen D. Lindsey, of the railroad from Waterville to its terminus in Solon, in the county of Somerset, together with the franchise of the company, and all its real estate, and all its personal property of every nature used in connection with its railroad, then possessed or to be thereafter acquired, in trust to secure the payment of the bonds of said company to an amount not exceeding five hundred thousand dollars, payable in twenty years from the date of the mortgage, with interest at the rate of seven per cent per annum, according to the coupons annexed to the bonds. Lindsey and Holland, two of the trustees, having deceased, Herbert M. Heath and Franklin M. Drew, were duly appointed trustees to fill the vacancies; and they, together with Lewis Pierce, are now the trustees under said mortgage. The Somerset Railroad Company issued and sold bonds secured by the mortgage to the amount of four hundred and fifty thousand dollars only. The company subsequently defaulted on the interest upon the bonds, and for more than three years prior to July 11, 1883, the company had failed to pay the interest on the mortgage bonds, and thereby had made a breach of the condition of the mortgage, though the principal of the bonds was not then due. The trustees under the mortgage never entered into possession of the mortgaged property, nor took any measures to secure a foreclosure of the mortgage; but the Somerset Railroad Company remained in possession of all the property, until the formation of a new corporation, under the name of the Somerset Railway. On the eleventh day of July, 1883, the holders of the mortgage bonds, to an amount largely exceeding one-half of the same, elected in writing to form a new corporation, and on the fifteenth day of August, 1883, did form a new corporation, under the name of the Somerset Railway,

as provided by chapter 51 of the Revised Statutes and acts additional thereto and amendatory thereof, and made the capital stock of the new corporation $736,648.76, which was made up as follows: $450,000, amount of outstanding bonds secured by the mortgage as principal; and $286,648.76, amount of interest upon the bonds due August 15, 1883, and then unpaid.

On the 13th day of July, 1883, the stockholders of the Somerset Railroad Company, at its annual meeting, voted that the mortgage bond-holders organize a new corporation, under the statute, and take possession of the road at such date as their organization should entitle them to do; and the stockholders also voted, at the same meeting, to surrender possession of the Somerset Railroad Company to the new corporation. In pursuance of the organization of the new corporation, and by the consent of the Somerset Railroad Company as indicated by the votes of its stockholders, the Somerset Railway, on the first day of September, 1883, took possession of the railroad and all other property included in the mortgage, and have ever since held possession of the same and operated the road. The capital stock of the Somerset Railway, being the amount of the unpaid bonds and coupons at their face value at the date of the organization of the new corporation, August 15, 1883, was divided into shares of one hundred dollars each, which shares were offered to the mortgage bond-holders at the rate of one share of stock for each one hundred dollars of bonds or that amount of coupons due August 15, 1883. Bonds and coupons to amount of $552,200 have been exchanged for stock in the new corporation, which has been issued, leaving outstanding and unexchanged $110,600 of mortgage bonds, and the coupons thereon.

A decree of strict foreclosure of this mortgage was entered by this court on the first day of April, 1887. On the eighth day of July, 1884, all the right in equity of the Somerset Railroad Company to redeem the mortgage was sold on execution, and purchased by the Somerset Railway, from which sale no redemption has been had.

The trustees under the mortgage have brought suits to recover possession of all the property included in it, and mesne profits

against various officers and servants of the Somerset Railway, which are now pending.

The bill prays to have the title and possession of the Somerset Railway to the property described in the mortgage declared valid, and the mortgage of July 1, 1871, declared void, and the holders of outstanding bonds and coupons ordered to surrender the same in exchange for stock in the Somerset Railway, and that the plaintiffs in the suits at law may be enjoined from prosecuting their suits, and from disputing the title and possession of the Somerset Railway, and for further relief.

That the bill presents a case within the equity jurisdiction is beyond doubt. Revised Statutes of 1871, chapter 51, § 53, and following sections, in force when this mortgage was made, prescribed a method of foreclosure of such mortgages by the trustees on application of one-third of the bond-holders in amount; and by section 55 it was provided that such foreclosure should enure to the benefit of all holders of bonds and coupons secured by the mortgage, and that the holders of such bonds and coupons or their successors or assigns become a corporation as of the date of the foreclosure, "for all the purposes, with all the rights and powers, duties and obligations of the original corporation by its charter," and required the trustees to convey to such new corporation all the right and title they had under the mortgage and its foreclosure. Section 56 provided for calling the first meeting of the new corporation, adopting a name, and authorized the new corporation to take and hold the possession and have the use of the mortgaged property.

These provisions for perfecting the security of the mortgage bond-holders, and to enable them to realize their debts, by operation of law, must be treated as part of the mortgage contract, and the rights thereby secured to the bond-holders could not be abridged or taken away by subsequent enactments. But it was competent for the law-making power to change the form and method of the bond-holders' remedy, provided the new method protected their rights as fully as that existing when the mortgage was given. *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *Seibert* v. *Lewis*, 122 U. S. 294; *Edwards* v. *Kearzey*,

96 U. S. 595; *Louisiana* v. *New Orleans*, 102 U. S. 206. Without changing the manner of foreclosure provided in R. S., of 1871, c. 51, the Legislature in 1876, by chapter 122, gave the benefit of the provisions of chapter 51, from § § 47 to 70 inclusive, to the holders of all mortgage bonds, whether the mortgage was foreclosed as provided in chapter 51, "or in any other legal manner;" and by chapter 53 of the laws of 1878, § § 47 to 70 of chapter 51 of R. S., of 1871, were made to apply to and include all such mortgages, "in all cases in which the principal of said scrip or bonds shall have been due and payable for more than three years, and shall remain unpaid in whole or in part, in the same way and to the same extent as if the mortgage had been legally foreclosed;" and authorized such bond-holders to form a new corporation, in the manner provided in chapter 51 of R. S., of 1871, "whenever the holders of such scrip or bonds to any amount exceeding one-half of the same shall so elect in writing." The same statute in § 2 provided that the "capital stock of such new corporation shall be equal to the amount of unpaid bonds and coupons secured by such mortgage, taken at their face at the time of the organization of the new corporation;" and by chapter 166, laws of 1883, the act of 1878 was extended to apply to cases in which "no interest has been paid for more than three years."

The remedy by foreclosure by the trustees, existing when the mortgage of 1871 was given, has never been abridged or taken away; but the subsequent statutes have enlarged and made more efficient the bond-holders' remedy; but these enactments did not operate injuriously to the Somerset Railroad Company, and are not therefore open to constitutional objection. The trustees had no power to take possession of the mortgaged property, nor to foreclose the mortgage, except directed so to do by a vote of the bond-holders, by a majority in value in the one case, or one-third in value in the other. R. S., of 1871, c. 51, § § 49-53. The new provisions in the subsequent acts, enabled a majority in amount of the bond-holders to act directly without the intervention of the trustees, thus simplifying the proceeding.

The interest upon the mortgage bonds having been unpaid for more than three years prior to July 11, 1883, the bond-holders, holding $351,900 in amount of the bonds secured by the mortgage, on that day elected in writing to form a new corporation, in accordance with chapter 51 of the Revised Statutes of 1871 as amended by the acts of 1878 and 1883, instead of resorting to a foreclosure by the trustees. It will be noticed that the amendatory acts required the action of a majority in amount of the mortgage bond-holders, while the foreclosure by the trustees required the concurrence of only one-third of the amount. The proceedings to organize the new corporation and establish the capital stock, under the amendatory acts, appear to be in strict conformity thereto; and the new corporation, under the name of the Somerset Railway, thereby became a legal corporation, on the fifteenth day of August, 1883, and then became entitled to "take and hold the possession and have the use of the mortgaged property." R. S., 1871, c. 51, § 56. The fact that some holders of mortgage bonds, who participated in the organization of the new corporation, and voted upon their bonds, have since transferred them to other parties not bond-holders at the time the Somerset Railway was organized, cannot affect the status of the corporation. The bonds being once voted, are subjected to the consequences of that vote, regardless of whose hands they may subsequently fall into. It is not in the power of a bond-holder, participating in the formation of a new corporation, based upon his bonds with others, to destroy the existence of the corporation, once legally formed, by a subsequent transfer of his bonds to third parties. *Barnes* v. *Chicago, Milwaukee & St. Paul R. R.* 122 U. S. 1. The new corporation took possession of the mortgaged property on the first day of September, 1883, and has ever since held it and operated the railroad. This action was authorized by the statute, consented to by the Somerset Railroad Company, the mortgagor, actively proposed and aided by one at least of the trustees, and ever since acquiesced in by all the trustees. It is too late for the trustees, or dissenting bond-holders, now to object to technical irregularities, if any exist; especially as the Somerset Railway has since extended

the railroad from North Anson to Bingham, a distance of about sixteen miles, built a branch railroad of one mile in length of great importance to the productiveness of the main line, placed a mortgage upon the road for $225,000 to make these extensions and other improvements, and in other ways materially changed the condition and relations of all parties interested in the road. Their long acquiescence, without objection, coupled with the changed conditions and relations, resulting from the possession and management of the property by the Somerset Railway, estops them from now questioning the legality of the organization of the new corporation. *Kent* v. *Quicksilver Mining Company*, 78 N. Y. 159; *Zabriskie* v. *Cleveland Railroad*, 23 How. 395; *Halstead* v. *Grinnan*, 152 U. S. 412; *Harwood* v. *Railroad Company*, 17 Wall. 78; *Railroad* v. *Railroad*, 65 N. H. 400.

The case shows, that on July 8, 1884, all the right in equity which the Somerset Railroad Company had to redeem from the mortgage was legally sold on execution to the Somerset Railway, from which no redemption was had. It follows that on July 8, 1885, when the time for redemption from the execution sale expired, the Somerset Railway, representing all the mortgage bond-holders, held the legal and full title to the equity of redemption which the Somerset Railroad Company had before held, and also the equitable, beneficial title under the mortgage, and was in full, entire and exclusive possession and use of all the property described in the mortgage. And as the trustees had no beneficial interest under the mortgage, and held only a dry trust, with no duties to perform under it, they could not interfere with the title or possession of the Somerset Railway. It had become the duty of the trustees to release their naked legal title to the Somerset Railway. R. S., of 1871, c. 51, § 55. And as equity regards that as done which ought to be done, the title of the Somerset Railway to all the property described in the mortgage must in equity be regarded as full and complete, and will be absolute at law when the trustees release their naked legal title, which they are required to do.

The title thus acquired to the mortgaged property, operated as payment of all the bonds secured by the mortgage, if the mortgaged property was of sufficient value over and above the amount paid for the equity of redemption; if not, all the bonds must be regarded as paid pro tanto, and the balance remains an unsecured debt against the Somerset Railroad Company. But as the life and existence of the Somerset Railway was based upon and derived from the mortgage bonds, and the corporation was in fact the mortgage bond-holders in organization, its title and possession enured to the benefit of all holders of bonds and coupons secured by the mortgage; and every bond-holder became a share holder in the property in the proportion the bonds held by him bore to the whole issue under the mortgage. This result follows, even if some of the bonds had passed into other hands since the organization of the bond-holders in the new corporation, and before the title had ripened in that corporation. *Haynes* v. *Wellington*, 25 Maine, 458; Jones on Mortgages, § 950; *Hurd* v. *Coleman*, 42 Maine, 182; *Hatch* v. *White*, 2 Gall. C. C. 152.

Any subsequent transfer of the mortgage bonds, unexchanged for stock, operated only as a transfer of the bond-holders' share in the property originally conveyed by the mortgage, if the property was of sufficient value to pay all the mortgage bonds and the amount paid for the equity of redemption for the mortgage; if insufficient for that, the transfer of the bonds carried that share as property, and the balance of the bonds unpaid by the property as an unsecured debt of the Somerset Railroad Company. *In Re Bond-holders of York & Cumberland Railroad*, 50 Maine, 564.

But it is claimed that the action of this court, in *Anson, Petitioners*, 85 Maine, 79, appointing a trustee under the mortgage of July 1, 1871, to fill a vacancy, was a decision upon the question involved here, and that the status of the bond-holders who have exchanged their bonds for stock of the Somerset Railway and the holders of mortgage bonds unexchanged, is res adjudicata. Not so. The case was a petition for appointment of a trustee to fill a vacancy caused by death of an original trustee; and the court expressly says: "The rights of the

different bond-holders are not now to be distinguished, for all the facts which might have a tendency to create differences are not now before us, and any attempt to settle all the conflicting claims, suggested by the history of the enterprise, would be premature. We do not now undertake to decide the relative equities between the outstanding bonds and those which were surrendered and cancelled in exchange for the stock of the new corporation, nor to decide the status of the new organization and its new issue of bonds."

The court, in that case, carefully refrained from determining the rights and powers of the trustees, or the rights of the new corporation, or of the mortgage bond-holders. It did not have before it a case calling for or authorizing such determination. It was mainly because the questions involved in this suit could not be determined in that, that the trustee was appointed, to avoid possible delay or confusion in determining the rights of all parties, and to afford the means to bring the whole case before the court, with no embarrassment from lack of parties.

The mortgage coupled with the purchase of the equity has ripened into full title, and ceased to have the character of a mortgage. It is now only valuable as a muniment of title, which has been perfected in the beneficiaries under the mortgage. There remains no property for the mortgage to operate upon. The trustees hold only a dry trust, without beneficial interest, with no duties to perform, except to release and transfer to the Somerset Railway the bare legal title which they held under the mortgage, which is now but a cloud upon the title of the Somerset Railway. This they must do on payment of any amount that may be due them for services or disbursements. As to them and their office, the mortgage is functus officio, and they cannot interfere with the title or possession of the Somerset Railway, rightfully holding the property as representing the mortgage bond-holders.

It appears that in April, 1883, before the formation of the Somerset Railway, Reuben B. Dunn and others, holding more than one-half of the entire issue of bonds under the mortgage of July 1, 1871, in behalf of themselves and all other holders of

bonds secured by the mortgage, brought a bill in equity in this court, in the county of Kennebec, against the Somerset Railroad Company, praying a decree of foreclosure of this mortgage for breach of condition. The trustees were not made parties to this bill, as they properly should have been, but no objection appears to have been made on that account. A decree was entered in the suit at a term of this court held on the third Tuesday of October, 1884, that if the Somerset Railroad Company should pay the over-due coupons on or before the first day of July, 1885, the complainants should take nothing by their bill, but if not so paid that the right of redemption should be barred. The amount not being paid at the time mentioned in the decree nor afterward, a final decree of strict foreclosure was entered on the thirty-first day of March, 1887. Revised Statutes, of 1871, c. 51, provided a method for foreclosure of railroad mortgages by trustees. Chapter 166 of the laws of 1883, § 4, provided that where the principal of any bonds issued by a railroad corporation, secured by mortgage shall have been due and payable more than three years, "or no interest has been paid thereon for more than three years, a corporation formed by the holders of such scrip or bonds, or if no such corporation has been formed, the holders of not less than a majority of such scrip or bonds, may commence a suit in equity for the purpose of foreclosing such mortgage; and the court may decree a foreclosure of such mortgage, unless the arrears are paid within such time as the court may order."

Aside from the foreclosure proceedings authorized by the trustees, equity furnishes the best, and perhaps now the exclusive, forum for foreclosure of this class of mortgages. The ordinary method of foreclosure of mortgages on real estate is ill adapted to the foreclosure of railroad mortgages. The protection of all the large interests usually involved in the latter, may require a receivership, or an injunction, or an order of sale, none of which can be accomplished by the ordinary proceedings for foreclosure, but can easily be provided for by the flexible processes of equity. The case of *Kennebec & Portland Railroad* v. *Portland & Kennebec Railroad*, 59 Maine, 1, holding otherwise, was decided

when the equity powers of this court were limited, and is not applicable under the full equity powers now possessed.

When the bill was filed by Dunn and others, no corporation of the bond-holders had been formed, and the bill was properly brought and maintainable under the statute last cited, and might have been sustained under the full equity power then existing in this court. Before the final decree was entered, all right and title of the Somerset Railroad Company had been divested, by the sale of its equity on execution, to the Somerset Railway, and it had no further interest in the property, or the proceedings in the equity suit; and it was therefore unnecessary to continue the equity suit for foreclosure to a final decree, but it was done, perhaps, from extra caution. The Somerset Railroad Company might have complained that the decree limited the right of redemption to a shorter time than the law allowed it under the mortgage, if it had retained any interest in the property. Having parted with its interest, it could not be injured by the decree. The bill being for the benefit of the bond-holders, and the decree, if valid, operating to perfect their title to the mortgaged property, they can hardly be heard to complain. But whether this decree was valid or not, we are not called upon to decide, as we do not deem it material to the determination of the rights of these parties.

When the new corporation was formed and took possession of all the mortgaged property, and acquired the right of redemption from the mortgage from the Somerset Railroad Company, all the holders of bonds secured by the mortgage then became share holders in the property, to which they then had the entire title and beneficial interest. The capital of the new corporation was exactly the amount of the outstanding bonds and coupons secured by the mortgage. This corporation proposed to issue its stock to the holders of bonds and coupons, upon surrender of the bonds and coupons, at the rate of one share of stock, of the par value of one hundred dollars, for the same amount in bonds and coupons. This proposition has been accepted and acted upon by the holders of bonds and coupons to the amount

of $552,200, leaving outstanding bonds to the amount of $110,600 and the unpaid over-due coupons thereon. This exchange of bonds for stock does not lessen or enlarge the rights of the holders of unexchanged bonds. They were all paid, so far as the value of the mortgaged property in excess of amount paid for the equity of redemption was sufficient to do so; and thenceforward the bonds, so far as paid, became evidence of the amount of interest the holder had in the railroad property, and not of a debt, the balance only being evidence of a debt for such balance. The Somerset Railway stood in the place of and represented all the mortgage bond-holders; its stock, when issued in exchange for bonds, practically represented the bond-holders' share in the property; the unexchanged bond represented the same and no more. The Somerset Railway can only issue its stock in exchange for mortgage bonds and coupons. It cannot sell and issue it to other parties. If any bond-holder declines ultimately to exchange his bonds for stock, an amount of stock of the company equal to such bonds cannot be issued at all. The capital stock of the Railway represents the bonds, and stands for them.

It was and is optional with the bond-holder to exchange his bonds for stock; he cannot be compelled to do so. The Somerset Railway, representing all the mortgage bond-holders, and being simply the bond-holders in organization, is entitled to hold, possess and operate the property. Its net earnings, when distributed in the form of dividends or otherwise, must be distributed to its stockholders and to the holders of unexchanged bonds in equal proportions.

If the holders of unexchanged bonds choose to take stock, they can do so at any time; or, if they choose, they can retain their present position, and receive their share of the net earnings pro rata with the stockholders. If they become dissatisfied with this position, and decline to take stock, upon a proper bill and sufficient equitable cause shown they may have partition of the property, as between equitable tenants in common, if practicable; or, if that is impracticable, as it probably would be, a decree of sale of the railroad property, subject to legal incumbrances, and

division of the proceeds, on the basis of taking the entire amount due on the $450,000 of bonds and unpaid coupons at the date of the organization of the new corporation, and apportioning the proceeds pro rata among the holders of stock in the Railway and the outstanding unexchanged bonds, thus doing exact justice to all. Pomeroy's Equity, § § 1388, 1389, 1390; *Nash* v. *Simpson*, 78 Maine, 142.

It appears that the Somerset Railway, on the first day of October, 1887, for the purpose of extending and improving the road and its equipment, made a mortgage of its entire property to trustees to secure the payment of its bonds to the amount of two hundred and twenty-five thousand dollars, all of which have been issued, sold, and are now outstanding; the proceeds being used in extending and improving the road. The mortgage of July 1, 1871, having exhausted its office and become inoperative as an existing mortgage, by union of the legal right of redemption and the equitable, beneficial title under the mortgage, to all the property described therein in the Somerset Railway, representing all the mortgage bond-holders,— the mortgage for $225,000 has become the first mortgage upon the road and its property. Whether the property was sufficient to pay the mortgage debt of July 1, 1871, or not, there is nothing more for it to operate upon.

The trustees must release and convey whatever title and interest may be in them to the Somerset Railway, on payment of any amount that may be due them for services and disbursements. A master to be appointed to ascertain and report the amount.

The trustees, Lewis Pierce, Herbert M. Heath, and Franklin M. Drew, must be perpetually enjoined from the further prosecution of their pending suits and from interfering in any way with the title, possession or use, by the Somerset Railway, of any and all the property described in the mortgage of July 1, 1871, except so far as it may be necessary for them, by suitable legal process, to enforce any lien, if any, which they may have upon the property, for the payment of such sums as may be found due them for services and disbursements as such trustees; and the

trustees must be commanded and enjoined to release and convey to the Somerset Railway all right and title they hold as trustees under the mortgages of July 1, 1871, upon payment of their charges.

Bill sustained with costs, against the trustees Pierce, Heath and Drew, and dismissed as to all the other respondents. Decree in accordance with this opinion.

LEWIS PIERCE, and others, *vs.* JOHN AYER, and others.

Kennebec. Opinion June 1, 1895.

Mortgage. Railroad. Possession.

In a writ of entry the following facts appeared:— July 1, 1871, the Somerset Railroad Company made a mortgage of its franchise and railroad property to trustees to secure the payment of bonds. The trustees under the mortgage brought suit to recover possession of all the property embraced in that mortgage. It was brought against various servants and officers of the Somerset Railway. The conditions of the mortgage having been broken, the mortgage bond-holders in 1883, organized a new corporation, under the statute, by the name of the Somerset Railway; and that corporation, in accordance with the statute, took possession of all the mortgaged property on the first day of September, 1883, and has ever since retained possession and operated the road. On the eighth day of July, 1884, it purchased, at execution sale, the equity of redemption from the mortgage, from which sale no redemption has been had.

Held; that by the statute, the Somerset Railway represents all the mortgage bond-holders, and its title to and possession of the mortgaged property enures to their benefit. Having acquired the equity of redemption, once held by the mortgagor, there is no occasion for a foreclosure of the mortgage. The cestuis que trustent under the mortgage, and the real owners, now that the equity of redemption from the mortgage has been acquired, have a sufficient title to the property;— and being in undisturbed possession and use of the same,— the trustees, who have no beneficial interest, cannot maintain an action to dispossess them.

See *Somerset Railway* v. *Pierce*, ante, 86.

This was a writ of entry to recover that portion of the road-bed, railroad, rolling stock and appurtenances of the Somerset Railroad Company, situate in the county of Kennebec, being all that part of said railroad and appurtenances situate in the county of Kennebec; a similar writ of entry being brought at

the same time in the Supreme Judicial Court of Somerset county to recover that part of said railroad and its appurtenances situate in said Somerset county.

Writ dated December 3, 1892.

The plaintiffs' title arises under the mortgage given by the Somerset Railroad Company on July 1, 1871, to Lewis Pierce, Daniel Holland and Stephen D. Lindsey, duly recorded in the registries of both counties.

It was admitted that Stephen D. Lindsey died on April 28, 1884, and Daniel Holland on May 5, 1890; that in August, 1890, proceedings were commenced by the town of Anson and others in the Supreme Judicial Court, in equity, sitting in the county of Kennebec, for the appointment of new trustees to fill the vacancies existing under said mortgage by the deaths of said Lindsey and said Holland, of which notice was duly given, and the Somerset Railway, and its Trustees, E. F. Webb and E. R. Drummond, appeared and filed demurrers and at the same time answers to the bill in equity of said town of Anson and others; that evidence was taken by the respective parties and the case was reported to the law court, which sustained the bill and directed the appointment of trustees at nisi prius; and that at the October Term of the Supreme Judicial Court, 1892, in Kennebec county, said Herbert M. Heath was duly appointed a trustee under said mortgage of July 1, 1871, in place of said Stephen D. Lindsey, and said Franklin M. Drew as trustee in place of said Daniel Holland, under said mortgage. Conveyance was made by Lewis Pierce in accordance with the decree. These writs of entry were brought by said trustees to recover said railroad property at the next term of court in each of said counties, following their appointment as aforesaid, against the persons claimed by said trustees to be found in the actual possession and control of said road.

The plaintiffs' counsel are in possession of bonds issued under the mortgage of July 1, 1871, amounting to $74,800, owned by the parties defendant in the equity suit as appears therein, with the coupons annexed, and it was admitted that there are in all $110,600 of such bonds still outstanding and unpaid. If the

plaintiffs were entitled to recover conditional judgment only in said writs of entry, they claimed to recover for said $110,600 of bonds and the amount due on the coupons thereon, and no more. If they were entitled to a judgment at common law, the amount of damages for rents, profits and income, were to be assessed at nisi prius. If entitled to neither form of judgment, then judgment is to be entered for defendants; or such other judgment as the court shall direct.

The facts and evidence in the suit in equity brought by the Somerset Railway against said Lewis Pierce and als., ante p. 86, made a part of the evidence in this suit, so far as legally admissible, for either party; and upon such other evidence as either party may take and file if legally admissible; and this suit was entered and argued at the same term and time as said equity suit. It was agreed also, that such judgments should be entered in both suits, upon so much of the evidence as may be legally admissible, as shall be in accordance with the law of the cases and the legal rights of the parties; the judgment in the action at law to be subject, so far as the Court may determine, to any decree in the equity suit. The suit in Somerset county to abide the result of this suit, and to be so entered on that docket.

D. D. Stewart; N. and H. B. Cleaves; H. M. Heath and O. A. Tuell, for plaintiffs.

Edmund F. and Appleton Webb; J. H. and J. H. Drummond, Jr., for defendants.

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

STROUT, J. This is a writ of entry. On July 1, 1871, the Somerset Railroad Company made a mortgage of its franchise and railroad property to trustees to secure the payment of bonds. The trustees under the mortgage bring this suit to recover possession of all the property embraced in that mortgage. It is brought against various servants and officers of the Somerset Railway. The conditions of the mortgage having been broken, the mortgage bond-holders in 1883 organized a new corporation, under

the statute, by the name of the Somerset Railway; and that corporation in accordance with the statute took possession of all the mortgaged property on the first day of September, 1883, and has ever since retained possession, and operated the road. On the eighth day of July, 1884, it purchased, at execution sale, the equity of redemption from the mortgage, from which sale no redemption has been had. By the statute, the Somerset Railway represents all the mortgage bond-holders, and its title to and possession of the property described in the mortgage enures to their benefit. Having acquired the equity of redemption, once held by the mortgagor, there is no occasion for a foreclosure of the mortgage. The cestuis que trustent under the mortgage, and the real owners, now that the equity of redemption from the mortgage has been acquired, have a sufficient title to the property; and being in undisturbed possession and use of the same, the trustees, who have no beneficial interest, cannot maintain an action to dispossess them.

The rights of all parties are fully discussed and determined in the case of *Somerset Railway, in equity*, v. *Lewis Pierce, et als.*, argued with this case. Another suit to recover possession of the property is pending in Somerset county, which, by the agreement of parties, is to abide the result in this. According to the terms of the report, the entry in this suit and in the Somerset suit must be,

Judgment for defendants.

FRANCES E. TASKER *vs.* INHABITANTS OF FARMINGDALE.

Kennebec. Opinion June 3, 1895.

Towns. Way. Negligence. New Trial.

A new trial will be granted where the thoughtless inattention of the plaintiff,— the very essence of negligence,— is the cause of the accident.

The court adheres to its former opinion in this case in 85 Maine, 523.

See *Tasker* v. *Farmingdale*, 85 Maine, 523.

ON MOTION.

The case appears in the opinion.

A. M. Spear, for plaintiff.

Orville D. Baker and Frank L. Staples, for defendants.

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

PER CURIAM. This case came before the Law Court at a former term, upon substantially the same evidence, and was there fully heard and considered. 85 Maine, 523. At that time the court said: "As the plaintiff was driving with two of her children over a road with which she was perfectly well acquainted, having driven over it hundreds of times, she saw an electric car coming. She says that her horse did not appear to be at all alarmed, and that she had him under full control. She, nevertheless, reined her horse out of the road on the opposite side from the car, so as to go as far from it as she could, and the first she knew, her carriage wheel dropped down over the end of a culvert and she and her two children were thrown out. The children were not hurt. But for injuries claimed to have been received by her, she recovered a verdict against the town of Farmingdale for $1150." She has now recovered a second verdict upon the same facts for $1566.66.

The court in the same opinion further says: "We think the verdict is clearly wrong. We cannot doubt that the accident was due entirely to the plaintiff's own thoughtless inattention. The road was smooth and nearly level, and wide enough for three such carriages as the one in which the plaintiff was riding to pass abreast. Her horse was not frightened and she had him under full control. She so testifies. She intentionally and unnecessarily reined him out of the road. It was in the evening, and the kindliest view that we can take of the plaintiff's conduct is that her attention was so absorbed by the electric car that she gave no thought to the danger she might encounter by driving out of the road. She saw the car, but she did not see and did not think of the culvert. Thoughtless inattention — the very essence of negligence — was the cause of the accident."

Upon second argument and further consideration the court considers that its views before expressed must control the case and the verdict be set aside.

Motion sustained.

FREDERICK S. RICHMOND

vs.

PHŒNIX ASSURANCE COMPANY.

SAME *vs.* LIBERTY INSURANCE COMPANY.

Androscoggin. Opinion June 3, 1895.

Insurance. Termination. Agent. Notice. Transfer. R. S., c. 49, § § 19, 90; Stat. 1891, c. 112.

A sale and conveyance of the insured property terminates and avoids a policy which contains the following stipulation: "If the property be sold or transferred, . . . or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon, . . . then, and in every such case, this policy shall be void."

Held; that there is no statute in this State affecting the force of such clauses in policies of insurance.

Where the broker who procured the policy is not the agent of the insurance company, he can not receive notice and give consent to the transfer or assignment of the policy under R. S., c. 49, § § 19 and 90; nor is such authority conferred upon insurance brokers by Statute 1891, c. 112.

A policy containing a memorandum that makes it payable to a third party, in case of loss, to the extent of his interest, becomes functus officio when the interest of the insured ceases.

ON REPORT.

These were actions of assumpsit brought by the plaintiff, Frederick S. Richmond, for the benefit of the American Bobbin, Spool & Shuttle Company against the Phœnix and Liberty Insurance Companies for the recovery of a loss under three policies in the Phœnix, one being called "the lost policy" for $500, and one policy in the Liberty Insurance Co. for $750. All of said policies covered the same property, and both cases were heard and tried on the same evidence excepting the policies themselves. There was no evidence in the case denying the loss, and no claim made by the defendants that the policies, if payable at all, should not be paid in full. Two points only were raised by the defense. First, that no due, proper and lawful proof of said loss was made to the defendants; and second, that Richmond, after the date of the policies, and before the loss, sold and transferred the property covered by the policies

without the consent of the companies in writing indorsed on the same.

The case is stated in the opinion.

J. P. Swasey and E. M. Briggs, for plaintiff.

Nathan and Henry B. Cleaves, Stephen C. Perry and Henry W. Swasey, for defendants.

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

EMERY, J. These are actions upon fire insurance policies issued by the defendant companies. The plaintiff, Frederick S. Richmond, while the owner in fee of the insured property, procured the insurance represented by these policies through one George A. Gordon, an insurance broker, but not holding a commission as agent from either of the defendant companies. Soon afterward, the plaintiff conveyed the insured property in fee to the American Bobbin, Spool and Shuttle Company of Boston. Still later, but during the term covered by the policies, the insured property was wholly consumed by fire. The American &c., Company, after the fire, assigned to the plaintiff (the original assured) all its claims under these policies; whereupon the plaintiff has now brought these suits.

At the time of the fire, the plaintiff had no insurable interest in the property, and sustained no loss by the fire. He claims, however, that his grantees succeeded to his rights under the policies, and that he can maintain these actions for his own benefit under the assignment to him, or, at least, for the benefit of the American &c., Company, the owner at the time of the fire.

In each of the policies issued by the Phœnix Assurance Company is the following clause of stipulation and condition: "If the property, [insured] be sold or transferred, . . . or if this policy shall be assigned before a loss, without the consent of the company indorsed hereon, . . then and in every such case this policy shall be void." In the policy issued by the Liberty Insurance Company, is this clause of stipulation and condition: "This entire policy, unless otherwise provided by agreement

indorsed hereon, or added hereto, shall be void if . . . any change, other than by the death of the insured, take place in the interest, title or possession of the subject of insurance," . . or "if this policy be assigned before a loss." There is nothing in our statutes affecting the natural force of these clauses. *Waterhouse* v. *Gloucester Insurance Co.* 69 Maine, 409. The conveyance of the insured property in fee by Mr. Richmond was within these clauses, and, by their express terms, that conveyance terminated or voided each of these policies, unless it was consented to by the company according to the terms of the policy. *Brunswick Savings Institution* v. *Insurance Company*, 68 Maine, 313; *Gould* v. *Insurance Company*, 76 Maine, 298.

The case does not show any such consent on the part of either company. The plaintiff informed Mr. Gordon, the broker, of the change in ownership, and requested him to procure the necessary indorsement upon the policies, of the consent of the companies. Mr. Gordon testified that he communicated this information and request to each insurance agent from whom he had procured the policies. These agents explicitly deny having received any such information or request, and deny that they, or their companies, ever consented to the transfer, or ever knew of it till after the fire. The three policies in the case do not show any indorsement of consent, and there is no evidence that the fourth policy (which is lost) ever bore any such indorsement.

The plaintiff urges that George A. Gordon, the broker, should be considered the agent of the companies, to receive notice and accord consent under sections 19 and 90 of the Insurance Act (R. S., c. 49), and cites the language of the opinion in *Day* v. *Insurance Company*, 81 Maine, 248. The evidence in the case shows affirmatively that Mr. Gordon was not the agent of either of the defendant companies, and did not assume to act for either of them. The plaintiff testified that he understood Mr. Gordon was not an agent of the companies. The statute providing for the licensing insurance brokers (Stat. 1891, c. 112,) does not confer upon such brokers and authority to bind insurance companies from whom they may obtain insurance for their principals.

But these policies also contained this clause: "Loss, if any,

payable to Whitall, Tatum & Co., New York, as far as their interest may appear." Whitall, Tatum & Co., after the fire, assigned to the plaintiff all their interest in these policies. The plaintiff claims that the interest of Whitall, Tatum & Co. was not affected by his conveyance to the American &c., Company, to which conveyance they were not parties, and that as their assignee, he can recover their interest. The case does not show that Whitall, Tatum & Co. had any interest at the time of the fire, nor does it appear that any interest of that firm was ever insured. They procured no insurance, nor, so far as appears, did the plaintiff procure any insurance for them. The plaintiff simply insured his own interest, and then directed that, out of such sum as might accrue to him as insurance upon his interest, there should be paid to Whitall, Tatum & Co. enough to satisfy their claim. When the plaintiff's own insurable interest vanished, Whitall, Tatum & Co.'s claim upon that interest also vanished. They were subject to all the conditions of the policies. *Biddeford Savings Bank* v. *Insurance Company*, 81 Maine, 566.

Judgment for defendant in each case.

THEOPHILE TURGEON *vs.* JOSEPH COTE, and another.

Androscoggin. Opinion June 3, 1895.

Pleading. Account annexed.

An account is a detailed statement of items of debt and credit, or of debt, arising out of contracts between parties.

A demurrer will defeat a writ when there is annexed to the declaration an account as follows: "For balance due on account for labor performed and materials furnished—(as contractor for wood work for the erection and construction of the above building as per agreement)—$725.00;" on which balance of account are credited several items of cash leaving a final balance of account of $260.00, there being no other count in the writ excepting that on the account annexed. The contract price is not stated; nor are any items given that constitute the balance of $725.00 due on account.

ON EXCEPTIONS.

This was an action of assumpsit to enforce a lien on the defendants' house.

The declaration in the writ contained a single count upon an account annexed.

The account annexed is as follows:

"November 10, 1894.

Joseph Cote and Agnes Cote,

To Theophile Turgeon, Dr.

"To Balce due on account for labor performed and materials furnished, as contractor for wood work, for the erection and construction of the above building, as per agreement, $725.00

Cr.

1894.

June 19th,	By cash received on account,	$125.00
July 7th,	" " " " "	150.00
Sept. 1st,	" " " " "	100.00
" 4th,	" " " " "	40.00
" 10th,	" " " " "	50.00
		$465.00
Balce due,		$260.00"

The defendants demurred to the declaration which was joined, and after hearing overruled.

The defendants thereupon took exceptions to the decision of the court overruling the demurrer; and the case was certified to the Chief Justice under R. S., c. 77, § 43.

J. G. Chabot, for plaintiff.

The contract being an executed one and the agreement performed on plaintiff's part, account annexed or indebitatus count is a proper count to admit any evidence in support or defense of same. 2 Chit. Pl. 16th Ed. p. 27, and cases cited; 2 Green. Ev. 10th Ed. § 104, p. 82, and cases cited.

Date of executed parol contract sufficiently alleged in the date of "the purchase of this writ," in this action, date alleged being immaterial since any other day could be proved at trial. 1 Chit. Pl. 16th Ed. p. 351, and notes; *Ripley* v. *Hebron*, 60 Maine, 388; *Little* v. *Blunt*, 16 Pick. 365.

And also sufficiently stated by the accompanying allegations, that the action is brought within ninety days after performance of said contract, for the construction of said building, to inform defendants. *State* v. *Rush*, 77 Mo. 586, cited in Am. and Eng. Enc. of Law, Vol. 5, page 352.

No averment need be made which the law does not require to be proved. *Knapp* v. *Slocomb*, 9 Gray, 73.

The point aimed at by defendants, (the allegation of precise date on which parol agreement, in account annexed was made,) being only matter of form, since any other date than the one alleged could have been proved in support of the action, if material, should have been by special demurrer calling attention to special defect. *Blanding* v. *Mansfield*, 72 Maine, 429; Steph. on Pl. *140. Counsel also cited: *Moore* v. *Royce*, 92 Mass. 556; *Cape Elizabeth* v. *Lombard*, 70 Maine 399; *State* v. *Carrick*, 14 Am. St. Rep. 390-1; *George* v. *Thomas*, 16 Tex. 74; S. C. 67 Am. Dec. 612.

D. J. McGillicuddy and F. A. Morey, for defendants.

The time of every item that goes to make up the plaintiff's cause of action or that can in any way be traversed must be given. Taking the declaration as it appears, what is there in it that can enlighten the defendants as to the nature of the action and the exact items for which suit is brought? The plaintiff should set out the items of his account. The items of his labor, the items of his materials. The writ shows that a three-story flat roofed wooden building was built by the plaintiff for the defendants. We wish the whole account given, and the time of every traversable fact that enters into the plaintiff's account in this suit. The difference between the parties is one hundred and forty dollars. It will be impossible for the defendants to prepare for trial unless they were apprised of each item in the bill. Counsel cited: *Shorey* v. *Chandler*, 80 Maine, p. 411, citing *Cole* v. *Babcock*, 78 Maine, 41.

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

PETERS, C. J. The account annexed to the writ, which as a part of the plaintiff's declaration is demurred to by the defendant, is as follows: "For balance due on account,— for labor performed and materials furnished, as contractor for wood work for the erection and construction of the above building as per agreement,—$725.00."

On this balance of account are credited several items of cash, leaving a final balance of account of $260.00. The building alluded to is one attached on the writ, and on which it is averred, a lien-claim for the amount of the account exists.

It is not alleged what the price of the work contracted for was, nor does it in any way appear what any or all of the items are constituting the balance due on account of $725.00. The defendant is entitled to know what these particulars are before he can be required to determine whether he will admit or contest the claim. Had the balance been declared upon as a sum due on an account stated it might have been different. An account is a detailed statement of items of debt and credit or of debt arising out of contracts between parties. The phrase "a balance due on account" discloses no items. *Bennett* v. *Davis*, 62 Maine, 544.

Demurrer sustained.

FRANK N. WEEKS *vs.* JAMES P. HILL.

Kennebec. Opinion June 4, 1895.

Sales. Husband and Wife. Remedy. Agency. Stat. 13 Eliz. c. 5.

Actual insolvency of the donor of a gift of property, is not an indispensable element in the proof of a fraudulent intent as to creditors.

When a conveyance is made without consideration, the fact of the grantor's insolvency is undoubtedly presumptive evidence of a fraudulent purpose towards creditors; but it is not a conclusive, nor the only, criterion by which to determine that question. The facts and circumstances may clearly show under Stat. 13 Eliz. c. 5, such a fraudulent intent on the part of a grantor who is not actually insolvent.

Whether a conveyance is made with an intent to hinder, delay and defraud creditors is a question of fact for the determination of the jury upon the consideration of all the circumstances attending the conveyance.

Semble, that the remedy of creditors is wholly an equitable one in cases of fraudulent conveyances of personal as well as real property between husband and wife.

Held; that there being evidence from which a jury might infer that the husband acted only as the wife's agent in purchasing the chattels, an instruction that she must be proved to be insolvent in order that creditors may avoid the transaction and so hold the property as belonging to the wife, would be erroneous.

ON MOTION AND EXCEPTIONS.

This was an action of replevin of four cows tried to a jury in the Superior Court, for Kennebec county, and in which the plaintiff obtained a verdict. The defendant, an officer, who had seized the cows on an execution against the plaintiff's wife, as her property, moved for a new trial and took exceptions to a portion of the charge of the presiding justice as appears in the opinion.

W. C. Philbrook, for plaintiff.

Harvey D. Eaton for defendant.

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

WHITEHOUSE, J. This is an action of replevin for four cows taken by the defendant, as a deputy sheriff, by virtue of an execution against Alice Weeks, the wife of the plaintiff, and in favor of Mary C. Wing. The judgment on which the execution issued was recovered on a promissory note signed by Alice Weeks and payable to her sister, Mary C. Wing, for the sum of one hundred and thirty-five dollars, dated April 30, 1892. The cows were found by the officer in the custody of the plaintiff, and it is not in controversy that at least two of them were purchased by the plaintiff with money furnished by his wife, Alice Weeks, October 1, 1892. It was contended in behalf of the defendant that if this was a gift from the wife to her husband it was made in fraud of existing creditors, and that the officer was justified in seizing the cows purchased with it, as the property of the wife.

The verdict was for the plaintiff, and the case comes to this court on motion and exceptions by the defendant.

The presiding justice instructed the jury, inter alia, as follows: "If Mrs. Weeks was insolvent, was owing this debt to Mrs. Wing, her sister, and for the purpose of preventing her recovering her debt, passed this money over into the hands of her husband with his knowledge or connivance, it would be such a fraud as would make void the gift, and anything purchased with that money could be pursued by Mrs. Wing, the creditor, and taken in satisfaction of her execution. . . . . You see that the premises which must be proven in order to make it a fraud must be that Mrs. Weeks, at the time she gave the money to her husband, was insolvent, and that she gave it to him with intent to defraud her sister or prevent her recovery of her debt."

This instruction must be held erroneous. Actual insolvency of the grantor in a voluntary conveyance, or of the donor of a gift of property, is not an indispensable element in the proof of a fraudulent intent as to creditors. Whether or not a gift, sale or conveyance is made in good faith or with the intent to hinder, delay or defraud creditors, under the Statute 13 Eliz. c. 5, recognized as a part of the common law of this State, is a question of fact for the determination of the jury upon consideration of all the circumstances attending it. *French* v. *Holmes*, 68 Maine, 525; *Laughton* v. *Harden*, 68 Id. 208; *Thacher* v. *Phinney*, 7 Allen, 146; *Pomeroy* v. *Bailey*, 43 N. H. 118. When a conveyance is made without consideration, the fact of the grantor's insolvency is undoubtedly presumptive evidence of a fraudulent purpose towards creditors; but it is not a conclusive nor the only criterion by which to determine that question. The facts and circumstances may clearly show such a fraudulent intent on the part of a grantor who is not actually insolvent. *Parkman* v. *Welch*, 19 Pick. 231; *Parish* v. *Murphree*, 13 How. 92. It is not necessary that insolvency should either be proved or presumed in order to render a voluntary conveyance void as to creditors. Bump on Fraud. Convey. 293, and cases cited.

But the plaintiff contends that any error in this instruction respecting the insolvency of the donor as an element in the proof

of fraud, becomes immaterial in this case, for the reason that the title to the cows had never been in the wife, Alice Weeks, but was vested directly in the husband, and hence if it be conceded that there was a gift of the money made in fraud of creditors, the cows purchased with it were not subject to seizure on execution but could only be reached, and made available to the execution creditor, by a proceeding in equity.

This contention of the plaintiff that tangible property, susceptible of identification, purchased with money thus fraudulently given by the wife to the husband, cannot be seized on execution as the property of the wife, but can only be reached by process in equity, is supported by the rule laid down in *Low* v. *Marco*, 53 Maine, 45, in which the title to real estate fraudulently conveyed by the husband to the wife, was under consideration, and to some extent by the doctrine of *Lawrence* v. *Bank*, 35 N. Y. 320; and although a different conclusion has been reached by several courts of last resort in other states, it may be conceded, that the same rule will be followed in this State in cases involving the title to personal property. Still the erroneous ruling in question may have been material; for there was evidence in this case tending to show, and the jury might have been justified in so finding, that in purchasing the cows, the plaintiff acted only as the agent of his wife. In that event, the ownership of them originally vested in the wife, and the act of fraud towards her creditors, if any, consisted not merely in placing the money in her husband's hands, but in transferring the cows purchased into his custody to be held in his name and as his property for the purpose of preventing a levy thereon by the execution creditor. In this view of the case the erroneous instruction was equally prejudicial, and the entry must be,

Exceptions sustained.

MARY C. WING *vs.* FRANK N. WEEKS.

Kennebec. Opinion June 4, 1895.

Fraudulent Conveyance. Execution Debtor. Pleading. Stat. 1887, c. 137, § 12.

In an action to recover "double the amount of the execution" for "fraudulently aiding in the transfer, concealment or disposal" of property disclosed by an execution debtor, *held;* that the statute on which it is based (Stat. 1887, c. 137, § 12,) is penal as well as remedial, and is not to be extended by construction beyond the reasonable meaning of its terms. It makes a clear distinction between the liability of a debtor and that of a third person.

Such action cannot be maintained when it appears that the situation of the property disclosed was not changed during the thirty days after disclosure.

Held; that a declaration in such an action is defective that contains no averment of any specific act of the defendant whereby the debtor was "fraudulently aided" in transferring, concealing or disposing of the property during that period or at any other time; nor a general allegation that the defendant "fraudulently aided" in the transfer, concealment or disposal of the property at any time.

See *Weeks* v. *Hill*, ante, p. 111.

ON REPORT.

The case appears in the opinion.

This was an action on the case, brought under the statute of 1887, c. 137, § 12. Plea, general issue.

(Declaration.) "In a plea of the case, whereas the said plaintiff on the 22nd day of April, 1893, at said Augusta, by the consideration of our Judge of our Superior Court, holden for and within our county of Kennebec, aforesaid, on the first Tuesday of April, 1893, recovered judgment against one Alice Weeks, of said Waterville, for the sum of one hundred forty-five dollars and forty-one cents debt or damage and nine dollars ninety-three cents costs of suit, as by the record thereof now remaining in our said court more fully appears; and whereas on the thirty-first day of May, 1893, said plaintiff presented a petition to Frank K. Shaw, Esq., a disclosure commissioner, within and for our county of Kennebec, duly appointed by the Supreme Judicial Court praying him to issue a citation for disclosure to said Alice Weeks and said commissioner granted

said prayer and issued a citation commanding the said Alice Weeks to appear before him at the Municipal court room, in Waterville, on the first day of June, 1893, at ten o'clock in the forenoon for the purpose of making a full and true disclosure of all her business and property affairs in accordance with the provisions of chapter 137 of Public Laws of 1887 of Maine. Said citation was duly served and in obedience thereto said Alice Weeks appeared at the time and place aforesaid and disclosed that she was the owner of one top-carriage valued at $50 and five cows valued at $200, all being then in the possession of this defendant, the said Frank N. Weeks. Whereupon the said disclosure commissioner decreed that said petitioner have a lien for thirty days on so much of said property as was not exempt from attachment and seizure on execution and the plaintiff alleges that none of said property was then exempt from attachment and seizure on execution. And afterwards on the 21st day of June, 1893, James P. Hill, a deputy of the sheriff of Kennebec county having in his hands for collection the execution issued on said judgment in favor of Mary C. Wing, by virtue of said execution and the disclosure commissioner's certicate thereon endorsed, granting a lien as above set forth, demanded of said Frank N. Weeks the said top-carriage and the said five cows; but the said Frank N. Weeks, then and there being in possession of said property and under a duty to surrender it to said officer on demand and having no lien or other reason for not so surrendering it, being unmindful of his said duty and disobedient to the decree of said commissioner and the statute in such case made and provided, refused then and there to surrender said property and concealed it and kept it from coming into the hands of said officer as by law it should have done; wherefore, and by force of the statute in such case made and provided, the said Frank N. Weeks has forfeited to the said plaintiff double the amount due on said execution to wit, double the sum of one hundred fifty-five dollars and forty-nine cents being the sum of three hundred ten dollars and ninety-eight cents.

"Yet, though often thereto requested," etc. . . .

Harvey D. Eaton, for plaintiff.

The defense, pendency of a prior action involving the same question raised here as to a portion of the property, can be shown only in abatement. *Small* v. *Thurlow*, 37 Maine, 504.

W. C. Philbrook, for defendant.

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

WHITEHOUSE, J. The plaintiff in this action was the execution creditor and the defendant in interest, in the replevin suit, *Weeks* v *Hill*, ante, 111, and the case is an outgrowth of the same transaction.

This suit is based on section 12 of chapter 137, laws of 1887, relating to the disclosure of execution debtors. That section provides that if the debtor "discloses personal estate liable to be seized on execution, the petitioner shall have a lien on it, or so much of it as the magistrate in his record judges necessary, for thirty days; and if the debtor transfers, conceals, or otherwise disposes of it within said time, or suffers it to be done, or refuses to surrender on demand, ... the petitioner may recover, in an action on the case against him, or any person fraudulently aiding in such transfer, concealment or disposal, double the amount due on said execution."

It is alleged in the plaintiff's declaration that Alice Weeks, the execution debtor in the replevin suit, and the wife of this defendant, pursuant to a citation for that purpose, appeared before a disclosure commissioner on the first day of June, 1893, and "disclosed that she was the owner of one top-carriage, valued at fifty dollars, and five cows, valued at two hundred dollars, all being then in the possession of this defendant, Frank N. Weeks; whereupon the disclosure commissioner "decreed that said petitioner have a lien for thirty days on so much of said property as was not exempt from attachment and seizure on execution." It is further alleged that the property thus disclosed was duly demanded of the defendant by the officer having the execution in favor of the plaintiff, but that the defendant "then

and there being in possession of said property and under a duty to surrender it to said officer on demand, and having no lien or other reason for not so surrendering it, being unmindful of his said duty and disobedient to the decree of said commissioner and the statute in such case made and provided, refused then and there to surrender said property, and concealed it and kept it from coming into the hands of said officer as by law it should have done."

There is no evidence in this case nor in the report of the replevin suit, which is made a part of this case, aside from the recital in the certificate of the disclosure commissioner, which gives any support to the averment that Alice Weeks disclosed that she "was the owner" of the cows and carriage in question. She "disclosed" that some eight months prior to that time she gave her husband the sum of three hundred dollars, and it appears that he purchased five cows with the money. She uniformly disclaimed any ownership in the cows. There is no evidence whatever, other than the commissioner's certificate, respecting the title to the carriage. The defendant appears to have asserted the right to hold it, and there is no evidence that he did not own it. It also appears that four of the cows in the defendant's possession had been seized on this same execution as the property of Alice Weeks, some two months before, and replevied by the defendant as above stated.

But it must be remembered that this is an action, not against the execution debtor who is alleged to have disclosed the property, but against the defendant to recover "double the amount of the execution," presumably for "fraudulently aiding in the transfer, concealment, or disposal" of the property within thirty days after the disclosure, and while the lien was decreed to continue. The statute invoked is penal as well as remedial, and is not to be extended by construction beyond the reasonable meaning of its terms. The rule of strict construction is applicable; and this signifies that an act of a penal nature "is not to be regarded as including anything which is not within its letter as well as its spirit, which is not clearly and intelligibly described in the very words of the statute as well as manifestly intended

by the legislature." *Abbott* v. *Wood*, 22 Maine, 541; *Butler* v. *Ricker*, 6 Maine, 268; Endlich on Int. of Stat. § § 329-334, and cases cited.

This statute makes a clear distinction between the liability of the debtor and that of a third person. The petitioner may recover the penalty of the debtor himself if "he transfers, conceals, or otherwise disposes of the property within thirty days," or "refuses to surrender it on demand," &c., but he can only recover the penalty of a third person for "fraudulently aiding in such transfer, concealment or disposal." Such third person is not made liable for simply "refusing to surrender" property which he claims as his own, which has not been "transferred, concealed or disposed of" during this period of thirty days, but has been exposed to seizure on execution during that period, and for eight months prior to that time.

It is not contended that the situation of this property was changed in the slightest degree during the thirty days after disclosure. There is no averment in the declaration of any specific act of the defendant whereby the debtor was "fraudulently aided" in transferring, concealing or disposing of the property during that period or at any other time; nor is there even a general allegation that the defendant "fraudulently aided" in the transfer, concealment or disposal of the property at any time. There are no proper averments in the declaration to bring the case within the terms of the statute. It follows that the action must fail for want of both allegation and evidence.

Plaintiff nonsuit.

GEORGE O. DANFORTH *vs.* ETTA M. DANFORTH.

Kennebec. Opinion June 5, 1895.

Divorce. Desertion. Condonation. R. S., c. 60, § 2.

"Utter desertion continued for three consecutive years" is one of the causes for which a divorce may be granted. R. S., c. 60, § 2.

If a wife deserts her husband and remains away from him for the full period of three consecutive years, and during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and cannot be defeated by proof that on one occasion, within the three years he visited his wife, and, for two or three nights, occupied the same bed with her.

ON REPORT.

This was a libel for divorce filed in the Superior Court, for Kennebec county.

The allegation relied on as a cause for divorce was utter desertion without reasonable cause for three consecutive years next prior to the filing of the libel.

The evidence was taken out before the presiding judge, and his report of the facts, as found by him, was submitted by the parties to the Law Court for it to determine whether or not they show legal cause for divorce.

The facts as found are as follows: Libel dated May 29, 1893. The libelee deserted the libelant, April 20, 1890, without reasonable cause and has continued such desertion ever since unless it was interrupted by the fact stated below. The libelant lived on a farm owned by him in Albion in Kennebec county. His wife refused to live with him there although often requested, but lived in Lewiston, where she has lived ever since her desertion of the libelant.

In September, 1891, and within three years before the date of the libel, the libelant went to the house occupied by his wife in Lewiston and there lodged with her, occupying the same bed as husband and wife two or three nights, she still refusing, however, to return to his house and live with him as his wife, and has all the time since refused to do so, without legal justification.

W. T. Haines, for Libelant.

W. H. Newell, and W. H. Judkins, for Libelee.

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

WALTON, J. The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and, during all that time, continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined. *Stewart* v. *Stewart*, 78 Maine, 548, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In *Kennedy* v. *Kennedy*, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that, on one occasion, he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion continued for three consecutive years," is one of the causes for which a divorce may be granted. R. S., c. 60, § 2. And we think that if a wife deserts her husband and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and can not be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home and to her duties as his wife, undoubtedly her prior desertion

will be interrupted, or regarded as condoned, and can not be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete,—that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded for further hearing in the court below.

BATH SAVINGS INSTITUTION, in equity,

vs.

BARZILLAI W. HATHORN, Administrator, and another.

Sagadahoc. Opinion June 7, 1895.

Trust. Gift. Savings Bank Deposit.

A gift must be executed by delivery; a trust by declaration.

An express trust of personal property may be created or declared by parol. Its terms must be clearly established and show an executed gift, so that the equitable title shall have passed effectually to the donee as in the case of a gift inter vivos.

In such a trust, the real title vests in the donee, while the legal title, perhaps carrying the control, may be placed elsewhere; but it is necessary that the donor, who declares the trust, should create an estate for his cestui that is no longer his own. The donor may retain the legal title, giving him the control, but for the benefit of his cestui according to the terms of the trust. The trustee thereby becomes merely an agent to administer the trust and is subject to the directions of a court in equity.

An entry on the books of a savings bank in the name of a donor, "in trust for the donee," is not conclusive evidence by itself of an absolute, indisputable gift; but extrinsic evidence is competent to control its effect.

Held; in this case, that all the declarations, acts and conduct of the donor are consistent with the presumption arising from the entry itself, and show a completed trust in favor of the donee.

ON REPORT.

Bill in equity, heard on bill, answers and proof.

This was a bill of interpleader brought by the Bath Savings

Institution against the defendant, Hathorn, as administrator of the estate of Henry Walker, deceased, and against Alice B. Files, to determine the title to a certain deposit in that institution.

The course of procedure adopted by agreement between all parties was this: Each defendant filed an answer and then by agreement a decree of interpleader was filed, and by further agreement it was stipulated that the answers should be taken as the pleadings in the case and the cause set down for hearing on bill, answers and proof, and that Miss Files be regarded as plaintiff in the continuance of the suit. It thus became, practically, a suit in equity by Alice B. Files against the administrator of Henry Walker's estate. The facts in the case were practically undisputed.

It appears that Henry Walker, died October 2nd, 1891, leaving neither wife nor children, his wife having died nearly six years before. Their home was in Woolwich, opposite Bath, and Miss Files, who was a second cousin of Mrs. Walker, frequently visited there, and Mr. and Mrs. Walker often visited the Files family in Winslow, the two families being in close and intimate relations. On July 1st, 1882, Mr. Walker deposited the sum of $700 in the Bath Savings Institution in his own name, but "in trust for Alice B. Files," and took out a depositor's book in that form. At the time of making the deposit he had a conversation with the treasurer of the bank as to its form, and the treasurer told him that if he put the book in anyone's name, in trust for anyone, it would go to that person at his decease, and Mr. Walker said he wished it to, that he wished it to go to Miss Files. In accordance with his direction the signature book, which all depositors are required to sign, was signed by Mrs. Potter, then a clerk in the bank, in the same form "Henry Walker, in trust for Alice B. Files, of Woolwich." Mr. Walker, retained the bank book in his possession ever after, but never drew any part of the principal or interest therefrom, but took the book to the bank occasionally to have the accrued dividends added. On one occasion very soon after the deposit was made, Miss Files' sister, now Mrs. White, was visiting at his house, and saw the book among some other papers that he

happened to be examining; she took it up and looked at it; saw the form of entry, and he told her then: "Yes, that is for Alice at my decease, and the next will be for you," and Mrs. White communicated this information to Alice, her sister, immediately on her return home from the visit, who expressed her satisfaction thereat.

Mrs. Trott, who was in the family as housekeeper for about six years, going there before Mrs. Walker's death, saw the book on three different occasions, and Mr. Walker explained to her also when she spoke of its being in trust, that the book was for Alice, and again just a few months before his death, after he had the July dividend added, he was examining the book, spoke of it as Alice's bank book, and asked Mrs. Trott to guess how much it had gained. She told him she supposed it was between ten hundred and eleven hundred dollars, and his reply was "you are pretty good for guessing. You guessed pretty nearly right, and that will be a great help to Alice, won't it, Mrs. Trott?"

Orville D. Baker and Leslie C. Cornish, for Alice B. Files.
Charles W. Larrabee, for defendant, Hathorn.

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

HASKELL, J. Henry Walker of Woolwich, died solvent and intestate October 2, 1891, leaving brothers and sisters and nephews and nieces, but neither wife nor children. His wife died January 1, 1886. She was a cousin to the father of the plaintiff, Alice B. Files of Winslow, who knew the old people as uncle and aunt and seems to have been always welcome at their house and a favorite with them.

On July 1, 1882, Mr. Walker deposited in the Bath Savings Institution $700, "in trust for Alice B. Files," saying, in substance, that he wished it to go to her at his decease. That deposit remained intact during Mr. Walker's life, and at his death amounted to something over $1000. He always retained the book, and it was found among his papers by his administrator, the defendant, who now claims the deposit as a part of his

estate. The evidence shows that Mr. Walker intended the deposit for Alice at his decease, but never communicated his intention to her.

The authorities all say that a gift inter vivos must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee. *Northrop* v. *Hale*, 73 Maine, 66; *Dale* v. *Lincoln*, 31 Maine, 420; *Robinson* v. *Ring*, 72 Maine, 140; *Augusta Savings Bank* v. *Fogg*, 82 Maine, 538.

A voluntary trust is an equitable gift, and, like a legal gift inter vivos, must be complete. A declaration of trust as effectually passes the equitable title of the fund to the cestui, as a gift inter vivos passes the legal title to the donee. The distinction between them is of a technical nature. In a trust, the real title vests in the donee, but the legal title, perhaps carrying control of the property, may be placed elsewhere; while, in a gift, both the real and legal title instantly fall to the donee. It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if, perchance, he so does it as to transfer the real or equitable title to the cestui; for then he creates an estate really no longer his own. He may retain the legal title, giving him the control, but for the benefit of the cestui, according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts. They are the children of equity; they spring from it, and cannot survive without its aid and control. The trustee is merely an agent to administer them, and nothing more.

An express trust of lands can only be created by some writing signed by the party or his attorney, R. S., c. 73, § 11, but a trust of personal property may be created or declared by parol. It is necessary, however, to clearly establish the terms of it, and show an executed gift, so that the equitable title shall have passed to the donee as effectually as a gift inter vivos. *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159; *Dresser* v. *Dresser*, 46 Maine, 48.

Says Lord Cranworth: "If a man chooses to give away any-

thing which passes by delivery, he may do so, and there is no doubt that, in the absence of fraud, a parol declaration of trust may be perfectly good, even though it be voluntary. If I give any chattel, that of course passes by delivery; and if I expressly or impliedly say I constitute myself trustee of such and such personal property for a person, that is a trust executed, and this court will enforce it in the absence of fraud, even in favor of a volunteer. . . . The authorities all turn upon the question whether what took place was a declaration of trust or merely an imperfect attempt to make a legal transfer of the property. In the latter case, the court will afford no assistance to volunteers; but, when the court considers that there has been a declaration of trust, it is a trust executed, and the court will enforce it, whether with or without consideration." *Jones* v. *Lock*, L. R. 1 Ch. App. 25.

In this case, the deposit is in the name of the donor, "in trust for the donee." Standing alone, this entry does not work an absolute, indisputable gift in the form of a dry trust, that is, a trust without limitation or condition, that may be terminated at the will of the cestui; but extrinsic evidence is competent to control its effect. *Brabrook* v. *Savings Bank*, 104 Mass. 228; *Clark* v. *Clark*, 108 Mass. 522; *Powers* v. *Provident Institution*, 124 Mass. 377; *Stone* v. *Bishop*, 4 Clif. 393; *Northrop* v. *Hale*, 72 Maine, 275.

The evidence discloses that, at the time the donor made the deposit, he expressed a desire that the donee should have the money at his death. That certainly shows no intent to part with the legal title at an earlier day. He is said to have subsequently made talk of the same purport; but he neither informed the donee of the deposit, nor made any effort, nor did any act to apprise her of it, or of his intention concerning it. The deposit on his part was both voluntary and secret. Information of it may have been communicated to her by others, but never at his request, nor with his knowledge. What evidence then operates to pass the equitable title in the deposit to her? He had consummated no contract with her. His intentions were kept in his own breast. He could have withdrawn the money at any time

and have made a new disposition of it, and she may not have been the wiser, so far as he knew. It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift inter vivos. Both require the same essentials. In both, some title must pass from the donor, differing only in degree. A gift must be executed by delivery. A trust by declaration.

In *Augusta Savings Bank* v. *Fogg*, 82 Maine, 538, the donor deposited a sum of money in the name of the donee, subject to his own order, with intent that, at his death, it should go to the donee. No trust was claimed or shown. It was an unexecuted purpose, an ineffectual attempt at testamentary disposition.

In *Parcher* v. *Savings Institution*, 78 Maine, 470, a depositor caused to be entered upon the bank ledger, words in substance, "payable also to Mrs. Leavitt in case of my death," and it was held no gift.

In *Curtis* v. *Portland Savings Bank*, 77 Maine, 151, the entry of "Subject also to" the donee was held to constitute no gift; but that a subsequent delivery of the bank book completed the gift.

In *Barker* v. *Frye*, 75 Maine, 29, a deposit in the name of the donee, subject to the donor during life, afterwards changed by erasing words giving the donor any control of the fund, and after notice to the donee of the change and that the bank book would be delivered to him the first time they met, and after his reply requesting that the book be sent to him, which the court says "was an acceptance of the gift," it was held that the gift was complete.

The same doctrine is held in *Northrop* v. *Hale*, 73 Maine, 66; *Robinson* v. *Ring*, 72 Maine, 140; *Drew* v. *Hagerty*, 81 Maine, 231; *Parkman* v. *Suffolk Savings Bank*, 151 Mass. 218.

All of our cases require something more than a mere intention to give, a promise to give, or an expectation to give. Benevolence alone will not do. There must be beneficence also. The mystery sometimes supposed to exist about a trust, cannot

change the nature of a transaction. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it.

In *Dresser* v. *Dresser*, supra, a writing specifying the terms of a voluntary trust, and a delivery of the trust property so that the dominion of the donor over it was thereafter lost, is a good example of a trust of this sort.

In *Alger* v. *North End Savings Bank*, 146 Mass. 418, the donor made a deposit similar to the one under consideration. It was in his own name as trustee for the donee, his housekeeper, who claimed the deposit as a payment for her services. It was shown that shortly before his death he told her: "I put it in for you," "that money is yours," and the court held that the judge, who tried the case, was authorized to find a perfected gift, if he chose to do so.

Some of the cases are in conflict concerning the question now under consideration, more in the application of the law to the ever varying facts in the numerous cases than otherwise; but our own cases are all consistent, and squarely hold to the doctrine that a trust in personal property may be created by parol, and that a deposit in bank in the name of another may be explained or controlled by evidence outside the written terms of the deposit. In this case the terms of the deposit clearly show an intended trust in favor of the donee, but may be controlled or limited by extrinsic evidence. This evidence confirms the trust, showing that it should cease at the death of the donor, and that the legal title should then pass to the cestui. When the deposit was made, the treasurer of the bank told the donor that, at his decease, the money would go to the donee, and the donor replied that was his wish. All the subsequent acts and declaration of the donor show the same intent. The gift cannot be upheld as an absolute gift inter vivos, nor as a gift causa mortis, for these gifts require a delivery of the res, a complete transfer of title. They differ from a gift in trust, in that they purport to, and must, pass the whole title, so that the donor can have no dominion or control over them. But a gift in trust withholds the legal title from the donee. It may be transmitted to a third person, or it may be retained by the donor, but in

either case the equitable title has gone from him, and unless the declaration of trust contains the power of revocation, or the wide discretion of chancery attaches, (*Coutts* v. *Acworth*, 8 L. R. Eq. 558; *Wollston* v. *Tribe*, 9 L. R. Eq. 44; *Everitt* v. *Everitt*, 10 L. R. Eq. 405; 7 L. R. Ch. App. 244, & 15 Ch. Div. 570; *Lister* v. *Hodgson*, 4 L. R. Eq. 30; *Sharp* v. *Leach*, 31 Beav. 491; *Anderson* v. *Ellsworth*, 3 Gif. 154; *Toker* v. *Toker*, 31 Beav. 629; *Phillips* v. *Mullings*, 7 L. R. Ch. App. 247; *Smith* v. *Iliffe*, 20 L. R. Eq. 666; *Welman* v. *Welman*, 15 Ch. Div. 570, 578, 579; *Prideaux* v. *Lonsdale*, 1 De G. J. and S. 433,) it leaves him powerless to extinguish the trust. Of course, the trust must be established by proof, and the fact that no evidence of a voluntary trust once created remains or can be shown, does not alter the principle. Many rights fail of enjoyment from the lack of evidence that might once be adduced. So a secret trust may be valid when it can be proved, but if the donor conceals the evidence of it and later appropriates the fund to his own use, it is simply a wrong on his part that prevails because of his perfidy, and goes unpunished and unnoticed because unknown. The cestui's rights are the same, although his remedy may have been destroyed.

In the case of *Re Smith*, 144 Pa. St. 428, a lad of three years went to live with his uncle. When the lad was twelve the uncle placed $13,000 in bonds in an envelope, on which he had written and signed a declaration that he held them for his nephew. The bonds remained in the uncle's possession until his death, and the court held a completed gift in trust for the nephew.

In *Connecticut River Savings Bank* v. *Albee*, 64 Vt. 571, the Court says: "A completed trust, although voluntary, may be enforced in equity. It is not essential that the beneficiary should have had notice of its creation or have assented to it. The owner or donor of personal property may create a perfect or complete trust by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself or another person the trustee."

In that case a father deposited money in a savings bank in

the name of his son, naming himself trustee. It appeared that one motive of the father was to avoid taxation; but said the court, that fact does not negative the idea that he also intended to create a trust for the benefit of his son. It is perfectly consistent with it, and the retention of the pass book is not inconsistent with such a purpose; he must have retained it as trustee.

Ray v. *Simmons*, 11 R. I. 266, is in point. One Bosworth deposited money in a savings bank in his own name as trustee for a stepdaughter. He did not tell her what he had done, nor show her the pass book. He kept that himself. After his death the court held that the stepdaughter was entitled to the money — that the transaction constituted a trust in her favor.

So is *Martin* v. *Funk*, 75 N. Y. 134. Susan Boone deposited $500 in a savings bank "in trust for Lillie Willard." Susan kept the pass book and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie and the retention of the pass book by Susan were urged in defense; but the court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878.

So is *Minor* v. *Rogers*, 40 Conn. 512. A widow deposited $250 in her own name "as trustee of William A. Minor," the child of a neighbor. The child knew nothing of the deposit until after the depositor's death, and meantime did not have possession of the pass book, and the court held the trust complete, and allowed a recovery of the money from the depositor's executor.

So is *Re Gaffney's Estate*, 146 Pa. St. 49. It appeared that Hugh Gaffney deposited $560 in his own name as trustee for Polly Kim, and the court held the entry itself prima facie evidence of the trust and, unexplained, sufficient to uphold it.

In *Gerrish* v. *New Bedford Institution*, *supra*, the court says: "No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another; that it is enough for the latter purpose if it be unequivocally declared in writing — or orally if the property be personal — that it is held in trust for the person named; that

when the trust is thus created it is effectual to transfer the beneficial interest and operates as a gift perfected by delivery."

The same case holds that notice to the beneficiary is unnecessary where the transaction is clear, but when ambiguous, or susceptible of different interpretations, it removes the doubt and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust, but, when considered in the light of this case, rather consider the notice a controlling than an essential element in the creation of a voluntary trust. The prevailing doctrine now is that notice is unnecessary, but when shown has controlling effect.

In this case the entry, "in trust for," is of clear and unmistakable import and sufficient to create a prima facie trust. It might have been controlled by evidence that would have shown a contrary intention, but such evidence is wholly wanting. Moreover, all the declarations, acts and conduct of the donor are consistent with the presumption arising from the entry itself, and show that it expresses the true import of the transaction and creates a completed trust in favor of the donee.

Decree accordingly with costs against the estate.

GEORGE H. HAMLIN, Executor, in equity,

vs.

EDWARD W. MANSFIELD, and others.

Penobscot. Opinion June 17, 1895.

Will. Perpetuities. Debts. Partnership.

It is the duty of an executor to pay the debts of the deceased and expenses of administration promptly and within the statute period, even if to do so defeats every devise and legacy.

The testator was a member of a copartnership, of which his son and another person were members. By the second clause of his will, he provided for the continuance of the partnership, with the use of his property therein "so long as my said son or any of his children see fit or desire to carry on the business, subject to any change as to the membership which my said

son or his children may see fit to make, so long as he or his children or any one of them remain members;" and by clause four of his codicil he provided that "said partnership shall have the right to retain and enjoy the benefit of all my portion of the assets of the firm which at my death constitute a part of their working capital." These provisions, if carried out, would make the executor a trustee of that portion of his estate which was part of the capital of the firm, and to so continue as long as his son, or any of his children then living or thereafter born, should desire. *Held;* that this provision is clearly obnoxious to the rule against perpetuities and therefore void.

Also, that the firm having been dissolved by the death of the testator, and the provisions of the will for its further continuance being inoperative and void, it becomes the duty of the surviving partners to close up its affairs under the provisions of the statute. If they fail to do this, the like duty will devolve upon the executor.

Also, the bequest over, of the testator's portion of the firm property, became operative immediately from the probate of the will; and vests in the legatees therein named.

By another provision of the will all moneys made payable to the several legatees or devisees, were to be paid by the executor to the treasurer for the time being of the Bangor Theological Seminary as trustee. *Held;* that the treasurer became a trustee with no duty or control over the fund, except to receive the money and immediately pay it over in the proper shares to each donee; it is harmless, if the executor pursue this course; and he will be justified in ignoring the trust, and paying directly to the beneficiaries the shares of each.

By another item of his will, the testator devised his machine and blacksmith shop, and the land on which they stood with the water rights, to three societies in differing proportions, subject to the occupancy by the copartnership, under its continuance, as contemplated by the testator. By his codicil he revoked the devise to the three societies, and devised the whole to one society absolutely. The provision for the continuance of the firm being void, *held;* that the devise to the last named society is valid, and vests the fee in it, which it is competent for the society to convey.

By a residuary clause the testator gave all the remainder of his estate to a missionary society. *Held;* that the testator intended to dispose of his entire estate, including his interest in the firm not required for the payment of debts, etc., and not otherwise bequeathed or devised; said interest is assignable by the society.

ON REPORT.

This was a bill in equity, heard on bill and answers, to obtain the construction of the will of Edward Mansfield, of Orono, Penobscot county.

The following course of procedure was adopted by the parties, and the case certified by agreement to the Chief Justice under the provisions of R. S., c. 77, § 43:

The complainants read the bill and the respondents read the different answers.

The case to be heard upon the facts stated in the bill of complaint, and all the answers.

The facts stated in both bill and answers to be regarded as true for the purposes of the decision of this case, the parties not understanding that there is any contradiction of facts so far as material.

The court to answer such questions as are put by either complainants or respondents, as it deems expedient and proper.

The respondents were Edward W. Mansfield, Israel Mansfield and Helen M. Mansfield, all of said Orono; Guy P. Bailey and Grace Stetson, both of Bangor, in said county; Edward M. Bailey of the city, county, and state of New York; The Bangor Theological Seminary, of Bangor aforesaid; The Congregational Church of said Orono, and the American Home Missionary Society, of the city, county, and state of New York.

The material portions of the will and codicil are as follows:

"1. To my adopted daughter Helen M. Mansfield, of Orono aforesaid, I give the sum of one thousand dollars.

"2. I will that the partnership which now exists between myself and my son Edward W. Mansfield and another, in the transaction of business at said Orono, as the same shall exist at the time of my death, shall be continued and not dissolved, but be carried on at the same place, so long as my said son or any of his children see fit or desire to carry on the business, subject to any change, as to the membership, which my said son or his children may see fit to make, so long as he or his children or any one of them remain members; and to that end that the partnership be authorized and have the right to use and occupy the machine shop and the blacksmith shop and their respective privileges and all the tools and machinery in use in the business of the firm to the full extent of my ownership thereof, the firm to pay for the use or rent of the real estate, thus occupied by it, the sum of two hundred dollars per annum, as hereinafter provided and also to pay all taxes on the real estate, as also on all the personal effects of the firm, also keep the whole well insured

and in good repair at their own expense, including the buildings as well as all the machinery and other property aforesaid, all such payments and expenses to be charged against the gross income of the firm's business. My estate to be regarded as a member of the copartnership and to receive its equal, pro rata share of the net income, the same as I now do, except that my estate is to receive nothing for personal services as I now do and such as the other members now do and will continue to receive.

"These provisions apply to any partnership or business which my said son or any of his children may be engaged or interested in, either solely or in copartnership among themselves or with others in connection with the shops and privileges aforesaid.

"At the end of each year there shall be an account made up of the business of the copartnership and the net income ascertained as nearly as possible and the amount thereof, so far as the interests of the firm admits, paid over to the respective members, the portion belonging to my estate to be divided as hereinafter provided.

"The firm aforesaid to have the right to use the patent rights which I own, as such firm, but no right to sell or use the same outside of their said business. Whenever there ceases to be any of my said son or of his children, solely or in partnership with others, to carry on said business as aforesaid, from any cause, then the portion of the firm's property belonging to my estate, as aforesaid, shall go one-fourth to said Edward, my son, or his heirs, according to the laws of descent, and the other three-quarters as hereinafter provided.

"3. To the American College and Education Society of Massachusetts, and American Home Missionary Society of New York and the Congregational Union, I do give and devise my machine and blacksmith shops, with the land on which they stand and all the water rights and privileges connected therewith, including all the real estate which I own outside or easterly of the railroad track, not however including any machinery or fixtures which I own as copartner with others or which the copartnership owns. To have and to hold said premises one-half to said

American Home Missionary Society, and one-fourth each to said American College and Education Society and Congregational Union, and their respective successors and assigns, in common and undivided, subject however to the rights of my son and his children and copartnership to occupy the premises and carry on business thereon as herein provided in the previous item of this will: . . .

"4. . . [Revoked by codicil.] . . All monies which, by the different items of this will, including rents and partnership incomes, are made payable to the several donees or devisees aforesaid, I will, for convenience, shall be paid to and received by the treasurer for the time being of said seminary as trustee to be paid by him to the respective parties aforesaid entitled thereto.

"5. All the remainder of my estate real and personal, after the payment of all my debts and funeral charges, I do give and devise to said American Home Missionary Society of New York, and to its successors and assigns forever.

(Codicil.) . . .

"4. In addition to the rights and privileges devised in the second item of my original will aforesaid to the partnership therein mentioned, said partnership shall have the right to retain and enjoy the benefit of all my portion of the assets of the firm which at my death constitute a part of their working capital, the income or profits of the partnership as thereby constituted to be divided and appropriated as already provided in my original will and this codicil except as herein otherwise disposed of, this provision not to include the two power presses belonging wholly to me.

"5. . . .

"6. I will that George H. Hamlin, of Orono, be the executor of my will instead of my son Edward W. Mansfield as provided in my original will, free from all obligation to give any bond as such. And it is hereby made the duty of my executor to see that the provisions made in the will and codicil respecting the copartnership business are strictly enforced and carried into effect he having full authority to make any agreement or

other arrangement about the partnership business and effects which he may think best, including the sale or other disposition of the presses now belonging to me, he to have all power the same as I now have as owner of the property wholly, or partially as member of the firm." . . .

Questions by complainant:

"1. Whether your complainant as executor can permit the property of the testator to remain in the business of the copartnership of which the testator was a member, as set forth in Item 2 of said will as amended by Items 4 and 5 of the codicil, and if so, within what limitations as to time said property can be so continued?

"2. Is it obligatory upon the executor of said will to continue said property in said copartnership as set forth in said Item 2 and amendments, and if so, from what source shall he procure money to pay the debts of the testator, the charges of administration and the specific cash legacy provided for by Item 1 of said will?

"3. Whether your complainant as executor, in accordance with Item 4 of said will is required to pay all monies made payable to the several donees or devisees, to the treasurer for the time being of the Bangor Theological Seminary as trustee?

"4. Whether your complainant, as executor, not expressly appointed a trustee, becomes such from the provision of the will?"

Questions by respondents, Edward W. Mansfield and Guy P. Bailey:

"1st. Whether or not the devise by said testator to the American Home Missionary Society, its successors and assigns, of said testator's 'machine and blacksmith shops with the land on which they stand and all the water rights and privileges connected therewith' was valid?

"2d. Whether or not said society under the terms of said will acquired such a title to said real estate that it could by deed give its grantees a good and valid title thereto?

"3d. Whether or not said society as legatee, either specific or residuary, under said will took any interest in and title to

the personal estate, individual and partnership? If so, is said interest assignable?

"4th. Whether or not the bequests to Helen M. Mansfield, Edward W. Mansfield, The Bangor Theological Seminary, the Congregational Church of Orono and to the children of Angie M. Bailey, of the testator's share in the property and assets of the firm of E. Mansfield & Co., were valid bequests? and whether or not said legatees, or any of them, could make legal transfers of said interests in said property?

"5th. Whether or not said Edward W. Mansfield and Israel W. Mansfield as surviving partners of the late firm of E. Mansfield & Co., have a right to give the bond, and to close up the affairs of said partnership, as provided in R. S., c. 69?

Charles J. Dunn, for George H. Hamlin, executor.

Jasper Hutchins and Frank A. Floyd, for Edward W. Mansfield, Israel W. Mansfield, Guy P. Bailey, Grace Stetson and Edward M. Bailey.

Franklin A. Wilson, for Helen M. Mansfield, the Bangor Theological Seminary and the American Home Missionary Society.

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

STROUT, J. Bill in equity for construction of the will of Edward Mansfield.

It is the duty of the executor to pay the debts of the deceased and expenses of administration promptly and within the statute period, even if to do so defeats every devise and legacy. He should first apply to this purpose that portion of the personal estate not specifically bequeathed; and if that proves insufficient, then so much of the real estate, not specifically devised, as may be needed to accomplish the object.

The testator was a member of a copartnership, of which his son and another person were members. By the second clause of his will, he provided for the continuance of that partnership, with the use of his property therein, "so long as my said son or

any of his children see fit or desire to carry on the business, subject to any change as to the membership which my said son or his children may see fit to make, so long as he or his children or any one of them remain members;" and by clause four of the codicil he provides that "said partnership shall have the right to retain and enjoy the benefit of all my portion of the assets of the firm which at my death constitute a part of their working capital." These provisions, if carried out, would make the executor a trustee of that portion of his estate which was part of the capital of the firm, and to so continue as long as his son or any of his children then living or thereafter born, should desire. This provision is clearly obnoxious to the rule against perpetuities, and is void. *Slade* v. *Patten*, 68 Maine, 382; Perry on Trusts, §§ 381, 382, 383; *Kimball* v. *Crocker*, 53 Maine, 263. The executor, therefore, is not authorized by law to continue the partnership, but its affairs should be closed, and the testator's interest withdrawn, to be disposed of under the valid provisions of the will.

The bequest over, of the testator's portion of the firm property, became operative immediately upon probate of the will, and is vested one-fourth in his son Edward, and three-fourths in the American Home Missionary Society, as provided in the codicil. The answer to the first, second and fourth questions in the bill, is contained in the foregoing.

To the third question, whether the executor, under Item 4 of the will, is required to pay all moneys made payable to the several donees, to the treasurer of the Bangor Theological Seminary as trustees, we answer that the leading idea in that clause referred to the disposition of the profits arising from the continuance of the partnership business, and the testator appeared to regard the payment to the treasurer of the seminary as a matter of convenience. He made the treasurer a trustee, with no duty or control over the fund, except to receive the money and immediately pay it over in the proper shares to each donee. It is harmless, if the executor pursue this course; and he will be justified in ignoring the trust, and paying directly to the beneficiaries the share of each.

By the third item of the will, the testator devised his machine and blacksmith shop, and the land on which they stand, with the water rights, to three societies in differing proportions, subject to the occupancy by the copartnership, under its continuance, as contemplated by the testator. By his codicil he revoked the devise to the three societies, and devised the whole to the American Home Missionary Society absolutely. The provision for the continuance of the firm being void, it is the opinion of the Court that the devise to the Home Missionary Society is valid, and vests the fee in it, which it is competent for the society to convey.

The residuary clause in the will gives all the remainder of the testator's estate to the American Home Missionary Society. As the testator manifestly intended to dispose of his entire estate, it follows, that under this clause the society takes all real and personal estate, including testator's interest in the firm, not required for the payment of debts and expenses of administration, and not otherwise bequeathed or devised. No reason is perceived why such interest is not assignable by the society.

The bequest of the income from partnership business, in article four of the will, fails and is inoperative, because the firm business cannot be continued.

The firm having been dissolved by the death of the testator, and the provisions of the will for its further continuance being inoperative and void, it becomes the duty of the surviving partners to close up its affairs under the provisions of the statute. If they fail to do this, the like duty will devolve upon the executor.

Bill sustained. Decree in accordance with this opinion.

DAVID W. DYER, Petitioner, *vs.* CITY OF BELFAST.

Waldo. Opinion June 18, 1895.

Way. Damages. Appeal. Retrospective Laws. R. S., c. 82, § 116. Stat. 1893, c. 297.

Chapter 297, Laws of 1893, which provides that: "When any person aggrieved by the estimate of damages for his land taken for a town or private way, honestly intended to appeal therefrom and has by accident or mistake omitted to take his appeal within the time provided by law, he may at any time within six months after the expiration of the time when said appeal might have been taken, apply to any Judge of the Supreme Judicial Court in term time or vacation, stating in his said application the facts of his case and said Judge after due notice and hearing may grant such petitioner permission to take his said appeal to such term of said court as said Judge shall direct," does not apply to a case where the right of appeal from an estimate of damages, under the law then in force, had been fully barred before its enactment.

Where a statute is so worded as to admit of a construction which would render it retrospective as well as prospective, a prospective operation only is to be given, unless the legislative intent to the contrary is declared or necessarily implied.

ON EXCEPTIONS.

The case is stated in the opinion.

Joseph and Joseph Williamson, Jr., for petitioner.

The legislature may pass retrospective statutes affecting remedies only. *Coffin* v. *Rich*, 45 Maine, 507. No vested rights are affected, because none existed.

No party can claim a vested right in the continuance of a special mode or procedure, or the perpetuation of any remedy or remedial process, which can be modified or abolished without impairing or taking away the right itself, when public policy, or obedience to justice demands a change. *Rich* v. *Flanders*, 39 N. H. 304.

A right cannot be considered as vested in a constitutional sense, unless it amounts to something more than such a mere expectation of future benefit or interest as may be founded upon an anticipated continuance of the existing general law. *Merrill* v. *Sherburne*, 1 N. H. 213.

Parties have no vested right to any particular remedy, and

the legislature may take away the specific remedy previously existing, and substitute for it another, and equal substantive remedy. *Story* v. *Furman*, 25 N. Y. 214.

The doctrine that the legislature by passing any particular law contracts and agrees that every citizen shall have a right to the benefit of that law, would deprive the legislative department of the power to correct its own errors, to vary the laws to meet the necessities of the people, or the exigencies of the times, &c. *Leathers* v. *Shipbuilders' Bank*, 40 Maine, 386. A mistake of fact is sometimes equivalent to a mistake of law. This is so in equity. 2 Pom. Eq. § 849.

If the terms "mistake of law," and "ignorance of law," were always used with strict propriety, it would be found that the cases in which relief is granted, are cases of ignorance and not of mistake; which latter implies some notice and consideration of the law. But the terms are commonly used as synomymous; or rather the term "mistake," has nearly usurped the other's place. Law Qu. Rev. 290. Where a legislature has not defined or described what is an accident or mistake, it is left to the court, in their discretion to determine. *Jackson* v. *Goddard*, 1 Mass. 230.

J. S. Harriman and R. F. Dunton, for city.

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

WISWELL, J. On the fifth of September, 1892, the city council of the city of Belfast laid out a street in that city across the land of the petitioner and awarded him $500, as the damages sustained thereby.

The statute in force at that time, R. S., c. 18, § 18, as amended by chapter 359, Public Laws of 1885, provided, in substance, that any person aggrieved by the estimate of damages might have them determined by a written complaint to the Supreme Judicial Court, "returnable at the term thereof next to be held within the county where the land lies after sixty days from the date of the laying out, alteration or discontinuance of such way

by the town." Under this statute the petitioner should have made his complaint returnable at the January Term, 1893, of this court in Waldo county, and having failed to do this, his right to appeal was barred.

But an act of the Legislature approved March 29th, 1893, chapter 297, laws of 1893, provides that: "When any person aggrieved by the estimate of damages for his land taken for a town or private way, honestly intended to appeal therefrom and has by accident or mistake omitted to take his appeal within the time provided by law, he may at any time within six months after the expiration of the time when said appeal might have been taken, apply to any judge of the Supreme Judicial Court in term time or vacation, stating in his said application the facts of his case and said judge after due notice and hearing may grant to such petitioner permission to take his said appeal to such term of said court as said judge shall direct," etc.

Within the time limited by this act, the petitioner applied to a justice of this court for permission to take his appeal from the assessment of damages of the city council to such term of the court as said justice should direct. The justice ruled that the act above quoted applied to this case and granted the permission requested, to which ruling exception is taken.

The question presented, then, is whether or not the act of March 29th, 1893, passed after the right of appeal had become barred by limitation, applied to this case, so that the petitioner, after his right had once been barred, but within the six months' extension allowed by the act, could apply to a justice of this Court for permission to take an appeal.

It is unnecessary to decide whether or not the Legislature has the power to make a remedial act of this nature retroactive. It may be argued with much force that no person has a vested right in a statute of limitation, unless by virtue of such statute he has acquired the title to real or personal property, see *Campbell* v. *Holt*, 115 U. S. 620, although courts have often held otherwise, and this Court in *Atkinson* v. *Dunlap*, 50 Maine, 111, held that after all existing remedies had been exhausted and rights had become permanently vested, all further interference is pro-

hibited; and that a statute designed to retroact on a case by reviving the right of review, after the time for a review had expired, was unconstitutional and void.

We think the decisive question in this case is whether, applying the universally adopted rules of construction of statutes the Legislature intended that this statute should have a retroactive effect. Statutes are always to have a prospective operation unless the intention of the Legislature is clearly expressed or clearly to be implied from their provisions, that they shall apply to past transactions. *Bryant* v. *Merrill*, 55 Maine, 515. In *Rogers* v. *Greenbush*, 58 Maine, 397, it is said: "There is no language in the new statute which indicates any intention in the Legislature to make it retrospective, or to apply it to past transactions, or to interfere with actions pending. We never hold an act to be retrospective, unless it is plain that no other construction can be fairly given." See also the case of *Deake, appellant*, 80 Maine, 50.

"And the general rule is laid down as one not subject to any exception, that they [statutes] are never to be allowed to have a retroactive operation, where it is not required either by the express command of the Legislature, or by an unavoidable implication arising from the necessity of adopting such a construction in order to give plenary effect to their provisions." *Gerry* v. *Stoneham*, 1 Allen, 322; *Garfield* v. *Bemis*, 2 Allen, 445.

The case of *Garfield* v. *Bemis*, supra, is very much in point. The Legislature of Massachusetts passed an act to the effect that whenever any one has a claim against the estate of a deceased person, which had not been prosecuted within the time limited by law, he might apply to the Supreme Judicial Court, by bill in equity setting forth all the facts, and if the court shall be of opinion that justice and equity require it, it may give him judgment for the amount of his claim against the estate of the deceased person. The Court held that this act did not apply to claims which were barred by the statute of limitations at the time of its passage.

In *Wright* v. *Oakley*, 5 Met. 400, the court held that a

provision in the revised statutes to the effect that the time of a party's absence and residence out of the state should not be taken as any part of the time limited for the commencement of an action against him, did not apply to a case in which the action was barred by the statute of limitations that was in force before the revised statutes went into operation.

In *Loring* v. *City of Boston*, 12 Gray, 209, it was held that a statute did not revive a claim for damages for land taken to widen the street, which claim was barred by limitation of time before its passage.

In *Kinsman* v. *Cambridge*, 121 Mass. 558, it was held that a statute very similar to the one now under consideration, which extended the time for a land owner to file his petition for a jury to assess his damages sustained by the laying out, widening, altering, relocating or discontinuance of any street, under certain circumstances, did not revive a right of action which was barred by limitation of time before the passage of the statute.

And in *Atkinson* v. *Dunlap*, supra, this court held that a statute of similiar purpose, in that case extending the time for commencing a petition of review, must be construed as intended to be prospective and that otherwise it would be unconstitutional.

Applying these rules, in the light of the decided cases, to the statute under consideration, we do not find any express command or necessary implication that it should have a retroactive effect or that it should revive a right of appeal which had once been effectually barred by limitation of time, under the statute then in force. It is true that the language is sufficiently broad and comprehensive to embrace all cases and to apply to the past as well as to the future, but this is not sufficient to give it a retroactive effect. *Garfield* v. *Bemis*, supra. Where the statute is so worded as to admit of a construction which would render it retrospective as well as prospective, a prospective operation only is to be given, unless the legislative intent to the contrary is declared or necessarily implied. See cases cited in Am. and Eng. Encyl. of Law, vol. 23, page 448.

This case is clearly distinguishable from that of *Berry* v. *Clary*, 77 Maine, 482, in which it was held that R. S., c. 82, §

116, providing that no party who receives any money or valuable thing as a consideration for a contract made and entered into on Sunday, shall be permitted to defend any action upon such contract until such consideration has been restored, applies to actions arising before as well as after its enactment. In the opinion in that case it is said: "It [the statute] in no way operates upon the contract or renders it valid. It exists precisely as it did before. The statute applies only to future remedies, and merely requires the defendant to restore the consideration received by him in the participation of an unlawful act as a condition upon which he may make his defense."

If the statute now under consideration be given a retroactive effect, it would revive a remedy once completely barred by lapse of time. This can only be done by legislative enactment in clear and unmistakable language.

It must be presumed that, in the passage of all acts, the Legislature has in view these well understood rules of construction, and that they are framed in conformity therewith. If the Legislature intends to make any statute retroactive, it can very easily give it such effect either by express language or necessary implication; and in the absence thereof it must be presumed that no such intention is contemplated. Full force and effect may be given to this enactment by making it apply only to cases arising subsequent to its passage.

Exceptions sustained.

NORWAY SAVINGS BANK, in equity,
vs.
MILTON H. MERRIAM, and others.
SAME *vs.* SAME.

Oxford. Opinion June 19, 1895.

Trust. Gift. Savings Banks Deposit.

The important difference between a gift and a voluntary trust is, that in the one case the whole title, legal as well as equitable, the thing itself, passes to the donee, while in the other, the actual, beneficial or equitable title passes to the cestui que trust, while the legal title is transferred to a third person or is retained by the one creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust as is the gift of the thing itself in a gift inter vivos.

To create a trust the acts or words relied upon must be unequivocal, implying that the person creating the trust holds the property as trustee for another. There must be an executed gift of the equitable title without any reference to its taking effect at some future time.

While courts of equity will enforce a perfect and completed trust, although purely voluntary, they will lend no assistance towards perfecting a voluntary agreement for the creation of a trust, nor regard it as binding so long as it remains executory. Nor will courts enforce as a trust a transaction which was intended as a gift but is imperfect for that purpose.

On April 27th, 1892, Mrs. Esther S. Reed, having at that time a deposit in the Norway Savings Bank of $1901.23 standing in her own name, surrendered her pass-book and had the whole of her deposit transferred to two new accounts. By her direction the sum of $950.62 was entered upon the books of the bank and upon a pass-book as follows: "Norway Savings Bank in account with Esther S. Reed and Harry Q. Millett or their survivor in joint tenancy." And the sum of $950.61 was entered by her direction upon the books of the bank and upon a pass-book as follows: "Norway Savings Bank in account with Esther S. Reed and Myra J. Millett, or their survivor in joint tenancy." Both of the pass-books were delivered to Mrs. Reed and were always afterwards kept by her among her private papers, where they were found after her death by her executor. She never in any way notified either Myra J. or Harry Q. Millett of the transaction at the savings bank, nor did either of them have any knowledge of it from any source until after her death. Mrs. Reed never drew any portion of the principal or interest of the deposit, and the accounts were in no way changed except that the semi-annual interest was placed to their credit. Myra J. Millett was an adopted daughter of Mrs. Reed, and Harry Q. Millett is the son of Mrs. Millett. Evidence was introduced of statements and declarations made by Mrs. Reed, tending

to show an intention upon her part that these deposits should take the place of certain provisions in favor of Mrs. Millett and her son in Mrs. Reed's will made several years prior to the transaction at the savings bank and that she intended to change her will by striking out the bequests in their favor. She died without ever having made any change in her will.

Held; that the acts and declarations of Mrs. Reed were not sufficient to constitute a completed gift or to create a voluntary trust;

That she did not intend by the transfer of her deposit to the new accounts, to make at that time fully executed gifts of either the legal or equitable title to the new deposits; but that her intention was to make a testamentary disposition of the deposits, so that the persons named should each take, in case he or she survived her, what might be left of each sum after her death;

That such an attempted disposition is void because contrary to the statute of wills.

ON REPORT.

These were two bills of interpleader brought by the Norway Savings Bank to determine the ownership of two deposits in that bank, and were heard on bills, answers and proof.

The case is stated in the opinion.

J. A. and Ira S. Locke, for executor of the will of Esther S. Reed.

A. R. Savage and H. W. Oakes, for Harry Q. and Myra J. Millett.

The circumstances all show that, at the time of the deposit, Mrs. Reed intended to make it in trust for the Milletts. There is no adverse argument to be drawn from her retention of the deposit books. *Minor* v. *Rogers*, 40 Conn. 512. She retained a joint interest in the deposit during her lifetime, with the contingency of having the entire deposit by survivorship. The book must be in the hands of one of the joint tenants. It cannot be in the hands of both. The decisions are numerous that the retention of the book under such circumstances does not bar the trust. *Barker* v. *Frye*, 75 Maine, 31; *Brinckerhoff* v. *Lawrence*, 2 Sand. Ch. 442; *Scott* v. *Berkshire Savings Bank*, 140 Mass. 157; *Northrop* v. *Hale*, 72 Maine, 275; *Minor* v. *Rogers*, 40 Conn. 512; *Blasdell* v. *Locke*, 52 N. H, 238; *Urann* v. *Coates*, 109 Mass. 581.

Nor was the trust void because, in some respects, it looked to a distribution of the fund after death. It is not testament-

ary, because a present beneficial interest was vested in the cestuis que trustent. The Milletts were joint tenants with her eo instanti. *Fletcher* v. *Fletcher*, 4 Hare, 67; *Stone* v. *Hackett*, 12 Gray, 227.

Neither is the trust in such case void because the donor reserves the right to use a part of the deposit or has in fact actually used a part. *Northrop* v. *Hale*, supra; *Stone* v. *Hackett*, supra; *Davis* v. *Ney*, 125 Mass. 590; *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159; *Minor* v. *Rogers*, supra.

In Massachusetts, the courts have intimated that there must be some evidence of intention outside of the mere entry upon the pass-book unless that was absolutely clear. A careful examination of the circumstances in those cases where it was held that the deposit was not in trust, develops the fact that in nearly every case the evidence preponderated or clearly showed that the depositor's purpose was something else, as, for example, to evade the by-laws of the bank or the statutes of the state, and for other similar reasons.

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

WISWELL, J. On April 27th, 1892, Mrs. Esther S. Reed, having at that time a deposit in the Norway Savings Bank of $1901.23, standing in her own name, surrendered her pass-book and had the whole of her deposit transferred to two new accounts. By her direction the sum of $950.62 was entered upon the books of the bank and upon a pass-book as follows: "Norway Savings Bank in account with Esther S. Reed and Harry Q. Millett or their survivor in joint tenancy." And the sum of $950.61 was entered by her direction upon the books of the bank and upon a pass-book as follows: "Norway Savings Bank in account with Esther S. Reed and Myra J. Millett, or their survivor in joint tenancy."

Both of the pass-books were delivered to Mrs. Reed and were always afterwards retained by her; they were found after her

death by her executor among her private papers. She never in any way notified either Myra J. or Harry Q. Millett of the transaction at the savings bank, nor did either of them have any knowledge of it from any source until after her death.

Mrs. Reed died October 26th, 1892, leaving a will dated August 13th, 1883, nearly nine years before the time of making the deposits above referred to, in which she made a bequest of $1000 in favor of Harry Q. Millett and of $500 in favor of Myra J. Millett. Myra J. Millett is an adopted daughter of Mrs. Reed and Harry Q. Millett is the son of Mrs. Millett. Mrs. Reed never drew any portion of the principal or interest of the deposits, and the accounts were in no way changed except that the semi-annual interest was placed to their credit.

Evidence was introduced of statements and declarations made by Mrs. Reed, tending to show an intention on her part that these deposits should take the place of the pecuniary provisions of her will in favor of Mrs. Millett and her son, and that she intended to change her will by striking out the bequests in their favor. She died without having made any change in her will.

Both of these deposits being now claimed by the executor of Mrs. Reed's will as belonging to her estate, and by Mrs. Millett and Harry Q. Millett respectively, the Norway Savings Bank has brought these two bills of interpleader to have the title to the same determined. The cases come to the law court upon report, the facts being the same in each.

That the acts of Mrs. Reed were not sufficient to constitute a gift of each of these deposits, must be and is conceded. To constitute a valid gift inter vivos the giver must part with all present and future dominion over the property given. He cannot give it and at the same time retain the ownership of it. There must be a delivery to the donee or to some one for the donee. And the gift must be absolute and irrevocable without any reference to its taking effect at some future period. *Dole* v. *Lincoln*, 31 Maine, 428; *Carleton* v. *Lovejoy*, 54 Maine, 446; *Robinson* v. *Ring*, 72 Maine, 140; *Northrop* v. *Hale*, 73 Maine, 66.

Here there was no delivery, either actual or constructive.

No surrender by Mrs. Reed of the control over the deposits. Whatever Mrs. Reed's intentions may have been, intention alone is not sufficient to constitute a valid gift. "The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit declaration of an intention to give, or of an actual present gift, yet unless there is delivery the intention is defeated." *Beaver* v. *Beaver*, 117 N. Y. 421.

For the same reasons, as well as for others, these were not gifts causa mortis.

But it is claimed that these acts of Mrs. Reed were sufficient to create voluntary trusts in favor of Myra J. and Harry Q. Millett.

The only important difference between a gift and a voluntary trust is, that in the one case the whole title, legal as well as equitable, the thing itself, passes to the donee, while in the other, the actual, beneficial or equitable title passes to the cestui que trust, while the legal title is transferred to a third person or is retained by the person creating it, to hold for the purposes of the trust. But a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust, as is the gift of the thing itself in a gift inter vivos. "It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift inter vivos." *Bath Savings Institution* v. *Hathorn*, 88 Maine, ante, p. 122.

The creation of a trust is but the gift of the equitable interest. But on account of the difference in the form and purposes of the two transactions, it necessarily follows that different acts are essential in the two cases. While delivery and a surrender of all present and future dominion over the property given is absolutely necessary in a gift, these would be inconsistent with the very purposes of a trust, where a person creates himself as the trustee; possession and control in such a case remain in him who has the legal title, subject to the direction of courts of equity.

But while delivery and surrender of possession are not necessary in the creation of such a trust, as is here sought to be maintained, there must be other acts which are so far equivalent as the nature of the transaction will permit. A perfect or completed trust is created where the donor makes an unequivocal declaration, either in writing or by parol, that he himself holds the property in trust for the purposes named. He need not in express terms declare himself trustee, but he must do something equivalent to it, and use expressions which have that meaning. To create a trust the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another. There must be an executed gift of the equitable title without any reference to its taking effect at some future time.

While courts of equity will enforce a perfect and completed trust, although purely voluntary, it is certainly true that equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. In order for such a trust to be valid and enforceable, it must always appear from the written or oral declaration, from the nature of the transaction, the relation of the parties and the purposes of the gift, that the fiduciary relation is completely established. Nor will the court enforce as a trust a transaction which was intended as a gift but is imperfect for that purpose, "for then every imperfect instrument would be made effectual by being converted into a perfect trust." If such a trust is otherwise sufficiently created, its validity is not affected by the fact that the donor reserved the right to modify the purposes or revoke the trust, nor that he reserved the income of the trust fund during life.

The foregoing is the general doctrine in relation to voluntary trusts as laid down by many authorities. *Martin* v. *Funk*, 75 N. Y. 134; *Young* v. *Young*, 80 N. Y. 422; *Beaver* v. *Beaver*, supra; *Stone* v. *Hackett*, 12 Gray, 227; *Davis* v. *Ney*, 125 Mass. 590; *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159; *Sherman* v. *New Bedford Savings Bank*, 138 Mass. 581; *Pope* v. *Burlington Savings Bank*, 56 Vt. 284;

Connecticut River Savings Bank v. *Albee*, 64 Vt. 571; *Marcy* v. *Amazeen*, 61 N. H. 131; *Taylor* v. *Henry*, 48 Md. 550; *Robinson* v. *Ring*, supra; *Bath Savings Inst.* v. *Hathorn*, *supra*.

Applying these general principles to the facts in the cases under consideration, it becomes necessary to determine whether Mrs. Reed by any unequivocal language or act showed her intention to create an executed voluntary trust with respect to these deposits, in favor of the persons named, so that whatever legal rights she retained were to be thereafterwards held by her as trustee for the donees.

We do not think that any acts or language of hers can admit of such interpretation. She never made a declaration of trust, formal or otherwise. She never notified the persons named as joint tenants of the transaction at the savings bank; and while this may not be necessary if the creation of the trust is clearly established, it is a circumstance of greater or less weight, according to the facts of each case, upon the question of intention. It seems to us that she purposely retained possession of the pass-books and withheld all knowledge of the transaction from the persons named in the entries upon the books, in order that she might retain the control of the deposits for her own purposes if necessary. We cannot see that she ever by act or word constituted herself a trustee of these sums of money for others.

In the recent case decided by this court of *Bath Savings Inst'n* v. *Hathorn*, supra, p. 122, in which a voluntary trust was sustained, the deposit was made "in trust for Alice B. Files." The court held that the words "in trust for" were sufficient to create a prima facie trust and that the declaration, acts and conduct of the donor were consistent with the presumption arising from the entry.

In *Barker* v. *Frye*, 75 Maine, 29, a deposit was made in a savings bank in the name of the donee, subject to the order of the donor during her lifetime. Subsequently the donor notified the treasurer of the bank that she desired to make such a change as would give the donee the full and absolute control over the deposit from that time and that her right to control the same should cease, and at her request the original entry, "subject to

the order of" the donor, was erased. She immediately notified the donee by letter of what had been done and that the bank book would be delivered to him the first time that they met. The donee accepted the gift. The court held that the gift was complete. The important and controlling facts in these cases do not exist in the cases now under consideration.

This court has held that where A deposited money in a savings bank in the name of B, without a declaration of trust at the time or subsequently, and retained the deposit book until his death, it was not sufficient to constitute either a gift or a trust. *Robinson* v. *Ring*, 72 Maine, 140.

That where A deposited in a savings bank money in the name of B, but without the knowledge of B, with the entry on the books of the bank and on the pass-book, subject to A, and A received the dividends and such portion of the principal as she required for her own use and held the pass-book always in her possession, that these facts did not constitute either a gift or a trust in favor of B, and that if there was any trust, B was the trustee for the depositor. See also *Parcher* v. *Savings Institution*, 78 Maine, 470; *Curtis* v. *Portland Savings Bank*, 77 Maine, 151; and *Drew* v. *Hagerty*, 81 Maine, 231.

It is, of course, true that the transaction at the savings bank in April, 1892, had some significance, and that by the change that Mrs. Reed had made at that time she intended to do something for the benefit of the persons, whose names by her direction, were respectively entered upon the books as joint tenants with her. But we think it is clear from the nature of the transaction, that she did not intend by this tranfer of her deposit to the new accounts, to make at that time fully executed gifts of either the legal or equitable title to the new deposits, or to part with all control over the same, except such as she might retain as trustee for the benefit of others; but rather that her intention was to make a testamentary disposition of these deposits, so that the persons named should each take, in case he or she survived her, what might be left of each sum after her death. Such an attempted disposition is inoperative because contrary to the statute of wills. *Augusta Savings Bank* v. *Fogg*, 82

Maine, 538; *Sherman* v. *New Bedford Savings Bank*, 138 Mass. 581; *Smith* v. *Speer*, 34 N. J. Eq. 336; *Towle* v. *Wood*, 60 N. H. 434.

In *Sherman* v. *New Bedford Savings Bank*, supra, A made a deposit with the following condition annexed: "Interest to be paid on order of A. Principal to be drawn by B after decease of A." It was held that this was not a perfect gift, that the intention of the donor was that the gift should not take effect until after his death and was therefore void. In this case the intention of the depositor was similar in effect. It cannot be claimed that the persons named as joint tenants could draw any portions of the funds until after the death of Mrs. Reed; until that time she intended to retain possession and control, not merely as trustee. It was only after her death that the survivor should have the benefit of the money deposited; until that time the attempted gift was not to take effect. There is a well-recognized distinction, and one upon which may depend the validity of the transaction, between a fully executed gift or trust in which the donor reserves the right to the income or even to such part of the principal of the fund as may be needed, as in *Davis* v. *Ney*, and *Stone* v. *Hackett*, supra, and an unexecuted trust which is not to take effect until the death of the donor.

Our conclusion, therefore, is that there was no perfected gift of either the legal or equitable title to the sums deposited by Mrs. Reed in the Norway Savings Bank, and that these deposits consequently belong to her estate.

We think however, in view of all the circumstances, that the taxable costs of each of the parties should be paid out of the estate.

Decree accordingly.

LUCIUS L. MORRISON, and another,

vs.

FIRST NATIONAL BANK OF SKOWHEGAN.

Somerset. Opinion June 19, 1895.

Deed. Description. Easement. High-water mark. Shore.

A deed of real estate contained this clause: "Saving and reserving from this conveyance, that said Dyers [the grantees] are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passageway back in common with themselves and others." The description of the granted premises included the strip. *Held;* that the deed conveyed the fee of the five-foot strip and reserved merely an easement.

The term "high-water mark," when applied to a non-tidal river, means the highest limit reached by the the water when the river is unaffected by freshets and contains its natural and usual flow.

The bank of a river or stream extends to the margin of the stream, to that point where it comes in contact with the water of the stream.

There is no inconsistency, therefore, in the two calls of a deed, one of which is in effect "to high-water mark of the Kennebec River," and the other, "thence westerly by the bank of the river." As used in the deed they mean exactly the same thing. They are correlative. The one touches the other.

ON REPORT.

The case is stated in the opinion.

D. D. Stewart, for plaintiffs.

S. J. and L. L. Walton, for defendant.

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

WHITEHOUSE, J., being related to one of the parties, did not sit.

WISWELL, J. Action of trespass quare clausum. Both parties derive title to their respective and adjoining lots of land from Samuel Weston, who at one time owned all the land in controversy. The lot now owned by the defendant was conveyed by Weston to Asa and Quincy Dyer by deed dated March 6th, 1838; while the plaintiffs' lot was conveyed by the

administrator of Samuel Weston to Judah McClellan, August 28th, 1841. The lot is described as bounded "westerly by land deeded by the late Samuel Weston to A. and Q. Dyer."

The only questions raised are as to the construction of the deed under which the defendant claims.

I. That deed contains this clause: "Saving and reserving from this conveyance, that said Dyers are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passageway back in common with themselves and others."

Does this language in the deed convey the fee of the five foot strip and reserve a right of way to be used by the grantees in common with others, or does it except from the conveyance the land itself and grant only an easement?

Such construction should be given to a deed, that each part, phrase and word, may have force and effect, that the intention of the parties, if by law it may, shall prevail; and exceptions from the grant must be construed, in cases of doubt, most strongly against the grantor. *Wellman* v. *Dickey*, 78 Maine, 29.

We have no doubt that the intention of the parties was, that the land should be conveyed and the easement reserved. The description of the premises includes the strip. If the intention had been otherwise, the description would have naturally excluded it and the deed would have contained appropriate language to grant a right of way in addition and as appurtenant to the land conveyed. Moreover, it will be noticed, that the clause quoted contains a provision restricting the grantees from erecting a building on this strip, there could be no object in doing this unless the fee in the soil was conveyed. No excess of caution, however extreme, would cause a grantor in conveying land to put in his deed a clause restricting the grantee from building on other land of the grantor not conveyed, nor from erecting a building upon land of the grantor over which a right of way only was granted.

Although the words "reserving" and "excepting," are so

often used indiscriminately that no controlling effect should be given to the use of one when it is evident that the other was intended, in this case, the language of the deed is technically correct for the purpose of accomplishing that, which is evident, from other parts of the clause, was intended.

An exception in a deed is always a part of the thing granted and of a thing in being, while a reservation is the creation of a right or interest which had no prior existence as such. *Winthrop* v. *Fairbanks*, 41 Maine, 307. In this case the deed provided "that said five feet is to be forever reserved for a passageway," etc.

The language used shows that the five-foot strip is on the grantees' side of the line of the land conveyed; it is the five feet next west "from the easterly line." This necessarily means the easterly line of the lot conveyed.

Our conclusion is supported by the authorities.

In *Stetson* v. *French*, 16 Maine, 204, a deed contained this provision, "reserving and providing for the keeping open and extending to low water Poplar street and Washington street, said streets to be for the future disposition of the parties to this deed in such manner as may hereafter be mutually agreed on by them." These streets were within the limits of the land conveyed. It was held that the fee in the whole land passed by the deed, and that an easement only in this part of it was reserved to the grantor.

In *Tuttle* v. *Walker*, 46 Maine, 280, a deed contained the following reservation, "excepting and reserving as follows, if the town should hereafter lay out and accept a road, from the road first mentioned to the river road, near the house of J. H. Hill, then the south end of the above described premises shall be considered and occupied for the use of the same, three rods wide; and otherwise, reserving the same for a private way forever." It was held, that the deed conveyed the fee of the whole lot of land described therein, subject to an easement for a town way over the three rods, if the town will accept it; and if the town does not use it for that purpose, then for a private way.

In *Kuhn* v. *Farnsworth*, 69 Maine, 404, a deed of warranty,

after describing the exterior lines of the farm conveyed by monuments, courses and distances, continued as follows, "containing one hundred and twenty-five acres and sixty-four rods, and no more, exclusive of the county road four rods wide through the above premises, which is reserved to the said grantor." It was held that the fee in the land contained in the road was not excepted or reserved to the grantor, but passed to the grantee; the easement only being excluded to relieve the warrantor from his covenant against incumbrances.

In *Wellman* v. *Dickey*, 78 Maine, 29, it was decided, that a deed containing these words "excepting the roads laid out over said land" conveys the fee within the limits of the road, subject to the easement of the public incident to the use of the way. In the opinion it is said that this was undoubtedly the intention, "otherwise the locus would naturally have been bounded by the line of the road."

In *Day* v. *Philbrook*, 85 Maine, 90, a deed contained these words: "Reserving the town road leading through the farm." The town road was subsequently discontinued. Held, that the fee of the road was not reserved in the deed but only in its use as an incumbrance.

In *King* v. *Murphy*, 140 Mass. 254, a deed contained a reservation of a strip of land on the westerly side of a lot conveyed, ten feet wide and fifty feet long, "for an open passageway to be used in common by the said Davis and Murphy [grantor and grantee] and their heirs and assigns forever." In the opinion it is said: "The description in the deed to the defendant covers the strip ten feet wide; and we agree with both counsel that the clause of reservation cannot be construed as an exception of this strip, the fee being retained in Davis, but is merely a reservation to him of a right of way over the strip."

The defendant therefore being the owner of the fee in the five-foot strip, this action cannot be maintained for the acts complained of on that portion of the locus, however it might be in an action on the case for a disturbance of the plaintiffs' right to use the same for the purposes of a way.

II. The next question presented involves the construction of

these calls in the deed under which the defendant derived its title, "thence southerly on a line at right angles with said southerly side of said road, to Kennebec river to high-water mark; thence westerly by the bank of the river or shore thereof to land conveyed by Josiah Parlin and myself to Joseph Leavitt and Osgood Sawyer many years since."

It becomes necessary to inquire into the meaning of the words in the description, "high-water mark," "shore" and "bank" when applied to a non-tidal stream.

The term "high-water mark" although sometimes used, is inappropriate when applied to a fresh water stream where the tide does not flow and ebb. But we think it must be construed as meaning, the line on the river bank reached by the water when the river is ordinarily full and the water ordinarily high. Not the highest point touched by the water in a freshet, nor when the water is the lowest in seasons of drought, but the highest limit reached when the river is unaffected by freshets and contains its natural and usual flow; the highest limit at the ordinary state of the river. This does not mean, as claimed by the plaintiffs' counsel, the top of the bank, many feet distant from the bed of the river in its ordinary state and only reached by the water on rare occasions of extreme freshet.

In *Plumb* v. *McGannon*, 32 Q. B. 8, (Canada,) it is said: "For the great flow caused by the melting of the snow and ice, and by the spring rains, or by other unusual floods or causes, is to be excluded in determining the limit of high-water mark. The true limit would appear to be, by analogy to tidal waters, the average height of the river after the great flow of the spring has abated and the river is in its ordinary state."

In *Railway Co.* v. *Ramsay*, 53 Ark. 314, (22 Am. St. 195,) it is said: "But it is necessary to a full understanding of the rights of a riparian owner and of the public in the lands between the banks of a river to determine the legal meaning of the phrase high water. It does not mean, as has been sometimes supposed, the line reached by the great annual rises, regardless of the character of the lands subject at such times to be overflowed. But, as decided in the case of *Houghton* v. *C. D. and M.*

Railway Co. 47 Iowa, 370, high-water mark, then as the line between the riparian proprietor and the public, is to be regarded as co-ordinate with the limit of the river bed."

The term "shore" is also inapplicable to a non-tidal river. The word strictly means that space which is alternately covered and exposed by the flow and ebb of the tide, the flats between ordinary high and low water mark. The "shore" is the ground between the ordinary high and low-water mark,—the flats,— and a well defined monument. *Montgomery* v. *Reed*, 69 Maine, 510.

A fresh water river has banks instead of shores, but the word is sometimes used with reference to a non-tidal river, synonymously with bank. The bank of a river or stream extends to the margin of the stream, to that point where the bank comes in contact with the stream. Gould on Waters, § 41, and cases cited in note.

In *Stone* v. *Augusta*, 46 Maine, 127, two of the calls in a deed were, "thence southerly and westerly, parallel with north line of said Lot No. 10, to the Mill Brook; thence by the bank of said brook to the north line of said lot No. 10." The court said in the opinion: "The plaintiff's land is, therefore, bounded by ordinary high-water mark, and this principle will not be changed by the fact that the land or bank continues to rise more or less precipitously above that point. His land is not limited to the top of the hill or bank beside the stream, but extends to the margin of the stream, to that point where the bank comes in contact with the stream."

In *Starr* v. *Child*, 20 Wend. 149, it is said: "The bank and the water are correlative. You cannot own one without touching the other." In that case it was decided, that, where in a conveyance of premises situated on the bank of a stream not navigable, the lines are stated to run from one of the corners of the lot to the river, and thence along the shore of said river to a certain street, the grantee takes to the thread of the stream. And although this decision was reversed by the Court of Errors of New York in *Child* v. *Starr*, 4 Hill, 369, in the latter case a similar definition of the bank of a river was given.

While it has often been held that the bank of a river includes

to low water mark, we think that in this case at least, by reason of the other calls, it should be limited to ordinary high-water mark. And as high-water mark is not at the top of a bank reached only by the water of the river in extreme freshets, neither does a call "thence by the bank" limit the grant to the top of the hill or a bank beside the stream, but extends it to the margin of the stream or river.

There is no inconsistency, therefore, in the two calls of the deed one of which is in effect to high water mark of the Kennebec river, and the other," thence westerly by the bank of the river." As used in this deed they mean exactly the same thing. They are correlative. The one touches the other.

The southerly boundary, then, of the defendant's land, is at high-water mark of the river, when the river is unaffected by freshets and is in its ordinary state, and where the bank touches the water when the river is in this condition.

To ascertain just where this would be in any case may be a matter of some difficulty. It may be the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture. Gould on Waters, § 45; *Railway Co.* v. *Ramsay*, supra.

In other cases where the conditions are not favorable for such a line of demarkation to be made by natural causes, it can only be ascertained by careful observation.

In this case we can do no more than to give the general principles and rules which will control in ascertaining where high-water mark, as above defined, is. We cannot from the evidence before us definitely and accurately locate it.

But it is evident that the acts complained of as trespasses were committed above ordinary high-water mark, and we do not understand that it is claimed by the counsel for the plaintiffs that any of these acts were done below the place where the line as above indicated would fall.

In accordance with the terms of the report, therefore, the entry will be,

Judgment for defendant.

FIRST NATIONAL BANK OF SKOWHEGAN,
vs.
LUCIUS S. MORRISON, and another.
SAME *vs.* SAME.

Somerset. Opinion June 19, 1895.

Deed. Description. Easement. Way. Possession.

A deed of real estate contained this clause: "Saving and reserving from this conveyance, that said Dyers [the grantees] are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passageway back in common with themselves and others." The description of the granted premises included the strip. *Held;* That the deed conveyed the fee of the five-foot strip and reserved merely an easement.

The demandant, having the fee, is entitled to judgment for possession, notwithstanding the tenant has an easement for a passageway over a portion of the demanded premises.

See *Morrison* v. *Bank*, ante, 155.

ON REPORT.

The cases appear in the opinion.

S. J. and L. L. Walton, for plaintiff.
D. D. Stewart, for defendants.

SITTING: PETERS, C. J., WALTON, EMERY, HASKELL, JJ.
WHITEHOUSE, J., did not sit.

WISWELL, J. These two cases, one a real action, the other an action of trespass quare clausum, were argued together.

The real action is to recover possession of a lot of land in Skowhegan, including a five-foot strip, extending from Water street southerly, at right angles with the street, to the Kennebec river at high-water mark.

The defendants seasonably disclaimed as to all the land demanded, except the five-foot strip, and as to that plead nul disseizin. This plea admits that the defendants are in possession and the only question is which has the better title. The plaintiff derived its title by various mesne conveyances

from Samuel Weston, who, in 1838, conveyed to the plaintiff's predecessor in title a lot, the boundaries of which included the land in controversy. That deed contains this clause: "Saving and reserving from this conveyance, that said Dyers [the grantees] are not to have the right of erecting a building within five feet from the easterly line and within twenty-five feet from my store, and that said five feet is to be forever reserved for a passageway back in common with themselves and others."

The defendants' counsel contends that this clause, properly construed, excepts the soil of the five-foot strip, and grants merely an easement over it.

In the case of *Morrison* v. *Bank*, ante, 155, this court has decided, contrary to the contention of the defendants' counsel, that the deed referred to, conveyed the soil and reserved an easement. That case is decisive of this. The plaintiff has the better title and should have judgment for possession.

This result is not affected by the fact that the defendants have an easement of a right of way over the strip in controversy.

"The fee in the land is to be regarded as distinct from an easement in the same. The fee may be in one and the easement in another. The demandant, having the fee, is entitled to recover, notwithstanding the tenant may have an easement in the passageway for the use of the mill." *Blake* v. *Ham*, 50 Maine, 311.

In *Morgan* v. *Moore*, 3 Gray, 319, it was held, that the owner in fee of land may maintain a writ of entry to establish his title against the owner of a perpetual right to use it for a passageway.

In *Hancock* v. *Wentworth*, 5 Met. 446, it was held, that it is no objection to a recovery in a real action, that the tenant has an easement in the demanded premises.

The action of trespass quare clausum is to recover damages for certain acts of the defendants in making excavations and in laying a foundation wall for a building erected by them upon their own lands, next east of the plaintiff's land. This foundation wall admittedly extended slightly over the plaintiff's line,

upon the five-foot strip in controversy. This is a technical trespass. The injury was slight and the damages should be nominal.

In the real action, the plaintiff is entitled to judgment for possession of so much of the demanded premises as was not disclaimed, subject to the defendants' easement in the five-foot strip next to the demandant's easterly line, for a right of way, as reserved by the grantor in the deed from Samuel Weston to Asa and Quincy Dyer, dated March 6th, 1838.

In the action of trespass quare clausum, the plaintiff should have judgment for damages assessed at one dollar.

Judgment accordingly, in both suits.

HENRY C. PEABODY, Judge of Probate,

vs.

CHARLES P. MATTOCKS, and others.

Cumberland. Opinion June 19, 1895.

Probate. Appeal. Costs. R. S., c. 63, § 30.

After a final decree of this court, affirming a decree of the Probate Court as to the settlement of an account of a testamentary trustee, a Judge of Probate has no power, in the settlement of a subsequent account, to allow costs incurred and counsel fees for services rendered in the settlement of the prior account and in the prosecution of an appeal from the decree of the Probate Court in relation thereto.

The whole subject of costs and the allowance of counsel fees in all contested cases in the original or appellate court of Probate, rests in the discretion of the court, but that discretion must be exercised in the proceedings in which the costs were incurred and the services of counsel rendered.

The question of the allowance of costs in the settlement of an account in the Probate Court and in an appeal from the decree of the Probate Court, being necessarily involved in that proceeding, the final decree, whether it allows costs and counsel fees to either party or is silent upon the subject, is conclusive upon the whole question.

See *Mattocks* v. *Moulton*, 84 Maine, 545.

ON EXCEPTIONS.

The case is stated in the opinion.

Augustus F. Moulton, for plaintiff.

Charles P. Mattocks and L. Barton, for defendants.

Allowance of counsel fees: *Blake* v. *Pegram*, 109 Mass. 542; *Forward* v. *Forward*, 6 Allen, 497; *Bartlett* v. *Fitz*, 59 N. H. 502; *Ammon's Appeal*, 31 Pa. St. 311; *Hazard* v. *Engs*, 14 R. I. 5; Woerner's Am. Law of Admr. §§ 384, 515, 516; *Young* v. *Brush*, 28 N. Y. 667; Hill Trustees, 567, 570; *Worrall* v. *Harford*, 8 Ves. 8; *Polhemus* v. *Middleton*, 37 N. J. Eq. 243; *Clement's Appeal*, 49 Conn. 519; In re, *Meeker's Estate*, 45 Mo. App. 186; *Watson* v. *Row*, 18 L. R. Eq. 680; *Poole* v. *Pass*, 1 Beav. 600; *Courtney* v. *Rumley*, 6 I. R. Eq. 99; *Sawyer* v. *Baldwin*, 20 Pick. 388; *Muscogee Lumber Co.* v. *Hyer*, 18 Fla. 698; *Hancox* v. *Meeker*, 95 N. Y. 528; *Widener* v. *Fay*, 51 Md. 273; Adams Eq. 8th Ed. p. 61; *Turnbull* v. *Pomeroy*, 140 Mass. 117; *Trustees* v. *Greenough*, 105 U. S. 527; *Manderson's Appeal*, 113 Pa. St. 631; *Towle* v. *Mack*, 2 Vt. 19; *Morton* v. *Barrett*, 22 Maine, 257; *Hawley* v. *James*, 16 Wend. 61; *Stewart* v. *McMinn*, 5 W. & S. 100; *Fearns* v. *Young*, 10 Ves. 184; *Perkin's Appeal*, 108 Pa. St. 314; *McElhenny's Appeal*, 46 Pa. St. 347.

Time when claim for counsel fees must be made: *Stetson* v. *Bass*, 9 Pick. 27; *Davis* v. *Cowdin*, 20 Pick. 513; *Smith* v. *Dutton*, 16 Maine, 313; *Arnold* v. *Mower*, 49 Maine, 561; *Coburn* v. *Lewis*, Id. 406; *Wiggin* v. *Swett*, 6 Met. 194; *Robinson* v. *Ring*, 72 Maine, 140; *Light's Appeal*, 22 Pa. St. 448.

Statute costs: *Thacher* v. *Dunham*, 5 Gray, 26; *Morton* v. *Barrett*, 22 Maine, 257; *Towle* v. *Swasey*, 106 Mass. 108; *Sargent* v. *Sargent*, 103 Mass. 297; *Bowditch* v. *Soltyk*, 99 Mass. 136; *Dunstan* v. *Dunstan*, 1 Paige, 509; *Sawyer* v. *Baldwin*, 20 Pick. 378; *Bigelow* v. *Morong*, 103 Mass. 287; *Monks* v. *Monks*, 7 Allen, 401.

Defenses available: R. S., c. 68; *Moody* v. *State*, 84 Ind. 432.

Costs defined: R. S., c. 63, § 30; *Rush County* v. *Cole*, 28 N. E. Rep. 772 (Ind.); *Apperson* v. *Mut. Ben. L. Ins. Co.* 38 N. J. 388; *Taylor* v. *C. M. & St. P. Ry. Co.* (Wis.) 53 N. W. Rep. 855; *DeCoursey* v. *Johnson*, 134 Pa. St. 328; *Leighton* v. *Morrill*, 159 Mass. 272; *The Maggie J. Smith*, 123 U. S. 349.

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

WISWELL, J. The defendant, a testamentary trustee, filed his account in the Probate Court for Cumberland county, therein crediting himself with various investments of the trust estate.

The Judge of Probate allowed certain of these investments, and disallowed others aggregating $3059.82. From the decree of the Judge of Probate, disallowing these items, the defendant appealed to the Supreme Court of Probate. The appeal was carried to the law court, *Mattocks* v. *Moulton*, 84 Maine, 545, and an entry ordered of "decree of Probate Court affirmed with costs." At the April Term, 1892, of this court for Cumberland county, the presiding justice made a decree in accordance with the opinion and mandate of the court.

By the decree of the Judge of Probate, affirmed by the Supreme Court of Probate, the defendant was charged with a balance of $5853.39, which sum included the above amount of disallowed investments. Of this balance all but the amount of the items disallowed has been turned over by the defendant to the person entitled thereto.

This action is upon the defendant's bond as trustee. Judgment was entered in the suit for the penal amount of the bond, and a hearing had before the justice presiding at nisi prius, to determine the amount for which execution should issue, in accordance with the following stipulation of the parties: "This case is submitted to the presiding judge, who in determining the amount for which execution shall issue upon the bond in suit is authorized to make any further allowances and charges which the judge of probate might make if the account was in settlement before him. It being the desire of the parties that the rights of Mattocks, as trustee, and the cestui que trust in the trust estate should be finally settled and adjudged in the cause according to law and equity applicable thereto."

At this hearing, the defendant claimed that he should be allowed the sum of $555.39 for costs and counsel fees incurred in the settlement of the prior account and in the appeal, includ-

ing the sum of $175 charged by him for legal services, he being a counselor at law; and including also the costs allowed against him by the final decree in the appeal proceedings. This sum was allowed to the defendant by the judge at nisi prius, to the allowance of which the plaintiff duly and seasonably excepted.

The question presented by these exceptions is, whether after a final decree by this court, affirming the decree of the Probate Court with costs, as to the settlement of an account, a judge of probate has the power in the settlement of a subsequent account, to allow costs incurred and counsel fees for services rendered in the settlement of the prior account and in the appeal from the decree of the Probate Court and the costs allowed against him in that proceeding.

It is the opinion of the court that a judge of probate has no such power, and that consequently the ruling of the presiding justice in allowing these items, was erroneous. The question of the allowance of costs incurred in the appeal was necessarily involved in that proceeding. By R. S., c. 63, § 30, "In all contested cases in the original or appellate court of probate, costs may be allowed to either party, to be paid by the other, or to either or both parties, to be paid out of the estate in controversy, as justice requires." The whole subject of costs in matters of this kind rests in the discretion of the court. That discretion must be exercised in the proceedings of which the costs were incurred; and even if a final decree is silent as to costs, it must be conclusively presumed that the question of the allowance of costs to either or both of the parties to the controversy was considered and passed upon. The decree of this court, made at the April term, 1892, in Cumberland county, was final as to all matters involved. We have seen that the question of the allowance of costs was necessarily involved; the question is therefore res adjudicata. The decree referred to was not silent as to costs but allowed them against the defendant.

This rule would not deprive a judge of the power to open a prior account so far as might be necessary to correct errors, a power expressly given by statute in Massachusetts; it simply prevents a matter being re-opened which has once been adjudicated.

In *Alvord* v. *Stone*, 78 Maine, 296, it is said: "In such case, [an appeal from a probate court] a final decree, silent as to costs, is as conclusive a bar to a recovery of them as if it affirmatively disallowed them. This court no longer has any jurisdiction over the subject."

In *Lucas* v. *Morse*, 139 Mass. 59, which decides that the probate court has no power to allow costs after a final decree has been entered in the controversy in which the costs accrued, it is said, "costs are awarded as a part of the judgment or decree of the cause in which they arise; and no case is cited which decides that a court, either at law or in equity, can award in one case costs which have accrued in another, unless they are included in the judgment."

The power of the court in the allowance of costs in probate appeals, is precisely the same as in equity. *Alvord* v. *Stone*, supra. The rights of the parties in equity are determined by the final decree. "There must not only be a decree in favor of a party, but there must also be an express order or decree for his costs, or they are lost." *Stone* v. *Locke*, 48 Maine, 425.

But it is urged that, even if the foregoing rule is correct as to the allowance of costs, it does not follow that it is applicable to expenses properly and necessarily incurred in procuring the assistance of counsel.

We think the principle is precisely the same. The sums which were allowed in this case were for the services of counsel, and the charges of the defendant for legal services, in the identical proceeding in which a final decree was made. If expenses such as these are to be allowed at all, it must be done in the judgment or decree in the proceeding in which they were incurred.

We do not question that costs and counsel fees properly incurred by a trustee, in protecting the estate confided to his care and paid by him, should be reimbursed to him out of the estate; nor that trustees who are obliged to employ counsel in the settlement of their accounts, should be allowed to charge to the estate the reasonable expenses therefor as held by many cases cited in the defendant's brief. But these rules do not apply to the question here at issue.

In *Clement's appeal from probate*, 49 Conn. 519, an executor in the settlement of his final account, charged the estate for his services and expenses in defending against an appeal from the allowance by a probate court of his prior account. It was held that he was entitled to an allowance out of the estate of a portion of the expenses incurred in the previous proceeding. But the question here discussed was not raised nor considered in that case.

The entry must therefore be,

Exceptions sustained.

NORMAN W. FOGG *vs.* SAMUEL A. HOLBROOK, Executor.

Cumberland. Opinion June 19, 1895.

Administrators and Executors. Burial Expenses.

The estate of a deceased person is liable for all such reasonable expenses as are properly incurred in providing a decent burial.

The law implies a promise, from the peculiar necessities of the situation, upon the part of the executor or administrator to pay the reasonable funeral and burial expenses of the deceased, out of the estate, as far as he has assets.

AGREED STATEMENT.

This was an action of assumpsit, brought in the Superior Court, for Cumberland county, under R. S., c. 64, § 53, and c. 66, § 14, to recover for a burial casket, etc., and the personal services of the plaintiff, as an undertaker, rendered at the funeral of the defendant's testatrix.

(Declaration.) "Also, for that the estate of said Sarah M. Stetson and the said Samuel A. Holbrook, as executor thereof, at said Freeport, to wit, at said Portland on the day of the purchase of this writ, being indebted to the plaintiff in the sum of one hundred forty-nine dollars and sixty cents for so much money before that time had and received by the said estate and by the said Samuel A. Holbrook as executor as aforesaid, and with the knowledge and consent and at the special request of said executor, to the plaintiff's use, in consideration thereof then and there by force of statute in such case made and provided, the defendant in his said capacity and the estate of Sarah M. Stetson in his hands became liable to pay the same sum to the

plaintiff; and thereafterwards on the same day in consideration thereof the said estate being so liable and holden, the said defendant as executor thereof as aforesaid promised the plaintiff to pay him that sum on demand.

"And the plaintiff avers that said Samuel A. Holbrook is the duly appointed executor of the will of the said Sarah M. Stetson, deceased, and that within two years after notice given by said executor of his appointment and at least thirty days before this action was commenced, the said claim was presented in writing to said executor and payment thereof demanded, to wit, a claim for one casket and box furnished by said plaintiff for the necessary purpose of burial of Sarah M. Stetson, on April 23, 1892, of the value of one hundred and twenty-five dollars; also for one robe furnished as aforesaid and for the purpose aforesaid of the value of seven dollars and fifty cents; and also one wheat furnished as aforesaid and for the purpose aforesaid, of the value of three dollars and fifty cents; being all of the value of one hundred and thirty-six dollars.

"And the plaintiff further avers that such action was taken by the said Samuel A. Holbrook as executor as aforesaid in the premises, that two commissioners were duly appointed by the Judge of the Probate Court for said Cumberland county, by virtue of the statute, to hear and pass upon said claim, that said claim so committed was duly proved before them and that said commissioners after hearing, duly made their report in the premises to the Probate Court aforesaid, and that the said plaintiff being interested and being aggrieved at the decision of the said commissioners in the premises, duly filed his written notice of appeal from their decision in said Probate Court within twenty days after said report was made.

"And the plaintiff avers that this action is commenced within three months after said report was made and in accordance with the statute in such case made and provided, and that a schedule of his claim stating the nature of them was duly annexed to this writ before service.

"And the plaintiff avers that at least thirty days before commencement of this suit, and within two years after notice given

by said executor of his appointment, said claim was presented to said executor in writing and payment thereof demanded."

The case is stated in the opinion.

A. F. Moulton and John Howard Hill, for plaintiff.

A. W. Coombs and W. K. Neal, for defendant.

Counsel argued: (1.) That the acts of the brother of the deceased and the plaintiff did not create a debt against the estate of Sarah M. Stetson. (2.) That plaintiff is not entitled to recover judgment in this suit against the goods and estate of the deceased, in the hands and possession of the defendant, as executor of her will. (3.) That the expenses of the funeral of deceased were not reasonable and proper. (4.) That plaintiff has a legal claim against the brother of said deceased for the agreed price of the articles furnished by his direction, and charged to the estate of Sarah M. Stetson. (5.) That the brother of deceased has a legal claim against this defendant personally, and not in his representative capacity, for the reasonable expenses of the burial of Sarah M. Stetson.

Counsel cited: *Davis* v. *French*, 20 Maine, 21; *Baker* v. *Fuller*, 69 Maine, 155; *Bank* v. *Stanton*, 116 Mass. 438; *Luscomb* v. *Ballard*, 5 Gray 404; *Patterson* v. *Patterson*, 59 N. Y. 585; Chit. Cont. p. 296; *Sullivan* v. *Warner*, 41 N. J. Eq. 300; 7 Am. and Eng. Enc. pp. 340-41; *Myer* v. *Cole*, 12 Johns. 349; Dicey, Parties, pp. 319, 320; Croswell, Exors. § 393; Waterman's Maine Prob. Pr. p. 117.

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

WISWELL, J. This is an action of assumpsit, brought against the defendant in his capacity as executor of the will of Sarah M. Stetson, to recover for a casket and other articles furnished by the plaintiff, an undertaker, for the burial of the testatrix.

The articles were selected and ordered by a brother of the deceased, her nearest relative, and others, without the personal knowledge, consent or subsequent ratification of the defendant, the executor, who although he knew of her death and that he

was named as executor in her will, gave no directions and made no arrangements in regard to the funeral.

The only questions raised are, whether the estate of a deceased person is holden for the reasonable and proper burial expenses, neither ordered nor ratified by the subsequently appointed executor or administrator, so that a suit may be maintained against an executor in his representative capacity, to recover for such reasonable expenses; and if so, how much of the expenses incurred and sought to be recovered in this case, are reasonable in view of all the circumstances.

It is urged by the counsel for the executor that, under these circumstances the law implies an individual promise upon the part of the executor to pay reasonable expenses, and that he is personally liable therefor, for which he may reimburse himself out of the estate; but that the estate is not directly holden, and that this suit which is against the executor in his representative capacity, and in which if there is judgment for the plaintiff, it must be de bonis testatoris, cannot be maintained. They cite various authorities to this effect. But we think that it is the more reasonable rule to hold that the estate of a decedent should be liable for all such reasonable expenses as are properly incurred in providing a decent burial. When such expenses are incurred, necessarily after the death of a person, there is no one legally authorized to represent the estate. The services must be rendered and necessary articles furnished immediately; it is better that these things should be done upon the credit of the estate, than that there should be hesitation and inquiry as to who is liable to pay.

Reliance is had upon the cases in this State of *Davis* v. *French*, 20 Maine, 21, and *Baker* v. *Fuller*, 69 Maine, 155, which cases hold that an executor or administrator can create no debt against the estate of the deceased. It is argued that if an executor or administrator can not create a debt against the estate, that certainly the brother of the deceased, who ordered the articles of the undertaker, could not do so. There is no question of the soundness of the doctrine laid down in these cases. But under the circumstances which we are considering, neither the executor

nor the person who orders necessary articles for the burial, creates the debt, the law does so. The law implies a promise, from the peculiar necessities of the situation, upon the part of the executor or administrator to pay the funeral and burial expenses out of the estate, so far as he has assets.

This is the rule which was early adopted in Massachusetts and has since been followed. *Hapgood* v. *Houghton*, 10 Pick. 154; *Luscomb* v. *Ballard*, 5 Gray, 403; *Sweeney* v. *Muldoon*, 139 Mass. 304.

In *Luscomb* v. *Ballard*, supra, it is said: "In this Commonwealth an exception is made in the case of funeral expenses of the deceased. For these the executor may be charged in his representative character and judgment be rendered de bonis testatoris. But the case stands on its peculiar ground and is to be limited to it." This court has decided, in the recent case of *Phillips* v. *Phillips*, 87 Maine, 324, that: "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."

The sum sued for, at the market prices for the articles furnished, amounts to $136. Were these expenses reasonable? The following facts are admitted. The testatrix owned a house and about two and a half acres of land in Freeport village unencumbered. It was generally known that she had money at interest and she was considered to be in comfortable circumstances. Her nearest relatives were a brother and nephews and nieces, to neither of whom were there any bequests or devises in the will. These articles were selected by the brother and other relatives. The whole estate, when converted into money, amounted to $1061, and she was indebted to the amount of $78.

In view of all these circumstances we do not think that the burial expenses were so unreasonably large as to be disallowed.

Judgment for plaintiff for $136 and interest from the time of demand upon the executor against the goods and estate of the testatrix, in the hands of the defendant.

ELBERT WHEELER, Petitioner for Certiorari,

vs.

COUNTY COMMISSIONERS.

Waldo. Opinion June 20, 1895.

Taxes. Abatement. Certiorari. Corporation. Stock. R. S., c. 6, §§ 14, 19.

The judgment of the county commissioners upon a complaint or application for the abatement of a tax is a judicial act; and if, in such a case, they err in matters of law, a writ of certiorari is the proper remedy.

By R. S., c. 6, § 14, the value of the real estate of a corporation must be deducted from the value of the shares of the stock of the corporation, in assessing a tax upon the latter.

It is immaterial whether the tax upon a corporation's real estate is paid in money or in any other way. In any event, the value of the real estate must be deducted from the value of the stock. A contract, therefore, of a water company with a city for the payment of its taxes by furnishing water for municipal purposes, should not affect the value of the shares of stock, except to the extent that such contract, like any other, may enhance or depreciate the value of the stock, accordingly as it is beneficial or otherwise to the corporation.

This result is not affected by the fact that the word "franchise" is used in the contract. No legislation of this State has authorized municipal assessors to impose a tax upon a corporation by reason of its franchise.

The present value of the stock of a business corporation may depend upon the prospect of the future business and success of the corporation, and so far as this affects the present value of the stock, it should be taken into account in determining the value of the same for the purposes of taxation.

The petitioner, a resident of another state, was the owner, on April 1st, 1893, of common and preferred stock of the Belfast Water Company which was taxed to him in Belfast for that year. Within the time allowed by statute, he applied to the assessors for an abatement, upon the ground of over-valuation, and upon their refusal to grant an abatement he made application to the County Commissioners of Waldo County, as provided by statute, to be relieved from said taxes. The water company had made a contract with the city of Belfast to furnish water for various municipal purposes, "for such sums annually as said city should assess upon the franchise and works, which consist of the plant to supply water as aforesaid."

During the municipal year of 1893, the water company performed its part of the contract. The property and plant of the company situated in Belfast was valued by the assessors of that city at $31,500, and a tax assessed thereon of $521.40, which amount was offset against that due the water company for supplying water for the purposes named, in accordance with the contract.

This property situated in Belfast with some real estate in an adjoining town, was substantially all the property that the company owned on April 1st, 1893. The county commissioners, upon the petitioner's application to them, made the following adjudication: "After due consideration of the facts and arguments of counsel, we find and adjudge as follows: that, as a matter of law, the taxation of the shares of stock of said water company cannot be in any manner or extent affected by said contract between said city and water company, or the performance thereof; that said preferred stock, after deducting its proportional part of the value assessed on the land, buildings, machinery, pipes and other real estate, etc., of said water company by said city of Belfast and town of Northport, as required by R. S., c. 6, § 14, par. 3, had the further value of forty dollars per share placed thereon by said assessors, as representing in part the value of said property of said water company above the value thereof taxed directly to such water company as aforesaid, and in part the prospective value of such shares; and, therefore, the taxes assessed against the several above named parties holding said preferred shares were not excessive and no abatements thereof are granted."

Held; That the adjudication of the commissioners, whereby they placed a valuation upon the stock represented by an assumed value of the corporation's real estate, above the amount at which it was valued by the assessors of the city and town in which it was situated, was erroneous in law.

On report.

Petition for certiorari submitted to the law court on petition, and record of county commissioners, which the parties agreed should be considered an answer.

The case is stated in the opinion.

John C. Coombs, Joseph Williamson and H. M. Payson, for petitioner.

The petitioner has proved that the water company has never earned a dividend, nor even its running expenses, and had no assets except its plant taxed to the corporation. Nothing remained to give value to its shares. The contract was valid. The question of what amount of expenditure is proper and necessary is confided with the municipal authorities, with which the court cannot interfere. *East St. Louis* v. *United States*, 110 U. S. 321. The property and franchise which subserve a public purpose is to that extent a means or instrumentality for government purposes, and should not be taxed. *Camden* v. *Camden Vill. Corp.* 77 Maine, 530. Quasi public corporations hold their franchises . . . in trust for the public; and their property partly in trust for the public. *Bruns. G. L. Co.* v.

Unit. G. F. & L. Co. 85 Maine, 532; *Portland* v. *Water Co.* 67 Maine, 135. Additional tax is illegal. One on the corporation having been paid according to the contract, another one cannot be levied on the shareholders. The corporation in this respect is not distinct from its shareholders. There is no provision for taxing both the legal and beneficial owner, which is contrary to the general law. Cool. Tax, 228-9. *Amesbury, etc., Co.* v. *Amesbury*, 17 Mass. 461. Double taxation, unless value of real estate is deducted from the value of the shares. *Cumb. Marine Ry.* v. *Portland*, 37 Maine, 444; *P. S. & P. R. R. Co.* v. *Saco*, 60 Maine, 199. Tax contrary to statute; and on the facts found in the record there could be no prospective value to the shares which was not already taxed.

A tax on dividends is merely a method of valuing the franchise or capital stock. Cook Stock. § 561. The statute must intend that when there are no dividends there shall be no tax on the franchise.

J. S. Harriman and R. F. Dunton, for respondents.

The ruling of the county commissioners only relates to the right of the city to tax the stock; they did not mean to say that the value of the stock could not be to any extent affected by said contract. But even if it should receive the latter construction, it is difficult to see how the rights of this petitioner could be prejudiced by such ruling. The value of the stock may be to some extent affected by every contract which the company has to supply water; but the presumption is that every such contract is beneficial to the company and would tend to enhance the value of the stock, and if any such contracts are omitted from consideration in arriving at the value of the stock, the effect would be to reduce the value placed upon the stock, and the stockholder would be benefited rather than injured by such omission.

The granting or the refusal to grant the writ of certiorari is a matter of judicial discretion. The writ should never issue when proceedings are sought to be quashed for merely trivial or formal error, or when it is apparent no injustice will be done by not permitting it to issue. *Hopkins* v. *Fogler*, 60 Maine, 266.

It is evident that this ruling did not to any extent enhance the value which the commissioners placed upon the stock, and no injustice could possibly have been done to the petitioner by the ruling. Whether said contract did, in this case, affect the value of the stock, was a question of fact for the county commissioners to determine.

A writ of certiorari lies only to correct errors in law; and where the record contains no error, the writ cannot be issued. *Lapan* v. *Co. Com.* 65 Maine, 160.

The superior court will not, on certiorari, review the merits of the judgment of the inferior court or tribunal upon the evidence; the court below is the sole judge of the weight of evidence. Harris on Certiorari, § 102; *Gibbs* v. *Co. Com.* 19 Pick. 298.

In the estimate or computation of the value of the capital stock of the corporation, the judgment of the tax commissioner is not open to modification or revision by any other tribunal. *Commonwealth* v. *Cary Improvement Co.* 98 Mass. 19.

The value of the corporate property alone is not the measure of the value of the stock in a corporation. While this is an element of value, there are other elements equally important which should be considered in arriving at a correct estimate of the value of the stock in a corporation, such as the prospects of its future success, the nature and extent of its corporate rights and privileges, its business on hand, and the skill and ability with which its business is managed. *Commonwealth* v. *Hamilton Mfg. Co.* 12 Allen, 298; *Chicopee* v. *Co. Com.* 16 Gray, 38; *Commonwealth* v. *Cary Improvement Co.* 98 Mass. 22.

In the case of *National Bank* v. *New Bedford*, 155 Mass. 316, the court say: "The actual value of shares in a going concern depends not only upon its property, but also upon its prospects, since shares both represent property and prospects."

The commissioners based their valuation of the stock upon the property of the corporation and its prospects of future success. These were legitimate elements of value.

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

WISWELL, J. The Belfast Water Company, a corporation organized under an act of the legislature, entered into a contract with the city of Belfast, to supply water for drinking fountains, sprinkling streets, flushing sewers and for other municipal purposes, "for such sums annually as said city should assess upon the franchise and works, which consist of the plant, to supply water as aforesaid."

During the municipal year of 1893, the water company performed its part of the contract. The property and plant of the company situated in Belfast was valued by the assessors of that city at $31,500, and a tax assessed thereon of $521.40. The amount due the water company for supplying water, for the purposes named in this contract, and this tax, were offset against each other and receipts passed in accordance with the contract. This property, valued at $31,500 with some real estate in the adjoining town of Northport, was substantially all the property that the company owned on April 1st, 1893.

At that date, the petitioner, a resident of another state, was the owner of one hundred shares of the common and twenty-five shares of the preferred stock of the Belfast Water Co. The assessors of Belfast valued the petitioner's one hundred shares of common stock at $1000 and his twenty-five shares of preferred stock at $1000 and assessed a tax upon each of sixteen dollars.

The petitioner, within two years from this assessment, made written application to the assessors for the time being for an abatement, and upon their refusal to make the abatement asked for, he made application to the county commissioners of Waldo county, as provided by statute, to be relieved from said taxes.

Upon this application the county commissioners relieved the petitioner from the taxes assessed upon the common stock, but refused to do so as to the preferred stock and sustained the valuation placed thereon by the assessors.

The petitioner applies to this court for a writ of certiorari, representing that manifest errors of law appear in the records and judgment of the county commissioners, and that in placing a valuation of forty dollars per share on the preferred stock,

thereby sustaining the valuation placed thereon by the assessors, they adopted and proceeded upon erroneous principles, in the particulars later alluded to. A copy of the records of the commissioners is annexed to the petition, which by agreement is to be considered as an answer.

The record of the commissioners shows that they made the following adjudication: "After due consideration of the facts and arguments of counsel, we find and adjudge as follows; that, as a matter of law, the taxation of the shares of stock of said water company cannot be in any manner or extent affected by said contract between said city and water company, or the performance thereof; that said preferred stock, after deducting its proportional part of the value assessed on the land, buildings, machinery, pipes and other real estate, etc., of said water company by said city of Belfast and town of Northport, as required by Revised Statutes, chapter 6, section 14, paragraph 3, had the further value of ($40) forty dollars per share placed thereon, by said assessors, as representing in part the value of said property of said water company above the value thereof taxed directly to such water company as aforesaid, and in part the prospective value of such shares; and, therefore, the taxes assessed against the several above named parties holding said preferred shares were not excessive and no abatements thereof are granted."

They say in their adjudication that the value of forty dollars per share, placed by them on the preferred stock, is represented in part by the value of the property of the water company above the value taxed directly to the company. That is, that the real estate of the water company was worth more than the amount at which it was valued by the assessors of the city and town in which it was situated; and that such additional value should be and in fact was taken into account by them in establishing the value of the shares of preferred stock for the purpose of taxation.

This was clearly erroneous. The taxable property of the corporation must be taxed to the corporation. By R. S., c. 6, § 19, the property of corporations, "both real and personal, is taxable for state, county, city, town, school district and paro-

chial taxes, to be assessed and collected in the same manner and with the same effect as upon similar taxable property owned by individuals."

By R. S., c. 6, § 14, par. 3, "Machinery employed in any branch of manufacture, goods manufactured or unmanufactured, and real estate belonging to any corporation, except when otherwise expressly provided, shall be assessed to such corporation in the town or place where they are situated or employed; and in assessing stockholders for their shares in any such corporation, their proportional part of the value of such machinery, goods and real estate, shall be deducted from the value of such shares."

Real estate must be taxed to the owner or person in possession. The water company was the owner and was in possession of the property taxed to it, and the "proportional part of the value of such . . . real estate, shall be deducted from the value of such shares."

The commissioners in placing a value upon these shares, did deduct their proportional part of the value *assessed* on the company's real estate, and assumed that this real estate had an additional value. This assumption was unwarranted. The statute requires a deduction of the value of the real estate, not the amount assessed thereon.

"All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." Constitution of Maine, Article IX, § 8.

The property of this corporation was assessed by the assessors of the city and town in which it was situated; there was no appeal therefrom, and it must be assumed that the requirements of law were observed and that the property was assessed "according to the just value thereof."

The water company's real estate having been first taxed to the corporation and then taken into account, to some extent, in fixing the value of the shares, it resulted in double taxation. This is not only contrary to the spirit and policy of the law of taxation but also to the statute above quoted.

The commissioners further say that this value of forty dollars

per share is represented "in part by the prospective value of such shares."

It is undoubtedly true that the present value of the stock of a business corporation may depend very largely upon the prospect of the future business and success of the corporation. The stock of a corporation, which is not earning its operating expenses, very frequently has a present substantial value because of the prospects for increased business and earning capacity in the future. *Com.* v. *Mfg. Co.* 12 Allen, 298; *National Bank of Commerce* v. *New Bedford*, 155 Mass. 313. We think that nothing more than this was meant by the commissioners in their adjudication.

Nor do we think that the taxation of the shares can be affected by the contract referred to, except to the extent that such contract may enhance or depreciate the value of the stock, according to whether it is beneficial to the company or otherwise. It can make no difference whether the tax on the company's property is paid in money or by supplying water for certain municipal purposes, for which by contract the company is to receive an amount equal to the taxes assessed for the year; or whether the tax has been paid in any way, or not.

This result is not affected by the fact that the word "franchise" is used in the contract. The assessors of Belfast did not attempt to assess any tax upon the franchise of the corporation. No legislation of this State has authorized municipal assessors to impose a tax upon a corporation on account of its franchise, the powers and privileges granted to it by the sovereign power of the State. The State may impose such a tax, as has been frequently done and upheld; or, assessors in placing the valuation upon the shares of a corporation, should take into account the value of the franchise, because the value of the franchise necessarily affects the value of the shares, which by statute, are taxable to the owner thereof.

We find no error of law, therefore, in the proceedings of the commissioners, except that they included in the value of the stock, the value, to some extent, of the company's property which is by law taxable to it; but this is one which may be and

should be corrected by certiorari. The valuation was based upon erroneous principles.

"Certiorari does not lie on account of mistake or mere error of judgment. Nor can an error in the amount of an assessment or tax laid by the proper authority, when there is no error in the principle of apportionment, be corrected by certiorari; otherwise if the assessment be made on erroneous principles." Spelling on Extraordinary Relief, § 1967, and cases cited.

The judgment of the county commissioners upon a complaint for the abatement of a tax, is a judicial act, and consequently a mandamus does not lie to compel them to revise such a decision. If, in a such a case, they err in matters of law a writ of certiorari is the proper remedy." *Gibbs* v. *County Commissioners*, 19 Pick. 298.

In *Haven* v. *County Commissioners*, 155 Mass. 467, which was a petition for a writ of certiorari to quash the proceedings of county commissioners in refusing to abate a tax, the writ was granted because the commissioners received incompetent testimony upon the question of value.

In *Levant* v. *County Commissioners*, 67 Maine, 429, it is said: "The law not having expressly provided any remedy for correcting the errors of the board of county commissioners in their adjudications relating to the abatement of taxes, parties aggrieved by their decisions in matters of law, may, under the general authority contained in the above provisions seek redress in this court."

Although the amount involved is small, the principle is of sufficient importance to lead us to the conclusion, that by reason of the erroneous basis adopted by the commissioners, in placing a value upon the preferred stock, the petitioner did not receive substantial justice; and that so much of the proceedings as relate to the adjudication, sustaining the tax upon the preferred stock, should be quashed, and the matter heard anew.

Their decision in relieving the petitioner from the tax upon the common stock involves no question of law; it was simply an exercise of judgment, over which we have no right of review, and may stand.

Writ of certiorari to issue.

MARY A. WILLIAMS, in equity, *vs.* ENSIGN H. COOMBS.

Knox. Opinion June 21, 1895.

Partition in Equity. Co-Tenants. Repairs.

Since full chancery powers were conferred upon it, this court has the power to decree a sale of the whole property and a division of the proceeds between the tenants in common, whenever, in its judgment, a division of the property cannot be made without greatly impairing its value, and whenever a sale of the whole property would be much more beneficial or less injurious to the owners. But this power will not be exercised whenever an actual partition is practicable without such injury.

The parties are tenants in common, the complainant owning four undivided fifths and the defendant one undivided fifth, of a lot of land sixty feet square situated in the city of Rockland. The buildings on the lot consist of a story and a half house with ell and shed. The main house is four feet and nine inches from the west line of the lot, and thirty-two feet and nine inches from the east line of the lot, while the ell extends to the western line and the shed to within nineteen feet and six inches from the eastern line. The buildings extend from within a few feet of the street to within one foot and six inches from the back line of the lot. The house is not susceptible of division and separate occupancy.

Held; that this property could not be divided without greatly impairing its value, that a sale of the whole property would be much more beneficial to both parties and that the prayer of the bill asking that the court decree a sale of the property, should be granted.

Although it has been held by the courts in many jurisdictions, that a tenant in common, who makes necessary repairs upon the common property without the consent of his co-tenant cannot maintain an action at law to recover contribution for the same, it is a well-settled principle of equity jurisprudence, that such contribution may be compelled in equity under certain circumstances.

Where a tenant in common, without the consent of his co-tenant, or against his objections, has expended money in making necessary repairs upon the common property, which without such repairs was unsuitable for occupancy, and has thereby made it rentable and income-paying, and has collected rents from such property; and where the co-tenant in his answer to a bill in equity brought by the tenant who made the repairs, has asked for an accounting and payment to him of his proportional part of the rents and profits received;—the most equitable method is to charge the tenant who made the repairs and collected the rents, with all the rents and profits received by him and allow him to reimburse himself, out of the rents received by him, for the expenditures made for necessary repairs, but only to the extent of the amount of rents and profits in his hands.

The request of a defendant in his answer for an accounting and payment to him of his proportional part of the rents and profits received, is equivalent for this purpose, to the commencement of proceedings asking for affirmative relief.

No distinction should be made, in regard to the right of a co-tenant to recover contribution, for sums expended in making necessary repairs upon the common property, under the above circumstances, between one who at the time of making such expenditures had the legal title, and one who at that time was in fact the owner of an undivided portion of the premises, having completed a contract of purchase, agreed upon all the terms and gone into possession, everything having been done to give him the legal as well as the equitable title, except that the deed had not been passed, and who subsequently acquired the legal title.

ON REPORT.

Bill in equity, heard on bill, answer and master's report, praying for a sale of property owned in common because a partition was incapable; also for contribution for necessary repairs.

The case is stated in the opinion.

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

W. H. Fogler, for defendant.

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

WISWELL, J. The parties are tenants in common of a lot of land, with the buildings thereon, situated in Rockland; the complainant being seized in fee of four undivided fifths and the defendant of one undivided fifth.

In this bill in equity, the complainant seeks a partition of the property by a sale of the same and a division of the proceeds between the tenants in common in proportion to their respective ownerships; and also for a contribution by the defendant of his proportional part of sums expended by her for necessary repairs and taxes. She alleges, in substance, that because of the size and situation of the lot, and the character and location of the buildings thereon, an actual partition of the property could not be made without greatly impairing its value.

That this court has jurisdiction of a bill of this nature, and the power to decree a sale and division of the proceeds, if the situation is such as to justify it, is not denied by the counsel for the defendant.

Since full chancery powers were conferred upon it, this court has the power to decree a sale of the whole property and a division of the proceeds between the tenants in common, whenever, in its judgment, a division of the property cannot be made without greatly impairing its value, and whenever a sale of the whole property would be much more beneficial or less injurious to the parties. But this power will not be exercised whenever an actual partition is practicable without such injury or impairment of value. *Davidson* v. *Thompson*, 22 N. J. Eq. 83.

In *Wilson* v. *E. & N. A. R. R. Co.* 62 Maine, 112, a petition for partition, Mr. Justice WALTON said: "By process in equity the whole may be sold for the most that can be obtained for it, and the proceeds divided among the owners. Such is the usual course in England, and in most of the states in this country. *Wood* v. *Little*, 35 Maine, 111; 1 Story's Eq. Jur. c. 14. And this court now has equity jurisdiction in such cases."

In the unreported case of *Newhall, in equity*, v. *Taylor*, a bill in equity between tenants in common in which a sale and division of the proceeds was asked for, which case was entered at the June term, 1890, of the law court for the eastern district, the court sent down the following rescript: "This court sitting in equity has jurisdiction in the case of partition between co-tenants. Bill sustained. Receiver to be appointed at the next term of court, in Waldo county, to make sale of the property as may there be directed."

The only question then, upon this branch of the case, is whether the size and situation of this lot and the location and character of the buildings upon it, are such as to entitle the complainant to the decree asked for.

The lot is sixty feet square, it is situated on Oak street, very near to the principal business street of Rockland. The buildings on the lot consist of a story and a half house, with ell and shed. The main house is four feet and nine inches from the west line of the lot and thirty-two feet and nine inches from the east line of the lot, while the ell extends to the western line and

the shed to within nineteen feet and six inches from the eastern line. The buildings extend from within a few feet of the street to within one foot and six inches from the back line of the lot. The house is not susceptible of division and separate occupancy, and if the defendant's one-fifth of the whole property in value, taking into account the value of the buildings, should be set out to him from the land east of the dwelling-house, it would take nearly all of the unoccupied portion of the lot. This would greatly impair the value of the house and the land upon which it stands, while that portion thus set off to the defendant would be of much less value than it is now, while used as a part of the house lot.

It is the opinion of the court, therefore, that this property could not be divided without greatly impairing its value, that a sale of the whole property would be much more beneficial to both parties, and that the prayer of the bill, asking that the court decree a sale of the property, should be granted.

The complainant also asks that the defendant may be compelled to contribute his proportional part of the sums expended by her for necessary repairs and in the payment of taxes.

Although it has been held by the courts in many jurisdictions, that a tenant in common, who makes necessary repairs upon the common property, without the consent of his co-tenant, cannot maintain an action at law against him to recover contribution for the same, see *Calvert* v. *Aldrich*, 99 Mass. 74, it is a well-settled principle of equity jurisprudence, that such contribution may be compelled in equity under certain circumstances.

"Where two or more persons are joint purchasers or owners of real or other property, and one of them, acting in good faith and for the joint benefit, makes repairs or improvements upon the property which are permanent and add a permanent value to the entire estate, equity may not only give him a claim for contribution against the other joint owners, with respect to their proportional shares of the amount thus expended, but may also create a lien as security for such demand upon the undivided shares of the other proprietors." Pomeroy's Equity

Jurisprudence, § 1240. See also Story's Equity Jurisprudence, §§ 1236 and 1237.

Various objections are urged against the application of the principle to the facts of this case. The principal portion of the expenditure for repairs was made in October and November, 1892, while the complainant did not acquire the legal title to four undivided fifths of the premises until December, first, 1892. It is necessary to briefly state the history of the title.

Harriet Coombs, at the time of her death, owned the property, subject to a mortgage given by her to the defendant to secure the sum of five hundred and fifty dollars and interest. She died intestate in April, 1890, and the equity of redemption descended to her heirs, viz., her five children, Ensign H. Coombs, Charles S. Coombs, Ada A. Coombs, Eva M. Williams and Alfred R. Douglass. The mortgage to the defendant was paid by the heirs in August, 1891. April 17th, 1890, two of the heirs, Charles S. Coombs and Alfred Douglass, conveyed their shares in the property to Eva M. Williams, in trust for Ada A. Coombs, who was a confirmed invalid, with power to mortgage, sell and convey the same, whenever the trustee deemed it necessary for the maintenance and support of the said Ada. Eva M. Williams then owned one-fifth in her own right, two-fifths in trust for her sister, and the sister owned one-fifth in her own right. August 19, 1891, Ada A. Coombs and Eva M. Williams, the latter both as trustee and in her own right, mortgaged the four-fifths owned by them to Frederick H. Daniels, to secure the sum of eight hundred and seventy-five dollars, and on August 16th, 1892, this mortgage was assigned to Charles F. Williams, the husband of Eva M. Williams and the son of the complainant. December 1, 1892, Ada A. Coombs and Eva M. Williams conveyed their shares in the property to Charles F. Williams, who on the same day conveyed the same to his mother, the complainant. Thus she acquired the legal title to four-fifths of the property.

It is claimed that the complainant, although she did not have the legal title, was the equitable owner of four-fifths of the property, and that in equity this should entitle her to the same

right of contribution as if she had been the legal owner of an undivided portion of the premises. Upon this claim the master's finding, is as follows: "The plaintiff claimed, and I find that in August, 1892, it was arranged between the owners of four-fifths of the property and the plaintiff that she should advance the money for the Frederick H. Daniels mortgage, and in consideration of that and of the support of the invalid sister, Ada A. Coombs, they would sell and convey their share in the property to her, the plaintiff; and that this arrangement was consummated and their part sold to the plaintiff, August 16th, 1892, when she paid the Daniels mortgage, which was assigned to said C. F. Williams, acting for her; that they intended to give her a deed of it at the same time, August 16th, 1892; but the deed was not executed till December 1st, 1892."

According to this finding, the complainant had become the owner in fact, although not in law, prior to the expenditures in October and November, 1892. The bargain had been completed, the terms agreed upon, she had gone into possession of the premises, and everything had been done to give her the legal as well as the equitable title, except that the deed had not been passed.

It is a fundamental rule in equity that what ought to be done is considered as done. *Ricker* v. *Moore*, 77 Maine, 292.

It is the opinion of the court, that no distinction should be made in this respect between one who has the legal title and one who is in fact a part owner and in possession of the premises at the time of the expenditures, and subsequently acquires the legal title.

It is further urged by the counsel for the defendant that this prayer of the bill should not be granted because such relief is only granted by chancery courts when the person of whom contribution is claimed has commenced the proceedings in equity asking for partition or other affirmative relief; and also because of the fact, as found by the master, that "no notice was given the defendant that such repairs were to be made, nor was he consulted in reference to them while they were being made, and he had no knowledge that those or any other repairs were to be

made till they were begun; and he then went to said C. F. Williams, the plaintiff's agent, in charge of the premises for her, and forbid his putting any repairs upon the premises or doing anything to them."

But it appears that these premises have been rented at one hundred and seventy-five dollars per year since August 16th, 1892, and the rent collected, or that it could have been collected by the complainant. The defendant alleges in his answer that the complainant is now and for a long time has been in the exclusive possession of the premises, receiving all the rents and income thereof, and he asks that she should account for such rents and profits and pay him his proportional part of the same.

She should be charged with all the rents received, but it would be inequitable to compel her to account for the rents received and not to allow her to credit herself with the sums expended in making necessary repairs, which have made the house rentable and income-paying. The master finds: "Plaintiff claimed, and I find, that the buildings were badly out of repair; that it was necessary to repair them in order to preserve them and render them suitable for such tenants as would rent premises so situated."

Courts have sometimes refused to compel contribution for improvements made, but have allowed the person in possession to retain the rents received by reason of such improvements. We think the most equitable method in this case is to charge her with the full amount of rents received and to credit her with such sums as have been expended in making necessary repairs. The request of the defendant in his answer, for an accounting and payment to him of his proportional part of the rents and profits received, is equivalent, for this purpose, to the commencement of proceedings asking for affirmative relief.

But inasmuch as these repairs were made without notice to the defendant or consultation with him, we think that she should be limited to the amount of rents in her hands and with which she is chargeable, that she may be allowed to reimburse herself out of rents collected for the necessary repairs, but that the defendant should not be compelled to contribute any further sum.

The item of taxes paid by her, should stand upon the same ground. A tax of fifty-one dollars and seventy-three cents was was assessed upon the whole property for the year 1892; she paid this tax October 7th, of that year. At that time she was in exclusive possession of the premises, and had been for some months, receiving all the rents. We think she should be allowed to reimburse herself for this sum out of the rents collected; to offset this item, with the sums expended for her repairs, against the sums received by her, but that no further contribution should be compelled. This is not creating a lien upon the property as was asked and refused in *Preston* v. *Wright*, 81 Maine, 306.

A receiver should be appointed at nisi prius, or upon a rule day to make sale of the property under such directions as may be given at the time of the appointment. The complainant is to be charged with all rents and profits collected by her or which should be collected, up to the time of the sale, and she is to be credited with all sums expended by her for necessary repairs and taxes in accordance with the master's report. If the amount with which she is to be charged is not equal to the amount with which she is to be credited, the defendant is not to be required to contribute any further sum. If the amount with which she is to be charged exceeds the amount with which she is to be credited, she shall pay to the defendant his proportional part thereof, or the same may be adjusted by the receiver in the distribution of the proceeds of the sale. The account stated by the master, in his report, is up to March 8th, 1894. If the parties cannot agree upon the items accruing subsequent to that date, it will be necessary for the master to have a further hearing and make a supplemental report. We think that no costs should be allowed either party.

Decree accordingly.

SAMUEL AND BENJAMIN F. ELDRIDGE, in equity,

vs.

DEXTER AND PISCATAQUIS RAILROAD COMPANY.

Penobscot. Opinion June 21, 1895.

Deed. Cancellation. Equity.

If a party can read, it is not open to him, after executing a deed, to insist that the terms of it were different from what he supposed them to be when he signed it.

If equity will ever relieve one who has entered into a transaction under a misapprehension of its effect, when the other party merely failed to correct such misapprehension, there being no such peculiar relations between the parties as to place the one who remains silent under any unusual obligation, the principle is well settled that such party who remains silent must himself have appreciated the legal effect of the transaction and must have known that the other was acting in ignorance of such effect.

ON REPORT.

Bill in equity, heard on bill, answers and proofs, praying for cancellation of a deed granting a right of way to the defendant railroad in Dexter, Penobscot county, so that the plaintiffs might recover damages for their land so taken.

J. and J. W. Crosby, for plaintiffs.

J. B. Peaks, for defendant.

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

EMERY, J., did not sit.

WISWELL, J. In February, 1889, the complainants conveyed to the defendant corporation a small strip of land, upon which the defendant's road-bed, for a short distance, has since been built. The consideration named in the deed was one dollar; there was no actual consideration, the conveyance was voluntary. The land conveyed was of trifling value, worth from ten to twenty-five dollars.

At the time of this conveyance, the complainants owned and still own other real estate, adjoining the land conveyed, upon

which there is a dwelling-house within a few feet of the railroad, and which they allege has been greatly injured by its proximity to the railroad, by reason of the noise, smoke and dirt resulting in the operation of the road; and also because in the construction of the road-bed, it became necessary to build an embankment which has darkened and in other ways injured the house.

The complainants allege, in effect, that this deed was executed by them without knowing its contents, that it was neither read to nor by them, and that the description includes more land than they intended to convey; that they were induced to make this conveyance by reason of false and fraudulent representations, although perhaps not intentionally false or fraudulent; and, upon this they more especially rely, that the complainants were entirely ignorant that the conveyance would in any way affect their right to claim and recover compensation for the injury to their remaining property; that the directors of the corporation, who procured a conveyance, were aware of the legal effect of the conveyance upon the complainant's right to recover for injuries to the remaining property, and were aware of the misapprehension of the complainants in this respect, but that they utterly failed to give them any information upon this subject and to correct their misapprehension. They therefore ask this court to cancel the deed and to declare it void.

No great reliance is placed upon the allegation that the deed was executed without being read. The deed was left with one of the complainants to procure the signature of the other. If it was not read by them, it was their own fault. They were not misled in any way as to its contents.

These complainants are men of intelligence; they were willing to make a voluntary conveyance to the railroad company, of the small piece of land needed, because of the advantages that they expected to derive from the extension of the railroad from Dexter to Foxcroft; they knew that they were making a conveyance, and would undoubtedly have been just as willing to give the lot actually described in the deed as the somewhat smaller one that they say they intended to convey.

But in any event, this is no ground for equitable relief, either affirmative or defensive.

"If a party can read, it is not open to him, after executing it, to insist that the terms of the deed were different from what he supposed them to be when he signed it. Nor could one who is unable to read, be admitted to object that he was misled in signing the deed, unless he had requested to hear it read, and this had not been done, or a false reading had been made to him or its contents falsely stated." *Metcalf* v. *Metcalf*, 85 Maine, 473.

The evidence utterly fails to show any such fraudulent representations or concealment of material facts, made by the committee of the directors who were engaged in settling land damages, either intentional or otherwise, as would warrant this court, upon any principle of equity, in granting the relief asked for.

This brings us to the next question, whether the ignorance of the complainants, of the effect of the transaction upon their claim for damages for injuries to their remaining property, will entitle them to the relief prayed for. There has been much conflict of authority as to when and under what circumstances ignorance of the law is a cause for equitable relief. But the general rules which have governed courts in granting equitable relief, because of a misapprehension of the legal effect of a transaction, are nowhere more clearly and satisfactorily stated than in Pomeroy's Equity Jurisprudence. We quote from section 843: "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knew or had an opportunity to know the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning

and effect of the whole or any of its provisions. Where the parties with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescission although one of the parties, and as many cases hold both of them, may have mistaken or misconceived its legal meaning, scope and effect."

In this case, the evidence does not disclose that there were any elements of fraud or other inequitable conduct upon the part of the persons representing the defendant corporation in the transaction. The testimony of the complainant, who met the directors and agreed to the conveyance, in regard to the interview is as follows: "The whole talk made to me, as I recollect it, was made by Mr. Geo. A. Abbott. He had a sketch in his hand with just two straight lines showing the little heater-piece that perhaps they would want to run across." He says: "If we buy Mrs. Horton's property we probably shouldn't touch your land at all. In case we don't buy that we probably should want to run across this little piece which he had the sketch of." He says: "We have been down talking with N. Dustin & Co. about their damages and they were not going to claim any. The remark that I made was that 'we don't want to be meaner than Dustin's folks are;' that is all the conversation that took place at that time that I remember. I assented to that and Mr. Straw went to writing the deed. Then I left the room. We were not to have any damages. Mr. Straw was present during all the time of this negotiation."

But it is further urged that if even there were no representations made by the directors, which induced the misapprehension upon the part of the complainants of the effect of the transaction, that their mere silence was inequitable and that it would be unconscionable to allow the defendant to profit by this conveyance.

If it is true that equity will relieve one who has entered into a transaction under a misapprehension of its effect, when the

other party merely failed to correct such a misapprehension, there being no such peculiar relations between the parties as to place the one who remains silent, under an unusual obligation, the principle is well settled, that such party must himself have appreciated the legal effect of the transaction, and must have known that the other was acting in ignorance of such effect. This does not appear in the case under consideration. The interview between the parties was extremely brief, and there is no evidence, from which it may be fairly inferred, that the directors knew that there was any ignorance or misapprehension upon the part of the complainants of the legal effect of the conveyance, or that the directors themselves gave this matter any consideration whatever.

The relief prayed for, therefore, cannot be granted and the bill must be dismissed. But the corporation has received some benefit from the conveyance, and we think that, under all the circumstances, it would be equitable that no costs for the defendant should be allowed.

The decree will be,

Bill dismissed, no costs.

STATE *vs.* CHARLES LYNCH.

Knox. Opinion June 21, 1895.

Indictment. Pleading. Dangerous Weapon. R. S., c. 118, § 25.

It is sufficient if the words used in an indictment to charge the commission of a statutory offense are more than the equivalent of the words of the statute, provided they include the full significations of the statutory words.

An indictment alleged that the respondent made an assault upon one McRae, "with a deadly weapon to wit, a loaded revolver in his right hand he the said Charles Lynch then and there had and held, did make an assault with an intention him the said Daniel A. McRae then and there with a loaded revolver aforesaid feloniously wilfully and of his malice aforethought to kill and murder against the peace of said state and contrary to the form of the statute in such case made and provided."

Held; that the offense specified in R. S., c. 118, § 25, viz: "an assault, armed with a dangerous weapon with intent to kill and murder," was set out with sufficient certainty.

ON EXCEPTIONS.

The case appears in the opinion.

B. K. Kalloch, County Attorney, for State.

William H. Fogler, *A. A. Beaton*, *and R. R. Ulmer*, for defendant.

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

WISWELL, J. The respondent demurred generally to an indictment, in which the offense is set out as follows: "That Charles Lynch of Vinal Haven in the county of Knox on the twenty-fifth day of November now last past with force and arms at Vinal Haven aforesaid in the county of Knox aforesaid in and upon one Daniel A. McRae in the peace of the State then and there being to-wit at his post of duty in the engine room of the steamer Governor Bodwell then and there being in the body of the county of Knox aforesaid making a landing at the wharf in Vinal Haven aforesaid in the county of Knox aforesaid upon the said Daniel A. McRae with a deadly weapon, to-wit a loaded revolver in his right hand he the said Charles Lynch then and there had and held did make an assault with an intention him the said Daniel A. McRae then and there with the loaded revolver aforesaid feloniously wilfully and of his malice aforethought to kill and murder against the peace of said State and contrary to the form of the statute in such case made and provided."

This is an exact copy, including punctuation, of so much of the indictment as is quoted. The demurrer was overruled and exceptions taken.

The language of the indictment is somewhat confused and there are unnecessary allegations, but the question is whether the accusation is set forth with sufficient particularity and certainty to inform the accused of the offense with which he is charged, and to enable the court to see, without going out of the record, what crime has been committed, if the facts alleged are true.

It is also necessary that the indictment should employ "so

many of the substantial words of the statute as will enable the court to see on what one it is framed; and, beyond this, it must use all the other words which are essential to a complete description of the offense; or, if the pleader chooses, words which are their equivalents in meaning; or, if again he chooses, words which are more than their equivalents, provided they include the full significations of the statutory words, not otherwise." Bishop on Criminal Procedure, vol. 1, § 612.

In *State* v. *Hussey*, 60 Maine, 410, it is said: "An indictment should charge an offense in the words of the statute or in language equivalent thereto." In that case the language used was not equivalent to the statutory words, nor did it have a broader meaning, including the significations of the words of the statute.

We think it is sufficient if the words used in the indictment are more than the equivalent of the words of the statute, "provided they include the full significations of the statutory words."

This indictment, is said by the prosecuting attorney, to have been drawn under R. S., c. 118, § 25, which is as follows: "Whoever assaults another with intent to murder, kill, maim, rob, steal, or to commit arson or burglary, if armed with a dangerous weapon, shall be punished by an imprisonment for not less than one, nor more than twenty years; when not so armed, by imprisonment for not more than ten years, or by fine not exceeding one thousand dollars."

We will separately consider the objections to the indictment raised by the counsel for the respondent.

The statute makes it an aggravation and provides a more severe punishment, if the person making the assault is, "armed with a dangerous weapon." The indictment alleges that the assault was made with a "*deadly* weapon, to-wit, a loaded revolver in his right hand he the said Charles Lynch then and there had and held."

While *deadly* and *dangerous* are not equivalents, deadly is more than the equivalent and includes the full signification of the statute word. A dangerous weapon may possibly not be

deadly, but a deadly weapon, one which is capable of causing death, must be dangerous.

The indictment does not use the word of the statute "armed." But it alleges that the assault was made with a deadly weapon, "to-wit, a loaded revolver in his right hand he the said Charles Lynch then and there had and held." If an indictment alleges that an assault is made with a dangerous or deadly weapon which, the person making the assault, had and held in his hand, it is equivalent to an allegation that he was armed with such a weapon. "Armed" means furnished or equipped with weapons of offense or defense. A person who has in his hand a dangerous weapon with which he makes an assault, is certainly "armed" within the meaning of the statute.

The indictment uses the words "with an intention," instead of the statutory words "with intent." The language of the indictment, in this respect, is exactly equivalent to the words of the statute.

The form of pleading adopted in this indictment is not to be commended. It is always advisable to follow the forms which have received judicial approval, or which have long been in unquestioned use. It is also much safer to employ the words of the statute than those about which a question may arise. But the indictment in this case, although not free from criticism, has set out with sufficient certainty the offense specified in R. S., c. 118, § 25, viz.: an assault, armed with a dangerous weapon, with intent to kill and murder.

Exceptions overruled.

PETER GILROY, Petitioner to be admitted to Citizenship.

Androscoggin. Opinion June 24, 1895.

Naturalization. Lewiston Municipal Court. Jurisdiction. Const. of U. S. Art. I, § VIII; R. S., of U. S. § 2165; Stat. 1893, c. 310.

There is no provision of the Federal Constitution which requires the courts or judges of a State to perform any duties respecting the admission of aliens to citizenship.

Such courts and magistrates may, if they choose, exercise the power conferred upon them by Congress, unless prohibited by state legislation. But this is a naked power, and imposes no legal obligations on the courts to assume and exercise them.

Chapter 310, Laws of 1893, which prohibits any court established by this State, other than the Supreme Judicial and Superior Courts, from entertaining any jurisdiction over the naturalization of aliens is not in violation of any provision of the constitution of the United States.

ON EXCEPTIONS.

The case appears in the opinion.

D. J. McGillicuddy and F. A. Morey, for petitioner.

Counsel argued that the State cannot by legislation take from the Lewiston Municipal Court its power of naturalizing foreigners, and that the court is one of common-law jurisdiction. *Dean, Pet'r*, 83 Maine, 489.

It is one of the courts to which Congress said an alien might make application for admission to citizenship. If the State creates a court, as it has done in this case, which fully answers all the requirements of the United States statutes, then an alien has the right to apply to such a court for naturalization.

"State courts in admitting aliens to citizenship under naturalization laws act as United States courts." *Matter of Christern*, 43 N. Y. Superior Court, 523.

It has been decided that Congress could confer this power of naturalization upon State courts.

In Am. and Eng. Ency. Vol. 6, p. 267,—Note reads as follows:—

"While in principle it might be considered doubtful whether Congress would confer any judicial power on the State Courts,

yet the power to naturalize has been expressly upheld in *State* v. *Penney*, 10 Arkansas, 621, and it is probable that this view would be taken by all the courts to avert the results which would follow a contrary decision." Congress has the sole power of enacting naturalization laws and no State can pass any law to confer citizenship of the United States. *Chirac* v. *Chirac*, 2 Wheat. 269.

How then can the Legislature of this State pass any law affecting the naturalization of aliens when Congress has reserved to itself the power of making all naturalization laws?

The United States passes this uniform rule and imposes upon the courts of the various States, that are possessed of common-law jurisdiction, etc., the duty of naturalizing persons. When admitted to citizenship it is true the alien becomes a citizen of the United States, but he exercises all of the powers of citizenship in the immediate portion of the State in which he happens to reside and the benefit of his becoming a citizen inures more to the State than to the United States. The State, really, has all of the benefit of his becoming a citizen.

The law of the United States acts directly upon the judge of the Lewiston Municipal Court, together with all judges of this State.

The United States claim certain rights directly of the judiciary of the several States notwithstanding they are State officers. The United States had the right to require the Judge of the Lewiston Municipal Court to enforce, to a certain degree, its laws, notwithstanding he is appointed by the Governor of this State and paid out of the treasury of the State.

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

WISWELL, J. An alien applied to the Lewiston Municipal Court, at its July Term, 1894, to be admitted to become a citizen of the United States. The Judge of the Court declined to entertain the application and dismissed it on the ground that by virtue of Chap. 310 of the Laws of 1893, that court no longer

had any jurisdiction of naturalization cases. The applicant excepted to this ruling.

By the Constitution of the United States, Article I, Sec. VIII, it is provided that Congress shall have power, "To establish an uniform rule of naturalization."

Congress has enacted that an alien making application for citizenship shall make a declaration on oath, "before a Circuit or District Court of the United States, or a District or Supreme Court of the Territories, or a Court of Record of any of the States having common-law jurisdiction and a seal and clerk." And that he may be admitted to become a citizen by "some one of the courts above specified." R. S., of the United States, § 2165.

Assuming that the Lewiston Municipal Court is a court of record having common-law jurisdiction and a seal and a clerk, within the meaning of the statute referred to, the question is presented whether the act of the Legislature, approved March 29th, 1893, is in violation of or contrary to any provision of the federal constitution. That act provides that the Supreme Judicial and Superior Courts shall respectively have jurisdiction of applications for naturalization, but that no other court established by the State shall entertain any primary or final declaration or application made by, or in behalf of, an alien to become a citizen of the United States, or entertain jurisdiction of the naturalization of aliens. Chap. 310, Laws of 1893.

There is no provision of the federal constitution which requires the courts or judges of a State to perform any duties respecting the admission of aliens to citizenship. It is well established that such courts and magistrates may, if they choose, exercise the power conferred upon them by Congress, unless prohibited by state legislation. *Prigg* v. *Pennsylvania*, 16 Peters, 622. But this is a naked power, and imposes no legal obligations on the courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the constitution of the United States. *Stephens, Petitioner*, 4 Gray, 559.

The Massachusetts Legislature, in 1855, enacted a statute prohibiting any court of the State from receiving or entertaining any primary or final declaration or application of an alien to

become a citizen of the United States, or to entertain jurisdiction for the naturalization of aliens. It was held in the case of *Stephens, Petitioner*, supra, that this statute was not contrary to the Constitution of the United States.

The ruling of the Judge of the Municipal Court was correct.

Exceptions overruled.

CHARLES M. DU PUY

vs.

THE STANDARD MINERAL COMPANY, and others.

Sagadahoc. Opinion June 25, 1895.

Trust. Jurisdiction in rem. Non-resident Parties.

Where real estate situated in this State has been conveyed by deed in trust, *held*, that the trust is within the equity jurisdiction of this court and may be dealt with regardless of the residence of the parties in interest. When the trustee under the conveyance voluntarily submits himself to the jurisdiction of the court, both the res and the title to it are in court.

Whether a bill in such case will be sustained and relief given is a matter of discretion to be considered at the hearing of the parties in the court below; but the jurisdiction of the court is well settled, and its jurisdiction of the res enables the court to execute its own decrees by sale or other apt methods.

ON EXCEPTIONS.

Bill in equity, praying that the plaintiff might be discharged as trustee in a certain trust deed and for the appointment of a new trustee.

The bill having been dismissed in the court below, for want of jurisdiction on the ground that the trust was created outside the State, and none of the parties interested being citizens or inhabitants of the State, the plaintiff took exceptions to the decree dismissing the bill.

The plaintiff filed his bill of complaint on September 24, 1894, and having proved to the satisfaction of the court that all of the defendants reside out of the State of Maine, but within the United States and east of the Mississippi river, the court made an order on the 12th day of October, 1894, requiring the defendants to appear and answer the bill within one month

from the rule day next succeeding the date of said order, to wit, within one month from the 6th day of November next succeeding the date of said order, and directing that service of said order be made upon the defendants by publication three times in different weeks within thirty days in the Bath Enterprise, a newspaper published within the county of Sagadahoc.

The plaintiff on the 8th day of December, 1894, filed a motion in writing that the bill be taken pro confesso. On the 5th day of January, 1895, this cause duly came on to be heard and was argued by counsel, and it was proven to the satisfaction of the court that the plaintiff was a citizen of the State of New York, and that service of said order had been made by publication as therein directed and that none of the defendants had appeared or had interposed any answer, plea or demurrer to the bill, but that the defendants, Daniel H. Bacon and Frank E. Thompson, had by their petition duly acknowledged and presented to the court, joined in the prayer of the bill of complaint, and requested the court to appoint Edward Sturges Hosmer, Esquire, of the city of New York, in the place of the plaintiff, as trustee of the trust set forth in the bill of complaint, and that the plaintiff and the said Daniel H. Bacon and the said Frank E. Thompson had by an instrument in writing, duly acknowledged, waived their right to security for the due execution of the said trust, as to their respective interests, aggregating seven hundred and ninety-two one-thousandths, in case the said Edward Sturges Hosmer were appointed as such trustee, and that a bond in the sum of three thousand one hundred and twenty dollars will be adequate protection to the other beneficiaries for the due execution of the trust as to their remaining interest of two hundred and eight one-thousandths; thereupon, after due consideration, and after reading the said bill and the order of publication and proof of compliance therewith, and the petition of Daniel H. Bacon and Frank E. Thompson, and the affidavits of Brainard Tolles and Charles M. Du Puy, and the waiver of security above recited, it was —

Ordered, adjudged and decreed: That the bill be dismissed for lack of jurisdiction, on the ground that the trust was created

outside of the State of Maine, and none of the parties interested therein, or in this suit, are citizens or inhabitants of the State of Maine.

Some of the principal portions of the plaintiff's bill are as follows:

"First. On or about the eighth day of August, 1889, the defendant, the Standard Mineral Company, being then seized in fee simple absolute of two certain lots, pieces or parcels of land situate in the town of Georgetown, county of Sagadahoc and State of Maine, . . . did convey the said two lots, pieces and parcels of land to your orator, by the execution and delivery of the deed aforesaid, in trust nevertheless: (1) To hold and keep the same until such time as your orator should sell the same, as in said deed provided; (2) to sell the same at such time and place and in such manner as to your orator might seem best, either at public or private sale, for such sum of money as to your orator might seem best, and (3) to apply the proceeds over and above all lawful costs and expenses incurred in the administration of the trust, as follows: To keep and apply to the individual use of your orator five hundred and three one-thousandths of the net proceeds of said sale; to pay to Daniel H. Bacon, one hundred and sixty one-thousandths of said proceeds; to pay to Frank E. Thompson one hundred and twenty-nine one-thousandths of said proceeds; to pay to I. W. Shuttuck eleven one-thousandths of said proceeds; to pay to A. E. Sumner one hundred and ten one-thousandths of said proceeds; to pay to Elizabeth Little thirty-two one thousandths of said proceeds, and to pay to Orvillus H. Gilbert fifty-five one-thousandths of said proceeds, the terms and conditions of which trust being more fully set forth in the aforesaid deed. . . .

"Second. Since the delivery of said deed your orator has acquired a lien by way of mortgage upon the share or interest in said proceeds set apart to Daniel H. Bacon and to Frank E. Thompson, to secure payment of two several promissory notes in the aggregate sum of seven thousand five hundred dollars, which are both due and unpaid. Since the delivery of

said deed the aforesaid Elizabeth A. Little has intermarried with the aforesaid I. W. Shuttuck and is now the defendant Elizabeth A. Shuttuck. Since the delivery of said deed the said I. W. Shuttuck has died and letters of administration of all the goods, chattels and credits which were of his estate have been duly granted by the Surrogate of the County of New York, in the State of New York, where the said I. W. Shuttuck was residing at the time of his death, to the defendant Elizabeth A. Shuttuck. The defendant Anna M. Clayton claims to have derived some right or title to the share or interest in said proceeds set apart to A. E. Sumner, since the delivery of said deed, but as to the nature of the right or title, if any, of said defendant to the said part or share, your orator is not informed and makes no allegation.

"Third. Notwithstanding diligent effort to sell the said lands, your orator has not been able to find a purchaser therefor at private sale, at a fair and reasonable price, or at any price. The said lands are now subject to liens for unpaid taxes for the years 1891, 1892 and 1893. In order to avoid a total loss of the lands, the best interest of all the beneficiaries of the said trust requires that the said lands be sold at public sale as soon as possible. Such sale cannot be made by your orator without danger of sacrificing both his own interest and that of the other beneficiaries, for the reason that none of the other beneficiaries are willing to purchase the said lands at a fair and reasonable price or at any price, and your orator upon such public sale would be incompetent, as trustee, to bid for or to purchase the said lands even though such course should be necessary to protect his beneficial interest in the trust estate, and his lien upon the interests of the defendants Daniel H. Bacon and Frank E. Thompson.

"Fourth. The said lands are vacant and uncultivated and valuable only for quarry purposes, and your orator has derived no profit or income therefrom, and has permitted no waste to be committed in respect thereto, and has not conveyed or encumbered the same, or any part thereof.

"Wherefore, your orator prays to be discharged from his

office of trustee, and that a new trustee be appointed by this court, and that the aid and direction of the court be given to such new trustee in the execution of the trust set forth in the aforesaid deed of conveyance, and that such new trustee be instructed to sell the lands aforesaid with all convenient speed and to distribute the proceeds thereof to the persons respectively entitled thereto, and that your orator may have, generally, such other and further relief as the circumstances and nature of the case may require," etc.

Francis Adams and Nathan Coombs, for plaintiff.

Brainard Tolles, of the New York bar, filed a brief and argued:

(1) That the judgment denying relief to the plaintiff because he is a citizen of New York and not of Maine is contrary to the second section of Article Fourth of the Constitution of the United States which provides, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

(2) That the judgment is contrary to the law of the State of Maine because,

(*a*) The controversy is one which the judicial power of the State of Maine is competent to determine, inasmuch as it relates to the title to lands within the State.

(*b*) All the judicial power which the State of Maine has over such controversies has been conferred on this court by R. S., chap. 68, § 5.

All essential elements of jurisdiction are present, and an effectual decree can be made and enforced so as to do justice between the parties. *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 429; *Merrill* v. *Curtis*, 57 Maine, 154; *Ward* v. *Arredondo*, Hop. Ch. 213.

(3) Proceeding in rem: *Pennoyer* v. *Neff*, 95 U. S. 714; *Arndt* v. *Griggs*, 134 U. S. 329; *Single* v. *Scott Paper Co.* 134 U. S. 117.

The judgment now sought is in rem and not one in personam against any of the defendants.

(*a*) It is not sought to require the defendants to do or to

refrain from doing any act. It is not sought to impose any personal liability or obligation upon them.

(*b*) It is not a judgment capable of enforcement outside the limits of the State. Affecting as it does the title to real estate here situated, the only way in which it can ever be directly enforced will be when some controversy arises over the possession of the land. Then the right to possession will be enforced according to the title created by the decree. Manifestly this is a matter exclusively for the local executive power. No other State could reach within the borders of Maine and enforce a judgment affecting the title or possession of land within this State.

(*c*) The court has power to make a decree operating directly upon the title to the land, and not needing the execution of a conveyance to make it effectual. Of course, as a matter of practice, in all ordinary cases, a conveyance would be made. But the title would pass, not by force of the conveyance, but by force of the decree. See *Kenady* v. *Edwards*, 134 U. S. 117, overruling in part *Greenleaf* v. *Queen*, 1 Pet. 139, upon which a dictum, contrary to the case cited, was based in *Matter of Abbott*, 55 Maine, 580; *Bradstreet* v. *Butterfield*, 129 Mass. 339; *Attorney General* v. *Barbour*, 121 Mass. 568; *Bliss* v. *Bradford*, 1 Gray, 407; *Pillsbury* v. *E. & N. A. R. Co.* 69 Maine, 394.

(4) Jurisdiction over actions in rem, respecting Maine real estate is perfect and exclusive:

(*a*) The regulation of titles to Maine real estate is governed by the laws of this State, and upon the courts of this State ought to fall, in the first instance, the duty of declaring and applying those laws.

(*b*) This State has a primary interest in the possession, development and use of lands situated within its borders, and ought not to permit the same to be tied up and rendered unproductive through the lack of legal remedies for complications of the title.

(*c*) The executive power of this State is alone able to enforce decrees affecting the title to lands within the State.

(*d*) This State is the only one to which non-resident beneficiaries would naturally look to receive notice of proceedings affecting the title to lands here situated. Too heavy a burden would be laid upon them if they were required to read all the newspapers published in all the states of the Union, at the peril of being held bound by a publication made in Florida or Montana. *Arndt* v. *Griggs*, supra; *Williams* v. *Maus*, 6 Watts, 278; *Bowditch* v. *Banuelos*, 1 Gray, 220; *Eaton* v. *McCall*, 86 Maine, 348; *Lynde* v. *C. C. & I. C. R. Co.* 57 Fed. Rep. 993; *Farmers L. & T. Co.* v. *Postal Tel. Co.* 55 Conn. 334; *Pitts, &c. R. Co.'s Appeal*, 4 Cent. Rep. 110; *Knox* v. *Jones*, 47 N. Y. 395; *Butler* v. *Green*, 19 N. Y. (Super.) 890; 1 Pom. Eq. § 298; *People* v. *Am. L. & T. Co.* 43 N. Y. St. Rep. 332.

In considering the assertion that the jurisdiction of the courts of this State to remove and discharge trustees of lands in this State, and to appoint their successors, is exclusive as well as complete, regard should be had to the distinction between the relief granted in such cases and that which consists merely in an enforcement of the provisions of the contract out of which the trust arose, as, for example, in actions to compel the performance of duties appertaining to the trust, or actions for an accounting. In the latter class of cases the court has to do merely with personal duties and obligations. The title to the trust estate is not affected, and all the terms and conditions of the trust remain unaltered.

Non-residence of defendants no obstacle to jurisdiction. *Inhabitants of Anson*, &c., 85 Maine, 79.

The authorities sustain the proposition that the notification of beneficiaries, in proceedings to remove or discharge trustees, is a matter of local law and is not a condition precedent to the exercise of jurisdiction. Any State, if it sees fit, may dispense with it altogether, and decrees rendered without notice to the beneficiaries will be valid, where the court has jurisdiction over the trustee and over the corpus of the trust estate.

This was expressly determined by the Supreme Court of the United States in the long contested litigation which successive-

ly appeared before that tribunal under the titles: *Williamson* v. *Berry*, 8 How. 495; *Suydam* v. *Williamson*, 24 How. 433; *Williamson* v. *Suydam*, 6 Wall. 738. This is a cause celebre in respect to the power of a state over real property within its borders. It was finally determined in favor of the claim of authority on the part of the State, the Supreme Court reversing itself in order to follow the decision of the local tribunal. *Matter of Robinson*, 37 N. Y. 261; *Nicoll* v. *Boyd*, 90 N. Y. 516; *De Peyster* v. *Beekman*, 55 How. Prac. 92; *Estate of Brick*, 9 Civ. Prac. 400; *Tompkins* v. *Moseman*, 5 Redf. 402; *Chase* v. *Chase*, 2 Allen, 101; *Short* v. *Caldwell*, 155 Mass. 57; *Felch* v. *Hooper*, 119 Mass. 52.

Even conceding that some notice to beneficiaries is necessary, it is evident that this power of giving notice by publication to non-residents is one which it is absolutely necessary for the courts of this State to possess. Without it, titles might be tied up by interminable complications, for which the courts would have no power to give relief. The unexpected inability of a trustee to act might result in valuable lands lying idle, employing none of the industry of the State and contributing nothing to its wealth and prosperity.

Non-residence of plaintiff no obstacle to jurisdiction. *Loaiza* v. *Superior Court*, 85 Cal. 11; *Sentenis* v. *Ladew*, 140 N. Y. 463; *Cole* v. *Cunningham*, 133 U. S. 107; *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Barrell* v. *Benjamin*, 15 Mass. 354; *Cofrode* v. *Gartner*, 79 Mich. 332.

The situation actually existing is this: The court has jurisdiction of the land; it has also personal jurisdiction of the trustee and of the holders of seven hundred and ninety-two one-thousandths of the beneficial interest. The holders of two hundred and eight one-thousandths of the beneficial interest have been served by publication and have not appeared. The court has power to appoint a new trustee and to confer upon him a good title to the trust estate. It is for the interest of the State and in accord with public policy that this power should be

exercised. If this court does not intervene the parties are remediless and both plaintiff and defendants must suffer loss. The relief demanded is one which would be instantly accorded to a citizen of Maine, and Maine is bound by solemn compact with her sister State, New York, to accord to the citizens of the latter all the privileges and immunities which she grants to her own citizens.

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

HASKELL, J. The real estate mentioned in the bill is situated in the county of Sagadahoc, and was conveyed to the plaintiff, by deed, in trust for specific purposes therein named. This trust is within our jurisdiction, and may be dealt with regardless of the residence of the parties in interest. The plaintiff is the trustee and voluntarily submits himself to the jurisdiction of the court, so that both the res and the title to it are in court. Whether the bill shall be sustained and relief given is a matter of discretion to be considered below; but the power is settled beyond question, as the authorities cited at the bar clearly signify.

The early doctrine laid down by some writers that the remedy in equity is purely personal, and that, as decrees in equity never execute themselves, it is necessary to have jurisdiction of the person in order to make decrees effectual, does not hold true in all cases and has been very generally discarded, inasmuch as jurisdiction of the res enables the court to execute its own decrees touching it by empowering an officer of the court to transfer titles, even to real estate, by sale or other apt methods, so that the equitable interests of all concerned may be preserved and the property applied, or distribution of the assets made, as the respective interests therein may require.

Since the doctrine alluded to obtained, equitable interests have multiplied in the shape of liens, created by law, and of resulting trusts, and from many other methods of business that the commercial world has adopted and engrafted upon the strict

rules of the common law; so that it has become imperative that jurisdiction of the res should be sufficient to give adequate relief in all matters where equitable interests have attached. Of course, this jurisdiction must be exercised with great prudence, and only where the court is satisfied that absent parties have knowledge of the proceeding and have had ample opportunity to intervene and protect their rights.

In this cause, the res is within the jurisdiction of the court, and whether the relief sought should be given is a consideration to be determined below after a careful review of all the rights and interests involved, so that sound equity may be done.

Exceptions sustained. Bill retained for hearing.

ALFRED L. STILPHEN *vs.* RALPH R. ULMER, and another.

Kennebec. Opinion June 29, 1895.

Trial Justice. Jurisdiction. Fish and Game. Stat. 1891, c. 95, §§ 16, 18.

The statute of 1891, c. 95, authorizing the recovery of penalties by complaint for violations of the fish and game laws directs that such prosecutions may be commenced in any county in which the offender may be found, or in any neighboring county. *Held;* that a trial justice in Knox county has no jurisdiction of such a complaint, under the statute, for an offense committed in Kennebec county, the offender not being found in Knox county.

ON REPORT.

This was an action of trespass for false imprisonment against the defendant Ulmer, of Rockland, county of Knox, a trial justice, and John L. Thompson, of Newcastle, county of Lincoln, a game and fish warden.

June 3, 1893, the plaintiff, a resident of Pittston, in Kennebec county, was arrested at his home by the defendant Thompson on a warrant issued by the defendant Ulmer at Rockland, on the preceding day, upon Thompson's complaint for maintaining an illegal fish-weir in Dresden, Lincoln county, extending into Eastern river. The plaintiff was taken to Rockland upon this process, found guilty and sentenced to pay a fine of fifty dollars and costs taxed at twenty dollars and forty-six cents, which he

paid and was thereupon discharged. The statute, 1891, c. 95, § 18, under which the defendants justified is as follows: "Sec. 18. Officers authorized to enforce the fish and game laws, and all other persons, may recover the penalties for the violation thereof in an action on the case in their own names, or by complaint, or indictment in the name of the State; and such prosecution may be commenced in any county in which the offender may be found, or in any neghboring county."

The defendants further relied, in their argument, on the stat. 1885, c. 285; and the defendant Thompson, as a warden, on R. S., c. 40, § 40.

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

The trial justice in Knox county had no jurisdiction by statute over this plaintiff, as Knox is not next or contiguous to Kennebec, Lincoln intervening. Neighboring means next or contiguous. His jurisdiction is derived from statute, and there are no presumptions in favor of inferior courts. *Martin* v. *Fales*, 18 Maine, 23; *Hersom's case*, 39 Maine, 476; *State* v. *Whalen*, 85 Maine, 469, and cases. When claiming any right, or exception, under his proceedings, he must show affirmatively that he acted within his jurisdiction. *Thurston* v. *Adams*, 41 Maine, 423. Rule of interpretation: *Winslow* v. *Kimball*, 25 Maine, 495.

The object of the law was to enable an officer, if he found a violator of the law a long distance from a magistrate in the county in which the offense was committed, or the defendant found, to take him across the border into the next county, where the court might be located but a short distance away, thereby saving expense and time, both to the defendant and the State; e. g., an offender might be found in Somerset county just across the line from Eustis, in Franklin county, where there is a trial justice, while the nearest magistrate in Somerset would be North New Portland, twenty or thirty miles away. To meet such a case as this was the sole purpose of the law. Persecution instead of prosecution was not the intention of the Legislature in enacting this law; but persecution wilful and oppressive was the purpose to which the law was put in the case at bar.

Statute in derogation of common law: *Dwelly* v. *Dwelly*, 46 Maine, 379; *People* v. *Palmer*, 109 N. Y. 110; S. C. 4 Am. St. Rep. 423; *Dunn* v. *Met. E. R. Co.* 119 N. Y. 540.

When criminal statutes admit of two constructions, the one most favorable to the defendant must be given: 1 Bish. Crim. Law, § 139; *Exparte McNulty*, 77 Cal. 164; S. C. 11 Am. St. Rep. 257; *Durkee* v. *Janesville*, 28 Wis. 464; S. C. 9 Am. Rep. 500.

Counsel also argued that the act of 1891, permitting an offender to be taken from his own, or the county where the offense is committed, to an adjoining county for trial, is contrary to the Maine Constitution and § 1, 14th Amendment of U. S. Constitution, as not being due process of law. *Eames* v. *Savage*, 77 Maine, 212, and cases.

Counsel also cited: *Woodbridge* v. *Connor*, 49 Maine, 353; *Vinton* v. *Weaver*, 41 Maine, 430; *Gurney* v. *Tufts*, 37 Maine, 131, and cases; *Wood* v. *Graves*, 144 Mass. 365.

True P. Pierce, for defendants.

The act of 1891 was intended to enlarge the jurisdiction of trial justices, besides that conferred by stat. 1885, c. 258. The law under which a trial justice acts may be unconstitutional and void, and still he is not liable in torts for his acts. Moak's Underhill Torts, 191, and citations. If he had a general jurisdiction of the subject upon which he acted, he would not be liable, if he exceeded his jurisdiction. *Lang* v. *Benedict*, 73 N. Y. 12; *Hallock* v. *Dominy*, 69 N. Y. 238; *Knell* v. *Brisco*, 40 Md. 414.

If this plaintiff had raised the question of the constitutionality of this act, Mr. Ulmer, in his judicial capacity, could have decided it; and even if his decision had been a wrong one, the law would hold him harmless. The plaintiff might also have raised the question that this statute gave Mr. Ulmer no jurisdiction of the subject matter involved. The statute certainly gave an enlarged jurisdiction; and Mr. Ulmer, after a careful examination of it, claims jurisdiction and acts in the premises,— acts without malice, fraud or corrupt motive. Certainly, in a case of that kind, even if he acted in excess of his real jurisdiction

the law ought to protect him in his judicial act as fully as it would if he acted on a statute which was void ab initio. This would not be an assumption of jurisdiction where none in fact existed; it would only be acting by reason of an honest mistake as to authority in excess of a real jurisdiction, a mistake as to extent, and such a mistake as a judge of a court of a much higher grade could be readily pardoned for making. Counsel also cited: Cool. Torts, c. 14; *Gifford* v. *Wiggins*, 18 L. R. A. 356 (Minn.).

The defendant, Thompson, acted in his official capacity, only, and by express authority given him by the statute provisions of this State. R. S., c. 40, § 40. It is there provided that the governor "may appoint wardens, who shall enforce all laws relating to game and the fisheries, arrest all violators thereof, and prosecute all offenses against the same; they shall have the same power to serve all criminal processes against such offenders as sheriffs, and shall be allowed the same fees." His authority is co-extensive with the State. When a warrant which appears to be regular upon its face is placed in his hands, it is not a matter of choice with him whether he will obey its behests or not. The law gives him no alternative; but it protects him in the discharge of his imperative duty. *Emery* v. *Hapgood*, 7 Gray, 55.

It seems to be settled by an almost unbroken line of authorities that if a person merely lays a criminal complaint before a magistrate, in a matter over which the magistrate has a general jurisdiction, and on which the person charged is arrested, the party laying the complaint is not liable for an assault and false imprisonment, although the particular case may be one in which the magistrate had no jurisdiction. *Langford* v. *B. & A. R. R.* 144 Mass. 431. In this case the court close with this remark: "In the case before us, the magistrate had jurisdiction of the subject matter and of the party; although the complaint was defective, the warrant was good on its face; and an arrest under it was an act done by virtue of legal authority, and does not constitute an assault."

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

HASKELL, J. Trespass for false arrest. Plaintiff resided and was arrested in Kennebec county upon a warrant issued by a trial justice in Knox county for violating the fish and game laws in Lincoln county. He was taken through Lincoln county into Knox county for trial before the magistrate who issued the warrant and was fined $70.46 including costs which he paid. His arrest continued for the space of twelve hours, but was without malice or evil intent. The court is of opinion that the proceeding was unauthorized and illegal, but that actual damages only may be recovered.

Defendants defaulted for $100.

WILLIAM K. LANCEY

vs.

OBED FOSS, and another, Executors.

Somerset. Opinion September 13, 1895.

Bankruptcy. Assignment. Actions. Limitations. R. S. of U. S., §§ 5046, 5047, 5057.

In March, 1878, the plaintiff brought suit against his debtor for the purpose of collection, upon numerous notes and upon an account annexed, and also upon a special contract. Subsequently in the same year the plaintiff became bankrupt under the Act of 1867 and received his discharge in 1879. His assignee duly appointed, did not appear in the case, nor did the bankrupt's schedule of assets set forth any of the notes, accounts or claims embraced in the suit which stood on the docket without further disposition until March, 1892.

Held; that such items of estate, corporeal and incorporeal as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject always to the superior right and title of the assignee. Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors, who may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt who can defend or enforce it against all others. *Also*, that if the defendants desire, they can have an order of notice of this action served upon the assignee which will conclude him of record.

It appeared in the case that the assignee did not take over the title. He elected not to take it and left it in the plaintiff. He neither took nor passed the title. The plaintiff thus retaining the title subject to the assignee's

paramount right, but good against others until such paramount right is asserted, *held*, that the two years limitation (R. S. of U. S., § 5057) does not apply as a bar to this action. That statute bars only the assignee and those claiming under him.

Held; that the statement, in the facts agreed in this case, of the omission to include these claims in the bankrupt's schedule of assets is not a statement of fraud. There may have been innocent reasons for it, and the court cannot assume that it was fraudulent. The fraud, if any, was against the assignee and creditors, and not against these defendants.

AGREED STATEMENT.

The parties agreed upon the following facts:

"The writ is dated March 14, 1878, returnable to the September term of this court in Somerset county, 1878.

"Suit is brought upon numerous notes of Going Hathorn, the defendants' testator, and upon an account annexed, and also upon a special contract set out in the writ.

"Copy of writ may be furnished by either party.

"Subsequently, in 1878, the plaintiff was declared a bankrupt, upon his own petition in the District Court of the United States for the District of Maine; a schedule of his assets and liabilities was filed in said court, the assets not including the claims in this writ; and an assignee was duly chosen and appointed on November 7, 1878, and on said November 7, 1878, by decree and assignment of the proper Register in Bankruptcy under the U. S. Bankrupt Act of 1867, all the estate and property of said Lancey was duly assigned to said assignee.

"The assignee never appeared in this case.

"On June 2, 1879, said Lancey was duly discharged from all his debts and liabilities and received a certificate of such discharge in usual form, from said District Court of the United States, paying about twenty five cents on the dollar.

"If upon the foregoing facts this action can be maintained by the plaintiff, it is to stand for trial; otherwise a nonsuit is to be entered."

S. S. Hackett, for plaintiff.

D. D. Stewart, for defendant.

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

EMERY, J. The statement of the case shows that the plaintiff is entitled to a hearing in this court upon the merits of his claim against the defendants, unless he is prevented by some provision of the U. S. Bankruptcy Act of 1867, to which he had become subject by the bankruptcy proceedings. The defendants contend that he is thus prevented by several provisions of that act.

I. Section 5046, U. S. Rev. Stat., Title Bankruptcy, provides that all of the property of the bankrupt, including all choses in action, all debts due him, all rights and causes of action, (with certain exceptions not material here) "shall in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in the assignee." Section 5047 provides that the assignee may be admitted to prosecute in his own name, or that of the bankrupt, any suit pending at the time of the adjudication. This suit and the subject matter of it are clearly within these sections.

Upon these sections and the bankruptcy proceedings the defendants base a vigorous argument, that the plaintiff was completely shorn of all title and interest in this action and its subject matter; that the entire title and interest ipso facto passed to the assignee, leaving nothing in the bankrupt plaintiff; that the latter became civiliter mortuus, and lost the power of maintaining actions upon then existing claims as completely as one physically deceased. There are various expressions and dicta of judges which seem to state the operation of the statute as broadly as do the defendants, but we are not referred to any express decision going so far upon the language of this particular act.

Undoubtedly, by the operation of the bankruptcy proceedings under this act, the assignee is vested with the full right to take all the estate of the bankrupt, whether scheduled or not, and is vested with sufficient power and title to fully administer it in his own name, or that of the bankrupt, as he may elect. But all such property of a bankrupt is not cast upon the assignee nolens volens, like the personal property of a deceased intestate upon the administrator. In the latter case the title cannot

remain with the deceased, but must fall on his successor. The assignee of a living bankrupt, however, may decline to take or interfere with such property as he deems onerous or worthless. The property so rejected by the assignee does not thereby become derelict, to vest in the first appropriator. The rights and obligations which the assignee declines to enforce, or notice, do not thereby vanish into nothingness.

Such items of estate, corporeal or incorporeal, as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject always to the superior right and title of the assignee. Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world except his assignee and creditors. These may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt. The title does not fall to the ground between the two. If the assignee or creditors will not take it, no one else can appropriate it. The bankrupt can defend or enforce it against all others.

The above statement of the law is supported directly or incidentally by many judicial decisions. *Evans* v. *Brown*, 1 Esp. 170; *Chippendale* v. *Tomlinson*, 7 East, 57; *Temple* v. *London, &c. Railway Co.* 2 Jur. 296; *Re Stafford*, 18 W. R. 959; *Herbert* v. *Sayer*, 5 Q. B. 965; *Fyson* v. *Chambers*, 9 M. & W 460-466; *Smith* v. *Gordon*, 6 Law Rep. 313; *Amory* v. *Lawrence*, 3 Cliff, 523; *Taylor* v. *Irwin*, 20 Fed. Rep. 615; *American File Co.* v. *Garrett*, 110 U. S. 288; *Reynolds* v. *Bank*, 112 U. S. 405; *Laughlin* v. *Dock Co.* 65 Fed. Rep. 447; *Eyster* v. *Gaff*, 91 U. S. 521; *United States* v. *Peck*, 102 U. S. 64; *Thatcher* v. *Rockwell*, 105 U. S. 467; *Sparhawk* v. *Yerkes*, 142 U. S. 1; *Sessions* v. *Romadka*, 145 U. S. 29; *King* v. *Remington*, 36 Minn. 15; *Sawtelle* v. *Rollins*, 23 Maine, 196; *Foster* v. *Wylie*, 60 Maine, 109; *Nash* v. *Simpson*, 78 Maine, 142.

In this case at bar, the action with its various counts upon promissory notes, merchandise sold, etc., was pending in the Supreme Judicial Court for Somerset county at the time of the

adjudication and assignment in bankruptcy. The claims here in suit were not scheduled by the bankrupt, but their existence, and the existence of this action to enforce them, were matters of public record upon the docket and files of a court of general jurisdiction. The assignee and creditors may be presumed to have known of them. The assignee, however, never appeared in the case, and does not now appear after a lapse of fourteen years. He never appropriated or took over these claims. It is an easy and natural inference that he elected not to take them, but to leave them with the bankrupt. *United States* v. *Peck; Sparkawk* v. *Yerkes; Sessions* v. *Romadka*, supra.

The defendants cannot be heard to complain of this conduct of the assignee. As to them it is res inter alios. The judgment in this action will protect the defendants against the assignee as effectually as if he appeared in the case. Whatever he may hereafter do to appropriate the proceeds of the suit, if any, will not affect the defendants. *Eyster* v. *Gaff; Thatcher* v. *Rockwell*; *Foster* v. *Wylie*, supra. If, however, the defendants desire, they can have an order of notice of this action served upon the assignee which will conclude him of record.

II. Section 5057, U. S. Rev. Statute, Title Bankruptcy, provides that "no suit either at law or equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The defendants contend that this section bars the further prosecution of this action. Their argument is that the assignee could not after the two years begin a suit in his own or the bankrupt's name, nor could he come into or prosecute a suit already begun by the bankrupt. Their further argument is, that every person claiming, or who must claim under the assignee, is equally barred from beginning or prosecuting suits after the two years, and that, as whatever title this plaintiff has necessarily came from the assignee, he is barred as the assignee is barred. Many cases are cited in support of these arguments.

In every case cited, however, the title was held to have once passed to the assignee. It followed that the plaintiff either had no title or was barred by the two years' limitation upon the assignee. Thus in *Parks* v. *Tirrell*, 3 Allen, 15, cited so confidently by the defendants, the court held that the title had passed to the assignee, and that the bankrupt plaintiff could only show title from the assignee, and hence was barred equally with the assignee.

In this case at bar, as already stated, the assignee did not take over the title. He elected not to take it and left it in the plaintiff. He neither took nor passed the title. The plaintiff retained the title subject to the assignee's paramount right, but good against others until that paramount right was asserted. Therefore the cases cited do not apply. The two years' limitation in the Bankruptcy Act does not apply. It bars only the assignee and those claiming under him. The plaintiff is not in either category. In *Amory* v. *Lawrence*, 3 Cliff. 523, cited supra, the suit was by a bankrupt on a claim existing before the bankruptcy; but the suit was begun long after the two years' limitation had expired. The defendants invoked the statute, but it was held not to apply,—see also *Ludeling* v. *Chaffe*, 143 U. S. 301.

III. The defendants further contend that the act of the plaintiff in omitting these claims from his schedule was evidently intentional and in fraud of the Bankruptcy Act, and that this fraud vitiates and extinguishes his right to recover them. But in the statement of the case there is no allegation of fraud. The statement of the omission to include the claims in the schedules is not a statement of a fraud. There may have been innocent reasons for it. The court cannot assume that it was fraudulent. Again, the fraud, if any, was against the assignee, the creditors and the Bankruptcy Act, and not against these defendants.

We have not been shown anything in the statement of the case, or in the Bankruptcy Act, which in our opinion inhibits the plaintiff from proceeding with this suit.

Action to stand for trial.

PATRICK W. CLORAN *vs.* PETER A. HOULEHAN.

Kennebec. Opinion November 29, 1895.

Attorney. Debt. Discharge. R. S., c. 82, § 45.

It is provided by R. S., c. 82, § 45, that "no action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small."

A claim was intrusted to an attorney for collection by a person representing himself to be the authorized agent of the creditor, and after a careful investigation of the claim the attorney accepted one-half of the demand in full satisfaction and discharge of the whole debt. The creditor, having refused to ratify the settlement, brought an action against his debtor to recover the full amount of his claim. *Held*; That the question for the jury was not whether the attorney had special authority to compromise the claim, but whether the claim had been intrusted to him by the plaintiff; not whether the attorney exceeded his authority, but whether he had any authority at all from the plaintiff.

Upon a motion for a new trial, *the court are of opinion*, that in view of the existing method of effecting sales of merchandise and making collections by the aid of traveling salesmen and the mutual confidence that underlies the established usages in all departments of modern mercantile life, few business men would hesitate to act upon the presumption created by the facts and circumstances in this case that the person who intrusted the bill to the attorney for collection was the duly authorized agent of the plaintiff. *Also*, that if this evidence was not sufficient to require the court to submit the question to the jury, the corroboration afforded by the newly-discovered evidence renders it sufficient; and that the defendant is entitled to have the jury pass upon this evidence in connection with that introduced at the trial.

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit tried to a jury in the Superior Court, for Kennebec county, and a verdict having been rendered in favor of the plaintiff, the defendant took exceptions and filed a general motion for a new trial. There was also a motion for a new trial founded on newly-discovered testimony.

The case is stated in the opinion.

Emery O. Beane and Fred E. Beane, for plaintiff.

George W. Heselton, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit to recover the sum of sixty dollars for one thousand cigars sold and delivered to the defendant at Gardiner by F. J. Roberts, a traveling salesman for the plaintiff, whose place of business was in Lynn, Mass.

The defendant admitted the receipt of the goods, but denied that there was anything due on the bill in suit, claiming that thirty dollars of the account had been paid to the plaintiff's agent, F. J. Roberts, and the balance to the plaintiff's attorney, C. L. Andrews of Gardiner, who was said to have been subsequently employed by another traveling agent of the plaintiff to collect the claim or the balance due on it.

The verdict was for the plaintiff for the full amount claimed, viz., sixty dollars and sixty-four cents, and the case comes to this court on exceptions and a motion to set aside the verdict as against the evidence, and also a motion for a new trial on the ground of newly-discovered evidence.

It was not in controversy that Mr. Andrews was employed as an attorney at law to collect the claim, by some one representing himself to be the authorized agent of the plaintiff, and that in pursuance of this employment, after a careful investigation of the matter, Mr. Andrews in good faith accepted from the defendant the sum of thirty dollars as "payment in full" of the plaintiff's claim, and forwarded a check for that amount to the plaintiff. But the plaintiff repudiated this settlement and returned the check to Mr. Andrews with directions to restore the money to the defendant. The defendant, however, declined to accept it when thus tendered to him. After the lapse of a year and a half the plaintiff employed other counsel to commence this suit.

It is provided by section forty-five of chapter eighty-two of the Revised Statutes that "no action shall be maintained on a demand settled by a creditor, or his attorney intrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small." It was not controverted that Mr. Andrews drew thirty dollars in money on the check received from the defendant and that in accordance

with the terms of the receipt given to the defendant at the time, this payment was mutually understood to be an extinguishment of the whole debt. If, therefore, Mr. Andrews was the plaintiff's attorney "intrusted to collect the demand," it had been settled and this action subsequently brought upon it could not be maintained, whether the prior payment of thirty dollars alleged to have been made to Roberts had in fact been made or not. The question for the jury, therefore, was not whether Mr. Andrews had special authority to compromise the claim, but whether he was the plaintiff's "attorney intrusted to collect it;" not whether he exceeded his authority, but whether he had any authority at all from the plaintiff.

Upon this branch of the case the presiding judge instructed the jury as follows: "It was claimed by the defendant at the outset that the whole bill had been paid, that thirty dollars was paid to Mr. Roberts, the agent of the plaintiff, and that thirty dollars more was paid by check to Mr. Andrews, an attorney for the plaintiff. But in order to show that a payment to an agent, or one who is claimed to be the agent, was a payment to the principal, it was necessary to show that the agent had authority to make *such settlement*; and in this case, inasmuch as the defendant's proof, in my opinion, fell short of showing authority on the part of Mr. Andrews to collect the bill, and the evidence showing that whatever he did as the agent and attorney of the plaintiff was repudiated by the plaintiff and he was requested to return the check, I have excluded testimony upon that point as insufficient to show that Mr. Andrews had in fact authority from the principal to accept payment *in the way testified to by him*. So that is laid out of the case."

The plaintiff had employed four different traveling agents who successively visited the defendant's place of business in Gardiner during the two years prior to the alleged settlement of this claim, but neither Mr. Andrews nor the defendant was able to state the name of the person who left the claim in question in Mr. Andrew's office for collection. It is in evidence, however, that on the day the claim was left with Mr. Andrews a man appeared in the defendant's place of business in Gardi-

ner acting as the plaintiff's agent for the collection of bills; and it subsequently appears from the description of this man given by the defendant and the description by Mr. Andrews of the man who employed him to collect the bill, that the two agents were one and the same person. He had in his possession the necessary data to enable him to make a correct statement of the defendant's account, together with other bills of the plaintiff against other parties, and such printed bill-heads as were uniformly furnished by the plaintiff to his agents. E. F. Cloran, the plaintiff's son and book-keeper, who was himself a traveling salesman for the plaintiff at one time, testified that their agents were authorized to collect bills, but not to settle for less than the face of the bills without special permission from the house. It further appears from the testimony of this witness, and of F. J. Roberts, that it was in the usual course of the business for the plaintiff's agents to employ an attorney-at-law to enforce the collection of doubtful or disputed claims. Mr. Andrews testified that he received one letter, if not two, directly from the plaintiff's house, but had been unable to find either of them after careful search, and gave his recollection of the contents of one of them as follows: "I think the contents were that they declined to accept any such settlement as I had made in the matter, and wished me to return the money to Mr. Houlehan, *and bring action on the case.*"

In view of the existing method of effecting sales and making collections by the aid of traveling salesmen and the mutual confidence that underlies the established customs and usages in all departments of modern mercantile life, few business men would hesitate to act upon the presumption, created by the facts and circumstances above stated, that the person who intrusted the bill to Mr. Andrews for collection was the plaintiff's duly authorized agent. The contents of the letter received by the attorney directly from the plaintiff's house show a clear and distinct recognition by the plaintiff of the attorney's general authority to collect the bill, with further directions to commence an action upon it. If this evidence was not sufficient to require the court to submit to the jury the question whether Mr.

Andrews was the "plaintiff's attorney intrusted to collect the bill," we think the corroboration afforded by the newly-discovered evidence should render it sufficient. Since the trial both Mr. Andrews and the defendant have seen and conversed with the person who on the same day called at the defendant's place of business and left the bill in question with Mr. Andrews for collection, and identified him as Homer Bush, who according to the testimony of E. F. Cloran was then the plaintiff's authorized agent. We think the defendant is entitled to have a jury pass upon this evidence in connection with the other evidence introduced at the trial tending to show that the settlement of the demand in suit was made by the plaintiff's "attorney intrusted to collect it," and that the entry should be,

Motion sustained. New trial granted.

THE GRAND TRUNK RAILWAY OF CANADA, PETITIONER FOR CERTIORARI,

vs.

COUNTY COMMISSIONERS.

Cumberland. Opinion November 29, 1895.

Railroads. County Commissioners. Repeal of Statute. R. S., c. 1, § 5; c. 51, § 34; Stat. 1893, c. 205.

Whenever the jurisdiction of a tribunal over any subject matter depends wholly upon a statute, a new act repealing the statute, or so amending it as to transfer the jurisdiction to another tribunal, without any reservation as to proceedings then pending, will have the effect to invalidate all such proceedings at whatever stage they may have arrived. If final decision has not been rendered, or final relief granted, before the amendatory act went into effect, it cannot be rendered or granted after the amendatory act.

A petition to the county commissioners under R. S., c. 51, § 34, for gates at railroad crossings is not an "action" within the meaning of R. S., c. 1, § 5.

On petition of the municipal officers of Pownal, the county commissioners of Cumberland county adjudged that a flagman was necessary at the intersection of the railway with a certain highway in that town. But by an amendment to the statute, which took effect after the hearing before the commissioners and prior to their decision, jurisdiction of the subject mat-

ter embraced in the petition was taken from the county commissioners and conferred upon the railroad commissioners, without any saving clause respecting proceedings then pending. *Held*; that the amendment to the act invalidated the decision of the county commissioners subsequently rendered.

ON REPORT.

This was a petition for certiorari. The cause came on for hearing upon answer by way of demurrer to the petition, which said answer by way of demurrer was joined by the petitioner; and by agreement of counsel, the same was reported to the law court to enter such judgment as the legal rights of the parties may require.

All the original papers in the proceeding were made a part of this report.

The case is stated in the opinion.

A. A. Strout and C. A. Hight, for petitioners.

C. A. True, County Attorney, for respondents,

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

WHITEHOUSE, J. On the fourteenth day of February, 1893, the municipal officers of Pownal presented to the county commissioners of Cumberland county a petition based on section 34 of chapter 51 of the Revised Statutes, representing that public safety required the maintenance of gates across a highway in that town at its intersection with the Grand Trunk Railway, and asking for a decision upon the reasonableness of such request. The petition was entered at a term of the court of county commissioners holden on the twenty-first day of February, 1893, a hearing thereon was had on the fifth day of April, 1893, and on the fifth day of June following the county commissioners adjudged and decided that a flagman at the crossing in question was necessary for the public safety and ordered the railway company to station a flagman there.

The railroad company now prays for a writ of certiorari, alleging as cause for error, inter alia, that the county commissioners, at the time of rendering this decision on the fifth day

of June, 1893, had no jurisdiction of the subject matter embraced in their adjudication, and that they acted entirely without authority of law.

It is not in controversy that when the original petition was presented and at the time the hearing thereon was held on the fifth day of April, the county commissioners had jurisdiction of the subject matter by virtue of section 34, chapter 51 of the Revised Statutes, above cited. But that section was amended by chapter 205 of the Public Laws of 1893, by the substitution of the word "railroad" for the word "county" in the fifth line thereof. Thus jurisdiction of the subject matter embraced in these proceedings was taken from the county commissioners and conferred upon the railroad commissioners, without any saving clause respecting proceedings then pending. This amendatory act of 1893, took effect on the 28th day of April, after the hearing on the petition in question before the county commissioners, but prior to their decision on the fifth day of June.

It is a well established and familiar rule of law that whenever the jurisdiction of a tribunal over any subject matter depends wholly upon a statute, a new act repealing the statute or so amending it as to transfer the jurisdiction to another tribunal, without any reservation as to proceedings then pending, will have the effect to invalidate all such proceedings at whatever stage they may have arrived. If final decision has not been rendered or final relief granted before the amendatory act went into effect, it cannot be after. *Williams, Pet'r*, v. *Co. Com.* 35 Maine, 345; *Co. Com. Pet'rs*, 30 Maine, 221; *Plantation* v. *Thompson*, 36 Maine 365; *So. Carolina* v. *Gaillard*, 101 U. S. 433; Endlich on Int. of Statutes, § 479.

It is true that section 5, chapter 1, R. S., provides that "actions pending at the time of the passage or repeal of an act are not affected thereby;" but the word "actions" in this statute does not include a petition pending before the county commissioners, founded on section 34 of chapter 51, such as is here under consideration. The amendatory act of 1893 cannot have simply a prospective operation like some new positive enactment, for the effect of the amendment was to repeal one provision and

substitute another. *Webster* v. *Co. Com.* 63 Maine, 29; and 64 Maine, 434. See also *Co. Com. Pet'rs*, 30 Maine, 221; and *Belfast* v. *Fogler*, 71 Maine, 403.

On the fifth day of June, 1893, the county commissioners had no jurisdiction of the subject matter in question, and their adjudication was without authority of law.

Writ of certiorari to issue.

ROBERT GODDARD *vs.* INHABITANTS OF HARPSWELL.

Sagadahoc. Opinion December 13, 1895.

Towns. Liability for torts of its officers. Ways.

A town is not liable for the torts of its selectmen in building a road, when there is no vote authorizing them to take charge of that work.

The duty of building roads is devolved by law upon certain public officers, such as highway surveyors, or road commissioners. A vote to authorize the selectmen to borrow money for building a road does not empower the latter as agents of the town to assume the work of building.

See *Goddard* v. *Harpswell*, 84 Maine, 499.

ON MOTION AND EXCEPTIONS.

This was an action of trover for the conversion of some stone used in the construction of a road. A new trial having been ordered, see 84 Maine, 499, the jury returned a second verdict for the plaintiff in which the damages were assessed at three hundred and eighty-five dollars. The defendants moved for a new trial and also took exceptions. It became unnecessary to consider the latter.

The case appears in the opinion.

C. W. Larrabee, for plaintiff.

Weston Thompson, for defendants.

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

EMERY, J. The defendant town was required by law in consequence of a decree of the county commissioners, affirmed

by this court upon appeal, to open and build a certain town way or road within the town. The road was afterward built and certain stone of the plaintiff within the location of the road was appropriated and used in its construction. The plaintiff brought against the town this action of trover for that conversion of his stone.

To connect the town with the conversion of the stone, he adduced the following evidence: (1) a vote of the town "to raise three hundred dollars by assessment, and allow the selectmen to hire a sum not exceeding five hundred dollars," to pay "for land damages and to build the road," (viz: the road in question); (2) the acts of three men, the selectmen of the town, in advertising for proposals, and making a contract with one Coombs of Brunswick, for building the road; (3) the direction by the selectmen to the contractor to make use of the plaintiff's stone, as material for the road; (4) the appropriation and use by the contractor of the stone under that direction; (5) the approval by the town auditor of a charge by the selectmen for advertising for proposals, and of a charge for the five hundred dollars hired.

It does not appear whether the selectmen at the time of their action were also either highway surveyors or road commissioners as they might lawfully have been. If they were, then as to opening and building this road, they were public officers acting for the public, and not mere town agents acting for the town. In such case, though the town appointed them and furnished the money for them to expend, it is not responsible for their unlawful acts. *Goddard* v. *Harpswell*, 84 Maine, 499; *Hennessey* v. *New Bedford*, 153 Mass. 260. In the absence of evidence to the contrary, in an action against the town, it is to be presumed that they were acting as such public officers.

If, however, they were not such officers, but were acting, or assuming to act, as selectmen and agents of the town, then it does not appear that the town ever authorized them to do more in relation to this road than to hire the necessary money. The vote of the town put in evidence went no further. The approval by the auditor of their charges for advertising for proposals

was not a ratification by the town of their direction to the contractor to take the plaintiff's stone. Their general powers as selectmen do not supersede those of highway surveyors or road commissioners. Without a vote of the town empowering them as selectmen or as individuals to take the duty of opening and building this road out of the hands of the regular road officers, they cannot bind the town by their contracts or torts in the premises. *Tufts* v. *Lexington*, 72 Maine, 516; *Bryant* v. *Westbrook*, 86 Maine, 450; *Hennessey* v. *New Bedford*, 153 Mass. 260. No such vote is shown.

Motion sustained. Verdict set aside.

CHARLES F. W. DILLAWAY, and others,

vs.

GEORGE A. ALDEN.

Kennebec. Opinion December 13, 1895.

Contracts. Wagers. Brokers.

Contracts between a stockbroker and a customer for buying or selling stocks upon a margin in the hope of profit from the fluctuation in price, are not illegal, if either party expects the final balance to be liquidated by a delivery of the remaining stocks.

If, however, neither party expects any delivery of stocks at any time, but both parties understand that only money is to be paid from one to the other according to changes in the market price the arrangement is a mere wager upon changes in price and is illegal.

In this case there were numerous dealings with reference to changes in price, but the broker always kept command of sufficient actual stock, to make delivery when demanded, and at the end of the last deal, did transfer the remaining stock to his customer's order. Such transactions were not wagers.

ON REPORT.

This was an action of assumpsit on the defendant's promissory note for $12,586.42, given at Boston, July 3, 1893, to the plaintiffs, Dillaway, Starr & Co., on six months. Plea, general issue, and the following brief statement of defense:

"That the note described in the plaintiffs' writ was given

without consideration and is null and void; that it was given by way of settlement and in consideration of contracts made by and between the plaintiffs and the defendant, by way of gaming and wagering, contrary to the form of the statute then and still in force (in the Commonwealth of Massachusetts, where said contracts were made and executed), in such case made and provided, and contrary to law in such case; that prior to the making of such note, said plaintiffs, as brokers, residing and doing business in the city of Boston and Commonwealth of Massachusetts, contracted with the defendant to buy and sell, in the Commonwealth of Massachusetts, upon credit and margins, certain securities and commodities; that neither the plaintiffs nor defendant at the time such contracts were made, had any intention to perform said contracts by actual receipt or delivery of such securities or commodities, and payment of the price therefor, and that they in fact were never delivered or paid for, nor did either ever intend that the other was bound to deliver the same, but that in all said contracts the real intent of the parties was to wager on and to speculate in the rise and fall of such securities and commodities, and that the one party was to pay and the other to accept the difference between the contract price of such securities and commodities at the date fixed for executing said several contracts, or when said contracts should be closed; and that there was no intention that said securities or commodities be bought outright; and that such contracts were all gambling transactions and illegal and void; and that said note was given for such credits and securities and transactions, so arising in buying and selling such securities and commodities, within said Commonwealth of Massachusetts; and if the plaintiffs paid any money for or on account of the defendant, for which said note was given, they did so knowing that such money was lent and advanced to and for the defendant on account of, and to be used in, gaming and illegal transactions, in which the plaintiffs and defendant were connected, and that the plaintiffs themselves made the application of such moneys, according to their own judgment, in the promotion and furtherance of such gaming and illegal transactions."

"The defendant further averred that he frequently forbade the plaintiffs from buying and selling of said securities and commodities on the defendant's account, but the plaintiffs disregarded his directions so made, and fraudulently, and for their own benefit, and for the commission which the said plaintiffs would receive in such transactions as brokers, fraudulently continued to buy and sell said securities and commodities."

S. S. Brown, for plaintiffs.

Edmund F. and Appleton Webb, for defendant.

Counsel cited: R. S., c. 125, § 10; Mass. Stat. 1890, c. 437; *Kennedy* v. *Cochrane*, 65 Maine, 594; *Bond* v. *Cummings*, 70 Maine, 125; *Banchor* v. *Mansel*, 47 Maine, 60; *Irwin* v. *Williar*, 110 U. S. 499; *Tyler* v. *Carlisle*, 79 Maine, 210; *Franklin Company* v. *Lewiston Inst. for Savings*, 68 Maine, 47; *Rumsey* v. *Berry*, 65 Maine, 574; *Cunningham* v. *National Bank of Augusta*, 71 Ga. 400 (S. C. 51 Am. Rep. 266); *Bruce's Appeal*, 55 Pa. St. 298; *Dyer* v. *Curtis*, 72 Maine, 185; *Marble* v. *Grant*, 73 Maine, 423.

The gambling nature of the transaction is shown plainly from the fact that during all these transactions, aggregating more than half a million in a few months, not a single share of the stock was ever delivered to the defendant or seen by him, or paid for by him; neither have the plaintiffs ever expected payment or delivery.

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

EMERY, J. The material facts found by the court are these: The defendant had an intimate personal acquaintance with one Brown, a member of the firm of Francis B. Dana & Co., stock-brokers in Boston. March 29, 1892, the defendant turned over to this firm two hundred shares of St. Louis Southwestern Railway stock, and $2000 of Maine Central Railroad five per cent bonds. The stock was the residuum of some prior stock transactions with or through Brewster, Cobb & Estabrook, another brokerage firm in Boston. The Maine Central bonds

had been deposited with this latter firm as collateral security for margins. All were turned over to Francis B. Dana & Co., on the defendant's order.

From April, 1892, to March, 1893, Francis B. Dana & Co., apparently bought and sold various stocks on the defendant's account. Their books show numerous such transactions. The defendant appears to be charged with amounts paid for stocks plus commissions, and credited with proceeds of stock sold minus commissions. Some few of these seeming transactions were by direct, special instructions of the defendant. The mass of them, however, were under what Dana & Co. claimed to be general authority from the defendant to buy and sell for him at their discretion.

In April, 1893, as the result of these various stock transactions (actual or seeming) the books of Dana & Co. showed a balance against the defendant of some $12,500, for which according to their books they held as security three hundred and fifty shares of various stocks, and the original $2000 of Maine Central bonds. In the meantime Brown had withdrawn from the firm of Dana & Co., and become a member of the plaintiff firm of Dillaway, Starr & Co., of Boston, also stock-brokers. At Brown's request, the defendant gave the last firm written instructions to pay the balance due from him to Dana & Co. and take over his securities in their hands. This the plaintiffs did, April 13, 1893, paying Dana & Co., $12,511.41. At the request of Mr. Dillaway, the defendant on July 3, 1893, gave the plaintiffs his note for that sum and interest, collaterally secured by the stocks and bonds they had received from Dana & Co. This action is upon that note.

I. The defendant contends and testified that he did not authorize Francis B. Dana & Co. or Brown to buy or sell stocks on his account except in a very few specific instances, and further that he gave repeated instructions to them to cease operations and close his account. Brown testified to the contrary. The defendant, however, at the end instructed the plaintiffs to pay the balance of all the transactions and then gave his note for that balance so paid. So far as the plaintiffs

are concerned the defendant must be held to have ratified the doings of Dana & Co.

II. The defendant again contends that the transactions with Dana & Co. which created the balance against him, and which are the consideration of his note, were wagering contracts and void by the law of Massachusetts where they took place, and by the law of Maine where the balance is sought to be recovered,— that Brown knew of this illegality, and that his knowledge affects the plaintiff firm of which he was a member. Waiving the question whether this illegality and Brown's knowledge, if established, would be a defense to this note against the plaintiffs, we proceed to inquire whether such illegality is established.

The purchase and sale of stocks for profit, — contracts to buy stocks to sell again on a hoped-for-rise in price,— contracts to sell stocks on a hoped-for-fall in price,— are not illegal. Speculation is not necessarily gambling. A purely speculative contract is not necessarily a wagering contract. Speculation and speculators may serve a useful purpose in providing a continuous market, and in differentiating a special class to assume the hazards of fluctuations in prices, and thus relieve the regular trader or producer of that risk. So long as there is a real transaction,— so long as something is actually bought or sold, or is actually contracted for, either for purchase or sale,— there is no wagering, not even if the thing contracted for does not then exist. Nor does a subsequent change in, or cancellation of, the contract affect its original validity.

When, however, there is no real transaction, no real contract for purchase or sale, but only a bet upon the rise or fall of the price of a stock, or article of merchandise in the exchange or market, one party agreeing to pay, if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done, — nothing is bought or sold, or contracted for. There is only a bet.

Efforts are often made to give such a bet the appearance, if not the nature of a business transaction. The parties often go through the form of buying or selling, or contracting to buy or

sell, with the mutual understanding, however, that the contract is not to be performed, but is to be cancelled by the payment of the amount of the change in market price. In such case it is apparent there is no real business transaction but only a bet, complicated in form perhaps, but of an unconcealed nature.

Such contracts are to be held valid, however, unless the nullifying understanding is mutual and is made apparent. The transactions between Dana & Co. and the defendant were upon their face actual transactions, actual buying and selling stocks for the defendant's account. The appearance upon the books of Dana & Co. is of actual transactions. The only evidence tending to show that these transactions were not actually had, that there was no actual buying or selling as entered on the books, is the personal testimony of the defendant himself. That testimony, however, falls short of showing a mutual understanding, an understanding by Dana & Co. as well as by himself, that he was to acquire no right to any stocks bought, and was not to deliver any stocks sold. Brown, on the other hand, testifies that every item charged against, or credited to, the defendant on the books of Dana & Co. was an actual purchase or sale on the Boston Stock Exchange according to the rules and customs of that Exchange,—that every transaction was followed by a delivery of the stock certificates from the seller to Dana & Co. or to the purchaser from Dana & Co.

It is not claimed that there was a manual transfer of stock certificates each way, each time, and for every share bought or sold during the day, or that they were transferred in the name of the defendant. The labor involved in such frequent transfers and re-transfers seems to have been avoided by a sort of clearing-house system among the brokers in the stock exchange, by which when there were numerous transactions both ways in the same stock, only the balance would be delivered and paid for as between the brokers. But under this system each broker had each day within his immediate control, stock certificates to represent the purchases made for his principal. It also appears that these stock certificates were rarely, if ever, assigned to or in the name of the principal, but were assigned to the broker,

or in blank. These certificates were not kept in the broker's vaults, but were used by him as instantly redeemable collateral for money borrowed to make advances and carry on business, the broker, however, always keeping within his instant control enough certificates to turn over to his principal on demand, or to deliver to a purchaser when ordered to sell. Brown testified that Dana & Co. always had within their immediate control certificates representing all the stocks appearing to the credit of the defendant on their books, and could and would have delivered them on demand. When demand was finally made by the order of April 10th, 1893, they at once delivered certificates for all the stocks then standing to the defendant's credit.

These devices of the brokers to facilitate their transactions, may bear to the superficial observer the appearance of jugglery rather than of regular buying, selling and delivering; but a deeper and longer look will discover that they are appropriate means for the quick and economic transaction of large volumes of legitimate business. All through the various deals is the intention to finally strike a balance, and liquidate it by an actual transfer of stock certificates. At the end when the deals or transactions are finally closed, and the balance is struck, the broker is ready to deliver the requisite stock certificates of his principal's order. In this case at the end of some two years of numerous operations in the stock-market, the stocks represented in the final balance were actually delivered by the transfer of the stock certificates to the defendant's order. The defendant received these certificates as the final result of his stock operations. He has shown that these operations were disastrous to him, but he has not shown that they were not what they purported to be, viz., actual buying and selling stocks through a broker. Hence his defense fails.

For authorities in support of this statement of the law see *Rumsey* v. *Berry*, 65 Maine, 570; *Barnes* v. *Smith*, 159 Mass. 344; *Bibb* v. *Allen*, 149 U. S. 481; *Bangs* v. *Hornick*, 30 Fed. Rep. 97; *Bigelow* v. *Benedict*, 70 N. Y. 202; *Hatch* v. *Douglass*, 48 Conn. 116. This last case is almost parallel with the case at bar.

Defendant defaulted.

WILSON M. HATTIN *vs.* FLORA M. CHASE.

Kennebec. Opinion December 14, 1895.

Contract. Performance. Waiver. Damages.

The plaintiff claimed a balance due for constructing a drain across the defendant's farm under a general contract to "dig a drain two feet wide, two feet deep and fill it full of rocks, at one dollar per rod." *Held*; that if the contract had been as claimed by the plaintiff, the law would imply an undertaking on his part to perform the work in a reasonably workmanlike manner, having regard to the general nature and situation of the drain and the purpose for which it was manifestly designed; and it is an equally well-settled rule that under such circumstances the defendant, in the same action, is entitled to have deducted from the contract price, by way of recoupment, all damages arising from a disregard of the obligations imposed by law in the performance of the contract; as well as those occasioned by a violation on the part of the plaintiff of the express terms of the contract.

Whether there was a waiver by the defendant of all objections to the drain arising from the plaintiff's unskillful and defective performance of the work is a question of fact for the jury, to be determined with reference to the intention of the defendant, the subject matter of the contract, and all the facts and circumstances disclosed by the evidence. It was not claimed that the defendant's continued possession of the farm during the winter was any evidence of such waiver; *held*, that an instruction to the jury that the partial payment of fifty dollars on account of the work, made even with full knowledge of the defects in the drain, must be deemed as a matter of law to be a waiver of all objections to it, and a final acceptance of the work, is erroneous.

A partial payment under such circumstances would be competent evidence to be considered by the jury in connection with all the other facts; but it would by no means be conclusive, and under some circumstances would obviously have very slight tendency to establish such a proposition. A dissatisfied party often makes only a partial payment for the specific purpose of protecting his rights under a contract by thus reserving an opportunity to assert a claim for damages for imperfect performance.

ON EXCEPTIONS.

The plaintiff recovered a verdict in the Superior Court, for Kennebec county, for a balance due him under a verbal contract to construct a drain. The defendant alleged exceptions which appear in the opinion.

H. M. Heath and C. L. Andrews, for plaintiff.

L. T. Carleton, for defendant.

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

WHITEHOUSE, J. This is an action of assumpsit to recover a balance alleged to be due from the defendant for the construction of a drain on her farm.

It was not in controversy that the plaintiff dug a drain ninety-one rods long across the defendant's land and filled it with stones, under an oral contract by which he was to receive a compensation of one dollar per rod, and that in March following the completion of the work in December he received from the defendant the sum of fifty dollars in part payment therefor. At the trial the defendant claimed that by the express terms of the contract the plaintiff engaged to construct a "good nice drain, two feet wide and two feet deep and lay an under-drain and fill it with suitable rocks, and build it in a workmanlike manner;" but contended that the contract was disregarded by the defendant and that the work was so defectively and imperfectly done that the drain was practically unserviceable, and that the payment of fifty dollars was greatly in excess of the value of the drain as it was in fact constructed. The defendant further contended that she never accepted the work and never intended to waive any of her rights under the contract; and it is not stated that there was any evidence of an acceptance or waiver unless the part payment of fifty dollars and her continued possession of the farm during the winter can be deemed such evidence. It was not claimed, however, that mere occupation of the farm would amount to an acceptance.

Upon this branch of the case the presiding judge instructed the jury as follows: "If that fifty dollars had been paid with the full knowledge of the defendant as to the manner in which the drain was constructed, it would be an acceptance of the drain as built, and would be a waiver or a giving up of any objection that the defendant might have had as to the construction of the drain, and he would be liable to pay the balance for its construction. . . . . So I say that if she or her agent knew precisely how the drain was constructed at the time that

fifty dollars was paid, and no objection was made, it was an acceptance." Subsequently the presiding judge read an instruction requested by the defendant to the effect that it was incumbent upon the plaintiff to prove a substantial performance of his part of the contract to enable him to recover, and that if he failed to do this he was not entitled to recover, and said to the jury: "I will give you that in connection with what I have already said to you as to waiver and acceptance."

The testimony was conflicting in regard to the precise terms of the contract, the plaintiff claiming that his agreement was a general one to "dig a drain two feet wide and two feet deep and fill it full of rocks, at one dollar per rod," without any express provision as to the manner of building it or the quality of the work. But this issue is not involved in the decision of the question of law presented by the instructions given; for it is an elementary principle that if the contract had been as claimed by the plaintiff, the law would imply an undertaking on his part to perform the work in a reasonably workmanlike manner, having regard to the general nature and situation of the drain and the purpose for which it was manifestly designed. As stated by Mr. Bishop, "the law interpreting the contract, adds to its general words, in the absence of special ones, or of special facts controlling the particular case, his promise to bring to the work ordinary skill and capacity, together with integrity therein and faithfulness to the interests of his employer." Bish. on Cont. § 1416. And it is equally well-settled and familiar law that under such circumstances the defendant, in the same action, is entitled to have deducted from the contract price by way of recoupment, all damages arising from a disregard of the obligations imposed by law in the performance of the contract, as well as those occasioned by a violation on the part of the plaintiff of the express terms of the contract. "Whatever the nature of the contract, however numerous or varied the stipulations, ... and whether they are all written or only partly written, or partly expressed and partly implied, the range of the right of recoupment is coextensive with the duties and obligations of the parties respectively, both to do and forbear,

as well those imposed first by the language of the contract, as those which subsequently arise out of it in the course of its performance. It extends to damages resulting from negligence where care, activity and diligence are required and from ignorance where knowledge and skill are required." 1 Sutherland on Dam. 279. See also Waterman on Set Off, Ch. 10 (Recoupment), § § 458-465; *Austin* v. *Foster*, 9 Pick. 341; *Cota* v. *Mishow*, 62 Maine, 124.

In the case at bar the defendant was entitled to have the plaintiff's compensation adjusted with reference to the terms of the agreement which she claims was never repudiated or broken by her. But she received the benefit of the services performed under the agreement, and although the plaintiff may have failed to construct and complete the drain according to the obligations imposed by the terms of the agreement and created by the law, yet if he endeavored in good faith to perform and did substantially perform the agreement he was entitled to recover for his services the contract price after deducting so much as they were worth less on account of such imperfect performance of the contract. *White* v. *Oliver*, 36 Maine, 92, and authorities cited; *Morgan* v. *Hefler*, 68 Maine, 131; *Gleason* v. *Smith*, 9 Cush. 484; *Moulton* v. *McOwen*, 103, Mass. 587. Or, as the rule is often stated with less practical accuracy, he is entitled to recover the fair value of his services, having regard to and not exceeding, the contract price after deducting the damages sustained by the defendant on account of the breach of the stipulations in the contract. *Blood* v. *Wilson*, 141 Mass. 25; *Powell* v. *Howard*, 109 Mass. 192.

Whether there had been a waiver by the defendant of all objections to the drain arising from the plaintiff's unskillful and defective performance of the work was a question of fact for the jury, to be determined with reference to the intention of the defendant, the subject matter of the contract and all the facts and circumstances disclosed by the evidence. The instruction that a partial payment for the work, made even with full knowledge of the defects in the drain, must be deemed as a matter of law to be a waiver of all objection to the drain and a

final acceptance of the plaintiff's work, was clearly erroneous. A partial payment made with full knowledge of the condition of the work and without objection to it, would be competent evidence for the consideration of the jury, in connection with all the other facts and circumstances, as having some tendency to show such waiver and acceptance; but it would by no means be conclusive, and under some circumstances would obviously have very slight tendency to establish such a proposition. A dissatisfied party often makes only a partial payment and withholds a balance for the specific purpose of protecting his rights under a contract by thus reserving an opportunity to assert a claim for damages for imperfect performance. It was a misdirection to instruct the jury that a partial payment made even under the circumstances stated, was ipso facto such an acceptance and waiver as would preclude the defendant from claiming damages by way of recoupment for violation of the contract on the part of the plaintiff. *Davis* v. *School District*, 24 Maine, 349; *Andrews* v. *Portland*, 35 Maine, 475; *White* v. *Oliver*, 36 Maine, 92; *Moulton* v. *McOwen*, 103 *Mass.* 587; *Flannery* v. *Rohrmayer*, 46 Conn. 558; *Button* v. *Russell*, 55 Mich. 478.

Exceptions sustained.

JAMES HOPKINS SMITH, and another, *vs.* JOSEPH H. BLAKE.

Cumberland. Opinion January 8, 1896.

Lease. Rent. Payment. Evidence.

The meaning and construction of written contracts is to be ascertained from the language used.

In a lease which reserves an annual rental of twenty-seven hundred dollars, and contains a covenant of the lessee to pay the said rent in equal quarterly payments of six hundred and twenty-five dollars each, the erroneous division of the reserved rent does not have the effect to reduce the rent to twenty-five hundred dollars. Taken as a whole, a lease thus written satisfactorily shows that the rent reserved was twenty-seven hundred dollars; and that its erroneous subdivision into quarters was merely a mathematical mistake.

Held; that parol evidence is not admissible to control or explain the provisions of the lease; but the receipts given for rent are open to explanation.

ON REPORT.

This is an action of assumpsit upon an account annexed to the writ as follows: "Portland, Me., September 1st, 1894. Joseph H. Blake to James Hopkins Smith and Henry St. John Smith, Dr. To use and occupation of plaintiffs' land, tenements and messuages, viz: of that portion of Widgery's wharf with the buildings thereon, in said Portland, owned by said lessors, together with the rights of way thereto pertaining, belonging to said lessors, from the 23rd day of August, A. D., 1892, to the 23rd day of August, A. D., 1894, at $2700 per annum, as per written lease, - - - - - $5400

"Contra credit by cash, - - - - 5000

"Balance due, - - - - - $400

"Interest thereon from the several dates when the installments thereon became due as per written lease, to date of writ, - - - 25"

Total, - - - - - $425"

The writ was dated September 1, 1894. The plea, the general issue.

The plaintiffs put in the following lease and stopped:

"This indenture, made the twenty-third day of August in the year of our Lord one thousand eight hundred and ninety-two, Witnesseth, That James Hopkins Smith of the city, county and State of New York, and Henry St. John Smith of Portland, county of Cumberland and State of Maine, do hereby lease, demise, and let unto Joseph H. Blake of Portland in said county of Cumberland and State of Maine, that portion of Widgery's wharf so called, with the buildings thereon, situated in the said Portland, now owned by the said lessors, together with the rights of way thereto pertaining, belonging to said lessors. The premises to be kept in repair by said lessors in such manner as in their judgment is required; to hold, for the term of seven years from the twenty-third day of August in the year of our Lord eighteen hundred and ninety-two, yielding and paying therefor the rent of twenty-seven hundred dollars per annum. And the said lessees do so covenant to pay the said rent in equal quarterly

payments as follows: Six hundred and twenty-five dollars on the twenty-third day of each November, February, May and August, during the whole of said term, and to quit and deliver up the premises to the lessors or their attorney, peaceably and quietly at the end of the term aforesaid, in as good condition and order,—reasonable use and wearing thereof, loss by fire, or inevitable accident excepted,—as the same are or may be, put into by the said lessor, and to pay all water rates and not make or suffer any waste thereof; and that he will not assign or underlet the premises, or any part thereof, without the consent of the lessors in writing, on the back of this lease. And the lessors may enter to view and make improvement, and to show the premises to persons wishing to hire or to purchase, and to expel the lessee if he shall fail to pay the rent aforesaid, whether said rent be demanded or not, or if he shall make or suffer any strip or waste thereof, or shall fail to quit and surrender the premises to the lessors at the end of said term, in manner aforesaid, or shall violate any of the covenants in this lease by said lessee to be performed.

"And it is further agreed, that in case said premises shall be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of injuries sustained, shall be suspended or abated, until the said premises shall have been put in proper condition for use and habitation by the said lessors, or these presents shall thereby be determined and ended at the election of the said lessors, or their legal representatives.

"And it is further agreed that the premises shall not be occupied, during the said term, for any purpose usually denominated extra-hazardous as to fire, by insurance companies." . . .

Other facts appear in the opinion.

J. W. Symonds, D. W. Snow and C. S. Cook, for plaintiffs.

Courts of law and equity, for the rule was the same in both, where there is a manifest error in a document, will put a sensi-

ble meaning on a contract by correcting or reading the error as corrected. *Burchell* v. *Clark*, L. R. 2 C. P. Div. 97.

In *Spyve* v. *Topham*, 3 East, 115, indentures of lease and release were intended to be made to a trustee but were made by mistake to the cestui que trust, so that no estate passed by the exact words of the deed, but in the habendum and the rest of the deed the trustee's name was used. It was held that the title was good, and Lord Ellenborough said: "The cases cited are perfectly satisfactory in authorizing us to put a construction on the deed in support of it, which from the reason and good sense of the thing we should probably have done without such authorities." *Ewer* v. *Myrick*, 1 Cush. 16.

If there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary; and therefore herein a deed doth differ from a will. Shep. Touch. 2 Bl. Com. 381.

Seth L. Larrabee and Melville A. Floyd, for defendant.

Plaintiffs admit that one of them, James H. Smith, drafted this lease, making duplicates which were executed by both plaintiffs and defendant in Henry Smith's office. They admit that the lease in suit was a second one drafted to take the place of a prior one offered to plaintiff but objected to by him on some ground. They admit the payments by defendant, quarterly, promptly for six successive payments, of $625 per quarter, and their receipt of the same, without objection. Payments were made by check in each instance and the checks came into the hands of both plaintiffs. Receipts for quarterly rent stating specific quarters were given by the Smiths for nearly two years. At the time of the first payment November 23, 1892, defendant by Henry's request, plaintiffs' copy of lease not being at hand, produced his own copy for inspection and Henry took it and examined it. An amicable arrangement was made by which defendant should deposit his money in the bank with which Henry is connected so that the payments were made by checks to Henry there. The plaintiffs by their acts for nearly two years, during which time they both had full knowledge of the subject

matter, have placed a construction upon the lease in suit which the court in view of the circumstances of its execution will not change.

In this case the actual consideration of the lease may be shown by parol evidence.

"Parol evidence may be given of a consideration not mentioned in a deed provided it be not inconsistent with the consideration expressed in it." 1 Greenl. Ev. § 285; *Warren* v. *Walker*, 23 Maine, 459; *Varney* v. *Bradford*, 86 Maine, 510.

Evidence offered to support either $625 per quarter or $2700 per year as a consideration in the lease in suit is not contradictory of or inconsistent with the consideration as written into the lease by plaintiffs, for both amounts are by them stated.

In *Smith* v. *Faulkner*, 12 Gray, 255, the court say: "If their meaning is doubtful you resort to extrinsic evidence not to discover an intention outside the contract nor to import an intention into it, but to enable you the better to read, understand and interpret what is in the contract." . . . "Nor is this rule, by which the court interprets the contract, departed from where the extrinsic evidence is itself a matter of controversy."

SITTING: WALTON, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

STROUT, J. On the twenty-third day of August, 1892, plaintiffs leased defendant certain wharf property for seven years, "yielding and paying therefor the rent of twenty-seven hundred dollars per annum." "And the said lessee do so covenant to pay the said rent in equal quarterly payments, as follows, six hundred and twenty-five dollars on the twenty-third day of each November, February, May and August during the whole of said term." And in the reddendum the lessors are given the right "to expel the lessee if he shall fail to pay *the rent aforesaid*." And in the fire clause, it was provided that in case of loss or damage, by fire, "*the rent hereinbefore reserved*" shall be abated or suspended until the premises should be restored. The question is, whether the rent under the lease is twenty-

seven hundred dollars yearly, or twenty-five hundred dollars, the amount of four quarterly payments of six hundred and twenty-five dollars each.

The meaning and construction of written contracts is to be ascertained from the language used. Parol testimony may be admitted to explain a latent ambiguity, but not one patent upon the terms of the contract. So the circumstances in which the parties were placed at the time of making the contract, and collateral facts surrounding it, may be shown. 1 Greenl. Ev. § 297. Mere inaccuracy of language does not constitute an ambiguity of either class. In such cases parol evidence is inadmissible to show the intention of the parties. The language of this lease is explicit, and the question in issue cannot be determined from parol evidence of what was said and done at the time of the contract, but must be ascertained from the lease itself.

In a letting for a series of years, the leading idea as to rent, is the yearly rental. Its subdivision into frequent payments is a matter of mathematics, and a secondary subject of thought. It is common knowledge that in the great majority of leases, and in negotiations for them, the rent stated and talked about is the yearly rent. In this lease the grant is made, "yielding and paying therefor the rent of twenty-seven hundred dollars per annum." The gross yearly sum was clearly in the minds of the parties and clearly stated. The tenant's covenant was "to pay the said rent in equal quarterly payments." And the covenant would have been complete if it had stopped there. And in that case, no doubt could have existed that the rent per year was twenty-seven hundred dollars; but the covenant proceeded unnecessarily to add "as follows, six hundred and twenty-five dollars" each quarter. This unnecessary addition, disagreeing in the amount with the rent immediately before reserved, which the lessee covenanted to pay, is manifestly a clerical error. It is to be construed as if it read, the tenant covenants to pay the rent reserved in equal quarterly payments, which are, or equal to, six hundred and twenty-five dollars per quarter. If such was the language, there could be no doubt that the annual rent

was twenty-seven hundred dollars; and the attempted division into quarters was simply a mathematical error, which should be rejected, or corrected.

"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, it appears that the rent reserved in the grant was twenty-seven hundred dollars; that the tenant covenanted to pay "the said rent in equal quarterly payments;" that in the reddendum he was to be expelled if he failed to "pay the rent aforesaid;" and in the fire clause the stipulation is "the rent hereinbefore reserved." The rent reserved in the grant was twenty-seven hundred dollars. The erroneous division of that rent into four parts, cannot modify or control the express rent reserved and mentioned in the grant, the reddendum and the fire clause, but is controlled by them.

But it is said, that the parties by their acts have given a construction to the contract in accordance with defendant's construction. Such acts, if done understandingly, with full knowledge of all the facts, are sometimes of controlling force. It appears that six quarters' rent, at the rate of six hundred and twenty-five dollars each, were paid to Henry St. John Smith, one of plaintiffs, and receipts were given in each case for three months' rent. But it also appears that the contract for lease was made with the other plaintiff, James H. Smith, and that Henry was not familiar with its terms. Henry says that at one time defendant called to pay the rent, and showed him the lease, folded so as to show the six hundred and twenty-five per quarter, but not to show the twenty-seven hundred dollars reserved rent; and that he looked at it, and supposing it to be right, accepted the money and gave the receipt, which defendant had previously prepared. This is denied by defendant, though he admits showing Henry the lease, Henry not having

present plaintiffs' duplicate. But in May, 1894, when defendant offered to pay the rent to Henry, he had discovered the mistake, and declined to receive the money. The matter ran along till August 23, 1894, when defendant, by letter to plaintiffs, proposed to tender twelve hundred and fifty dollars, two quarters' rent then being due, unconditionally, and without prejudice to any claims plaintiffs might have for any larger or different sum; and on August 27, 1894, twelve hundred and fifty dollars was paid to James, and a receipt given for the amount, "On account rent due under written lease." Thereafterward the receipts were given on account of rent.

Defendant claims that when the twelve hundred and fifty dollars were paid, it was a settlement of all claims to the date of payment, and a waiver by agreement of any claim under the lease for a yearly rent in excess of twenty-five hundred dollars. But this claim is negatived by defendant's letter to plaintiffs, of August 23, 1894, and the terms of the twelve hundred and fifty dollars receipt, and all subsequent receipts.

The plaintiffs are men of large affairs, and it is not difficult to understand how they might be misled by the quarterly amounts stated in the lease. Their receipts in full for several quarters are open to explanation. Upon all the evidence, we are satisfied that they were misled, perhaps by a lack of caution, but the defendant has not been prejudiced thereby.

"A court of law should read a written contract according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the whole instrument." *Wallis Iron Works* v. *Monument Park Association*, 55 N. J. L. 152.

It is the opinion of the court, that the rent reserved by this lease is twenty-seven hundred dollars per annum, and that the naming of six hundred and twenty-five dollars as the quarterly payments, is a clerical error, which should be, and is corrected by perusal of the whole lease. The suit is for the difference between twenty-five hundred dollars per annum, which has been paid, and twenty-seven hundred dollars per annum, which

should have been paid; and the plaintiffs are entitled to recover it.

Judgment for plaintiffs.

CITY OF GARDINER *vs.* INHABITANTS OF MANCHESTER.

Kennebec. Opinion January 10, 1896.

Pauper. Collusive Marriage. Minor Children. R. S., 1871, c. 24, § 1; 1883, c. 24, § 1.

A marriage is valid without any certificate of intention being obtained as required by law, when solemnized by a duly authorized magistrate.

A female pauper, having a settlement in Manchester, was married in 1878 to a pauper having a settlement in Gardiner. *Held*; that under the statute then in force, R. S., 1871, c. 24, § 1, if the marriage was collusive for the purpose of changing the settlement of the wife and so inoperative for that purpose, the children would take the settlement of the husband.

The pauper status of the children of that marriage is determined by the law as it stood at the date of the marriage.

Held; that the father's settlement being in Gardiner, the children who were then minors and who were born illegitimate before the marriage, having become legitimate by the subsequent marriage, and those born subsequently, had their pauper settlement in Gardiner by derivation from the father.

Held; that the evidence fails to establish the allegation that the marriage was procured to change the wife's settlement; she, therefore, took her husband's settlement which was in Gardiner.

Houlton v. *Ludlow*, 73 Maine, 583, affirmed.

ON REPORT.

This was assumpsit on account annexed to the writ dated November 2, 1894, to recover for pauper supplies, furnished Elizabeth (Howard) Hutchinson and seven minor children, widow of George Hutchinson. Plea, general issue. It was admitted that on June 28, 1878, George Hutchinson had a pauper settlement in the city of Gardiner, and Elizabeth M. Howard, a pauper settlement in the town of Manchester.

The plaintiff contended that the marriage of Elizabeth (Howard) Hutchinson to George Hutchinson, on June 28, 1878, was procured by the agency or collusion of I. N. Wadsworth, chairman of the board of selectmen of Manchester, deceased. Mrs. Hutchinson, called by the defendants testified: . . .

"I remember the fact of my marriage in Manchester by Mr. Wadsworth and the circumstances connected with it. We went to Manchester with a horse and carriage from my mother's on Malta Hill in Augusta and found Mr. Wadsworth at work in a field right side of the road.

"Ques. Prior to the performance of that marriage ceremony by Mr. Wadsworth, had Wadsworth or any town officer of Manchester or anybody coming to you from them, suggested to you the idea that you should be married?

"Ans. No, sir, in no way or shape. No one had spoken to us, and I don't think anyone in Manchester knew anything about it. I went out and told Mr. Wadsworth myself.

"Ques. In other words, is this the fact: that your going there with George Hutchinson and your being married was entirely your own matter and not suggested to you in any way by Mr. Wadsworth or any other town officer, or any person representing or acting for the town of Manchester?

"Ans. No, sir, it was not anyone in Manchester whatever; it was wholly my own matter.

"Ques. What did you say to Wadsworth?

"Ans. I told Wadsworth that I wanted him to marry us; that they would not give me any certificate in Gardiner, and I wanted him to marry us, and he said all right. I asked him to perform the marriage ceremony. I did not ask his advice about it and he did not suggest it to me. He did not in any way, shape or how suggest it or advise it or ask me to get married. I had been living with George seven or eight years prior to my marriage; I had lived with him, in the same house, without marriage." . . . . .

Other facts appear in the opinion.

W. C. Atkins, city solicitor,
A. M. Spear and W. D. Whitney, for plaintiff.
H. M. Heath and C. L. Andrews, for defendants.

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

STROUT, J. Action for pauper supplies furnished to Elizabeth M. Hutchinson and her seven minor children. The contention is whether the pauper settlement was in Gardiner or Manchester. It is admitted that, on June 28, 1878, Elizabeth M. Howard had a pauper settlement in Manchester, and George L. Hutchinson a pauper settlement in Gardiner. On that day the parties were married. They had previously lived together, and children had been born of that cohabitation. It is claimed by plaintiff that the marriage was procured by Isaac N. Wadsworth, then chairman of defendant town, for the purpose of changing the settlement of Elizabeth M. Howard, from Manchester to the town in which her husband had a pauper settlement. It appears that the marriage was solemnized by Mr. Wadsworth, without any certificate of intention of marriage being obtained as required by law; and he thereby became liable to the penalty provided by the statute. The marriage, however, was valid. *Damon's case*, 6 Maine, 150; *Milford* v. *Worcester*, 7 Mass. 55. Its only infirmity was in its effect upon the pauper settlement of the wife. The marriage occurred in 1878. At that time R. S. of 1871, c. 24, § 1, was in force. That statute did not contain the clause in the present revison, that "no derivative settlement is acquired or changed by a marriage so procured." That clause was added in 1883. The status of the children as to settlement, is determined by the law as it existed at the date of the marriage. At that time a marriage procured to change a settlement affected only the settlement of the wife, and not that of her children by her husband. This construction is in accordance with the language and intent of the statute then in force. It has been expressly so held by this court in *Houlton* v. *Ludlow*, 73 Maine, 585; *Minot* v. *Bowdoin*, 75 Maine, 210.

At the time of the marriage, the wife had minor children by Hutchinson. The subsequent marriage made these children legitimate, and gave them the settlement of the father. R. S. of 1871, c. 24, § 1, clause 3. The children born subsequently took the settlement of the father by R. S. of 1871, c. 24, § 1, clause 2, and R. S. of 1883, c. 24, § 1, clause 2. The father's settlement being in Gardiner, the children who were then minors and who

were born before the marriage, having by the subsequent marriage become legitimate, and those born subsequently, had their pauper settlement in Gardiner, by derivation from the father. The two children born since the amendment of the law in 1883, are unaffected by that amendment. The pauper status of the parents, and derivative settlements of their children, were established by the law existing at the date of the marriage.

The pauper settlement of the wife depends upon the question whether the marriage was procured to change her settlement, by the agency or collusion of the officers of Manchester; if not, then she took the settlement of her husband,—R. S. of 1871, c. 24, § 1, clause 1,—if he had one in this State. He did then have a settlement in Gardiner.

Was the marriage fraudulently procured? for it would be fraudulent, if procured for the purpose of changing a settlement. Fraud is never presumed, but must be proved, not necessarily by direct and positive testimony, but the evidence must be sufficient to satisfy the mind of its existence. As early as June, 1870, the intention of marriage between the parties was duly entered in the clerk's office of Gardiner; but no certificate was issued because the mayor forbade the issue; but no proceeding was had thereunder as provided by R. S. of 1871, c. 59, § 8. The parties continued to live together as husband and wife till their marriage in 1878. Meantime children had been born to them. It may well be, that the mother was anxious to make her children legitimate by marriage, and to escape a possible prosecution for illegal cohabitation, as well as the disgrace attending the illicit connection. She is the only witness who testifies to the circumstances inducing and attending the marriage. Wadsworth, the justice who solemnized the marriage, is dead. Mrs. Hutchinson says that prior to the marriage, neither Wadsworth nor any other town officer of Manchester, or any one from Manchester, had ever suggested the marriage; that it was wholly her own matter; that she told Wadsworth she wanted him to marry them; that Gardiner would not give her a certificate; that she had children and desired to be married; that she did not ask his advice, and he gave none. Such a statement

would appeal strongly to a humane man, and might induce him to perform the marriage service without a certificate, to relieve the woman from disgrace, and legitimatize her children, notwithstanding the statute penalty. She was not then a pauper. And Wadsworth, even if he knew of this statute, could very well have done what he did, without thought of the question of settlement of one not then, and perhaps never to be a pauper. An honest and humane motive, under the circumstances, and the information communicated to him, is more consistent with the facts than a dishonest and fraudulent one.

It is true, that after Wadsworth had been compelled to pay a fine for marrying without a clerk's certificate of intention, and for failing to return the marriage within the statute period, the town of Manchester reimbursed him his outlay, upon the ground that the marriage had in fact transferred the settlement of the wife from Manchester to Gardiner. And it is strongly argued that this act of the town is indicative of a previous collusive and fraudulent act on the part of Wadsworth to procure the marriage for that purpose. But the act of the town is equally consistent with an honest action of Wadsworth in marrying the parties, and the subsequent knowledge of the town that the marriage did in fact change the settlement of the wife, and thereby relieved the town from a possible or probable future liability, and that as Wadsworth had been subjected to loss, it was fair for the town to indemnify him. It would be going too far to treat this act of the town as satisfactory evidence of the wrongful procurement of the marriage, in the absence of all other evidence, and contrary to the positive testimony of Mrs. Hutchinson that neither he nor any other officer of Manchester, in any way advised, suggested or procured the marriage, but that it was entirely her own act and of her own volition.

In *Minot* v. *Bowdoin*, supra, the jury were instructed, that "if a municipal officer of the town made use of the facts of the situation, either by way of advice, argument, persuasion or inducement, made use of any means to induce the marriage for the purpose of changing the settlement, in such a sense that but for such act of the municipal officer, the marriage would not

have taken place, . . then the marriage was procured by agency of the municipal officer to change the settlement." Of this instruction, this court said, "it determines what is required to invalidate such marriage so far as relates to the settlement of a pauper, and by necessary and obvious implication negatives the the idea that the mere honest giving of good advice would in any way affect such settlement." If Wadsworth knew the marriage would change the woman's settlement, at the time he performed the marriage ceremony, such knowledge would not bring the case within the statute. To have that effect, something must have been done by word or act, which induced the marriage, and without which it would not have taken place.

Upon the evidence, the plaintiff fails to show that the marriage was procured to change the settlement. It follows that the wife took the settlement of her husband, which was in Gardiner.

The case comes to us on report, and there must be,

Judgment for defendants.

THOMAS GRIFFIN *vs.* DAVID F. MURDOCK.

Oxford. Opinion January 10, 1896.

Pleading. Money Count and Omnibus Count.

A count was specially demurred to because it combined in one all the money counts, with one for goods sold and delivered, work and labor, and an account stated. *Held*; that it is in the form long in use, and usually denominated an omnibus count. It has been sustained by practice and authority for a long time, and is good.

ON EXCEPTIONS.

This was an action of assumpsit containing a count against defendant as indorser of a promissory note and the general omnibus or money counts with no specification under the money counts.

To the count against defendant as indorser and to the count upon an account stated in the omnibus count contained, the defendant pleaded the general issue, but to each of the other counts he filed a special demurrer at the first term.

(Demurrer.) "Now the said defendant comes and defends, etc., when, etc., and says that the first count in the plaintiff's declaration and the matters therein contained in the manner and form as the same are therein stated and set forth, are insufficient in law.

"Wherefore, the defendant prays judgment upon said count in the said declaration contained, and for his costs.

"And the said defendant further says that each and every count in the second or omnibus count in the plaintiff's declaration, except the count upon an account stated between the plaintiff and defendant, are insufficient in law.

"And for special cause of demurrer to each and every count in said omnibus count, except the count on an account stated, the defendant says that each and every of said counts are uncertain and indefinite as to the time in which the several contracts therein alleged were made or the indebtedness accrued, whether at one time or at several times, whether within or previous to six years before the date of the purchase of said writ, as to the items constituting said indebtedness, whether one or several; as to whether the promise therein declared on was made within or previous to six years before the date of the purchase of said writ, or when made; that it is impossible to determine from said counts or either of them when and under what circumstances and conditions the contracts or promises therein alleged were made, nor are they in any way sufficiently identified or described by any language in either of said counts, or the time sufficiently definite to enable the defendant to properly answer or plead to the same.

"Wherefore the defendant prays judgment upon counts in the said declaration mentioned.

"And the said defendant further says that the count for 'goods before that time sold and delivered by the plaintiff to the defendant at his request' in the second or omnibus count in the plaintiff's declaration is insufficient in law.

"And for special cause of demurrer says that said count is uncertain and indefinite as to the time when said goods were sold and delivered or when said indebtedness accrued, whether

at one time or several times, whether within six years or previous to six years before the date of the purchase of said writ; as to the items constituting said indebtedness, as to the kind, character and quality, whether one or several or in what amounts; as to whether the promise therein declared on was made within or previous to six years before the date of the purchase of said writ or when made; that it is impossible to determine from said count when and under what circumstances and conditions said goods were sold and delivered or the contracts and promises therein alleged were made, nor are said goods sufficiently described by any language or the time when sold sufficiently definite to enable the defendant to properly answer or plead to the same.

"Wherefore he prays judgment on the said count in the said declaration mentioned."

Similar demurrers were filed to the other counts in the omnibus count, viz: "work before then done and materials for the same provided;" "other money before then lent;" "other money before then paid;" "other money before then had and received;" "and other money, for interest upon other moneys, then due and owing from said defendant to said plaintiff and by the plaintiff lent and advanced to said defendant."

The presiding justice overruled the demurrers and adjudged the counts, to which demurrers were filed, good. The defendant thereupon excepted to the ruling.

John P. and John C. Swasey, for plaintiff.

M. P. Frank and P. J. Larrabee, for defendant.

In the omnibus count, except the count on account stated, each and every other allegation of indebtedness the defendant claims is insufficient for the reason that the particular promise to be proved under the allegation is not sufficiently described or set forth. It is not claimed that the count may not be amended so as to make it sufficient; but that in its present form it is demurrable for the reasons set forth in the defendant's special demurrer. If the count in its present form and each allegation in it is sufficiently definite then it is unnecessary to set forth in

a writ anything more than the fact that, at the commencement of the action, the defendant was indebted to the plaintiff. This is the only information the count in its present form gives to the defendant. The plaintiff might prove almost anything under such a count, might introduce in evidence any indebtedness on one or more promissory notes; might show that at some time he had sold the defendant goods of any description whatever; or that at some time not stated the defendant was indebted to him for money which the defendant had received on his account; or, in fact, might set up almost any claim to establish any sort of indebtedness from the defendant to the plaintiff.

"The office of the declaration is to make known to the opposite party and the court the claim set up by the plaintiff." *Wills* v. *Churchill*, 78 Maine, 285.

The allegation of indebtedness upon an account stated between the plaintiff and the defendant may be held to make known to the defendant what the plaintiff claims, but defendant claims that he ought not to be compelled to go to trial upon the remaining counts in the omnibus count without further particulars as to the plaintiff's claim under them, for he cannot know what he is to meet. There is no doubt that the plaintiff would have been compelled to file specifications under this count upon motion by the defendant. Rules of S. J. Court, Rule XI.

But the defendant can take advantage of the want of specification equally as well by a special demurrer setting forth the particulars wherein the declaration is not sufficiently definite to meet the purposes which the law requires. *Harrington* v. *Tuttle*, 64 Maine, 474; *Babcock* v. *Thompson*, 3 Pick. 446; *Bennett* v. *Davis*, 62 Maine, 545.

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

STROUT, J. The count specially demurred to in this case, combines in one all the money counts, with one for goods sold and delivered, work and labor and an account stated. It is in

the form which has long been in use, and is commonly called an omnibus count. It is indorsed by Mr. Chitty in his work on Pleading, vol. 1, pp. 343, 349; and the form of the count given by him in vol. 3, p. 89, is substantially the same as the one under consideration. It was approved in *Webber* v. *Tivill*, 2 Saunders, 122, and was held good by this court in *Cape Elizabeth* v. *Lombard*, 70 Maine, 400. It has been sustained by practice and authority for so long a time, that it must now be considered settled and at rest.

Exceptions overruled.

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

SAME *vs.* WILLIAM S. ROBERTSON.

Franklin. Opinion January 10, 1896.

Dower. Assignment. R. S., c. 103, § 3.

Where dower is assigned by the sheriff under a writ of seizin of dower, it must be from each separate parcel; and of such portion of each as will produce one-third of the net income of the whole.

Where an assignment of dower appears, by the assignment and officer's return, to have been made from five only out of eleven parcels, *held;* that such an assignment, when made upon a writ of seizin, is not warranted by law.

A widow's dower should be set out definitely, by metes and bounds when practicable, so that she can occupy her own without further proceedings. *Thus,* where there is set out one-third part of a described parcel of land "measured from the North side, and one-third part of the building standing thereon, measured from the North end," *held;* that it was not set out by metes and bounds, nor specifically as one-third of the rents and profits.

Where dower is attached to and assigned from a single parcel of land, and has been set out by a sufficiently accurate description "as and for her dower," *held*; that the assignment is sufficient.

ON EXCEPTIONS.

J. C. Holman, for plaintiff.

H. L. Whitcomb, for defendant.

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

STROUT, J. Two cases argued together. The first was an action of dower, in which demandant had judgment for dower in eleven several parcels of land. Where dower is assigned by the sheriff under a writ of seizin of dower, it must be from each separate parcel, and of such portion of each as will produce one-third of the net income of the whole. *Leonard* v. *Leonard*, 4 Mass. 533. Such assignment is "according to common right." The heir may assign one manor in lieu of a third of three manors, which will be good, if accepted by the widow. And this is called an assignment "against common right." *French* v. *Pratt*, 27 Maine, 393; *Boyd* v. *Carlton*, 69 Maine, 203. It should be set out by metes and bounds, when practicable, so that the widow may occupy in severalty. When this cannot conveniently be done, it must be assigned in a special manner, as of a third part of the rents and profits. R. S., c. 103, § 3.

The assignment here appears to have been made from five only of the eleven parcels. It is said in argument, that the writ described the defendant's real estate from the different deeds by which it was conveyed to him, and that one parcel in fact may thus appear to be several, and that the assignment ignored this description and set out the dower from each separate tract, although such tract might have been conveyed in several deeds, and appear in the writ as distinct parcels. This may be so, but the assignment and officer's return does not disclose it, as it should, if true.

We must take the assignment as it appears. From that it is shown that there were eleven parcels of land, and that dower was assigned from five parcels only, as and for her dower in all the lands. Such assignment, when made upon a writ of seizin, is not warranted by law.

In one of the assignments there is set out in terms one-third part of a described parcel of land, "measured from the North side, and one-third part of the building standing thereon, measured from the North end." It is not set out by metes and bounds, nor specially as of one-third of the rents and profits. It left the widow to ascertain as best she could, the boundaries of her third part, which would require a survey to accomplish.

Such assignment is invalid. A widow's dower should be set out definitely, so that she can occupy her own without any further proceeding. These irregularities can be corrected on a new assignment.

Other objections are made, but they need not be noticed, as the defects referred to are fatal.

In the suit against Robertson, dower attached to and was assigned from a single parcel of land. It was set out by a sufficiently accurate description, "as and for her dower" therein. It is objected that the return does not show that the part set out would produce one-third the net income of the whole parcel. But the term dower is one very well understood by laymen; and when the appraisers set out a part of the tract, as and for dower, the necessary implication follows, that they adjudged it would produce one-third of the income of the whole lot subject to dower. The assignment in this case is sufficient.

The entry in *Skolfield* v. *Skolfield*, will be,

Exceptions sustained.

And in *Skolfield* v. *Robertson*,

Exceptions overruled.

WILLIAM J. ROBERTS *vs.* BOSTON AND MAINE RAILROAD.

York. Opinion January 10, 1896.

New Trial. Railroad. Defective Car. Negligence. Verdict. Jury.

The plaintiff, while in the performance of his duty as brakeman, descended from the top of a box-car over the end next to the tender, with face towards the car, and tried to pull the coupling pin, with his feet on the lower round of the ladder, and his right hand on the second or third round, but the pin would not come out, either on account of a crook in it, or the strain upon it; he took hold of it and turning it half way round pulled it out and laid it down upon the dead wood; the engine had begun to move toward the siding and was in motion when he pulled the pin. He swung round in a position to go up the ladder and while in a sitting posture, was caught and jammed against the car by the tender, and his hip was dislocated. *Held*; that the evidence was so preponderating in favor of the defendant, not only in respect to the soundness of the car, but also in respect to the reasonable performance of duty on the part of the defendant in furnishing reasonably safe and proper appliances, that the jury were not justified in rendering a verdict for the plaintiff.

See *Roberts* v. *B. & M. R. R.* 83 Maine, 289.

ON MOTION AND EXCEPTIONS.

Upon the new trial granted in this case, see *Roberts* v. *B. & M. R. R.* 83 Maine, 289, the plaintiff recovered a second verdict for $4863.78; and the defendant moved for a new trial and filed exceptions to the exclusion of evidence and the refusal of the presiding justice to order a nonsuit. The pleadings and arguments of counsel appear with a statement of the facts in the former report of the case.

Hampden Fairfield, *William F. Russell and Luther R. Moore*, for plaintiff.

George C. Yeaton, for defendant.

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

FOSTER, J. The plaintiff claims damages for bodily injuries received while employed as brakeman by the defendant corporation, in unshackling a freight box-car from the tender of a locomotive while the car was being pushed or "kicked" backward upon a siding, at Pine Point Station, whereby he was caught and jammed between the tender and box-car, and his hip dislocated.

The ground upon which the plaintiff seeks to recover against the defendant company is on account of an alleged defective draw-bar, in that the springs "were weak, insufficient and useless," and because the "dead-wood was worn, insufficient and useless," and because of such defects the draw-bar was pushed in by the engine, in "kicking" the car, further than it would have been if it had not been defective.

The plaintiff says that he descended from the top of the car over the end next to the tender, with face towards the car, and tried to pull the coupling-pin, with his feet on the lower round of the ladder, and his right hand on the second or third round, but the pin would not come out either on account of a crook in it, or such a strain upon it; that he took hold of it and turning it half-way round, then pulled it out and laid it down on the dead wood; and that the engine had begun to move toward the

siding and was in motion when he pulled the pin; that he swung round in a position to go up the ladder, and while in a sitting posture he was caught and jammed against the car by the tender, and his hip dislocated.

This case has been tried once before resulting in a verdict for the plaintiff, which verdict this court set aside. *Roberts* v. *B. & M. R. R.* 83 Maine, 298.

The second trial likewise resulted in another verdict for the plaintiff.

We have given this case very careful consideration, and while there appears to be some evidence on behalf of the plaintiff additional to that in the former trial, we feel satisfied that this verdict ought not to stand. In fact, the reasons were so fully stated in the opinion of this court why the former verdict should be set aside, that it is unnecessary to reiterate them in this connection as they apply with equal force now as then, notwithstanding the additional evidence. True, there is some additional evidence, but even with that it is so overwhelmingly in favor of the defendant, not only in respect to the soundness of the car, but also in respect to the reasonable performance of duty on the part of the defendant in furnishing reasonably safe and proper appliances, that it seems as if the jury must have been influenced by some improper motive, bias, or prejudice in rendering a verdict in favor of the plaintiff.

A new trial must therefore be granted.

Motion sustained. New trial granted.

ALMEDA J. WADSWORTH *vs.* FRED P. MARSHALL.

Knox. Opinion January 10, 1896.

Quarry. Blasting. Notice. Negligence. R. S., c. 17, §§ 23, 24.

Under R. S., c. 17, §§ 23 and 24, it is the duty of persons engaged in blasting lime or other rocks before each explosion to give seasonable notice thereof, for the protection of persons within the limits of danger. Failure to give such notice is negligence per se, and renders the party liable for injuries resulting therefrom, whether caused by flying debris, or the frightening of horses by the noise of the explosion.

The established doctrine of contributory negligence, as a defense, applies to this class of actions; and the defendant may show in an action on this statute which is remedial, that the unsafe character of the horse driven by the plaintiff, or his negligence in other respects, contributed to the injury. If he does this, plaintiff cannot recover, notwithstanding the negligence of defendant.

ON EXCEPTIONS.

This was an action under R. S., c. 17, §§ 23 and 24, to recover for personal injuries to the plaintiff, alleged to have been caused by an explosion from a blast fired by the defendant without giving seasonable notice thereof, while engaged in blasting lime-rock.

The plea was the general issue.

The testimony showed that on the 19th day of June, 1894, the plaintiff was riding northwardly, in a wagon drawn by one horse at a walk, along a public highway known as Union street leading from Rockport village to Camden village; and that at a point in said Union street, near its junction with Limerock street, the horse became frightened and unmanageable and jumped suddenly and violently, whereby she was thrown from the wagon to the ground and received thereby severe personal injuries.

The plaintiff claimed, and introduced testimony tending to prove, that the cause of the horse's fright was an explosion from a blast of lime-rock fired by the defendant in the limestone quarry of the S. E. & H. L. Shepherd Company; and that the defendant gave no seasonable notice of such blast as is required

by section twenty-three of said chapter seventeen, or any notice whatever, to persons traveling in said Union street.

It was admitted that the defendant, at the time said accident occurred, was employed by said company in blasting and quarrying limestone in its limestone quarry, and that said company was the owner of said quarry.

The testimony showed that the quarry in which the blast is alleged to have been fired is adjacent to said Union street; that the quarry of Carleton, Norwood & Co., adjoins said quarry of the S. E. & H. L. Shepherd company on the north and is also adjacent to said street; that the horse at the time he took fright was four hundred and sixty-five feet distant from the point of the alleged blast; that the point of the alleged blast was seventy-seven feet below the level of the surface of the street, and was two hundred and ninety feet distant from the line of the street; that at the time when the horse took fright and the blast was alleged to have been fired, the plaintiff had reached a point at the junction of Limerock and Union streets and two hundred and forty-seven feet northerly from a point in the street directly opposite the place of the alleged blast.

The plaintiff did not claim to have been struck or injured by any fragment or other missile thrown by such blast, but claimed that her injuries were caused solely by the horse becoming frightened by the explosion.

The defendant denied that any blast was fired by him, at or near the time, when the accident occurred to the plaintiff and introduced testimony upon that point.

The defendant's counsel requested the presiding justice to instruct the jury that if the plaintiff's injuries were caused by the horse becoming frightened by the explosion from a blast fired by the defendant without having given seasonable notice thereof, while engaged in blasting limestone, this action is not maintainable.

The presiding justice, in order to give progress to the case, refused to so instruct the jury; and instructed the jury that if the plaintiff's injuries were so caused she was entitled to recover therefor in this action.

The defendant's counsel further requested the presiding justice to instruct the jury that, if at the time when such blast was fired, the plaintiff had passed the place of such blast and was not approaching thereto, the action is not maintainable; which instruction, the presiding justice, for the same reason, refused to give.

The horse with which the plaintiff was riding belonged to her husband, and at the time of the explosion was being driven by her grandson, a young man eighteen years of age.

The defendant offered testimony tending to prove that said horse was vicious, not properly broken, and unsafe for the purpose for which it was then being used.

Such testimony, upon objection by plaintiff's counsel, was excluded by the presiding justice.

The verdict was for the plaintiff; and the defendant alleged exceptions.

Reuel Robinson, *C. E. & A. S. Littlefield*, for plaintiff.

W. H. Fogler, for defendant.

As the plaintiff does not allege or claim that her injuries were produced by any fragment of stone or other missile thrown by the explosion, the defendant contends that the action is not maintainable under the statute. If the legislature had intended to protect persons from the sound of blasts and explosions, it would have used language which would have been applicable to blasts and explosions produced by any means and for any purpose. But the statute is confined to persons engaged in blasting "lime-stone or other stone." It does not apply even to persons engaged in blasting other substances such as logs, or frozen earth. The great danger from blasting stone is from fragments of stone thrown by the blast, and by confining the effect of the statute to blasting stones, it is apparent that it was the intention of the legislature to protect persons from such danger.

The statute requires persons engaged in blasting stone to give seasonable notice so that persons may retire to a safe distance. This is a reasonable provision if it means such notice as will

give persons an opportunity to retire beyond the range of flying fragments. Such distance can be calculated with considerable accuracy. But to require such notice as will enable a person to retire to such distance that his horse will not become frightened by the explosion is unreasonable, because it is indeterminate, indefinite. One horse may not be frightened by a blast at a distance of a few rods, another may be frightened by the same blast at a great distance. The plaintiff's horse, she alleges, became frightened and unmanageable at a distance of four hundred and sixty-five feet, or nearly thirty rods, from the place of the alleged blast. If the horse became frightened at the blast, at what distance would he not have been frightened? What would be a safe distance, in case of a blast, for another horse to be? If the statute has the construction contended for by the plaintiffs, it would be necessary before every blast to send messengers in every direction a distance at which the most nervous and most easily-frightened horse would not take fright from the explosion. It was not the intention of the legislature to impose such a burden upon persons engaged in a legitimate business.

If the statute was intended to cover injuries caused by the mere noise or sound or jar of an explosion, why should it not have included all blasts and explosions, and not blasts fired by persons employed in quarrying stone? An explosion from the firing of a gun, or cannon, is not included in the statute, but the remedy for any injury produced by such explosion is left to that at common law.

Under this statute an action will lie only for such damages as are the direct cause of the injury and not for injuries produced by the fright of a horse from the sound of an explosion.

2. At the time when the plaintiff was injured she had passed the point of the alleged blast. From a point in the street opposite the place of the alleged blast to the place of the accident was 247 feet. At the time, therefore, that her horse took fright, she was retiring from the place of the blast and not "approaching" it. The statute requires notice such that "all persons or

teams approaching shall have time to retire to a safe distance from the place of said explosion."

If a statute be both penal and remedial, it should be construed strictly. *Abbott* v. *Wood*, 22 Maine, 541.

The word "approaching," used in the statute must be given some meaning. There is no ambiguity in the word. It has but one definition, "drawing nearer," "advancing towards." As the plaintiff was not drawing nearer, or advancing towards the place of the blast, at the time of the explosion she does not come within the terms of the statute.

If it is urged that such a construction of the statute would be open to the charge of absurdity, the answer is that the court is called upon to construe, and not to enact a statute. The language of the statute must be taken in its ordinary acceptance.

3. It has long been a settled rule of the common law, that, for injuries negligently inflicted upon one person by another, there can be no recovery of damages if the injured person by his own negligence, or by the negligence of another imputable to him, proximately contributed to the injury. 4 Am. & Eng. Encl. of Law, 15; *Whitney* v. *M. C. R. R. Co.* 69 Maine, 208; *Woodman* v. *Pitman*, 79 Maine, 456; *Parker* v. *Pub. Co.* 69 Maine, 173. And this rule applies as much to causes of action given by statute as to causes of action arising at common law. 1 Shear. & Redf. Neg. § 62; Beach on Contrib. Neg. § 16; *Taylor* v. *Carew Mfg. Co.* 143 Mass. 470 and cases cited; *Hussey* v. *King*, 83 Maine, 572.

4. The statute which imposed upon the defendant the duty of giving notice, is of the same nature as that which makes it the duty of towns to keep their ways safe and convenient for travel. For neglect of such duties, the parties in fault are liable to persons suffering injury for such neglect. *Moulton* v. *Sanford*, 51 Maine, 127; *Perkins* v. *Fayette*, 68 Maine, 152; *Knowlton* v. *Augusta*, 84 Maine, 572.

The remedy in both classes of cases is statutory. Both are based upon the neglect of the defendants to perform a duty positively imposed by statutes. The statutes in both cases are penal in their nature. The court has given the statute relating to ways a strict construction. *Perkins* v. *Fayette*, supra.

The statute now under discussion, being expressly penal, is to be, at least, as strictly construed. In all actions for damages based upon the alleged negligence of the defendant the question is whether the defendant's neglect is the sole, efficient cause of the plaintiff's injury, or was there some other new and independent cause intervening between the neglect and the injury. See 1 Shearman & Redfield, Sec. 25, et seq.; 19 Am. & Eng. Encl. of Law, 300 et seq.; 16 Id. 428 et seq.; *M. & St. P. Ry.* v. *Kellogg*, 94 U. S. 469.

SITTING: WALTON, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

STROUT, J. The exceptions in this case, require a construction of chap. 17, § 23, of the Revised Statutes, which provides that: "Persons engaged in blasting lime-rock or other rocks, shall before each explosion give seasonable notice thereof, so that all persons or teams approaching shall have time to retire to a safe distance from the place of said explosion; and no such explosion shall be made after sunset."

Section 24 provides a penalty against any one violating the provision, and makes such person "liable for all damages caused by any explosion."

Statutes are to receive the construction intended by the legislature. "To ascertain this we may look to the object in view; to the remedy intended to be afforded; and to the mischief intended to be remedied." *Winslow* v. *Kimball*, 25 Maine, 495. "The duty of the court, being satisfied of the intention of the legislature clearly expressed in a constitutional enactment, is to give effect to that intention and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction." *Oates* v. *National Bank*, 100 U. S. 244. "And we should discard any construction that would lead to absurd consequences." *Gray* v. *Co. Com.* 83 Maine, 435. "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. 565. So in *Murray* v. *Baker*, 3 Wheat. 541, the words "beyond seas" in a state statute of limitations were held to mean "out of the state."

To apply these principles: When the law was enacted, it was well known that extensive quarrying of lime and other rocks, in close proximity to much traveled highways, was done; and that persons traveling on such highways were thereby greatly endangered, not only from flying rocks, but from the frightening of horses by the noise of the explosion. The intention of the Legislature in passing the act, was to ensure safety from these dangers. Hence notice of the "explosion" was required to be given to travelers in time for them to "retire to a safe distance." It is argued that the mischief intended to be remedied was that of flying rocks or other debris, and that the frightening of horses by the noise of the explosion is not covered by the statute. We cannot concur in this view. The safety of the traveler was intended to be secured. Many of the quarries are so far below the surface of the ground, that there is little danger of flying rocks reaching the highway. The traveler's danger from missiles is much less than that from the frightening of horses from the noise of the explosion. Both these dangers were present in the minds of the Legislature when a remedy was proposed, and they evidently intended by this statute to guard against both. One of Webster's definitions of the word explosion, is "a bursting with violence and loud noise, because of internal pressure." The remedy given by § 24, is for "all damages caused by any explosion." Whether the damage is caused by the noise of the explosion, or by flying substances, is immaterial. Whatever damage may be caused by the explosion, whether by noise and its effect on horses, or otherwise, is within the statute protection, and the basis of liability.

It is claimed that the statute protection applies only to those "approaching" the point of explosion, and does not include those who have passed the point nearest the blast, and are receding from it, though they may be in near proximity and not "a safe distance from the place." Such construction leads

to absurd results, and cannot be accepted as the meaning of the Legislature. The word "approaching" in the statute, when considered with reference to the danger guarded against, and the remedy provided, must be regarded as equivalent to, in proximity to the place of explosion, within the limits of danger.

The requested instructions were rightfully refused.

Exceptions are taken to the exclusion of testimony offered by the defendant to prove, that the horse with which plaintiff was riding at the time of the injury, was vicious, not properly broken, and unsafe for the purpose for which it was then being used.

While the statute affixes a penalty to its violation, and is so far penal in character, the damages to be recovered by an injured party are only the actual damages suffered, and in this, the provision is remedial, and to be construed as such.

The statute requires seasonable notice of an explosion. Failure to give it is negligence, which subjects the delinquent to the payment of damages caused by his negligence. But it does not follow that the injured party is thereby relieved of all obligation to exercise due care on his part. It is possible that the explosion, of which no notice was given, may have frightened plaintiff's horse, and the vicious character or untrained habit, or negligent driving of the horse after the fright, which might have been slight, contributed to the injury, or might have been the proximate cause. The instruction proceeded upon the ground, that if no notice of the explosion, such as the statute required, was given, the defendant would be liable, regardless of the character of the horse, or any other negligence of the plaintiff. In *Hussey* v. *King*, 83 Maine, 571, which was an action under R. S., c. 30, § 1, to recover for injuries caused by the bite of a dog, it was held that the owner or keeper of a dog was prima facie, absolutely liable for injury inflicted by the animal; and that the plaintiff need not allege or prove, in the first instance, either his own care or the defendant's negligence. But the court carefully reserved, as undecided, the question whether the acts of the injured person provocative of the dog could be successfully shown in defense.

Under the statute subjecting towns to liability for injuries caused by defective highways, it has uniformly been held in this State that the plaintiff cannot recover unless he was in the exercise of due care, and that this must be shown affirmatively by the plaintiff. In *Taylor* v. *Carew Manf. Co.* 143 Mass. 470, which was a case under a statute making corporations owning factories liable for damages to an employee, if the openings of elevators were not protected in a manner specified, the court held that "where a statute does not otherwise provide, the rule requiring the plaintiff in an action for negligence, to show that at the time of the injury complained of he was in the exercise of due care, is the same, whether the action is brought under a statute or at common law. The doctrine of contributory negligence governs both classes of actions." And this court said in *Hussey* v. *King*, supra, p. 572, the "rule applies not only to actions given by the common law, but also to those given solely by statute, where the gist of the action is the default, omission or carelessness of the defendant." Whether the same rule should apply to the class of actions to which the present suit belongs, need not be decided, as the defendant did not raise the question, but proceeded upon the ground, that when the plaintiff had shown the absence of sufficient notice of the explosion, and an injury resulting, she had made a prima facie case; and that the burden then rested upon the defense to show plaintiff's contributory negligence.

That the action in this case is based upon the omission and neglect of the defendant does not admit of doubt. If he had given the notice as required, and had not been guilty of any other fault, no liability would have arisen, even if plaintiff had suffered an injury. What would be a "safe distance" does not necessarily or probably mean absolutely beyond all sound of the explosion. The plaintiff might have driven to a point so far removed as to properly be considered a safe distance, and yet an unbroken or vicious horse might have been frightened by the noise of a distant explosion, which would not have had that effect upon a horse suitable to drive. In such case, the fault of the horse would contribute to the injury, if indeed it might not

be regarded as the proximate cause. It would be a harsh construction of the statute, to hold that the negligence of the quarryman in not giving notice, subjected him to liability for damages, largely, if not wholly, resulting from the negligence of the traveler in riding with an unsuitable horse. An animal suitable to drive, might, notwithstanding a fright, be immediately controlled, and no injury occur; while an untamed or vicious horse might not be amenable to control, and hence an injury. Both law and sound reason concur in the proposition, that a negligent party is liable for injuries caused by his own negligence to a person who is not guilty of negligence which contributes to the injury, and not otherwise. The statute, affording this remedy to an injured party, is little more than a reiteration of the common law. The only difference being, that the failure to give notice of an explosion is made negligence per se, and is not excused by any amount of care in other respects.

This action, under the statute, is remedial. Defendant is liable for the consequences of his negligence, if no negligence of the plaintiff contributed to the injury. If it did, plaintiff cannot recover. The established doctrine of contributory negligence, as a defense, applies to this class of actions.

The evidence in the case is not reported, and we cannot know whether the offered proof as to the character of the horse, in connection with the other evidence in the case, would have shown contributory negligence of the plaintiff. But it was an element in that proposition, and should have been admitted.

Exceptions sustained.

FRANK E. PEABODY *vs.* EDWARD STETSON, and another.

Penobscot. Opinion January 10, 1896.

Insolvency. Non-resident Debtor. Attachment. Constitutional Law. R. S., c. 70, § 33; Stat. 1891, c. 109.

Chapter 191 of the laws of 1891, which subjects a resident of another state, who has property in this state, to the provisions of the insolvent law, provides a mode for the equitable distribution of the debtor's property in this state, through the machinery of the insolvent law; and limited to that purpose is constitutional. The act is prospective in its operation, and can have no retroactive effect. It became operative on May 3, 1891.

Held; that an attachment of a debtor's property made prior to that date, is not dissolved by proceedings in insolvency, under that act, instituted within four months after the attachment.

In this case the defendant's attachment of the insolvent's real estate was made on March 12, 1891. The inchoate lien thus obtained became perfected by judgment in the suit, and sale of the land on execution. *Held*; that defendant's title to the land demanded in this writ is good, the plaintiff's mortgage not having been recorded until April 13, 1891.

See *Manufacturers' National Bank* v. *Hall*, 86 Maine, 107; *George Stetson* v. *Dudley Hall*, and another, 86 Maine, 110.

ON REPORT.

This was a real action to recover certain lands in the Northern registry district of Aroostook county, which the demandant claimed under a mortgage given by Dudley C. Hall, of Medford, Massachusetts, dated December 17, 1890, and recorded April 13, 1891, as appears in the case George Stetson v. Dudley and Dudley C. Hall, 86 Maine, 110. This mortgage was duly foreclosed. George Stetson, a resident of Bangor, in this state, on the tenth day of March, 1891, brought an action on a promissory note given by the Halls for $10,000, dated September 6, 1890, and on March 12, 1891, made an attachment of the real estate of Dudley C. Hall, in Aroostook county, and a copy of the officer's return of the attachment was filed in the Northern registry of that county on March 16, 1891. The action proceeded to judgment and said Hall's real estate was duly seized and sold on execution to these defendants.

Under the statute of 1891, c. 109, approved March 27, 1891, which went into effect May 3, 1891, proceedings in insolvency were begun on May 11, 1891, against Dudley C. Hall, in Penobscot county, on the petition of his creditors, not including George Stetson, or these defendants who are executors of his will. The debtor was adjudged an insolvent and assignees were appointed, who received an assignment July 22, 1891.

The principal question in this case was whether the attachment made by George Stetson, March 12, 1891, upon his writ against Dudley C. Hall and the subsequent seizure and sale on execution were avoided by the proceedings in insolvency.

The statute under which the proceedings in insolvency were instituted is as follows:

An Act to amend section seventeen of chapter seventy of the Revised Statutes, relating to the Insolvent Law.

CHAPTER 109.

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

Section seventeen of chapter seventy of the revised statutes of eighteen hundred and eighty-three, is hereby amended by inserting after the word "resides" in the third line of said section the words "or if a non-resident of the state, to the judge of the county in which said non-resident debtor may have personal property or real estate," so that said section as amended, shall read as follows:

Section 17. When one or more creditors of a debtor makes application under oath, by petition by them signed, to the judge of the county in which the debtor resides, or if a non-resident of the state, to the judge of the county in which said non-resident debtor may have personal property or real estate, or from which he has absconded or removed beyond the state, within six months before the filing of said petition, leaving property or estate in said county, setting forth that they believe that their aggregate debts provable under this chapter, amount to more than one-fourth part of the debts provable against such debtor, and that they further believe, and have reason to believe, that said debtor is insolvent, and that it is for the best interests of all the creditors that

the assets of such debtor should be divided as provided by this chapter, and it shall be satisfactorily made to appear to the judge that the allegations contained in such application are true, and that such debtor is insolvent, the judge shall issue his warrant, under his hand, to the sheriff of the county or either of his deputies, directing him forthwith to attach the real and personal estate of the debtor not exempt by law from attachment and seizure on execution, wherever the same may be situated within the state, and forbidding the payment to or by such debtor of any debt, demand or claim, and the sale, transfer, mortgage, pledge, conveyance, or removal by such debtor, his agents or attorneys, of any of his estate, property, rights or credits, and the making of any contracts for the sale or purchase thereof, or relating thereto, until such warrant is revoked by said judge. Upon the issuing of such warrant, the register shall cause an attested copy of such application and warrant to be served upon the debtor, or such other notice as the judge may order, to be given, and the debtor thereupon may appear, and a hearing shall be had upon such application by the judge, who may thereupon revoke such warrant, unless such allegations are proved. After service of the copy of the application and warrant upon such debtor, or the giving of such other notice provided by this section, as the judge may order, and until the revocation of such warrant, any payment of a debt, demand or claim, to or by said debtor, and any sale, transfer, mortgage, pledge, conveyance, or contract, for the sale or purchase of any estate, property, rights or credits, of such debtor, by him, or his agent or attorney, shall be null and void. If upon hearing or default, the judge finds the allegations of such application to be true and proved, and that said debtor is insolvent, he shall issue his additional warrant to said sheriff or either of his deputies, and cause such other proceedings to be had as are provided in the preceding section.

Approved March 27, 1891.

J. B. Peaks, for plaintiff.

The attachment was dissolved by statute 1891, c. 109. Plain-

tiff's mortgage not affected by the insolvency proceedings. *Coffin* v. *Rich*, 45 Maine, 507; *Kingley* v. *Cousins*, 47 Maine, 91; *Bryant* v. *Merrill*, 55 Maine, 515.

The courts have always recognized the right of the legislature to change, modify or take away a remedy by a subsequent statute, and not violate the constitutional provision. In *Frost* v. *Ilsley*, 54 Maine, 351, the legislature had changed the law of lien claims, while the plaintiff's lien existed by a statute then in force. The plaintiff claimed it was not retroactive, and if so the legislature had no authority to destroy an existing lien; but the court decided otherwise, and that the legislature had always the control of any remedy. Even to take it away, and not violate any provisions of the constitution. In *Coffin* v. *Rich*, 45 Maine, 507, the court say: "There can be no doubt that the legislature have the power to pass retroactive statutes, if they affect remedies only." Such is the well-settled law of the state. See *Owen* v. *Roberts*, 81 Maine, 444.

Applying the law to this case, defendant's attachment on March 12, 1891, was only a remedy provided by the statute. It was a statute remedy for the collection of a debt. It had no force outside of the provisions of our statute. It was a remedy pure and simple. If an existing lien-claim for wages, by force of our statute, was only a remedy, as held by our court in *Frost* v. *Ilsley*, supra, how can the real estate attachment of defendants, by force of our statute, be anything more than a remedy; and if one can be modified or changed by the legislature, why not the other?

In *Lord* v. *Chadbourne*, 42 Maine, 429, which involved the construction and the provisions of the statute that no action of any kind should be maintained in any court for this state for intoxicating liquors, the court say: "The legislature may pass laws altering or modifying or even taking away remedies for the recovery of debts, without incurring violation of the provisions of the constitution."

In *Fales* v. *Wadsworth*, 23 Maine, 553, the court say: "No person can have a vested right in a mere mode of redress provided by statute." The legislature may at any time repeal or

modify such laws. They may prescribe the number of witnesses which shall be necessary to establish a fact in court, and may again at pleasure modify or repeal such laws, and so they may prescribe what shall and what shall not be evidence of a fact, whether it be in writing or oral.

The law of 1891 was simply a modification of the law as it then stood. It put the affairs of non-resident and resident insolvents into the same court, where they are to be governed by the same process; where all insolvent estates are to be distributed by the provisions of chapter 70, R. S. And to have the effect of modifying the remedy by attachment, is precisely the same case as the modification of the remedy in *Frost* v. *Ilsley*, supra, where the legislature changed the law of lien.

Charles P. Stetson, for defendants.

The Act of 1891, c. 109, is wholly unconstitutional. It is not competent for the legislature of Maine, to pass a law providing for proceedings of involuntary insolvency against a citizen of Massachusetts.

Insolvent laws of a state can only be local and have no extra territorial force, so as to act upon the rights of citizens of other states. *Felch* v. *Bugbee*, 48 Maine, 9, p. 18.

Every bankrupt or insolvent system must partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to a hearing. Hence every system in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt.

But on what principle can a citizen of another state be forced into the courts of this state for investigation?

But when in the exercise of that power (power to pass insolvent laws), the states pass beyond their own limits and act upon the rights of other states, there arises a conflict of sovereignty and a collision with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other states and with the constitution of the United States. *Ogden* v. *Saunders*, 12 Wheaton, 213.

The statute of 1891, c. 109, is not and was not intended to be retroactive or retrospective.

A statute is construed to operate prospectively only; unless on its face the contrary intention is manifest beyond reasonable question. *Shreveport* v. *Cole*, 129 U. S. 39.

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

STROUT, J. This is a writ of entry to recover certain lands in the northern Registry District of Aroostook county. Demandant claims under a mortgage of these lands, and other lands in the southern district of Aroostook, given to him by Dudley C. Hall, dated December 17, 1890, recorded in the southern district on December 29, 1890, and in the northern district, April 13, 1891. Defendant claims the lands in controversy, under an attachment in suit, *George Stetson* v. *Dudley C. Hall et al.*, made on March 12, 1891, duly recorded, and a sale upon execution which issued upon the judgment rendered in that suit; at which sale defendants became purchasers, and received a deed from the officer. It is not controverted that all proceedings after the attachment were in regular form and within the statutory periods of time, to maintain the lien of the attachment in force; and that the attachment, antedating as it did, the record of demandant's mortgage in the northern registry district, took precedence of the mortgage, unless the attachment was vacated by insolvency proceedings against Dudley C. Hall, the debtor. Hall, at the date of the mortgage, was a citizen of Massachusetts, owning these lands in Maine, and it is not claimed that he has at any time been a citizen of this state, or resident here. Demandant was then and now a citizen of Massachusetts.

On the twenty-seventh day of March, 1891, the Legislature of this state, by an amendment to the insolvent law, provided that a non-resident of the state who had real or personal property within it, should be subject to its provisions. Chapter 109, law of 1891. This act became an operative law on the

third day of May, 1891. On the eleventh day of May, 1891, a petition in insolvency was filed by creditors of Dudley C. Hall (but not including these attaching creditors), in Penobscot county; and on the ninth day of July, 1891, Hall was duly declared an insolvent under the law of 1891, and assignees were appointed, and an assignment made to them in accordance with the provisions of the insolvent law.

The main question is, whether these insolvency proceedings vacated the attachment on the Stetson writ. Demandant claims that it was vacated under R. S., chap. 70, § 33, as the attachment had not existed four months prior to commencement of insolvency proceedings.

Defendants say, the act of 1891 is unconstitutional; and if not, that it cannot retroact to discharge a lien legally existing before the enactment of the law.

The constitutionality of state insolvent laws, in the absence of a general bankrupt law of the United States, when confined to the limits of the enacting state, and operating upon its own citizens, is beyond question, since the case of *Ogden* v. *Saunders*, 12 Wheat. 369. It is equally well settled that such laws cannot operate to bar suits by citizens of the same state upon contracts existing prior to the passage of the law; *Schwartz* v. *Drinkwater*, 70 Maine, 409; and that they have no effect upon contracts held by citizens of other states, unless such holders became parties by proving their claims. *Owen* v. *Roberts*, 81 Maine, 445.

The act of 1891 attempts to subject to its provisions citizens of other states, owning property in this state, over whom neither this state nor its courts have any personal jurisdiction. But the property of such non-residents situated in this state, is subject to control under the local law. Many provisions of the insolvent law cannot be applied or enforced against a non-resident, who does not voluntarily come in and make himself a party to the proceeding.

The object of the statute undoubtedly was, to enforce an equitable distribution of the debtor's property in this state, among his creditors; and this is attempted to be accomplished

through the machinery of the insolvent law. Enough of the provisions of that law can be enforced against a non-resident to accomplish this object; and it may well be, when that result is reached, that further proceedings cease, because inapplicable. Regarded in this light, and confined to this purpose, it is not in conflict with any constitutional provision.

Assuming the decree of insolvency against Hall, to be effective for this purpose, we are to determine its effect upon the attachment in the Stetson suit. When the attachment was made on the twelfth day of March, 1891, it became, under the law then existing an inchoate lien upon the land in controversy, which entitled the creditor, if he observed all the requirements of the statute to perfect his lien, to subject the lands, by sale on execution, to the payment of any judgment in his suit. It appears that all these requirements were fulfilled, and the defendants became the purchasers of the lands. *Kilborn* v. *Lyman*, 6 Met. 304. Until the enactment of the statute on March 27, 1891, which went into effect on May 3, 1891, there was no provision of the insolvent law which could affect Hall, or his property in this state; and the creditor's lien could not be lost, except by his own laches.

On the third day of May, 1891, a new statute subjected Hall's property in this State to its control. The general rule is that statutes shall have a prospective operation unless the intention of the Legislature is clearly expressed, or clearly to be implied from their provisions, that they shall apply to past transactions. *Deake, appellant*, 80 Maine, 55. So far as the rights of these parties, and the disposition of Hall's property in this State, are concerned, the entire insolvent law, including the amendment of 1891, must be regarded as first becoming law on the third day of May, 1891. The act of 1891, is not in terms made retroactive, and nothing in its language raises a fair implication that the Legislature intended it to have that effect. It is necessarily prospective in its application to Hall, and cannot be retroactive in its operation upon his property. The first proceeding is against Hall to obtain a decree of insolvency. There was no authority for such proceeding till May 3, 1891. Hall's

property is affected, as the result of the decree of insolvency, and cannot be affected by any provisions of the insolvent law, existing before the law subjected Hall to its provisions. As to him, all its provisions speak from May 3, 1891, and do not retroact upon rights, liens or conditions lawfully existing prior to that date. *MacNichol* v. *Spence*, 83 Maine, 90; *Hussey* v. *Danforth*, 77 Maine, 20; *Palmer* v. *Hixon*, 74 Maine, 448. The provisions in the original insolvent law, that attachments existing less than four months prior to proceedings in insolvency are dissolved, must, as to Hall and his property, be construed as speaking from the third day of May, 1891, and be operative upon subsequent attachments of the property of a non-resident insolvent, and cannot be permitted to destroy a lien, created, existing and valid before the enactment of the law.

To give it such retroactive effect, would seem to impair the obligation of the contract, which the states are prohibited from doing by the constitution of the United States, as that provision has been defined and construed by the Supreme Court of the United States. *Bronson* v. *Kinzie*, 1 How. 312; *Edwards* v. *Kearzey*, 96 U. S. 607; *Planters' Bank* v. *Sharp*, 6 How. 301. These decisions upon this question are authoritative and binding upon all state courts.

It has sometimes been said, that a remedy may be materially impaired, if not wholly taken away, without conflicting with this constitutional provision,— that in such case the contract subsists, though the means of enforcing it are so much weakened by subsequent legislation, as to render it of little value to the holder. But the Supreme Court of the United States, in *Edwards* v. *Kearzey*, supra, say: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. Want of right and want of remedy

are the same thing. . . . The laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement." This court has held that attachments made upon contracts entered into while the insolvent law was in existence, were affected by its provisions, although the debt was held by a citizen of another state. *Owen* v. *Roberts*, 81 Maine, 445. But in that case, the court carefully reserved the question whether an attachment made before insolvency, upon a debt existing before the enactment of the insolvent law, should not be regarded as a vested right. And in *Bigelow* v. *Pritchard*, 21 Pick. 175, though not deciding the point, the court say: "A creditor has no vested right in the mere remedy, unless he may have exercised that right by the commencement of legal process under it, before the law making an alteration concerning it, shall have gone into operation."

Limiting the act to a prospective operation, so far as the rights of these parties are concerned, it follows that the lien of defendants' attachment was not lost by the insolvency of Hall, and that the defendants have title to the lands in controversy, and there must be,

Judgment for defendants.

GEORGE W. CHIPMAN, Assignee in Insolvency,

vs.

FRANK E. PEABODY.

SAME, in equity, *vs.* EDWARD STETSON, and another.

Penobscot. Opinion January 10, 1896.

Insolvency. Retroactive Statutes. Attachment. Mortgage. R. S., c. 70; Stat. 1891, c. 109.

The statute of 1891, c. 109, amendatory of the insolvent law, and subjecting property of insolvent non-resident debtors within this State to the jurisdiction of the Court of Insolvency, *is held* to be prospective in its operation and not retroactive.

Held; that a lien created by an attachment of a non-resident debtor's property in this State before the enactment of the statute of 1891, c. 109, is not affected by subsequent proceedings in insolvency against such debtor under that act.

A non-resident gave on December 17, 1890, a mortgage of lands in Maine duly recorded to the defendant to secure a pre-existing debt. The debtor was decreed an insolvent on petition of his creditors filed in Penobscot county, May 11, 1891, under the Statute of 1891, c. 109, which went into effect May 3, 1891. *Held;* that the proceedings in insolvency did not invalidate the mortgage.

See *Peabody* v. *Stetson*, ante, p. 273.

ON REPORT.

The first of these actions was a writ of entry.

Plea, nul disseizin.

The plaintiff claimed title as assignee in insolvency of Dudley C. Hall, of Medford, Massachusetts. The defendant claimed title under a mortgage from Dudley C. Hall to himself; and it was admitted that such mortgage was given by said Hall to secure a pre-existing debt, and for no other purpose.

Plaintiff read in evidence the following: A certified copy of the petition in insolvency by Henry Bradlee and others, creditors of Dudley C. Hall, filed May 11, 1891, in Penobscot county, and adjudication and decree thereon dated June 11, 1891.

A certified copy of memorandum of first meeting of creditors, July 9, 1891.

A certified copy of the docket entry, showing appearance of counsel for the insolvent.

A certified copy of the choice of assignees dated July 9, 1891.

A certified copy of the acceptance of the assignees, dated July 9, 1891.

A certified copy of the assignment, dated July 22, 1891.

It was admitted that William C. Haskins, one of the assignees of the insolvent estate of Dudley C. Hall, deceased, February 17, 1892.

The defendant read in evidence the following:

Copy of mortgage from Dudley C. Hall to Frank E. Peabody, dated December 17, 1890, recorded in Northern District, Aroostook county, April 13, 1891, at one hour and thirty minutes, P. M., in volume 24, pages 233, 234, 235, 236, and 237.

It was admitted by plaintiff that this same mortgage was also duly recorded in the registry of deeds for the southern district of Aroostook county, December 29, 1890, in vol. 118, page 359.

Defendant also read in evidence a certified copy of notice of foreclosure of said mortgage, dated October 7, 1891, published in the Aroostook Republican, at Caribou, October 14th, 21st and 28th, 1891, entered in the registry for the Northern District, Aroostook county, in volume 1, pages 371, 372 and 373, of the records of foreclosure.

At the conclusion of the evidence the case was withdrawn from the jury and reported to the law court for such decision as the legal rights of the parties may require.

The second action was a bill in equity, which after setting forth the above proceedings in insolvency against Dudley C. Hall, a non-resident debtor, alleges the attachment of his real estate in this State, and its seizure and sale on execution to the defendants after judgment. The particulars of the attachment, etc., are stated in the case, *Peabody* v. *Stetson*, ante, p. 273.

The bill further alleges:

"Seventh. That all of the aforesaid attachments made as aforesaid, being made within four months preceding the commencement of the insolvency proceedings aforesaid, (the petition being filed on the 11th day of May, 1891, and the adjudication of insolvency being on the 11th day of June, 1891,) were dissolved by virtue of section 33 of chapter 70 of the Revised Statutes of Maine, and that the sales on said execution were null and void.

"Eighth. That all the conveyances made as aforesaid in pursuance of said void sales, duly recorded as aforesaid, although themselves null and void, yet constitute a cloud upon the title of your complainant to said lands in said several counties, and that he is unable to sell and dispose of the aforesaid lands, and property of said insolvent estate and divide the proceeds among the creditors of said estate, and wind up the affairs thereof, so long as said cloud remains upon the title as aforesaid.

"Wherefore, your complainant prays this Honorable Court to decree that all of the aforesaid execution sales, and the several

conveyances made thereon, to be null and void, and that the respondents be ordered to release their apparent title to the several parcels above described to your complainant, and for such further relief as the case may require.

"Geo. W. Chipman, Assignee.

"Dated, Boston, Aug. 6, A. D., 1894.

William B. French,
Boston, Mass. } Complainant's Solicitors."
Charles H. Bartlett,

Answer. . . "Respondents deny the allegations of paragraph seventh of complainant's bill and say that said attachments were and are valid, and the sales as stated of the real estate on said execution were and are valid and that they, said respondents, by virtue thereof hold and are entitled to said real estate; and they say that the proceedings in insolvency in this State against said Dudley C. Hall cannot affect or impair the said attachments and said sales on execution, and say that said proceedings in insolvency in this State were under and by virtue of the laws of this State approved and enacted March 27, 1891, and which did not take effect and become effective until May 3, 1891, and long subsequent to the date of said attachments; and said law and statute so as aforesaid enacted, was not, and was not intended to be, retroactive, and by express provision of law said statute and said proceedings under same cannot affect the said writ and action of respondents against said Hall nor the said attachments of real estate on said writ, nor the said sales on execution nor the title of respondents to said real estate, by virtue of said sales."

The case was heard on bill, answer, replication and proofs.

Charles H. Bartlett, and W. B. French, of the Boston bar, for plaintiff, in the action at law, argued:

It is admitted that the mortgage was given by the debtor Hall to the defendant Peabody to secure a pre-existing debt, and that the mortgage was not recorded in the northern district of Aroostook three months prior to the commencement of insolvency proceedings against Mr. Hall; and it follows that,

if the statute is literally construed, the mortgage was not seasonably recorded, and the assignee took the lands free and discharged therefrom.

The plaintiff contends that the statute (R. S., c. 70, § 33,) requiring a three months' record prior to the commencement of proceedings in insolvency must be observed, because it is a law governing the transfer of titles to land, and was in force when the mortgage was given.

It is well established that all instruments and contracts affecting the title to land must, to have any validity, be executed in the form and attended with all the solemnities required by the laws of the state or country in which the land is situated. *Cutter* v. *Davenport*, 1 Pick. 86; *Osborn* v. *Adams*, 18 Pick. 245-247; *Goddard* v. *Sawyer*, 9 Allen, 78; *Hosford* v. *Nichols*, 1 Paige Ch. N. Y. 220-225; and *Houston* v. *Nowland*, 7 Gill & J. (Md.) 480-493. It is also familiar law that the capacity of the parties to take and hold land is determined by the lex loci.

There has been a gradual and continuous growth in the United States, from an early day, in extending the provisions of laws governing the registration of conveyances, until now, not only the whole system of land titles, but also the titles to almost all kinds of personal property, are governed by laws prescribed by statute. Webb, Record Titles, § 4.

These recording acts have uniformly been liberally construed, so that they might attain their intended object. *Kelly* v. *Calhoun*, 95 U. S. 710; *National Bank* v. *Conway*, 1 Hughes, U. S. 710; *Parkist* v. *Alexander*, 1 Johns. Ch. 393; *Jackson* v. *Town*, 4 Cow. 549-605; *Fort* v. *Burch*, 6 Barb. 60-70; *Peck* v. *Mallams*, 10 N. Y. 543; *Moore* v. *Thomas*, 1 Oregon, 201-252; *Kenyon* v. *Stewart*, 44 Penn. St. 179-192; *Fallass* v. *Pierce*, 30 Wis. 480.

A statute requiring mortgages to be recorded is a lex loci which must be observed in order to give them validity against third parties who have acquired an interest in the property without notice of the incumbrance. Broome on Mortgages, § 92; 1 Jones on Mortgages, § 472, and cases cited; *Bacon* v. *Van Schoonhoven*, 87 N. Y. 446-450; *Decker* v. *Boice*, 83 N.

Y. 215-220; *Yerger* v. *Burt*, 56 Iowa, 77; *Henderson* v. *Pilgrim*, 22 Texas, 464; *Hayes* v. *Tiffany*, 25 Ohio St. 549-552; *Nailor* v. *Young*, 7 Lea, (Tenn.) 737; *Shaw* v. *Wilshire*, 65 Maine, 485.

Counsel also cited: 2 Pars. Cont. * 572; *Goddard* v. *Sawyer*, 9 Allen, 78; R. S., c. 70, § 33; *Owen* v. *Roberts*, 81 Maine, 439; Reno on Non-Residents, § 282.

The provision in regard to requiring the three months' record existed at the time of the contract forming a part thereof, and could be taken advantage of as soon as a state of facts arose, giving the court jurisdiction of the person; that is, whenever Hall came to Maine, and should go into, or be put into insolvency.

The provision in the insolvency act requiring mortgages given to secure a pre-existing debt to be recorded three months before the commencement of insolvency proceedings, to be good as against the assignee of the estate of the mortgagor, is one of those solemnities which the law of the place may properly prescribe, and which must be observed to give the mortgage validity on the happening of the contingency within the prescribed time.

The object of the legislature in imposing the obligation of recording such mortgages within a prescribed time was undoubtedly to secure prompt registration, that the public might know, or have the means of knowing, the actual title to lands by an examination of the record in the registry of deeds of the district in which the land is situated.

J. B. Peaks, for defendant, Peabody.

There is no admission and no proof that Hall, the mortgagor, was insolvent or in contemplation of insolvency at the time he gave the mortgage. And it is not admitted and it is not proved that the mortgage was given with a view of giving a preference to any creditor. And it is neither admitted nor proved that the defendant had reasonable cause to believe that the mortgagor was insolvent or in contemplation of insolvency. Nor that such mortgage was made in fraud of the laws relating to insolvency.

The language of the admission is that it was given to secure a pre-existing debt, and for no other purpose. The very words

"and for no other purpose" takes the case entirely out of the provisions of R. S., c. 70, § 52. Further, one of the provisions of section 52 is that such payment, pledge, assignment, or conveyance must be made in fraud of the laws relating to insolvency. At the time this mortgage was made, there were no laws relating to insolvency which could affect it in the least, as non-resident property was not subject to laws relating to insolvency in any way whatever.

The law of 1891 is simply an amendment of the existing statute. It is intended to put the affairs of non-resident and resident insolvents into the same court, where they are to be governed by the same process, where all insolvent assets are to be distributed by the provisions of R. S., c. 70, but it cannot affect the obligation of a contract such as this. It would be unconstitutional. *Bryant* v. *Merrill*, 55 Maine, 515.

Argument, in the equity case, by *Messrs. French & Bartlett.*

1. That the legislature clearly intended that deeds of assignment issued in insolvency cases after the amended act went into operation, should dissolve all attachments made within four months prior to the commencement of insolvency proceedings.

2. That the statutory rule of construction must give way to the clearly expressed intent of the legislature.

3. That the remedy by attachment on mesne process is not a vested right, but a contingent lien depending for its existence upon legislative will, and that it forms no part of the obligation of the contract.

4. That the defendant's levy did not disseize the plaintiff, and is only a cloud upon his title, to remove which equity alone affords a remedy.

R. S., c. 1 § 3, providing that "actions pending at the time of the passage or repeal of an act shall not be affected thereby" is not applicable. *Kilborn* v. *Lyman*, 6 Met. 299. The attachment was dissolved. The lien of an attaching creditor is conditional and qualified. It does not become fixed, absolute or vested until final judgment and levy. It is a privilege conferred by the legislature subject to modification. 1 Am. and

Eng. Encly. p. 894; *Ex parte Foster*, 2 Story, 145; *Kilborn* v. *Lyman*, supra.

There can be no vested right in a statute process or remedy. *Oriental Bank* v. *Freese*, 18 Maine 109-112; *Coffin* v. *Rich*, 45 Maine, 507-514; *Kingley* v. *Cousins*, 47 Maine, 91; *Baldwin* v. *Buswell*, 52 Vt. 57; *Harrison* v. *Sterry*, 5 Cranch, 289-299; *Bigelow* v. *Pritchard*, 21 Pick. 169-175; *Grant* v. *Lyman*, 4 Met. 470; *Kilborn* v. *Lyman*, 6 Met. 299-304.

Nor can there be any vested right in a mechanics' lien, which is a statute remedy. *Frost* v. *Ilsley*, 54 Maine, 345-351; *Bangor* v. *Goding*, 35 Maine, 73; *Gray* v. *Carleton*, 35 Maine, 481; *Hanes & Co.* v. *Wadey*, 73 Mich. 178; *Woodbury* v. *Grimes*, 1 Col. 100-106; *Bailey* v. *Mason*, 4 Minn. 546.

An act making witnesses competent or incompetent applies to cases pending, and causes of action existing when it takes effect, because it is purely remedial. *Westerman* v. *Westerman*, 25 Ohio, 500-507; *John* v. *Bridgman*, 27 Ohio St. 22-43; *Oliver* v. *Moore*, 12 Heiskell, (Tenn.) 482-487; *Hepburn* v. *Curts*, 7 Watts, 300.

An act creating a remedy where none existed is valid, because it interferes with no contract and divests no vested rights. *Schenley* v. *Commonwealth*, 36 Penn. St. 29-57; *Underwood* v. *Lilly*, 10 Serg. & R. (Penn.) 97-101; *Hosmer* v. *People*, 96 Ill. 58-61; *Wellshear* v. *Kelly*, 69 Mo. 343-354; *Paschall* v. *Whitsett*, 11 Ala. 472-478.

And any lien given by the legislature may be taken away by the legislature without in any wise interfering with or impairing the obligation of contracts. *Martin* v. *Hewitt*, 44 Ala. 418-435; *Iverson* v. *Shorter*, 9 Ala. 713; *Watson* v. *Simpson*, 5 Ala. 233; *Beck, Adm'r*, v. *Burnett*, 22 Ala. 822; *Fitzpatrick* v. *Edgar*, 5 Ala. 499; Cooley Const. Lim. 361.

The extent of the operation of the deed of assignment upon previous attachments depends upon the law in force when the assignment was made. *O'Neil* v. *Harrington*, 129 Mass. 591; *Sullings* v. *Ginn*, 131 Mass. 479.

And it has been repeatedly held that a debtor has no vested

right to a discharge in insolvency, and that the law in force when the discharge is granted governs. *Ex parte Lane*, 3 Met. 213; *Eastman* v. *Hillard*, 7 Met. 420; *Eddy* v. *Ames*, 9 Met. 585; *Thayer* v. *Daniels*, 110 Mass. 345; *Batten* v. *Sisson*, 133 Mass. 557.

The plaintiff has no remedy at the common law. He has not been disseized or ousted; the defendant has made no entry on the lands in question for the purpose of dispossessing the plaintiff, or done any act to gain possession in himself. The only thing looking towards a disseizin was the levy, made long after the statutory deed of assignment was issued and had been recorded. *Jones* v. *Light*, 86 Maine, 437.

The remedy by attachment on the mesne process is no essential right which enters into and forms a part of the obligation of the contract. It is merely a matter of procedure, depending wholly upon the statute, and is subject to repeal at any time at the will of the legislature, without any violation of the constitutional provision prohibiting the enactment of laws impairing the obligation of contracts. See *Ogden* v. *Saunders*, 12 Wheat. 213; *Kilborn* v. *Lyman*, supra; *Bank* v. *Freese*, supra; *Kingley* v. *Cousins*, supra; *Baldwin* v. *Russell*, supra; *Bigelow* v. *Pritchard*, supra; *Grant* v. *Lyman*, supra; *Sprague* v. *Wheatland*, 3 Met. 416; *Ward* v. *Proctor*, 7 Met. 318; *Stetson* v. *Hayden*, 8 Met. 29; *Shelton* v. *Codman*, 3 Cush. 318-321; *Jewett* v. *Phillips*, 5 Allen, 152; *Saunders* v. *Robinson*, 144 Mass. 306; *Geer* v. *Horton*, 159 Mass. 261; *Berry* v. *Clary*, 77 Maine, 482; *Blount* v. *Windley*, 5 Otto, 173; *Sampson* v. *Sampson*, 63 Maine, 328; *Bird* v. *Keller*, 77 Maine, 270; *Ex parte Lane*, 3 Met. 213.

Charles P. Stetson, for defendants, Stetsons.

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

STROUT, J. These cases were argued at the same time, and are so intimately related, that they may be considered together.

The plaintiff is the assignee in insolvency of Dudley C. Hall,

a non-resident of Maine, against whom a decree in insolvency passed under chapter 109 of the laws of 1891, upon a petition filed by creditors in Penobscot county, on May 11, 1891. On December 17, 1890, Dudley C. Hall mortgaged to Frank E. Peabody certain lands in Aroostook county, part of the lands being in the northern and part in the southern registry districts. The mortgage was recorded in the southern district on December 29, 1890; and in the northern district, on April 13, 1891. The mortgage, which contained a provision of foreclosure in one year, appears to have been regularly foreclosed, by publication, the first publication being on October 14, 1891.

The suit of *Chipman* v. *Peabody* is a writ of entry to recover certain lands in the northern district of Aroostook county, which were included in the mortgage of Hall to Peabody.

In the equity suit against Stetson, complainants claim title to these and other lands in Aroostook, Penobscot and Piscataquis counties, as assignee in insolvency of Dudley C. Hall; all of which are claimed by defendants under an execution sale and conveyance to them by the officer making the sale, by virtue of an attachment made on writ, *George Stetson* v. *Dudley C. Hall et al.*, of the Penobscot lands, on March 10, 1891, of the Piscataquis lands on March 11, 1891, and of the Aroostook lands on March 12, 1891; the complainants claiming that the mortgage to Peabody, being "to secure a pre-existing debt, and for no other purpose," that the attachments of all said lands were vacated by the insolvency proceedings, and that the record title of defendants is a cloud upon complainants' title, which is sought to be removed.

First, as to the real action.

The mortgage to Peabody was made in December, 1890, four months before the enactment of the law which made Hall, a non-resident, subject to insolvency proceedings, and five months before it went into operation. When made, it was a valid, legal contract, under which valuable real estate was conveyed to Peabody. It was recorded in both Aroostook Districts before the law of 1891, chapter 109, was in force. To give that statute a retroactive effect to invalidate that contract, would be clearly

unconstitutional. *Bronson* v. *Kinzie*, 1 How. 312; *Edwards* v. *Kearsey*, 96 U. S. 607; *MacNichol* v. *Spence*, 83 Maine, 90; *Palmer* v. *Hixon*, 74 Maine, 448.

The act of 1891 must be construed as prospective in its operation; and so far as non-residents are concerned, it was a new law, and as to them all the provisions of the insolvent law must be regarded as first in force on May 3, 1891, when chapter 109 became operative. The mortgage from Hall to Peabody was not invalidated by Hall's insolvency.

Second, as to the equity suit.

The attachment upon the Stetson writ, created a lien upon the lands attached, which became perfected by subsequent proceedings. *Kilborn* v. *Lyman*, 6 Met. 304; R. S., chapter 81, § § 56, 59. This lien was in existence before the enactment of chapter 109 in 1891, and nearly two months before that statute was in force. The act did not provide for any retroactive effect, and none is implied from its language. By the established rule of construction, it should have a prospective and not retroactive operation. To give it the latter effect is, to say the least, of doubtful constitutionality. Cases supra. It better comports with the harmonies of the law, and the rights of parties, to treat it as prospective only, in all its provisions. *Torrey* v. *Corliss*, 33 Maine, 336. So treated, the defendants have acquired legal title to the lands sold on execution, and the assignment in insolvency to the complainant conveyed only the equity of redemption from such sale, which has long since expired. The complainants now have no title to any of the lands in controversy.

The statute of 1891 is more fully examined in the opinion in *Peabody* v. *Stetson*, ante, p. 273, argued at the same time as these cases.

The entry will be in the case of *Chipman* v. *Peabody*,

Judgment for defendant.

And in the case of *Chipman, in equity*, v. *Stetson*,

Bill dismissed.

NELLIE F. HURLEY *vs.* INHABITANTS OF BOWDOINHAM.

Sagadahoc. Opinion January 10, 1896.

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

The words "actual notice" in the statute, (R. S., c. 18, § 80) relating to actions for the recovery of damages sustained by defects in highways, signify something more than an opportunity to acquire notice by the exercise of due care and diligence.

Evidence that a highway surveyor negligently disregarded a general complaint that all the culverts in his district were in bad condition has no tendency to prove that he had actual notice of a particular defect in one of them.

The facts and circumstances in a given case may justify the conclusion that he must have had actual notice unless grossly inattentive; but proof of gross inattention is not proof of actual notice.

A defective culvert was covered with planks about two feet in length laid lengthwise of the road; and the plaintiff's horse broke through the plank in the horse-path between the wheel-ruts. It appeared that this plank was so decayed that a piece eight or nine inches long was broken out of the middle of it by the horse's foot, leaving the two ends still attached to the stringers; but at the time of the injury it was covered with earth to the depth of two inches. *Held;* that the plaintiff failed to prove that the municipal officers or highway surveyors of the town had twenty-four hours' actual notice of the defect which caused the injury.

A statement to the selectmen that there wasn't "a safe culvert" on the road where the accident happened, without special mention of the culvert in question is not sufficiently definite and specific. Neither can a statement to the highway surveyor that "all the culverts were in bad condition and needed repair" be deemed actual notice of the identical defect which may be the cause of an accident.

Bragg v. *Bangor*, 51 Maine, 534; *Smyth* v. *Bangor*, 72 Maine, 249; *Rogers* v. *Shirley*, 74 Maine, 144, affirmed.

ON EXCEPTIONS.

This was an action on the case, under R. S., c. 18, for injuries from an alleged defect in a culvert.

The defendants did not controvert the evidence tending to prove that the selectmen, or highway surveyor, had actual notice of the alleged defect; but seasonably requested the court to instruct the jury that the evidence offered was insufficient to establish the element of twenty-four hours' actual notice.

The defendants also contended that one Simeon E. Tarr was

not a highway surveyor competent to bind the town by receiving notice at the time claimed in the evidence, and seasonably requested the court to so rule.

The defendants excepted to so much of the charge as relates to the allegations and element of twenty-four hours' actual notice by or to the selectmen or highway surveyor as follows:

"I instruct you that Mr. Tarr, under this testimony may be regarded by you as highway surveyor for that district upon the 15th day of May, when he was repairing that culvert, with sufficient official authority to receive notice of the actual condition of the culvert which should bind the town. And I instruct you further, if you believe the testimony as to what was said to Mr. Tarr about the condition of that culvert on the 15th of May, I think that you would be authorized to find that he did then have actual notice of the actual condition of the culvert. And, to cover the whole case upon that point, I will also instruct you that if you believe the testimony of the witnesses who stated that they gave notice to the selectmen as to the condition of all the culverts upon that way and if you find as a fact that this culvert was rotten and defective, then you would be authorized upon that testimony to regard the selectmen as having actual notice of the actual defective condition of the culvert, sufficient to meet the provisions of the statute which require them to have such notice before the plaintiff can recover."

Weston Thompson, for plaintiff.

The defendants are here objecting that the case lacks proof of notice to their officers of defects which they and the same officers were bound to find without notice, and repair, at the peril of indictment and fine. R. S., c. 18, §§ 52, 88.

This requirement of notice is less exacting than it would be if the statutes not bearing on the civil action, did not lay upon the defendants the duty of ascertaining defects without waiting for notice. Any information which fairly puts the officers upon inquiry and enables them with reasonable search to find the defect, should be sufficient. Behind the statute granting the civil action is a principle of natural equity which is the reason

for the enactment; a principle that finds expression in the common law definition of a tort.

Here we have the plaintiff's hurt and the defendants' neglect of legal duty as its sole and proximate cause: all the natural justice that warrants any action of tort.

Although "town officers" are not usually town agents, the road officers are by statute made agents for the town in their relation to this plaintiff; because the town is liable criminally for their neglect, (R. S., c. 18, §§ 52, 88,) and because the town may be estopped by their conduct, when through them, "the defendant" has made repairs. R. S., c. 18, § 81. *Hayden* v. *Attleborough*, 7 Gray, 338, 340, 345; *Gilpatrick* v. *Biddeford*, 51 Maine, 182. These suggestions apply with peculiar force to a case where the defect is merely rottenness, the inevitable result of time and weather on such materials as the town saw fit to use in building the culvert; the injury happening so long after the last repair as to make the rottenness a reasonable and even necessary inference from the time and the neglect.

The plaintiff has undertaken to prove "notice" to the municipal officers and also to the road surveyor; but it is enough if she has succeeded in showing notice to either.

"Notice" in the statute, means knowledge, whether acquired by representations from other persons, or by personal inspection, or otherwise. This is the fair interpretation of the section, and it has been so understood by the court. The notice required is not necessarily one to be "served." *Holmes* v. *Paris*, 75 Maine, 559, shows this, and also shows the agency for the town of road officers in cases of this kind.

Eastman appeared May 11, 1894, and "told them . . . that the road was in very bad condition; that there wasn't a safe culvert between my house and Richmond, not safe to travel over." As plaintiff was not hurt till the thirtieth this notice was seasonable. It was sufficiently specific. It did not say the whole road to Richmond was defective. It specified the bad places, the culverts; including the one at which plaintiff was hurt. Any man could easily have found those culverts, includ-

ing the one in this case, from that notice only. The notice was not bad because it included other bad culverts, as well as the one here concerned. *Rogers* v. *Shirley*, 74 Maine, 144.

It was not open to the parties in this case to try the question whether other culverts within Eastman's complaint were as he represented them. The evidence indicates that his statements to those officers were in all respects and as to all the culverts, true; for the defendants called Small, who says he built all the culverts at the same time and of the same kind of material and all had stood without repairs for six years. If one of them had become rotten at both ends and in the middle by time and weather only, it is fair to infer in default of countervailing evidence, that the others were in the same condition.

The municipal officers disregarded Eastman's notice. If they had examined one of the culverts and found it sound, they might possibly have been excused afterwards for treating the notice as unreliable. If they had examined the culvert where plaintiff was hurt, and (as we think) if they had examined any culvert, they would have found that Eastman's assertions were true.

A town and its officers disregard such a notice from a respectable citizen at their peril. *Shauer* v. *Alterton*, 151 U. S., 607.

Surely it cannot help the defense to show that this long neglected road had been the subject of much complaint before. Hemlock lumber had stood in these culverts as long as it would last.

It is immaterial whether Eastman spoke from knowledge, from information, from inference, from conjecture, or from a purpose to deceive. He did not state his complaint as inference or hearsay, but as of his own knowledge. He asserted the defect as a fact. Until after plaintiff was hurt, the officers had no reason to doubt (so far as appears) that Eastman spoke from his own senses and spoke truth, as to every culvert within the terms of his assertion. They had a notice which should have put them on prompt inspection; they had no reason to doubt that it was true, and it was true. It would repeal the statute to allow the town to escape by testimony that its officers

did not examine the way for six years and (without cause for skepticism) disbelieved the assertions of respectable citizens who told them the truth. The jury were not bound to believe that the selectmen disbelieved.

H. M. Heath and C. L. Andrews, for defendants.

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

WHITEHOUSE, J. The plaintiff recovered a verdict of eight hundred and seventy-five dollars against the defendant town for a personal injury sustained by her May 30, 1894, by reason of a defective culvert in the highway.

The defendants contend that the plaintiff failed to comply with the requirement of the statute (R. S., c. 18, § 80) which makes it incumbent upon the sufferer to prove as a condition precedent to the maintenance of the action, that the "municipal officers, highway surveyors or road commissioners of such town, had twenty-four hours' actual notice of the defect or want of repair;" and the case comes to the law court on exceptions to the ruling of the presiding justice upon this point.

The culvert in question was eighteen and one-half feet long, measuring from one side of the road to the other, twenty-four inches wide over all, and fifteen inches between the stringers, with a depth of sixteen inches. It was constructed in 1888, of sound hemlock plank two and a half inches thick. Two planks were set on edge lengthwise of the culvert and across the highway, and covered with planks about two feet long nailed across the culvert and lengthwise of the road. At this point there was a single well-defined traveled way, two wheel-ruts and the horse-path, and within the limits of the traveled way the culvert was covered with earth to the depth of about two inches, the top of it being substantially level with the grade of the road.

On the 30th of May, 1894, the plaintiff accepted an invitation to ride from Richmond to Bowdoinham, and when the horse stepped on the culvert in question, he broke through the short plank in the horse-path between the two wheel-ruts, and

the plaintiff was thrown violently to the ground receiving the injury of which she complains. It appears that this plank was so decayed that a piece eight or nine inches long was broken out of the middle of it by the horse's foot, leaving the two ends still attached to the stringers.

There was no claim that this culvert had ever been examined or repaired by any municipal officer or highway surveyor prior to the 15th of May preceding the accident on the 30th of the same month. But it was contended that, on the 15th of May, 1894, the highway surveyor had actual notice of the defect both from personal observation and from a conversation with Carleton Meserve; and furthermore that the selectmen all had actual notice of the defect from information given them "about the middle" of the same month by Thomas A. Eastman.

Respecting the alleged notice to the highway surveyor, on the 15th of May, these facts are disclosed: The acting surveyor, Mr. Tarr, was notified by his son that a plank was off of the culvert in the wheel-track. He promptly examined the culvert and found that the plank in the westerly wheel-track, which was originally sawed a little too short, had been thrown out of position. In the place of this he supplied a new plank which he carried with him. He testified that the old one was sound enough to be "safe for anything to pass over;" that he cut into the plank next to it, and found it "quite sound;" that he looked underneath the culvert and it looked well; that he had never been informed by anybody that there was a rotten plank in the horse track, or a rotten plank in any part of the culvert, and that he had no knowledge of any such defective condition. But while he was thus engaged in repairing the westerly end, Mr. Meserve drove along in his carriage, and in conversation remarked that the "culverts were in bad condition and needed repair; that they all needed repair." He did not specify any particular culvert. He admits that he had no knowledge of the actual condition of the defective plank in question and made no reference to it; and that his statement to the surveyor was simply the expression of an opinion that in view of the age of

the culverts it would be advisable to have them examined and repaired.

The alleged notice to the selectmen rests wholly on the complaint made to them in their office "about the middle of May," 1894, by Thomas A. Eastman. He said: "I told them that we expected them to do more work on our road this year; that the road was in very bad condition, that there wasn't a safe culvert between my house and Richmond — not safe to travel over." The culvert in question was between Eastman's house and the Richmond line; but he made no special mention of this particular culvert in that interview. He admits indeed that prior to the accident he had no knowledge of the existence of this culvert. It was substantially covered with dirt, and the top being level with the road, he had never noticed it. Nor had he ever been informed of any defect in this culvert. He admits that he only made a general complaint that the road was bad; that knowing that some of the culverts were bad, he expressed the opinion that all were. He admits that he did not communicate to the selectmen any information in regard to any part of this culvert.

But for the purposes of the trial, the presiding judge gave the jury the following instruction upon this branch of the case: "If you believe the testimony as to what was said to Mr. Tarr about the condition of that culvert, on the 15th of May, I think that you would be authorized to find that he did then have actual notice of the actual condition of the culvert. And to cover the whole case upon that point, I will also instruct you, that if you believe the testimony of the witnesses who stated that they gave notice to the selectmen as to the condition of all the culverts upon that way, and if you find as a fact that this culvert was rotten and defective then you would be authorized upon that testimony to regard the selectmen as having actual notice of the actual defective condition of the culvert, sufficient to meet the provisions of the statute which require them to have such notice before the plaintiff can recover."

We are unable to concur in this construction of the statute as applied to the facts of this case. It is not in harmony either

with the obvious purpose, or the natural import of the terms, of the amendatory act of 1877, and is at variance with the previous decisions of this court respecting this statute and that which preceded it.

In *Bragg* v. *Bangor*, 51 Maine, 534, the question involved was whether the town had "reasonable notice of the defect," as required by the former statute. In the opinion the court say: "It is notice of the defect that is required. The question then is, what is notice of an existing fact? . . . . Reasonable notice is such notice as gives information to the town officers or some of the inhabitants, of the actual condition of the road. . . These words mean something more than that a town might have had notice by diligence and care, or ought to have taken notice. . . . . Notice of a fact implies knowledge of the existence of the fact, brought home to the party to be charged, either by his own observation or by declarations made to him by those who have seen or know it."

But by the amendment of 1877, (R. S., c. 18, § 80,) the legislature manifestly designed to prescribe a more definite requirement respecting notice and impose a more rigorous limitation upon the traveler's right to recover for an injury received. In accordance with this view the court say in *Smyth* v. *Bangor*, 72 Maine, 249: "Since the passage of the act of 1877 no recovery can be had against a town or city for an injury received through a defect in one of its highways unless some one of its municipal officers, or highway surveyors, or road commissioners, had twenty-four hours' actual notice of the defect. And the notice must be of the defect itself, of the identical defect which caused the injury. Notice of another defect or of the existence of a cause likely to produce a defect is not sufficient." So also, in *Rogers* v. *Shirley*, 74 Maine, 144, the court say: "The call now is for twenty-four hours' actual notice . . . of the defect or want of repair which is the cause of the accident, provable as in other cases where actual notice is required, by circumstances showing personal knowledge on the part of the party to be notified, or information conveyed to him by others of the existing facts. Nor can one be said to have actual notice

of such a thing as this statute has referred to, until both the character and, approximately, the location upon the face of the earth, of that which constitutes the defect is in some way made known to him."

In the case at bar, it has been seen that Meserve gave no specific information to the highway surveyor of the identical defect which caused the injury, nor did Eastman give the selectmen any definite information respecting the defect in question; for the simple reason that in each instance neither Meserve nor Eastman had any such information to give. It is plain that neither the selectmen, nor the highway surveyor, acquired from these sources of information any actual notice of the particular defect which was the cause of the accident. The statements of Meserve and Eastman were not sufficiently definite and specific to fulfill the more exacting requirements of the present statute.

But inasmuch as actual notice is a conclusion of fact which may be established by all grades of competent evidence, circumstantial as well as direct, it is still insisted that if he had not been grossly inattentive to his duty the highway surveyor would have derived actual notice, and that he ought to be deemed to have had actual notice of the defective condition of the plank in question, from the personal examination and inspection made by him at the time of repairing the other defect at the westerly end of the culvert. The surveyor, however, in his testimony, expressly denies that he ever in fact had any personal knowledge of the rotten condition of the plank in the horse-path; and there is no direct evidence that he ever did have any such knowledge. It only appears that he might have acquired personal knowledge of the actual condition of all parts of the culvert, if he had made a more careful and thorough examination of it on the occasion mentioned; but as already intimated, the words actual notice in this statute signify something more than an opportunity to obtain notice by the exercise of due care and diligence. Evidence that a highway surveyor negligently disregarded a general complaint that all the culverts in his district were in bad condition has no tendency to prove that

he had actual notice of a particular defect in one of them. The facts and circumstances in a given case may justify the conclusion that he must have had actual notice unless grossly inattentive; but proof of gross inattention is not proof of actual notice.

Exceptions sustained.

CHESTER M. WALKER, Assignee of William A. Carkin, Insolvent,

vs.

WILLIAM A. CARKIN.

Knox. Opinion January 10, 1896.

Attachment. Exemptions. Express Wagon. Stat. 1887, c. 64.

Under a statute exempting from attachment one "express wagon," *held*; that a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce, and other light articles, and one that may conveniently be used for such purpose, is within the exemption. Whether a particular vehicle falls within this description is a question of fact for the jury.

ON MOTION AND EXCEPTIONS.

This was an action for replevin of a cart described in the replevin writ as a peddler's cart.

The plaintiff is the assignee in insolvency of the defendant, and the cart in controversy passed to the plaintiff under the assignment in insolvency unless it was exempt from attachment and seizure and sale upon execution.

The defendant claimed it as exempt as an express wagon. The verdict was for the defendant. The plaintiff claimed that the wagon in controversy was not, within the meaning of the statute, an express wagon. A view of the wagon was had by the jury.

The plaintiff requested the presiding justice to instruct the jury as follows, which request was refused:

"By the use of the term 'express wagon' in the statute of exemptions, the legislature have exempted the wagon usually and ordinarily known as an express wagon, and if the wagon in

controversy is not what is usually and ordinarily known as an express wagon, then the plaintiff is entitled to recover."

Among other things in his charge the presiding justice instructed the jury as follows against the objection of the plaintiff.

1. "Now an express wagon is commonly known by us all as a four-wheeled vehicle, with a straight body, commonly hung on springs, with a foot-board, a movable seat and a dumping tail-board, a vehicle of light construction. Any of you would at once recognize such a vehicle as an express wagon. But I do not think the meaning of this statute limits the exempted vehicle to one strictly of that description."

2. "But I think the true intent and meaning of the legislature was to exempt to the debtor a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce, and other light articles, and one that may be conveniently used for such purpose."

3. "I will read it to you again: I think it is a four-wheeled vehicle, suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce, and other light articles, and one that may be conveniently used for such purpose in distinction from one that is not of that character."

4. "Now, to make my distinction clear, the vehicle that is exempted here under the statute is a vehicle, as I have told you, suited and adapted for the transportation of small articles, light articles, and that may be conveniently used for that purpose."

5. "It is not necessary that it should be of any particular form or build, if it is suitable for the purpose for which it is used, if it is of a construction that is fitted for that purpose, that is adapted for that purpose, and that you would say was fairly to be applied as an instrument to carry out such purpose and intent, if the vehicle is, as I have told you, for common use, suited to transport luggage, bags of meal, light articles of merchandise and everything in distinction from one that is fitted for a particular trade."

6. "The statute meant to exempt to the debtor his horse, his cart, if he had one, if he had not, then a light vehicle suited to

carry common commodities, without distinction, a four-wheeled vehicle, and what has been defined as an express wagon."

To all of which instructions and refusals to instruct the plaintiff excepted.

C. E. and A. S. Littlefield, *C. M. Walker*, *and E. C. Payson*, with them, for plaintiff.

W. H. Fogler, for defendant.

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

STROUT, J. Replevin for a vehicle claimed to be exempt from attachment as an "express wagon," under c. 64, laws of 1887. The presiding judge instructed the jury that "an express wagon is commonly known by us all as a four-wheeled vehicle, with a straight body, commonly hung on springs, with a foot-board, a movable seat and a dumping tail-board, a vehicle of light construction. Any of you would at once recognize such a vehicle as an express wagon. But I do not think the meaning of the statute limits the exempted vehicle to one strictly of that description." "But I think the true intent and meaning of the legislature was to exempt to the debtor a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce, and other light articles, and one that may be conveniently used for such purpose." The last definition was substantially twice repeated to the jury.

Plaintiff excepted to this instruction, as also to a refusal to instruct, that if the vehicle was not usually and ordinarily known as an express wagon, it was not exempt.

Exemptions are intended to preserve to a debtor the means necessary for obtaining a livelihood in his vocation. Hence the tools necessary for his trade or occupation and a certain amount of materials and stock necessary therefor, a limited amount of household furniture, a pair of oxen, or in lieu thereof two horses or mules not exceeding a named value, are exempted. Then followed, in R. S., c. 81, § 62, clause 9, the exemption of one plough, one cart or truck wagon, and other articles specially

needed by a farmer in his vocation; to which was added in 1887, "one express wagon," "the vehicles intended to correspond with the animals used, and all designed as aids to labor rather than traffic." *Smith* v. *Chase*, 71 Maine, 166.

The defendant is a farmer. In that vocation he needs a vehicle for the transportation to market of various comparatively light products of the farm, and the return of articles used in the family, and upon the farm. No special form of construction of such vehicle was intended by the legislature. It may be open or covered. The purpose and use and adaptability to that purpose and use, was in view, instead of technical description of carriage builders. It must be one suitable and convenient for the purpose. It does not include carriages designed and mainly used for riding and traveling; but only those suitable and convenient for transporting "truck, small parcels of merchandise, light country produce, and other light articles." Having in view the vocation of the defendant, the instruction given was definite and in accordance with the intent of the statute and the object to be accomplished and sufficiently favorable to the plaintiff.

Motion for new trial. The instructions being correct, it was for the jury to determine whether the vehicle in question was an express wagon, within the definition of that term as given by the court. They had a view of the vehicle. It was in evidence that the defendant used it for the transportation to his customers of butter, milk, eggs, potatoes and apples, the product of his farm, and transported home in it his grain, and that this was the purposes for which he used it and that he did not use it as a peddle cart. His eggs, butter and milk were delivered to regular customers. His apples and potatoes were "usually sold before I [he] brought them in and then delivered them." These facts distinguish this case very clearly from *Smith* v. *Chase*, supra. That was a regular peddler's cart, fitted up as a movable store. The jury found the vehicle to be an express wagon, within the definition given, and we perceive no reason for disturbing the verdict.

Exceptions and motion overruled.

CLARENCE P. WESTON, Petitioner,

vs.

MOUNT DESERT AND EASTERN SHORE LAND COMPANY.

Hancock. Opinion January 11, 1896.

Writ. Amendment. Attachment. Record.

An officer made an attachment of real estate on April 27, 1891, and duly returned it to the registry of deeds. Some person unknown fraudulently changed the date of the attachment on the writ to April 28, and made the same alteration in the officer's return to the registry of deeds, and in the register's minutes and record of attachments. On petition of the plaintiff, *held*; that the officer was properly allowed to correct the date in his return on the writ, by restoring the original and true date.

ON EXCEPTIONS.

This was a petition praying that the date of the attachment, and returns on the writ and returns and records of the same in the registry of deeds, in Hancock county, where an action between the same parties had been defaulted and continued for judgment, might be restored by order of the court to conform to the facts.

The petition after alleging the bringing of the action on April 27, 1891, the making the attachment on that day by the officer and his return of the same into the office of the registry of deeds, etc., charges:

"That without knowledge or consent of said plaintiff and by some person unknown to him, the date, to wit, 'April 27th,' of said officer's return of said attachment on said writ has been changed to 'April 28th,'" etc.

"And for the information of the respondents hereto said plaintiff says that said attachment stands charged on said officer's books of account to G. P. Dutton, attorney for said plaintiff, as of April 27th, and on said officer's private docket of business transactions as made April 27th.

"And said petitioner further alleges that on the 17th day of January, 1891, Charles H. Lewis and Franklin D. White, in their capacity of president of and treasurer of said corporation,

[the defendant] and undertaking that their act was the act of the corporation, by their mortgage deed of that date and recorded January 27th, 1891, in volume 250, page 205, in the registry of deeds for Hancock county, undertook to convey to William Claflin and Dustin Lancey, trustees, all of the real estate in Hancock county of said corporation.

"And that an alleged vote of said corporation purporting to be confirmatory of said mortgage, and to have been passed April 28th, 1891, was received and recorded in said registry, May 1st, 1891, in volume 250, page 557.

"Wherefore said plaintiff prays that such notice as the court orders be given of this petition to said corporation and to said Claflin and Lancey, trustees, and that a hearing be had, and that the date of said attachment and returns on said writ and all returns and records in said registry of deeds of the same be restored by order of court to conform to the facts.

Clarence P. Weston, by
Geo. P. Dutton, Attorney."

"October 15th, 1894."

After due notice to the respondents, this petition was heard upon the affidavits of the officer and another witness by the presiding justice, who made the following order and to which the respondents took exceptions:

"Supreme Judicial Court. January Term, 1895.

"Motion granted so far as to allow the attaching officer to restore the true date of his return according to the fact. This had best be done by making a new return according to the truth, and the officer may endorse such return upon the writ."

The original returns on the back of the writ and photographic copies, taken under the direction of the clerk of the court, accompanied the bill of exceptions.

George P. Dutton, for plaintiff.

J. A. Peters, Jr., for defendant trustees.

Counsel cited: *Fairfield* v. *Paine*, 23 Maine, 498; *Bessey* v. *Vose*, 73 Maine, 217; *Milliken* v. *Bailey*, 61 Maine, 316. The return of attachment was complete and perfect in itself on

October 15, 1894, the date of the petition praying to have it changed. It was all there; there was nothing missing. There was no inconsistency in it. It was clear, and furnished notice to anyone who saw it that the attachment was made April 28th.

It is true that the date of the return shows evidence of alteration; but it is common knowledge that officers, as well as other persons, will write a date wrong and often roughly correct it by an erasure and new figure. If this alone will invalidate a return or authorize an officer to make a new return, other rights having intervened, and say at his discretion what the date should be, there is little safety in returns.

There was no reason for an amendment. The petitioner hardly claims this. He asks for a change. We urge that no change could be made by the officer under the law allowing him to amend. The discretion of the judge in the matter of amendments has to be legally exercised.

It may be argued that this was not an amendment, but a change, a "restoration." Courts have full power over their own records and can order any change. We do not, of course, deny this proposition; but we suggest that the change was not ordered in a proper manner. In the first place, because the court did not order what change, if any, should be made; but delegated to a private citizen, an ex-deputy sheriff, its power of decision, and expressly burdened him with the necessity of deciding what the "fact" was and making a new return according to what he should find to be the "truth." The officer was to decide as to the truth of his own affidavit, (without the assistance of cross-examination and argument,) and make a new return after he should make up his own mind. We submit that this is not the exercise of power by the court over its own records. In this case there would be two returns on the back of the writ, as the existing return was to be allowed to stand and another one made on the same writ below. This was subsequently done as a matter of fact.

If the officer's return was not made to be the 28th, as he said it was not in his affidavit, and his return has been changed without his consent, then this return of the 28th is not his

return, and the writ has no officer's return upon it. In such a case the officer cannot be permitted, as against these interested third parties, to make a new or any other return. This was practically decided in the second ground of opinion in *Bessey* v. *Vose*, supra.

We do not mean to be understood as arguing that there is no remedy for a fraudulent or other alteration of an officer's return of attachment. When the facts can be ascertained conclusively, after an examination of testimony on both sides, undoubtedly proper orders can be made whereby the original record can be restored. We submit that an ex-officer cannot do this under the power of amendment, nor can the court delegate to him the right to adjudicate upon the facts and make a new return to suit himself.

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

STROUT, J. The evidence shows that, on the 27th day of April, 1891, at 12.15 P. M., a deputy sheriff attached real estate in suit of this plaintiff against this defendant, and on the same day made a proper return of the attachment to the register of deeds in Hancock county, and made his return upon the writ under the date of April 27. That subsequently some unknown person wrongfully changed the date of the return upon the writ to the 28th, and made the same alteration in the officer's return to the registry of deeds, and in the register's minutes thereon, and in the record of attachment in said register's office. That this was done without the knowledge or consent of the plaintiff, or of the officer making the attachment. This petition asks to have all these dates restored to those originally made.

The judge who heard the case, after notice to parties interested, granted the petition "so far as to allow the attaching officer to restore the true date of his return according to the fact. This had best be done by making a new return according to the truth, and the officer may endorse such return upon the writ." To this ruling exceptions were taken by William Claflin

and Dustin Lancey, trustees under a mortgage to them from the defendant company of all its real estate in Hancock county. The mortgage was dated January 17, 1891, and recorded January 27, 1891.

The petitioner did not seek, and the court did not grant, an amendment of the officer's return. The relief sought and granted was only a restoration of the date originally made and written by the officer, a displacement of a fraudulent alteration, and restoration to its condition as it was before the fraudulent alteration.

Judicial records are always under the control of the court. It would be a reproach to the law if, in case of fraudulent alterations of its records, the court could not eliminate the fraud, and restore the record to its original, authentic character. Whether this is done in the present case, by erasing the fraudlent figure 8, and restoring the true and originally written figure 7, or by rewriting the whole return with the date of April 27, is immaterial. The result is the same. In either case the fraud is eliminated, as it should be, and the officer's return stands as it was originally written.

Exceptions overruled.

BEDFORD E. TRACY *vs.* CATHERINE G. ROBERTS, and others.

CATHERINE G. ROBERTS, and others, in equity,

vs.

BEDFORD E. TRACY.

Hancock. Opinion January 11, 1896.

Deed. Guardian. Minor. Limitations. Estoppel. R. S., 1871, c. 52, § 12; R. S., 1883, c. 71, § 30.

A guardian's sale of real estate is irregular and void where there is no petition or license covering the premises conveyed, and where there is no bond or notice of such sale.

In such case the Probate Court has no jurisdiction over the subject matter.

Nor does the five years' limitation, provided by R. S., c. 71, § 30, in which an action may be brought by the ward or other persons claiming under him to avoid such sale, apply to such case.

The limitation applies to defective sales under licenses from a court having jurisdiction, but not where there was no petition or license.

It is competent for a ward when he becomes of age to ratify and affirm a sale made by the guardian where it is invalid for a want of compliance with some statute requisite, or to avoid it within a reasonable time.

Facts stated that will be regarded as a ratification.

The doctrine of equitable estoppel is equally available in an action at law as in equity.

Where the consideration has been received and retained upon a defective sale, and such sale was made by the guardian in good faith and the wards have received the benefit of the proceeds, there being no fraud or mistake, but full knowledge of the facts, the doctrine of equitable estoppel applies, and the party cannot afterwards claim the land itself.

See *Kingsley* v. *Jordan*, 85 Maine, 137.

ON REPORT.

The case is stated in the opinion.

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

George P. Dutton, for Roberts.

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

FOSTER, J. Two cases are reported to this court, the first, a writ of entry for a parcel of land lying in Mount Desert; the second, a bill in equity brought by the defendants in the first suit against the plaintiff therein, praying for an injunction restraining him from prosecuting his suit at law, and for a decree requiring him to release to the complainants his pretended title.

The cases are submitted on the same statement of facts and are to be decided together.

In 1870 William Roberts was the owner of the premises in dispute. He died intestate leaving a widow, and Franklin B. Roberts and Horace D. Roberts, his children and sole heirs. The premises in dispute were assigned to his widow for her dower. She died February 23d, 1876.

September 25, 1875, Franklin B. Roberts died intestate, leaving three children as his sole heirs, Abbott L., Josephine M. and Ralph V. Roberts.

April 17, 1876, Abbott L. Roberts, being of full age, conveyed his interest, being one-third of an undivided half, in the

demanded premises, to his uncle Horace D. Roberts, by sufficient deed, duly recorded. Thus Horace D. Roberts was an owner of an undivided half of the demanded premises by inheritance from his father, William Roberts, and one-sixth by purchase from Abbott L. Roberts, heir of Franklin B. Roberts.

December 1, 1875, Deborah M. Roberts, widow of the said Franklin B. Roberts, was, upon her own petition, duly appointed guardian of Josephine M. and Ralph V., children of herself and the said Franklin B. Roberts, and duly filed her guardian's bond and inventory.

The said Franklin B. Roberts left other real estate at his decease, than that in controversy; and at the April term, 1876, of probate court, the said Deborah M. Roberts filed a petition to sell certain real estate of her said wards. Her license bond was duly filed and approved, wherein she recited that she was duly licensed to sell and convey "all of the real estate belonging to said Franklin B. Roberts the same described in the petition of said Deborah M. for license to sell entered at the last April term of said court, A. D. 1876."

On the third Wednesday of June, 1876, license issued to the said Deborah M. Roberts to sell the land "described in her petition for license." But neither does said petition, nor said license, embrace the demanded premises, nor does it appear that she ever took the oath required by law under said license, although the license was returned into court and recorded. June 27, 1876, the said Deborah M. Roberts, in her capacity as guardian of Josephine M. and Ralph V. Roberts, by a guardian's deed in due form reciting the aforesaid petition and license, conveyed to the said Horace D. Roberts the undivided interests of the said Josephine and Ralph V. Roberts in the demanded premises, which deed was duly recorded August 20, 1876.

If we correctly understand the facts, it appears that on that same day other real estate which was embraced in the petition and license, and to which the bond related, was sold by the said Deborah M. Roberts to other parties, as stated in the case of *Kingsley* v. *Jordan*, 85 Maine, 137, 138.

Horace D. Roberts died December 7, 1876, intestate, and the defendants are his heirs at law.

Ralph V. Roberts died June 16th, 1886, intestate, without issue, being nearly sixteen years of age, leaving as heirs his brother and sister, Abbott L. Roberts and Josephine M. Roberts. Josephine M. Roberts became of age in 1878.

September 18, 1888, Deborah M. Roberts then having become the wife of William W. Sumner, and Josephine M., who had married Otis M. Ober, and Abbott L. Roberts, by their deed of quitclaim without covenants, conveyed to the demandant, Tracy, their interest in the demanded premises, for the consideration hereafter stated.

It is admitted that the said Deborah M. Roberts was duly appointed guardian as aforesaid; that a license to her as said guardian had duly issued to her on the third Wednesday of June, 1876, to sell some real estate but that neither the petition nor license in any way covered the demanded premises, nor that she ever took the oath required by law under that license. It is also admitted that the said guardian in her said deed claims authority by virtue of the petition and license aforesaid; that she made the conveyance in good faith, and for the benefit of the estate of said wards; that her said wards received the benefits of the proceeds of said sale; that the plaintiff, when he took the deed from Deborah M. Sumner, Abbott L. Roberts and Josephine M. Ober, took it with full knowledge of said guardian's deed, and that the consideration thereof was an agreement on the part of the plaintiff to prosecute this claim against the defendants to final judgment for one-half the land, and if not successful to receive nothing for his services and expenses.

The tenants' ancestor, Horace D. Roberts, went into the occupation of the premises on the purchase from Abbott L. Roberts and from the guardian in 1876, and he, during his life, and the tenants after his death were not disturbed by any claim till the commencement of this action.

It will be seen from this statement that if the sale by the guardian is sustained, then the plaintiff has no title and this action cannot be maintained. For it is admitted in argument,

and the evidence discloses the fact, that he has no title to two-thirds of the demanded premises,— the one-half inherited by Horace D. Roberts, father of the tenants, from his father, William Roberts, and the one-sixth conveyed to him by Abbott L. Roberts. The controversy therefore is concerning the remaining third,— that which upon the death of their father, Franklin B. Roberts, came by inheritance to Josephine M. and Ralph V. Roberts. Can the plaintiff recover that third, or any portion thereof?

Was the guardian's conveyance of this third to the tenants' ancestor, Horace D. Roberts, such as can be legally sustained?

The plaintiff raises several formidable objections to the legality of that conveyance. The irregularities apparent throughout the proceedings are numerous and extraordinary. There was neither petition nor license that in any way covered the demanded premises; nor was there oath, or bond, or notice of sale, as required by statute.

The case at bar is essentially different from that of *Kingsley* v. *Jordan*, supra, where the only objection to the validity of the guardian's sale was, that it did not appear that the guardian took the oath required by law before making the sale. The petition, license and bond in that case embraced the premises then in controversy, and there was but one omission of the statute requisites to constitute a valid sale. The material facts in that case are so different from those in the present case, that the decision there can afford no criterion by which the rights of these parties are to be determined.

I. The defendants set up, in answer to these objections to the validity of the guardian's conveyance, the limitation provided by R. S., c. 71, § 30, viz: "No action shall be brought to recover an estate sold under this chapter . . . . . with a view to avoid the sale . . . . . by the ward or persons claiming under him, unless it is done within five years after the sale, or the termination of the guardianship, except that persons out of the state, or under legal disability at said times, are limited to five years after their return to the state, or the removal of the disability."

The statute in the section following that already cited, provides that in an action brought to contest the validity of any such sale by the ward or person claiming under him, no such sale shall be avoided on account of any irregularity in the proceedings if it appears, (1) That the license was granted by a court of competent jurisdiction, and the deed was duly executed and recorded; (2) That the person licensed took the oath, and gave the bond and notice of the time and place of sale required by law; (3) That the premises were sold in such manner, and within such time as the license authorized, and are held by one who purchased them in good faith. The implication being that an omission of these requisites would render such sale void.

The limitation of five years within which an action is to be brought applies to defective sales under licenses from a court of competent jurisdiction, and not to sales where no petition or license ever existed. *Chadbourne* v. *Rackliffe*, 30 Maine, 354, 360; *Poor* v. *Larrabee*, 58 Maine, 543, 558; R. S., 1821, c. 52, § 12. The petition to the probate court is the foundation upon which to base the jurisdiction of the court, and must allege sufficient facts to give the court jurisdiction and power to authorize the sale. *Overseers* v. *Gullifer*, 49 Maine, 360; *Danby* v. *Dawes*, 81 Maine, 30; *Gross* v. *Howard*, 52 Maine, 192.

Courts of probate are created by statute and possess special and limited jurisdiction only. The record of their proceedings must show their jurisdiction. Nothing is to be presumed in favor of the right to divest an heir of his title. The authority to do so is derived wholly from the statute, and its provisions must be strictly complied with.

This doctrine was affirmed in the case of *Williams* v. *Morton*, 38 Maine, 47, where a conveyance of real estate of his wards by their guardian, even under license of the probate court, without complying with the requirement of the statute as to giving a bond, was held to be void and to vest no title in the grantee; and the court further held that the money paid for such a deed might be recovered back in an action upon its covenants, or for money had and received. See also, *Moody* v.

Moody, 11 Maine, 247, 253; *Knox* v. *Jenks*, 7 Mass. 488; *Williams* v. *Reed*, 5 Pick. 480.

In the case last cited the court say: "There being no bond and no oath, the sale is void, or at least voidable, so that the parties to it are at liberty to vacate it, and consider it annulled."

A fortiori, where there is neither petition nor license, as well as no bond or notice of sale, and no oath, all of which are required by statute. The court had no jurisdiction over the subject matter.

The limitation of five years within which an action is to be brought by R. S., c. 71, § 30, cannot be applied in this case.

The sale was void as not being in compliance with the statute.

II. But there are other grounds upon which the tenants rely to defeat the plaintiff's recovery, and these are ratification, and equitable estoppel.

In *Kingsley* v. *Jordan*, supra, this court said: "When a sale by guardian under license is invalid for a want of compliance with some requirement of law by the guardian, it is competent for the ward when he becomes of age to ratify and affirm the sale, or he may avoid it within a reasonable time. If he affirms it, he becomes bound by it." *Williamson* v. *Woodman*, 73 Maine, 163.

It is admitted that the sale by the guardian was made in good faith, for the benefit of the estate of the wards, and that they received the benefit of the proceeds of the sale. Ralph V. died a minor, intestate, without issue. He was not quite sixteen years of age. His heirs took his share of the estate, and stood as he would stand if of age. *Kingsley* v. *Jordan*, supra. Nearly three years elapsed between his death and the commencement of this action. All these facts were known to the heirs. Josephine M. had become of age eleven years prior to the commencement of this action, and had made no claim prior to that time. For more than thirteen years the land in controversy had been in the possession, occupation and improvement of these defendants. To set aside the sale and reclaim the land they must pay back the consideration received and

retained,—and this they have not attempted to do. The guardian is estopped by the covenants in her deed from now alleging the illegality of her conveyance to Horace D. Roberts. *Williamson* v. *Woodman*, 73 Maine, 163; *Brazee* v. *Schofield*, 124 U. S. 495, 504.

Moreover, the doctrine of equitable estoppel applies in this case, and is legally available in an action at law as in equity. *Kirk* v. *Hamilton*, 102 U. S. 68, 77; *Dickerson* v. *Colgrove*, 100 U. S. 578. As the plaintiff stands in no better light than those from whom he claims to have received his title, (*Pratt* v. *Pierce*, 36 Maine, 448, 454; *Hovey* v. *Hobson*, 51 Maine, 62 67) his rights cannot be regarded as superior to theirs had they been the ones to attempt a recovery in this action.

In *Penn* v. *Heisey*, 19 Ill. 295 (68 Am. Dec. 597), the court holds that there is no distinction in the application of this principle between void and voidable sales, and that a party is estopped from setting up title to land when he has received and enjoyed the benefits of its sale, and it is in the possession of an innocent purchaser. "Such estoppels," say the court, "are and should be favored in law, honor, and conscience, for the truest and best of reasons, that a man, having received a benefit in one character, the value of the thing or of the property, shall not afterwards receive the thing or property itself in the same or another character. This principle, so equitable and legal, runs throughout all the transactions and contracts of civilized life."

There are numerous cases illustrative of this principle to be found in the decisions. Thus, one who accepts a part of the purchase money arising out of a sheriff's sale is estopped from denying the validity of the sale. *Stroble* v. *Smith*, 8 Watts, 280.

If a legatee, the executrix, proves the will and accepts a bequest under it, she will thereby be equitably estopped from asserting a claim in hostility to other provisions of the will. *Benedict* v. *Montgomery*, 7 Watts & Serg. 238. And again, this principle is firmly enunciated in *Deford* v. *Mercer*, 24 Iowa, 118 (92 Am. Dec. 460), where the heirs were held to be estopped from questioning the validity of a guardian's sale of

their interest in certain real estate on the ground of defective proceedings, where after becoming of age, with knowledge of all the facts, and in the absence of fraud and mistake of fact, they received and retained the purchase money arising from such sale; and the court there held that the principle applied to sales that were void. Dillon, C. J., in the course of the opinion says: "That they are not entitled to, and cannot have, both the money and the land, is a proposition which seems too plain to require either an extended argument or authority to show. We have so held in a former case arising upon the same sale. *Pursley* v. *Hayes*, 17 Iowa, 310. If the brief opinion filed in that case is closely examined, it will be seen that the propositions on which it rests are guardedly stated. That opinion is certainly correct. There is nothing in the circumstances of the present case which requires us to decide more than that where a party, with full knowledge of all the facts, there being no fraud or mistake, and nothing to repel the presumption that he knew his legal rights, but much to show that he did fully know them, voluntarily accepts and retains the purchase money arising from the sale of his land, he cannot afterwards claim the land itself. He is equitably estopped to deny the validity of the sale." *Horn* v. *Cole*, 51 N. H. 287, 289; 2 Pomroy Eq. § 802.

No further citation of authorities is necessary to establish the fact that such an estoppel as that which is invoked in this case, is not to be deemed odious, but on the contrary conducive to honesty and fair dealing. It prevents a party from making use of a title which, in equity and good conscience, ought upon every principle of right and justice, to inure to the use of another. If such a case was ever presented, we think this is one.

The result is, that in no view of the case has the demandant any title and cannot recover.

Judgment for the tenants.

In the other case, there being no necessity for the intervention of equity jurisdiction, the entry will be,

Bill dismissed without costs.

MARY E. BRADLEY, in equity,

vs.

SHERBURNE R. MERRILL, and others.

Cumberland. Opinion January 11, 1896.

Equitable Mortgage. Redemption. Improvements. Trust. Notice. Practice. Parties.

In determining whether a transaction constitutes an equitable mortgage, the criterion is, whether, on looking through the forms in which the parties have put the result of their negotiations, the real transaction was in fact a security or a sale.

If the transaction was intended to secure one party for claims against the other, it will be considered an equitable mortgage and not a sale.

Notes, or other evidences of indebtedness, are not necessary to render a transaction an equitable mortgage.

If there is in fact an indebtedness or liability secured by the transaction, that is sufficient.

Where a party purchases real estate that is subject to a trust, he cannot be considered a bona fide purchaser without notice if he has actual notice of such trust.

Actual notice, as used in such case, does not mean actual notice of the fact, but notice of facts which would or ought to put him upon inquiry in reference to it.

In the redemption of real estate mortgaged, the mortgagee will not be allowed for permanent improvements in the way of new structures not necessary for the preservation of the property and made without the consent of the mortgagor.

The only exceptions to this rule are: (1) Where the improvements have been made by the mortgagee under a bona fide but mistaken supposition that he was the absolute owner, and that the equity of redemption had become barred; or (2) where the mortgagee had reason to believe from the form of his conveyance, or the circumstances of his purchase, that he was the absolute owner.

A complainant in a bill in equity may discontinue as to parties upon the payment of costs; or without, if not claimed by the respondent.

Knapp v. *Bailey*, 79 Maine, 195, affirmed.

ON REPORT.

Bill in equity, heard on bill, answers and proof.

This was a bill in equity brought by Mary E. Bradley against Sherburne R. Merrill, John W. Lane, John F. Proctor and Edward Hasty, for the redemption of the house and lot, No.

776 Congress street in Portland, from, as she claimed, equitable mortgages. The bill was filed May 8, 1888; the defendants subsequently answered severally, and replications were filed to all the answers. At the April term, 1893, the cause was set for hearing on the bill, answers and proof and a hearing had. The complainant, against the objection of the solicitor for Hasty, discontinued as to Edward M. Rand, executor of John W. Lane, who had died since the filing of the bill, as to John F. Proctor, and as to Irving W. Drew et als., executors of Sherburne R. Merrill, who had died since the bill was filed, and the court allowed the discontinuance, to which allowance the defendant Hasty duly excepted. The testimony was taken out before Mr. Justice WALTON and was reported to the law court.

The written agreement given to the plaintiff, by defendant Merrill, and referred to in the opinion and arguments of counsel is as follows:

"Whereas Mary E. Bradley, of Portland, is desirous of purchasing the real estate situated on the southerly side of Congress street, in Portland, which Henry Pennell, of Gray, conveyed to me by deed bearing date June 5, 1883. Now, therefore, in consideration that the said Mary E. Bradley has agreed to thoroughly repair said house and put it in good condition to let to my satisfaction at her expense, I hereby agree to give and do hereby give to her the option of purchasing said property after one year, and within three years from the date hereof, time being of the essence of the contract, upon the following terms and conditions: that after one year and within three years from the date hereof the said Mary E. Bradley, her heirs or assigns, pay therefor the sum of six thousand dollars, with compound semi-annual interest on said sum from this date, at the rate of seven per cent per annum, until paid, together with all such sums as I shall expend upon or on account of said property for repairs, taxes or otherwise, with interest on said sum at the same rate from the time of such payment.

"And I further agree that said Bradley, her heirs or assigns, may at any time after one year and within three years pay any portion of said sum to be credited on account of said purchase,

all such payments, however, to be forfeited in case she shall fail to complete said purchase within the time aforesaid, and in case said Bradley, her heirs or assigns, shall complete said purchase within the time aforesaid, I am to account to her or her assigns for the net rent and income of said property that I may receive, deducting any commission that I may have to pay for collecting the same, provided and upon the express condition that all the foregoing terms and conditions are fulfilled and complied with on the part of the said Bradley, within the time herein above limited, I will, upon receiving the sums aforesaid, with the interest aforesaid, within the time aforesaid, convey to said Bradley the real estate aforesaid by good and sufficient deed of quitclaim."

"Dated this 5th day of June, A. D., 1883.

"Witness, T. F. Johnson. S. R. Merrill."

The case appears in the opinion.

J. H. and J. H. Drummond, Jr., and *D. A. Meaher*, for plaintiffs.

M. P. Frank and P. J. Larrabee, for Edward Hasty.

The defendant Hasty's title is derived from two sources, by deed from Sherburne R. Merrill dated June 12, 1886, recorded June 17, 1886, and by deed from John F. Proctor and John W. Lane, dated June 17, 1886, recorded June 19, 1886. Plaintiff claims that these two deeds are equitable mortgages only so far as she is concerned. The defendant by no means admits such to be the fact.

Assuming, for the sake of argument, that Merrill and Proctor had each, an equitable mortgage merely, not a legal mortgage containing the usual conditions, and that the plaintiff had an undoubtable title to an equity of redemption; still, under the facts and circumstances, as they are set forth and sustained by proof in the case, she would be in no condition to set up her title or right of redemption as against this defendant. The case shows that a real estate broker, Gardner, in Portland had the property for sale, and that through him this defendant was obtained as a purchaser of the property, and was introduced to

the plaintiff's husband, who was her agent, as the person having the disposal of the property. After examining it, the defendant made an offer of seventy-two hundred and fifty dollars, a fair and full price, for the property, provided he could have a good title for that sum. It does not appear that up to this time anything had been said by any of the parties as to how the title stood. The plaintiff, however, accepted this offer, promising that defendant should have the property, and a good title to it, for that sum. It does not appear anywhere in the case, except from the testimony of the plaintiff and her husband, that the plaintiff had ever rescinded this bargain or had in any way expressed her purpose not to carry it out in good faith, until the morning that the deed passed. Hasty acting upon the faith of that agreement, having proceeded to pay Merrill, who held what was in form a legal indefeasible title, even if Merrill's claim had been in reality but an equitable mortgage, and Proctor's claim an equitable mortgage, he would have had a right to proceed and clear up the title by paying off the other incumbrances, and the plaintiff would be estopped from setting up her equitable title against him. Merrill was in possession under a title in form covering, at that time, the entire fee, and under his deed from Merrill, defendant had full legal title and possession of the premises.

This case is more than a simple agreement that the defendant should have the property and a good title to it for the sum named. The amount of the various claims was stated and the figures were shown to Bradley before the defendant proceeded to pay any of the money, and no objection was made to the correctness of this statement. So that even if Merrill and Proctor had each held equitable mortgages, but in form the legal indefeasible title, Hasty had so far executed his parol agreement of purchase, and Bradley and his wife (he all the time acting as her agent) had so far assented to his proceedings or permitted him to act upon the faith of their promise, that it would have been too late for them to have set up a mere equitable title as against him.

In equity, therefore, the plaintiff ought to be required to

release to the defendant on payment of the balance, which he offered to pay, rather than the defendant to her, if she has any color of title. Such is the conclusion reached on the assumption that defendant's title is merely that of the holder of equitable mortgages, which in form cover the entire fee with an equitable right of redemption in the plaintiff, known to all parties concerned.

It is based on these propositions, which the facts in the case abundantly established, viz: 1. A parol agreement by plaintiff to sell to defendant by good and perfect title the property in question for the sum of seventy-two hundred and fifty dollars, a full and fair price.

2. The amount of the outstanding claims or equitable mortgages stated to plaintiff's agent, and the balance remaining, made known without any objection being raised on his part to its correctness.

3. No notice of the rescission of the agreement to sell until one of the claims, the first and largest, had been paid, and a deed taken from the person in possession holding the apparent full legal title, under which defendant had possession and full legal title to the premises.

The rule is well established that equity will compel specific performance of even a parol agreement to convey real estate when there has been a partial performance, such as payment of purchase money, and taking possession of premises, especially if improvements or repairs have been made. *Woodbury* v. *Gardner*, 77 Maine, 71; *Douglass* v. *Snow*, Id. p. 91; 2 Story's Eq. (13 Ed.) p. 73, note (a) p. 74, chap. 18, § 759; 1 Pom. Eq. §§ 921, 1409; *Pulsifer* v. *Waterman*, 73 Maine, p. 244.

It presents, therefore, a stronger case than we should have if the parol agreement had been reduced to writing, and we were seeking to compel a specific performance. The defendant simply asks to be let alone, to be left undisturbed in the title which he has. The plaintiff agreed that he should have a good title, and he has it, unless the plaintiff is allowed to upset it by interposing what she claims to be an equitable title.

The court will not permit a party, thus defrauding, to shield himself behind the statute of frauds, the very purpose of which is to prevent fraud, to use a title, thus fraudulently retained, in violation of his parol promise, assured, and for which, in reliance upon that promise, a large sum was paid. "The following principle of equity jurisprudence," says the court in *Creath* v. *Sims*, 5 How. p. 204, "may be affirmed to be without exception, that whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith." And again, in *Wilson* v. *Bird*, 28 N. J. Eq. 352: "One who comes into a court of conscience must come with skirts free from blame in the transaction." *Meason* v. *Kane*, 63 Pa. St. 335; *Stevens* v. *McNamara*, 36 Maine, 178; *Noble* v. *Chrisman*, 88 Ill. 186, 198-9; *Cheeney* v. *Arnold*, 18 Barb. 434; 2 Herm. Estop. and Res. Adjud. §§ 935, 936; 1 Pom. Eq. pp. 433-4, §§ 398, 404, 780.

But the defendant's title is not that of the holder of either legal or equitable mortgages. He has a full indefeasible title to the premises. The plaintiff never intended or claimed to have any other right than the right expressed in her contract, a right to purchase on certain terms, within a certain time. She and her husband always so understood it. Hence their pretense that they had made a tender to Woodman as agent of Merrill. Their understanding shows that the agreement actually was a contract of sale, not a pledging of the property, as security for a loan. Equity will not interfere to make a contract for the parties different from what they themselves intended it to be at the time they made it. It can be invoked to require the parties to act in good faith and to carry out their original intention. If the parties themselves did not make a mortgage in fact, that is, if the writing made and acts done by the parties did not constitute in reality a mortgage, and the parties did not intend to make a mortgage, a court of equity will not make it for them. The notes which the mortgage to the bank secured were neither taken by nor transferred to Smith. The transaction itself treated the foreclosure as complete and as vesting the

full title in the bank. The agreement of Smith with Bradley, wherein time is expressly made to be the essence of the contract, shows clearly that there should be no right of redemption, and that the transaction should not be construed as a mortgage.

The terms of the instrument itself, its date, and the fact that it was given to Mary E. Bradley instead of James Bradley, who held the Smith contract, indicate that the parties themselves intended that it should not, in any event, be construed as a mortgage. No notes were taken, no loan purports to have been made, no debt was kept alive.

These rights were simply a right or option of purchase within a certain time, in which she had the space of two years to exercise her option and take the property or not, as she might elect. The fact that the consideration was increased in each of the contracts only indicates what the fact really is, that the property itself situated in the western part of the city had been rising by reason of improvements in that part of the city. The plaintiff asks the court to so find on her own and her husband's uncorroborated testimony, in contradiction not only of the terms of the deeds under which the various parties held the title, given by other parties, not by the plaintiff, but in direct contradiction of the written instrument drawn specially to show what the intention of the parties was as regards the Bradleys.

Where there is a written instrument of defeasance, even when the holder of the written agreement was the grantor, the criterion in determining whether the transaction constitutes a mortgage is whether there was a subsisting debt or obligation. *Reed* v. *Reed*, 75 Maine, pp. 271, 272; Pom. Eq. § 1195; *Rich* v. *Doane*, 35 Vt. 125; *Conway* v. *Alexander*, 7 Cranch, p. 237; *Macauley* v. *Porter*, 71 N. Y. 173; *Glover* v. *Payn*, 19 Wend. 518; *Flagg* v. *Mann*, 14 Pick. 467, pp. 478, 479; *Slutz* v. *Desenberg*, 28 Ohio St. 371.

In the cases cited, the party seeking relief was himself, the grantor. Here the title comes from a different source. There was no previous debt, no payment of a previous debt of the party seeking relief, no new debt created by any of the papers drawn to express the agreement and undertaking between the

parties, and the defendant and those under whom he claims had continued in possession and in control of the property receiving the rents.

The plaintiff by her deed of bargain, sale and release recorded July 9, 1884, divested herself of all shadow of title that she could claim ever to have had, especially so far as the outside world was concerned. This was the object of the deed. No writing of any kind was given back to plaintiff as was the case when she assigned the agreement or option of purchase. The understanding was, that Lane should have the full control and entire disposition of all the rights the plaintiff ever had so that he could sell, if possible, and close up the whole matter.

The deed from Merrill to defendant was of the property, not of grantor's right, title and interest, and contains covenants of warranty against all persons claiming by, through or under him. This deed was taken after the facts in regard to the title had been learned so far as could be learned, by the exercise of such diligence as the law requires, and the consideration expressed in it, $6182.69, was paid, before any notice or claim on the part of the Bradleys that the proceedings were not entirely satisfactory to them; and we submit that the defendant under that deed was a bona fide purchaser without notice of any title other than that held under the Proctor deed from Lane. *Rangley* v. *Spring*, 28 Maine, p. 138.

The case shows that the defendant, as soon as he had the first intimation that plaintiff claimed that her title was only that of the holder of equitable mortgages, went immediately to her counsel, imformed him of the amount he had already paid for the property, and told him she could have it for that sum. He wanted no trouble about it, he desired to take no advantage whatever of the plaintiff, and did not intend that she should have any ground to claim that he had taken any advantage. He had previously rendered a written statement of the account, by exhibiting to Mr. Bradley the figures showing the amounts that he was to pay, and the amounts he actually paid, and which he informed plaintiff's counsel he had paid. And the amount for which he was willing to transfer the property to plaintiff was

the same as shown by the figures exhibited to Bradley at the time of the purchase.

Where a party has a title, not on its face a mortgage, and he is in possession under a title, which he is justified in believing is a perfect title, though not an unquestionable title, for very few titles are such, but a title which a man, by exercising ordinary prudence and investigation would be justified in setting up as a good, indefeasible title, and such title is asserted in good faith, but yet turns out in the end to be subject to an equitable right of redemption in another, which he has resisted in good faith, the rule is different. All that equity requires in such cases is honesty of purpose, reasonable prudence and good faith. Pom. Eq. § 1241; *McSorley* v. *Larissa*, 100 Mass. 270; *McLaughlin* v. *Barnum*, 31 Md. 425, p. 453, et seq.; *Preston* v. *Brown*, 35 Ohio St. 18, p. 32; *Miner* v. *Beckman*, 50 N. Y. 337; *Canal Bank* v. *Hudson*, 111 U. S. 66, pp. 82, 83; 2 Jones on Mortgages, § 1128.

It may be claimed that defendant did not act in good faith because he was notified that his title was only that of an equitable mortgage. He was not so notified, he was only notified that plaintiff so claimed. Is one to cease from all improvement because some one claims or notifies him that he claims the title to the property is not good? If such were the case, one might easily be made the victim of any malicious foe. Defendant was notified that plaintiff claimed she had a right to redeem. But she never made known on what fact she claimed the right, never exhibited any writing or agreement that she held, or notified defendant that she had one.

But if she can redeem at all, she can only redeem by virtue of the Merrill contract or "option" only, because that "option" in connection with the deed to Merrill, under all the circumstances, shall be regarded as constituting in equity, a mortgage. She can redeem, therefore, only by paying in accordance with the terms of that writing. In order to be entitled to a conveyance under that writing, she is to pay the sum therein named, the rate of interest therein named, and "such sums as I shall expend upon or on account of said property for repair, taxes or other-

wise with interest on said sum at the same rate from the time of such payment."

This defendant claims that, if plaintiff's title is all that she claims for it, she is in no condition to assert it in a court of equity against this defendant, inasmuch as in pursuance of her own parol agreement that he should have the premises by good title, for a sum specified, which he paid, before any notice of a rescission of that agreement, the larger part of the sum agreed to be paid, and took a deed which gave him a good title as against all the world, except the plaintiff. That it was impliedly agreed between him and the plaintiff, through her husband, how the money should be paid, the amount to be paid Merrill, the amount to be paid Proctor, and the balance remaining being stated, and shown to plaintiff's husband, with no objection as to the amounts, nor the parties to receive them, and the defendant paid them accordingly; the first, before any claim of revocation was made; and the latter, because it was imposed as a condition upon the first, and because the defendant had agreed to pay it with the assent, as he supposed, of the plaintiff. If the plaintiff has any remedy at all, therefore, it is a remedy at law for the recovery of the balance of the purchase money.

Messrs. Drummond and Drummond, and Mr. Meaher, in reply.

The first position of the defendant is based on an estoppel, the facts for which do not exist. It assumes that the verbal trade was not rescinded and that plaintiff's husband impliedly agreed to the amount due as stated by defendant Hasty. The contract was never a binding one, and there was no part performance or payment to take it out of the statute. Defendant never attempted to carry it out, but instead ignored the plaintiff's rights and attempted to buy the property from other parties who assumed to have the title to it. No conveyance of any rights plaintiff might have was prepared, and none contemplated. The parties engaged in the transaction, after the title of record had been examined, determined to ignore the plaintiff and any claim she might have.

Mrs. Bradley had already the day before the deeds were passed, notified Gardner in the presence of her husband that she would not carry out the trade and was then seeking information for the purpose, not of notifying Hasty that she had withdrawn from the trade as the learned counsel for the defendant contends, but for the purpose of forbidding, by advice of counsel, Merrill and Proctor from transferring the premises to anybody. Is it at all likely, under the circumstances, that if Hasty had shown the figures to Bradley he would have assented to them?

If Hasty is truthful in his position that he never knew of the withdrawal of Mrs. Bradley from her offer to sell, and that she had consented to the figures that he claims to have shown her husband, his conduct was very strange. The natural thing to have done would have been to have had her present at the time of the transfer and have had the proper transfer from her of any rights she might have in consideration of the $132.31 that he has always kept for her, in order, as he says, to carry out his trade. Certainly no estoppel can arise under this state of affairs.

If defendant believed he was carrying out, not a trade with Merrill and Proctor, but one made with Mrs. Bradley, he would have taken measures to have had the complainant or her husband present at the time the transfers were made and have had a transfer from her. He claims that the agreement from Merrill to Mrs. Bradley had expired before the transfer from Merrill and that at that time Merrill had an indefeasible title to the premises; but to excuse his payment to Proctor of $935 he says Merrill insisted upon it. What right had Merrill to insist upon the payment of part of the purchase price of the premises, as agreed to by Hasty and the complainant, to a third person who, according to Hasty's position, had at the time no interest in the property. If Hasty regarded himself as bound by the trade with Mrs. Bradley, and believed as he now claims that Merrill had the indefeasible title to the property with the rights of Mrs. Bradley and her assignees Proctor and Lane extinguished by limitation of the so called "option," why did he not

hold the balance of the $7250 after paying Merrill, for Mrs. Bradley instead of assuming to act for her in paying her debt without her consent and against her objection?

In every transfer of the property from the time the bank first transferred it to Smith, Mr. and Mrs. Bradley were given an agreement of reconveyance, thus showing that all the parties recognized that the Bradleys had some interest in the premises and finally, on one occasion, when a transfer was made, the Bradleys advanced money for repairs on the house, and at another, part of the consideration of the transfer was paid to Mrs. Bradley.

The words in the Merrill obligation "repairs, taxes or otherwise" do not aid the defendant. The word "otherwise" is by a well known rule of construction qualified by the words "repairs and taxes," and the legal construction of the clause is that the complainant was to pay such sums as Merrill expended upon or on account of said property for repairs, taxes or other things in the nature of repairs and taxes.

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

FOSTER, J. Bill in equity for the redemption of a house and lot on Congress street in Portland from what is claimed to be equitable mortgages.

The rights of the parties to this litigation cannot be understood without recurring to some of the important and material facts which appear in evidence. Many of the minor details, though bearing distinctly upon the issues involved, must necessarily be omitted.

March 7, 1876, the complainant owned the premises in controversy, subject to a mortgage to the Maine Savings Bank. Afterwards the bank foreclosed the mortgage and obtained the fee in the property on July 13, 1879. On October 1, 1880, the complainant procured a conveyance of the premises from the bank to James H. Smith for the sum of $4500, the said Smith at the time giving to complainant's husband an obligation to

convey the premises to him upon the payment of that sum and interest.

On October 4, 1882, complainant procured the conveyance of the premises from Smith to Henry Pennell in consideration of $4667.75, Pennell at the time giving the complainant an obligation to convey the premises to her upon the repayment of that sum and other expenses, under certain conditions.

On June 5, 1883, complainant procured the conveyance by Pennell to Sherburne R. Merrill for the sum of $6000, Merrill giving her an agreement in writing to reconvey the premises to her upon the payment of that sum and interest, and upon certain conditions.

In each of these transactions the money was advanced at the request of the complainant and for her benefit.

The deeds in these several transactions were duly recorded soon after they were delivered, but the only obligation that was recorded was the agreement from Merrill to complainant, which was recorded February 8, 1884, eight months after its date.

August 3, 1883, while complainant still held the agreement from Merrill, she borrowed from John W. Lane two hundred and fifty dollars for which she gave two notes of one hundred and twenty-five dollars each, and assigned to him the agreement from Merrill as security for the payment of the notes. In this transaction John F. Proctor acted for Lane and as his agent, at the same time giving back an agreement to reassign the Merrill obligation upon the payment of the notes. Afterwards, on July 7, 1884, complainant borrowed from Lane two hundred and fifty dollars more, for which she gave her note, and as security for the same she conveyed by quitclaim deed all her interest in the premises, Lane at the same time agreeing to reconvey upon the payment of the amount due upon all the notes. Interest was deducted from all these notes from their date to the time they became due.

On December 10, 1884, Lane, without the knowledge or consent of complainant, conveyed by quitclaim deed all his interest in the premises and in the Merrill obligation to said Proctor, the deed not being recorded till June 5, 1886. May 1, 1886, before the deed from Lane to Proctor had been recorded

and before complainant had any knowledge of it, Lane gave complainant an agreement to reconvey the premises.

Thus we find that at the time the property was conveyed by Pennell to Merrill, the complainant had an equitable interest in the property sufficient to support a mortgage. *Stinchfield* v. *Milliken*, 71 Maine, 567. She procured the conveyance of the property from Pennell to Merrill for her benefit. The money was borrowed from Merrill to pay Pennell, together with an additional amount needed for other purposes. The conveyance from Pennell to Merrill was made to secure the amount she had borrowed as shown by the obligation to convey given by Merrill to the complainant. No notes or other evidences of indebtedness were necessary to render the transaction an equitable mortgage. If there was in fact an indebtedness or liability secured by the transaction that was sufficient. *Reed* v. *Reed*, 75 Maine, 264, 272.

Transactions like these constitute equitable mortgages. The criterion always is whether the transaction was intended to secure one party for claims against the other. As was said by the court in *Reed* v. *Reed*, supra: "It is, therefore, a question of fact, whether, on looking through the forms in which the parties have seen fit to put the result of their negotiations, the real transaction was in fact a security or sale."

So far, therefore, as Lane and Merrill were concerned, these transactions constituted equitable mortgages with the right of redemption in the complainant. To be sure, prior to the time Lane gave the complainant the written agreement to convey, he had conveyed his rights in the premises to Proctor by quitclaim deed, but Proctor at that time knew all about the transactions between Lane and the complainant and her husband. In fact he either negotiated them himself, or was present at the time the loans were made, and, therefore, he could acquire no rights against the complainant except such as Lane held. He had not only notice but actual knowledge of complainant's rights.

Such was the condition of the title to the property when Edward Hasty, the respondent in this suit, became interested in the premises and purchased from Merrill, Proctor and Lane

by quitclaim deeds delivered June 17, 1886. He claims to be a bona fide purchaser of the property without notice, and denies any knowledge of the transactions with Merrill, Proctor and Lane except such as he found from the records of the instruments recorded. But he had knowledge of the obligation from Merrill to the complainant, as he states in his answer, and he is precluded from pleading ignorance of its effect in law.

Was he a bona fide purchaser without notice, or did he have such notice of the rights of the complainant in the property that he acquired only the rights of his grantors?

His attention was first called to the matter by Gardner, a real estate agent, and whom he knew to be such at the time. The agent had had the property placed in his hands, either to procure a lease, or for sale, by the husband of the complainant, and knew that the complainant claimed to be the owner of it, so entered it upon his books, and understood that Merrill held a mortgage upon it, and, moreover, that Proctor and Lane were in some way connected with it. He introduced Hasty to complainant's husband who was acting for her and who claimed to have the disposal of the property. After looking the property over with the husband, an offer of $7250 was made by Hasty provided he could get a good title. The husband concluded to accept the offer. Thereupon, Hasty went to Gardner's office and Gardner told him he did not know who owned the property, and advised him that he had better search the records and see. Hasty employed counsel to look up the title, and was advised that Merrill had given the complainant an agreement by which she had the privilege of purchasing upon certain conditions within a specified time, but that the time had nearly expired. The testimony from complainant and her husband is that a tender had been made of $6000, to Merrill through an alleged agent of Merrill, two days before the expiration of the time named in the obligation, but it was not accepted by the party as he claimed that he was not Merrill's agent; also, that on the 16th of June, the day before the deeds to Hasty were executed, they called at Gardner's office and notified Gardner and Hasty that complainant had changed her mind and would not sell for the sum offered by Hasty.

This is denied by Hasty. However, the next morning, June 17, Merrill and Hasty met at Proctor's office, and from there went to an attorney's office and Merrill delivered the deed to Hasty. While they were there, and after the Merrill deed had been passed and the money paid, as claimed by Hasty, but before the deed from Proctor and Lane was delivered, the complainant and her husband came in and forbade the sale of the property. Subsequently, Hasty took the deed from Proctor and Lane, paying the former $935.

The respondent claims that nothing was said to him in reference to complainant having a writing from Lane, or having any interest in the property, except what was disclosed by the records, but that he kept $132.31, the balance of the $7250 after satisfying the Merrill claim of $6182.69, and Proctor's claim of $935, for the complainant and offered to pay it to her. This is his account of the transaction in brief. The complainant and her husband, on the other hand, testify that the sale was forbidden before the Merrill deed was passed.

From the evidence and circumstances surrounding the transaction we think the respondent must have had such notice of the claim of the complainant under the obligation from Merrill as to defeat the claim which he sets up of being a bona fide purchaser without notice, and, therefore, he must be held, so far as that instrument is concerned, to have taken only the rights of his grantor, viz: that of an equitable mortgagee.

The respondent admits that the complainant forbade the transfer of the property to him before the deed from Proctor and Lane had been delivered to him. His rights acquired under that deed would certainly be acquired with notice of complainant's interest, or such notice as would put him upon such inquiry that he could have learned what her interest was if he had been disposed; and hence his claim against her under this deed can be only such rights as they held in the premises,— rights of second mortgagees.

The respondent admits that on the morning of June 17, 1886, when the deeds were passed, he met complainant's husband and notified him that he had learned that Merrill, Lane and Proctor had some claim upon the property and that he should have to pay

their claims before he could get a good title, and showed him the figures.

The complainant and her husband both assert that Hasty was notified, the evening before the deeds were passed, that she had changed her mind about the sale of the property and that she wanted to have her home and redeem it, and if he would loan her the money she would give him the preference in regard to the sale of it.

Taking all the transactions together and from all the evidence, we feel satisfied that the respondent must have had either actual knowledge of the complainant's rights in the property, or certainly such knowledge of the circumstances and facts as ought to have put him upon inquiry.

The respondent's title to the property was acquired by quitclaim deeds from Merrill, Proctor and Lane. In some courts it is held that such an instrument of conveyance does not make the grantee a bona fide purchaser without notice, (*Baker* v. *Humphrey*, 101 U. S. 494,) but in this State we have not gone to that extent, and it is held to be a circumstance only bearing upon the question. *Knapp* v. *Bailey*, 79 Maine, 195, 205; *Mansfield* v. *Dyer*, 131 Mass. 200.

Actual knowledge is not necessary. It is only necessary that a party should have actual notice of the trust. And actual notice as used in this connection does not necessarily mean actual notice of the fact itself, but notice of facts which would or ought to put him upon inquiry in reference to it.

The rule is thus stated by Bispham in his work on equity, on page 336: "He is bound, if circumstances point out a path, to investigate, to follow it. If he makes no inquiries, the presumption is that he has improperly turned away from the knowledge of the true state of the case, and he is, therefore presumed, as a conclusion of fact, to know what he might have informed himself of."

And in the case of *Knapp* v. *Bailey*, supra, where this principle was directly before the court, the principle is so clearly stated that its application seems appropriate to the case under consideration. In the course of the opinion PETERS, C. J.,

says: "The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser before buying should clear up the doubts which apparently hang upon the title, by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the 'signs and signals' seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which, to the mind of a prudent man, indicate notice, is proof of notice."

Under all the circumstances of the case, as disclosed by the evidence, we are satisfied that the respondent had such notice of the rights of the complainant in the property as estops him from claiming the protection afforded to a bona fide purchaser without notice, such notice as estops him from claiming any other rights than those of a mortgagee in possession, and leaves the complainant the right to redeem the premises from the mortgages.

The case shows that the respondent built a double house partly upon these premises and partly upon premises adjoining, the dividing line between the two lots coinciding with the partition wall between the two tenements.

In the statement of the account of the amount due on the mortgages is he entitled to an allowance on account of this house so far as it is upon the mortgaged property?

This house was commenced about two years after the respondent bought Merrill's interest and just prior to the time this bill in equity was filed. He had bought on the 17th of June, 1886, an equitable mortgage, together with such interests as Proctor and Lane had, with notice of the complainant's rights in the premises and of the character of her title in the same. Four days after this purchase, June 21, 1886, this complainant through her attorneys caused a demand in writing to be served upon him

for an account under the mortgages. Within four days from the time of his purchase he not only had notice but actually knew that this complainant claimed that his title was only that of a mortgagee in possession. Even if he did not know her precise rights he had knowledge of facts that were sufficient to put him upon inquiry. Instead of having reason to believe that he was the absolute owner, he had every reason to believe that he was not, and could have readily learned his precise status to the property and the rights of the complainant had he seen fit so to do. He could have easily protected himself. Foreclosure was open to him, and after foreclosure no one could dispute his rights as absolute owner. This he did not do. He preferred to take the chances of the complainant's redeeming. He knew, or ought to have known, had he exercised reasonable prudence, that he was only mortgagee of the premises, and that he had no right to add $3000 to the burden of redeeming the property, the cost of a new house that was neither necessary to the preservation of the property nor built with the consent of the mortgagor.

It is a well established rule that the mortgagee will not be allowed for permanent improvements in the way of new structures not necessary for the preservation of the property and made without the consent of the mortgagor. He is entitled to allowance for all improvements and repairs necessary for the preservation of the estate, or to make the premises tenantable, but further than this he cannot go at the expense of the mortgagor without his consent. *Ruby* v. *Abyssinian Society*, 15 Maine, 306; *Pierce* v. *Faunce*, 53 Maine, 351; *Sandon* v. *Hooper*, 6 Beavan, 246; 2 Jones on Mortgages, § 1126; Am. & Eng. Encyl. vol. X, "Improvements."

If the rule were otherwise it would be subject to great abuses, and would increase the difficulties in the way of the right to redeem, and would oftentimes be resorted to by unscrupulous mortgagees disposed to take advantage of the necessities of the mortgagor, as a means of defeating his power to redeem.

There are exceptions to the general rule as above stated; (1)

as where improvements have been made by the mortgagee under a bona fide but mistaken supposition that he was the absolute owner, and that the equity of redemption had become barred; or (2) where the mortgagee had reason to believe from the form of his conveyance or the circumstances of his purchase, that he was the absolute owner. *McSorley* v. *Larissa*, 100 Mass. 270; 3 Pom. Eq. § 1217, note 1.

But the case at bar does not fall within either of those exceptions. By taking the most ordinary precaution, the respondent could have readily ascertained what his title was and what his rights were. *Guckian* v. *Riley*, 135 Mass. 71, 73. A court of equity as a general rule will not relieve against the consequences of mere ignorance of law. Bispham on Eq. § 187.

Nor is this a case where the complainant has slept upon her rights and in silence seen the respondent make valuable improvements without objection, as in *Morgan* v. *Walbridge*, 56 Vt. 405. She was active in asserting her rights from the beginning. From the time when the negotiations with the respondent were progressing until she filed her bill, she was active, vigilant and persistent in claiming her rights and in obtaining a recognition of them by the respondent. Nevertheless, he persisted in refusing to recognize her rights and in acting in defiance of them, even after forbidden, and after a legal demand for accounting had been served upon him immediately after the purchase. It would be inequitable now to oblige her to assume the burden of permanent improvements made by the respondent with full knowledge of her claims and in defiance of her protests. In fact, it might practically in effect deny her the right to redeem.

The equities in this case are with the complainant, and in stating the account the permanent improvements in the erection of the new house should not be allowed.

The exceptions must be overruled.

The rule is, that the complainant can discontinue as to parties upon payment of costs; or without, if they are not claimed by the respondent. *Mason* v. *York & C. R. R.* 52 Maine, 82, 107.

The decree should be that the bill be sustained, that the respondent be ordered to render an account as mortgagee in possession, in accordance with this opinion, that the cause be sent to a master to determine the amount due to the respondent. Further decrees can be made on the coming in of the master's report.

Bill sustained with costs.

JOHN WHITE *vs.* JAMES N. CUSHING.

Piscataquis. Opinion January 13, 1896.

Bills and Notes. Order. Negotiability. Savings Bank.

An order in these words:

"$120. Dover, Oct. 27, 1893.

Piscataquis Savings Bank.

"Pay James Lawler, or order, one hundred and twenty dollars, and charge to my account on book No.——

J. N. Cushing."

"Witness—

"The bank book of the depositor must accompany this order;" is not a negotiable draft or order such as will authorize a suit to be brought upon it in the name of the indorsee.

The words upon the face of the order below the signature of the drawer, being there at the time of its inception, became a substantive part of it and qualified its terms as if inserted in the body of the instrument.

They render the order payable upon a contingency, and embarrass and restrict its free circulation for commercial purposes, rendering it not negotiable.

ON EXCEPTIONS.

This was assumpsit on an order, the terms of which appear in the head-note. The order was indorsed in blank by the payee and Samuel Lewis.

The words "The Bank Book of the depositor must accompany this order" were printed in small capitals on the lower margin of the order, under the signature of J. N. Cushing.

There was evidence tending to show that plaintiff bought the order of James Lawler, the payee, on or before the 21st day of November, 1893. The defendant asked the court to rule that the order was not negotiable, and an action could not be maintained in the name of White, but the presiding justice ruled, as

matter of law, that the order was negotiable, and the action could be maintained in the name of White by a simple indorsement by Lawler.

There was evidence tending to show that Lawler, the payee, obtained the order from Cushing, the maker, by fraud, and the defendant asked the court to rule that this defense was open to him in this action, although White might not have had knowledge of the claim of fraud when he bought the order from Lawler; but the presiding justice ruled that the order had all the characteristics of a check, and was not overdue until at least thirty days after its date, and that if the plaintiff bought the order within thirty days from its date for a valuable consideration in the ordinary course of business without actual notice of the fraud, he, the plaintiff, was an innocent purchaser, and the defendant could not set up fraud in the procuring of the order as against White.

There was evidence tending to show that on the twenty-eighth day of October, A. D., 1893, and before the order was negotiated by Lawler to anybody, Lawler took the order to the Piscataquis Savings Bank and demanded payment of the same of said bank, and that the bank refused to pay the same until after thirty days' notice had been given, and refused to pay the same unless it was accompanied by the bank book of the depositor, Cushing, as required in the order.

And there was evidence tending to show that the plaintiff, White, knew when he bought the order that this payment had been demanded by Lawler, and payment refused by the bank for the reasons above stated, and the defendant asked the court to rule that the order was then an overdue order, and that when White got it afterwards of Lawler it was subject to all the equities in White's hands that it would be in Lawler's; but the court ruled otherwise.

There was evidence tending to show that the consideration of the order was for dry goods sold by said Lawler to Cushing while traveling from town to town, and from place to place in the town of Charleston, in violation of the statute of this State, unless said Lawler had a license so to do.

There was evidence tending to show that White knew that the note was given for goods sold by Lawler while thus traveling.

There was no evidence that Lawler had any license to so sell, and the defendant asked the presiding justice to rule that said sale was in violation of the statute, and that White had notice of the same, and could not recover for that reason; but the presiding justice ruled that, so far as White was concerned, he had a right to assume that Lawler had a license for the purpose of selling said goods.

To all these rulings, and refusals to rule, the defendant excepted.

T. W. Vose, for plaintiff.

To be within the rule that prevents negotiability, the contingency or conditions must be such as will embarrass the paper in its course of circulation; but a memorandum which is merely directory or collateral will not affect it. *Overton* v. *Tyler*, 4 Pa. St. 346; *Hodges* v. *Shuler*, 22 N. Y. Reg. 114; *Arnold* v. *Rock River Valley Union Co.* 5 Duer, 207; *Hostater* v. *Wilson*, 36 Barb. 307; *Dennett* v. *Goodwin*, 32 Maine, 44; *Smilie* v. *Stevens*, 39 Vt. 315; *Dorsey* v. *Wolff*, 142 Ill. 589; S. C. 34 Am. St. Rep. 99; *Sumner* v. *Hibbard*, 38 N. E. Rep. 899.

The words in the margin of this order are no part of the contract between the maker or drawer and the payee; they create no contingency between them. The fraudulent acts or intent of the maker of otherwise negotiable paper will not defeat its negotiability. That this exact question has not arisen oftener is of some weight in favor of the plaintiff. The cases in Penna. on mercantile law are not cited with great confidence. For a summary of cases see Edwards' Bills and Notes, p. * 141; Ames' Bills and Notes; Big. L. C. Bills and Notes; *Dorsey* v. *Wolff*, supra; *Cota* v. *Buck*, 7 Met. 588; *Byram* v. *Hunter*, 36 Maine, 220.

J. B. Peaks, for defendant.

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

FOSTER, J. The plaintiff sues as indorsee of an order signed by the defendant of the following tenor:

"$120. Dover, Oct. 27th, 1893.

Piscataquis Savings Bank.

"Pay James Lawler, or order, one hundred and twenty dollars, and charge to my account on book No.——

J. N. Cushing."

"Witness ——

"The bank book of the depositor must accompany this order."

The order was indorsed in blank on the back by James Lawler and Samuel Lewis, and the plaintiff claimed to recover against the defendant as upon a negotiable instrument. The real question presented is whether the instrument declared on is negotiable, so that an action may be maintained upon it in the name of the indorsee.

To constitute a negotiable draft or order, it must be a written order from one party to another for the payment of a certain sum of money, and that absolutely, and without any contingency that would embarrass its circulation, to a third party or his order or bearer.

It has often been held that a bill or note is not negotiable if made payable out of a particular fund. But there is a distinction between such instruments made payable out of a particular fund, and those that are simply chargeable to a particular account. In the latter case, the payment is not made to depend upon the adequacy of that fund, the only purpose being to inform the drawee as to his means of reimbursement, and the negotiability of the instrument is not affected by it.

The objection that is raised to the negotiability of this instrument is, not that it is made payable out of a particular fund, but that it is subject to such a contingency as necessarily embarrasses its circulation and imposes a restraint upon its negotiability, by means of these words contained upon the face of the order: "The bank book of the depositor must accompany this order." Although these words are upon the face of the order below the signature of the drawer, they were there at the time of its inception, became a substantive part of it and qualified its

terms as if they had been inserted in the body of the instrument. *Littlefield* v. *Coombs*, 71 Maine, 110; *Cushing* v. *Field*, 70 Maine, 50, 54; *Johnson* v. *Heagan*, 23 Maine, 329; *Barnard* v. *Cushing*, 4 Metcalf, 230; *Heywood* v. *Perrin*, 10 Pick. 228; *Benedict* v. *Cowden*, 49 N. Y. 396; *Costelo* v. *Crowell*, 127 Mass. 293, and cases there cited.

Was the order negotiable? The answer to that depends upon the effect of the words "The bank book of the depositor must accompany this order." If not negotiable, the plaintiff as indorsee can not maintain an action upon it. *Noyes* v. *Gilman*, 65 Maine, 589. If their effect is such as constitute a contingency in relation to the payment of the order, dependent upon the production of the drawer's bank book by the holder or indorsee of the order, then they must be regarded as such an embarrassment to the negotiation of the order, and such a restriction upon its circulation for commercial purposes as to render it non-negotiable.

Without these words the order is payable absolutely, and there is no apparent uncertainty affecting its negotiability. With them, the order is payable only upon contingency, or condition, and that is upon the production of the drawer's bank book. This is rendered imperative from the language employed, and the bank upon which the order is drawn, would have the right to insist upon such production of the book in compliance with the terms of the order; and the case shows that it has refused payment upon presentation of the order for the reason that it was not accompanied by the bank book. It cannot, therefore, be regarded as payable absolutely and without any contingency that would embarrass its circulation. The drawer has it in his power to defeat its payment by withholding the bank book. Certainly the bank book of the depositor is within his own control rather than that of the indorsee of this order.

It was the necessity of certainty and precision in mercantile affairs and the inconveniences which would result if commercial paper was incumbered with conditions and contingencies, that led to the establishment of an inflexible rule that to be negotiable they must be payable absolutely and without any conditions or contin-

gencies to embarrass their circulation. *American Ex. Bank* v. *Blanchard*, 7 Allen, 333. In that case the words, "subject to the policy," being included in a promissory note, were held to render the promise conditional and not absolute, and so the note was held not to be negotiable. *Noyes* v. *Gilman*, 65 Maine, 589, 591; *Hubbard* v. *Mosely*, 11 Gray, 170.

A case in every essential like the one we are considering was before the Supreme Court of Pennsylvania in 1891. A fac simile of the order is given in the opinion. No two cases could be nearer alike. There, as here, the order was drawn on a savings bank. The suit was by the indorsee against the drawer as in this case. There, as here, the order contained a statement upon its face, but below the signature of the drawer, that the "Deposit book must be at bank before money can be paid." In discussing the question of its negotiability cases are cited from the courts of Maine, Vermont, Massachusetts and New York, as well as from Pennsylvania. In the course of the opinion the court say: "It sufficiently appears from the memoranda on its face that it was drawn on a specially deposited fund held by the bank subject to certain rules and regulations, in force between it and the depositor, requiring certain things to be done before payment could be required, viz: previous notice of depositor's intention to draw upon the fund, return of the notice ticket with the order to pay, and presentation of the deposit book at the bank, so that the payment might be entered therein." . . . "It is, in substance, merely an order on the dollar savings bank to pay J. W. Quinn, or order, nine hundred dollars in nine weeks from date, or February 1, 1888, provided he or his transferee present to the bank, with the order, the notice ticket, and also produce at and before the time of payment the drawer's deposit book. As already remarked, these are undoubtedly pre-requisites which restrain or qualify the generality of the order to pay as contained in the body of the instrument. They are also pre-requisites with which it may be difficult, if not sometimes impossible, for the payee, transferee, or holder of such an order to comply." *Iron City Nat. Bank* v. *McCord*, 139 Pa. St. 52 (23 Am. State Rep. 166).

The order in question was drawn upon a savings bank, and it is common knowledge that all such banks in this State have a by-law which all depositors are required to subscribe to, that "no money shall be paid to any person without the production of the original book that such payment may be entered therein."

This court in the case of *Sullivan* v. *Lewiston Inst. for Savings*, 56 Maine, 507, has considered the purpose and necessity of these salutary regulations. We should be slow to countenance any departure from this rule needed for the protection of depositors in our savings banks now numbering more than 160,000, and where deposits aggregate nearly $60,000,000.

Inasmuch as this order is not negotiable and no suit can be maintained upon it by the plaintiff as indorsee, it becomes unnecessary to consider the other exceptions.

Exceptions sustained.

MARTHA W. SMITH, and another, *vs.* CHARLES E. HUMPHREYS.

Cumberland. Opinion January 14, 1896.

Pleading. Demurrer. Contracts. Collusion and Fraud.

Upon a demurrer to a declaration showing a collusive and fraudulent attempt to aid the defendant to obtain title to land, to be sold by an administrator at a price much less than its value to the injury of creditors or other heirs, *held*; that the court will not enforce such a contract, nor aid one of the fraudulent parties to obtain the fruits of his fraudulent agreement.

A second count in the same declaration alleged that the plaintiffs conveyed their interest in a certain lot of land, of which they were part owners, as heirs, to the defendant, another heir, upon his agreement to pay two outstanding mortgages secured upon other real estate, in which the parties were interested, and to hold and carry the mortgages at a reduced rate of interest as long as the plaintiffs desired. Nothing was to be paid to the plaintiffs. The breach alleged was a failure to pay the mortgages, but there was no allegation of damages suffered by such breach. The court closed with a claim for money alleged to be due the plaintiffs under the agreement set out in the first count, which related to other lands, and alleged a promise to pay that. *Held*; that the count was fatally defective.

ON EXCEPTIONS.

This was an action of assumpsit on account annexed and two special counts, together with a money count, and submitted to

the presiding justice of the Superior Court, for Cumberland county, upon the pleadings.

The defendant's counsel duly filed a demurrer to the first count of the plaintiff's declaration. The demurrer was sustained and the first count of the plaintiff's declaration adjudged bad by the presiding justice. And to the second count defendant's counsel plead the statute of frauds in the following brief statement:

And for a brief statement of special matter of defense to be used under the general issue pleaded, the said defendant said, "that the alleged promise declared on in the second count of the plaintiff's declaration, being an alleged promise to take up two certain mortgages and carry the same as long as the plaintiffs might desire, at a reduced rate of interest, is not and never was in writing signed by the defendant or by any person thereunto lawfully authorized, nor is nor was any memorandum or note of said alleged promise in writing signed as aforesaid."

This plea the presiding justice sustained and adjudged the second count bad.

The plaintiffs excepted to both rulings.

First count: "In a plea of the case, for that said plaintiffs were seized in fee of a certain farm, known as the Humphrey farm at or near the Willows, so-called, in Brunswick village, of a certain value, to wit, of the value of two thousand dollars, on which farm said defendant on a certain day, to wit, on the first day of September, A. D., 1891, then and there had a mortgage amounting to one thousand seventy-seven dollars and on which mortgage there was interest then and there due amounting to a large amount, to wit, to the sum of two hundred fifty-eight dollars and forty-eight cents. And a certain discourse arose on a certain day, to wit, on the first day of September, A. D., 1891, between the plaintiffs and the defendant, who was then and there a near relative, in which discourse, defendant expressed himself desirous of becoming the owner of the said farm as it formerly belonged to his father and he had resided thereon, and thereupon it was agreed between the plaintiffs and the defendant that he should get a conveyance of the same from John A.

Waterman, Administrator of the estate of C. C. Humphreys, late of said Brunswick, deceased, to hold the same to defendant and his heirs at the appraised value thereof without any opposition from the said plaintiffs and in a measure through their aid, and that in consideration thereof he would pay over to the said plaintiffs, his relatives as aforesaid, the two hundred fifty-eight dollars and forty-eight cents which he would receive as interest on his said note and in addition thereto the sum of four hundred dollars in money, for and in consideration of the transfer to him of the aforesaid property by the said administrator without opposition on the part of the said plaintiffs and in a measure through their aid; and he then and there induced the plaintiffs to consent to and aid in and not object to the conveyance of said farm to said defendant and the said defendant thereafterward, to wit, on the eighth day of September, A. D., 1891, obtained a conveyance of the said farm from the said administrator and in consideration thereof, and for the aforesaid other consideration, promised the plaintiffs to pay them the sum of six hundred fifty-eight dollars and forty-eight cents according to his aforesaid agreement respecting the aforesaid property and getting possession of the same; yet the said defendant has failed and neglected to perform all and singular his aforesaid agreements and promises on his part to be performed and fulfilled and has never paid anything to either of the plaintiffs for the aforesaid services and aid."

J. J. Perry and D. A. Meaher, for plaintiffs.

A contract for the sale of land is executed and finished when a deed is given and is not a case within the Statute of Frauds. *Parker* v. *Wilkinson*, 17 Mass. 249; Mass. Digest, Vol. 11, p. 2516. A party who receives a grant of land from another on his promise to pay for it, cannot avoid making payment by showing that his promise is not in writing. *Dillingham* v. *Runnels*, 4 Mass. 400; *Pomeroy* v. *Winship*, 12 Mass. 523; *Wilkinson* v. *Scott*, 17 Mass. 249; *Brackett* v. *Evans*, 1 Cush. 79 and 82; *Nutting* v. *Dickinson*, 8 Allen, 540; *Basford* v. *Pearson*, 9 Allen, 387.

In this state the same principle has been repeatedly recognized by our courts; thus, when a verbal contract for the sale of real estate has been made, the party ready to perform has a remedy against a party who repudiates such contract under the Statute of Frauds.

If a parol contract for the purchase of real estate is made and fulfilled on the part of the purchaser and the vendor refuses to perform the contract on his part, the party performing the contract can recover back all payments which have been made. *Kneeland* v. *Fuller*, 51 Maine, 521; *Richards* v. *Allen*, 17 Maine, 296; *Jellison* v. *Jordan*, 68 Maine, 373; *Segars* v. *Segars*, 71 Maine, 530.

This case is simply a reversal of parties giving the vendee a remedy against the vendor for non-fulfillment of contract.

But the case at bar is a stronger case for the plaintiffs than any of these. In this case the contract was completed by giving and receiving a deed of conveyance of real estate.

In *Hall* v. *Huckins*, 41 Maine, 574, the court say: "If any thing has been received by defendant as payment in lieu of money as notes, specific chattels and even real estate, it equally entitles the plaintiff to recover." *Willey* v. *Green*, 2 N. H. 333; *Clark* v. *Penny*, 6 Conn. 297; *Arms* v. *Ashley*, 4 Pick. 71; *Miller* v. *Miller*, 7 Pick. 136.

Barrett Potter, for defendant.

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

STROUT, J. The demurrer to the first count was well taken. The case stated in it amounted to a collusive and fraudulent attempt to aid the defendant in obtaining title to a parcel of land to be sold by the administrator of C. C. Humphreys under license, at a price much less than its value, to the injury of creditors or other heirs, for a consideration to be paid therefor to the plaintiffs. The court will not enforce such a contract, nor aid one of the fraudulent parties to obtain the fruits of his fraudulent agreement. In such cases the maxim melior est

conditio possidentis, applies. Besides, the count does not allege that the defendant obtained title through the aid of plaintiff, which is the basis of his claim. The demurrer was properly sustained.

To the second count, defendant pleaded the general issue and the statute of frauds. The exceptions state that the plea was sustained and the second count adjudged bad. It does not appear that any suitable issue was made to require a ruling upon the sufficiency of this count. But as the parties have argued the question upon its merits, we deem it advisable to express our opinion. The count is inartificially drawn, but we gather from it the allegation that plaintiffs conveyed their interest in a certain lot of land, of which they were part owners, as heirs, to the defendant, another heir, upon his agreement to pay two outstanding mortgages amounting to twenty-six hundred dollars, secured upon other real estate, in which the parties were interested, and hold or carry the mortgages at a reduced rate of interest as long as plaintiffs desired. Nothing was to be paid to the plaintiffs. The breach alleged is failure to pay the mortgages. There is no allegation of damages suffered by this breach; but the count closes with a claim for money alleged to be due plaintiffs under the agreement set out in the first count, which related to other lands, and alleges a promise to pay that. This count is fatally defective.

Exceptions overruled.

ROBERT W. MESSER, Appellant,

vs.

CHARLES D. JONES, Administrator.

Knox. Opinion January 16, 1896.

Title by Descent. Illegitimates. R. S., c. 75, §§ 2, 3, 4; Stat. 1887, c. 14.

The provisions of statute in force at the time of the decease of a person intestate determine the rights of the heirs to the distribution or descent of his estate, and also who are entitled to inherit as heirs.

By R. S., c. 75, §§ 3 and 4, repealed in 1887, an illegitimate child could, under certain conditions, inherit from the lineal or collateral kindred of his father,

but could not in any event inherit from the lineal or collateral kindred of his mother.

Chapter 14, Public Laws of 1887, so far modifies the law in relation to illegitimates as to allow an illegitimate child to inherit from the lineal and collateral kindred of the mother as well as of the father, under certain conditions, as if legitimate.

The term "kindred," as employed in the statute, must be construed in reference to the particular statute in which the term is used.

AGREED STATEMENT.

This was an appeal from a decree of the judge of probate of the county of Knox, made and passed at a probate court held at Rockland on the third Tuesday of June, A. D., 1894, appointing Charles D. Jones, the respondent, to be administrator of the estate of Amanda Shepard, late of Union in said county of Knox, deceased.

The case was submitted to the law court upon the following agreed statements:

Said Charles D. Jones was appointed administrator upon the petition of Sarah A. Stratton and others whom, it is admitted, are first cousins of said intestate, and who claim to be the lawful heirs of said intestate.

Robert W. Messer, the appellant, claims that he and his brother, Ambrose P. Messer of Boston, Massachusetts, and his sister, Eliza E. Cooper of Jefferson, in the county of Lincoln, are the sole heirs of said intestate and the only persons interested in her estate.

The appellant for himself and also in behalf of his said brother and sister appeared at the probate court and objected to the appointment of an adminstrator upon the above named petition.

It was admitted that the appellant seasonably filed in the probate office notice of his appeal and seasonably filed his reasons of appeal and that the same were seasonably and lawfully served upon the respondent; and that a sufficient bond of appeal was seasonably filed.

The reasons of appeal filed by the appellant were as follows: "1. Because said Charles D. Jones was not appointed such administrator upon the petition of any person or persons interested in said estate.

"2. Because neither of the said petitioners, upon whose petition said Charles D. Jones was appointed such administrator, was interested in said estate either as next of kin, heirs, creditors or otherwise.

"3. Because said petitioners are cousins of said deceased, and said Robert W. Messer, and Ambrose P. Messer of Boston, Mass., and Eliza E. Cooper of Jefferson, Maine, are nephews and niece and only next of kin and sole heirs of said deceased."

Said Amanda Shepard died intestate on the seventeenth day of April, A. D., 1894, without issue, leaving neither husband, father, mother, sister nor brother. Said intestate was the legitimate child of Daniel Shepard and Alice Shepard, his wife, whose name before her marriage to said Shepard, was Alice Messer.

Daniel Shepard and Alice Messer were lawfully married April 23, 1802, and had eight legitimate children, one of whom died in infancy, and the remainder of whom lived to become of age. Neither of said children ever married and neither of them ever had children. All the brothers and sisters of said intestate died before her death. The intestate was born April 30, 1819. Said Daniel Shepard died January 10, 1851, and said Alice Shepard died November 20, 1863.

The appellant, said Robert W. Messer, and the said Ambrose P. Messer and said Eliza E. Cooper are the legitimate children of Parker Messer, who died before the death of said intestate.

Said Parker Messer was the illegitimate child of said Alice Messer and was born on the twenty-fourth day of June, 1800, and lived until about ten years old with an uncle and afterwards until he became of age in the family of one Daniel McCurdy.

The intestate and her brothers and sisters who lived to become of age, during their lifetime, continued to live together in one family and her estate is substantially the accumulation of her said brothers and sisters and herself.

If, upon the foregoing statement of facts, the said Robert W. Messer, Ambrose P. Messer and Eliza E. Cooper were decided to be lawful heirs of the intestate, Amanda Shepard, the appeal was to be sustained and the decree appealed from, was to be

reversed. Otherwise, the appeal was to be dismissed and the decree affirmed.

W. H. Fogler, for appellant.
T. P. Pierce, for respondent.

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

FOSTER, J. Appeal from a decree of the judge of probate of the county of Knox, appointing the respondent administrator of the estate of Amanda Shepard, upon the petition of the cousins of the intestate who claim to be her next of kin and heirs at law.

The appellant, and his brother and sister, Ambrose P. Messer and Eliza E. Cooper, claim to be the sole heirs of the intestate, and the only persons legally interested in her estate.

It is agreed that if the cousins are the lawful heirs of the intestate the decree of the probate court is to be affirmed. If they are not, the same is to be reversed.

The question to be determined is, whether the appellant and his brother and sister are lawful heirs of the intestate, Amanda Shepard.

Daniel Shepard was married in 1802 to Alice Messer. There were eight children as the result of this marriage, of whom the intestate was one, and neither of whom was ever married, and neither had children. Amanda Shepard, the intestate, died in 1894, having survived her father, mother, brothers and sisters.

Alice Messer, mother of the intestate, two years before her marriage to Daniel Shepard, gave birth to an illegitimate son whose name was Parker Messer, the father of the appellant, Robert W. Messer, Ambrose P. Messer and Eliza E. Cooper.

The appellant and his brother and sister claim through their father, Parker Messer, and who, as we have said, was an illegitimate son, having the same mother as the intestate.

Had Parker Messer been legitimate his children would be the sole heirs of the intestate, for nephews and nieces are one degree nearer in kinship than cousins. Computed by the rules of the

civil law a nephew stands in the third and a cousin in the fourth degree of kinship.

But in order to inherit under the common law, this kinship must be of legal inheritable blood. At common law an illegitimate child has no inheritable blood, and no rights of property can be traced through him.

Notwithstanding the statute relating to descent (R. S., c. 75, § 2,) provides that "kindred of the half blood inherit equally with those of the whole blood in the same degree," the term kindred under that statute means lawful kindred. *Hughes* v. *Decker*, 38 Maine, 153.

But the claim of the appellant is not based upon the rules of the common law, and he must, therefore, bring himself within the provisions of some positive statute enactment. And the provisions of statute in force at the time of the decease of a person intestate must determine the rights of the heirs to the distribution or descent of his estate, (*Hunt* v. *Hunt*, 37 Maine, 333,) as also who are entitled to inherit as heirs of a deceased person. No rules of the civil or common law, further than as they are adopted by the statute, can afford them any aid. The statute fixes its own rules, and by those rules we must be governed. The decision in this case, then, depends upon the proper construction of the statute in relation to the rights of illegitimate children in force at the time of Amanda Shepard's death, or ch. 14 of Public Laws of 1887, which is as follows:

"An illegitimate child born after March twenty-fourth, in the year of our Lord one thousand eight hundred and sixty-four, is the heir of his parents who intermarry. And any such child, born at any time, is the heir of his mother. And provided, the father of an illegitimate child adopts him or her into his family, or in writing acknowledges before some justice of the peace or notary public, that he is the father, such child is also the heir of his or her father. And in either of the foregoing cases, such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred, and these from such child and its issue the same as if legitimate."

Inasmuch as Parker Messer, the illegitimate child and father of the appellant, was born prior to 1864, the rights of the appellant, and whether he is an heir of the intestate, must be determined by the construction and meaning of the remaining portion of the statute in question.

One provision of the act has remained unmodified, through all the various changes that have been made since its enactment in 1838, and that is in relation to the illegitimate being the heir of its mother. No act on the part of any one is required to make the child heir of the mother who bore it. The maternity can never be in doubt, while the paternity may be.

The history of legislation upon the subject, not only in this state but in most of the states of the union, shows a continual advancement and a breaking away from those antiquated English maxims in the direction of humanity and justice towards innocent and unoffending sufferers. There has been but one current and that has been steadily advancing towards a modification of the strict rules of the common law. Nevertheless, there has always existed a requirement of some positive act on the part of the putative father in order to make such illegitimate child heir of the father. As the statute now exists those requisites are either marriage, adoption, or acknowledgment. The *first* clause relates to illegitimate children born after a certain date; the *second* clause prescribes the manner in which the guilty father may make his illegitimate child his heir by adoption, where no marriage has taken place between the parents; and the *third* clause prescribes another mode by which the child may be made heir of his father, and that is by acknowledgment before a proper officer that he is the father of such child. One or the other of these requirements is indispensable to the right of inheritance or heirship through the father. It is plain from these provisions that the legislature did not intend or provide any means of making any person heir to a putative father without his consent or desire. But they did provide that certain acts must be done by the father in order to legitimate a child born out of lawful wedlock.

The case shows that Parker Messer was born in 1800, that he

was illegitimate; and although his mother married two years after the birth of her child, it is not claimed that Daniel Sheppard, her husband, was the father of the illegitimate.

No one of the statutory requirements necessary to render Parker Messer an heir of his putative father has been complied with. There was no marriage, adoption, or acknowledgment on the part of the putative father rendering the child heir of such father.

Upon what grounds then does the appellant base his claim of heirship? It is upon the last clause of the statute in question, which follows the several alternative conditions in relation to heirship through the father and mother, viz: "And in either of the foregoing cases, such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred, and these from such child and its issue the same as if legitimate."

Before the passage of the present statute, which was enacted in lieu of sections three and four of chapter seventy-five of the Revised Statutes, an illegitimate child inherited from his father and mother the same as provided in the present statute.

But while by the Revised Statutes of 1883, an illegitimate child could, under certain conditions inherit from the lineal or collateral kindred of his father, yet he could not in any event inherit from the lineal or collateral kindred of his mother. The statute gave no such right. This discrimination against the right of such child to inherit through the mother was abolished by the act of 1887. After practically re-enacting the existing provisions of statute as to the right of such child to inherit from its parents, the act provides, "And in either of the foregoing cases, such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred," etc.

The right thus given to the child to inherit from the kindred of his respective parents is co-extensive with his right to inherit from his respective parents.

The use of the word "respectively" strengthens the construction thus given to the statute. The word conveys the idea that such child shall inherit, in each case, from the parent or parents,

of whom the Act has declared him to be an heir, and from the kindred of such parent or parents.

The Act provides four cases in which the illegitimate child may become an heir of one or both parents. Then follows the provision that in either of the foregoing cases the child, so declared to be an heir, and its issue, shall inherit from its parents respectively, that is, from the parent or parents of whom he is by the Act declared to be the heir, "and from their lineal and collateral kindred."

It is contended on the part of the defense that the words "either of the foregoing cases" in the last clause should be held to refer to only the last two cases previously mentioned— adoption, or acknowledgment. While the word "either," according to the strictly accurate and authoritative signification of the word, relates to two units or particulars only, "it often in actual use, though inaccurately, refers to some one of many." Century Dict. Webster defines "either" as "one or another of any number." And this, in our opinion, was the sense intended by the legislature, and that the words "either of the foregoing cases" should be held to include each and every case previously named.

A construction limiting the words "either of the foregoing cases" to the last two cases as contended for by the defense,— adoption or acknowledgment,— would make the right to inherit from the kindred of the mother depend upon the will and act of the putative father, and would oftentimes work injustice and inequality; whereas, the rule is intended to be general and equal in its application.

The term "kindred," as employed in the statute under consideration, was undoubtedly intended to embrace cases like the present, and it is not necessarily to be confined to the sense in which is was applied in *Hughes* v. *Decker*, supra. The court was there considering its application under the general statute of descent and distribution; while here it must receive its application in relation to this particular statute relating to illegitimates. Under that statute we think that the appellant is one of the next of kin and heir of the intestate. Therefore, in accordance with

the stipulation in the agreed statement the appeal should be sustained, and the decree appointing Charles D. Jones administrator, reversed.

Judgment accordingly.

ERNEST EMERY, in equity, *vs.* BRYANT BRADLEY.

Hancock. Opinion January 22, 1896.

Equity. Practice. Restraint of Trade. R. S., c. 77, §§ 19, 20, 25.

The law court will consider and determine exceptions to part of a final decree in equity.

When a vendor of the plant and good will of a business stipulates as a part of the contract of sale, that he will not go into or carry on that kind of business in that place, he can be enjoined by decree in equity from carrying on that business in that place as clerk or agent of some other person.

ON EXCEPTIONS.

This was a bill in equity praying for an injunction, and after hearing on bill, answer and proof, the following final decree was entered, to which the defendant excepted: "That the preliminary injunction as issued upon the filing of the bill be made permanent, but to the extent and in the form following only, viz: that the said Bryant Bradley, and his attorneys and agents, are strictly enjoined and commanded by said court, under the penalty of being adjudged guilty of contempt, absolutely to desist and refrain from going into or carrying on the business of photography at said Bar Harbor, either in his own name or in the name of his minor son, or other person, or as clerk or agent of his said son or other person, and from going into or carrying on said business of photography at said Bar Harbor in any manner, directly or indirectly, and from all attempts directly or indirectly to accomplish such object forever, and that no costs be recovered by either party."

The case is stated in the opinion.

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

W. P. Foster and C. H. Wood, for defendant.

Restraint which extends beyond any apparently necessary protection to the other party is unreasonable. *Herreshoff* v. *Boutineau*, 17 R. I. 3.

The rights of the plaintiff would be amply protected by enjoining the defendant from running a photograph business of his own. The clause of the decree which prohibits him from working at his trade or as a clerk in the employment of some other photographer is unreasonable and unjust. The bill itself shows that more than seven years had elapsed between the date of the sale and the bringing of this bill. Defendant had done nothing in the line of photographic work during that period, and whatever of reputation he had gained before the sale had been lost sight of by the public. It is preposterous to assume that the fact of the defendant working as a journeyman hand at his trade or as a clerk for some other photographer, should he desire to do so, would result in impairing in the slightest degree the value of the business he had sold more than seven years before to the plaintiff. He simply agreed not to go into or carry on the "said" business, and by the "said" business the parties intended that the defendant should not conduct a business similar to that which he was at that time disposing of. The language used should be taken in the common acceptation of the term "going into and carrying on business." The intention of the parties as evidenced by this language was that the defendant should not open a photograph gallery, should not advertise as a photographer, and in short should not "go into and carry on" the business of a photographer as that term is understood among business men and in business communities.

In *Clark* v. *Watkins*, the agreement was to "not carry on the business of a chemist either in his own name or for his own benefit or in the name or names or for the benefit of any other person." Held, that soliciting orders for another chemist was not a breach of this agreement. *Clark* v. *Watkins*, 9 Jur. N. S. 142.

On the sale of his business the vendor agreed that he would not carry on or exercise the trade, either in his own name or

that of any other person or persons, in a particular town; held, that his managing the business of another person in the same trade in the town, at a weekly salary, was not a breach of the agreement. *Allen* v. *Taylor*, 19 W. R. 556.

Defendant sold "his business as a photographer" and promised not to "go into or carry on said business," "simply this and nothing more," he did not add, as do nearly all the cases in Mass. (like *Boutelle* v. *Smith*, 116 Mass. 111,) apparently against us, that he would not "act as clerk or agent," would do "nothing directly or indirectly," or some such kindred expression.

Contracts in limited restraint of trade to be valid must be reasonable. *Carroll* v. *Giles*, (S. C.) 4 L. R. A. 154 and note.

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

EMERY, J. This equity cause was heard by a single justice upon bill, answer and evidence, a replication being waived. After a final decree for the plaintiff had been signed, entered and filed, the defendant instead of appealing generally, excepted to a single clause in the decree. This exception was allowed and is now presented to the law court.

I. The plaintiff's counsel insists at the outset that exceptions cannot be allowed to a final decree; that the only mode of obtaining a review by the law court of any part of the final decree is by appeal. The equity procedure act, however, seems to contemplate exceptions to a final decree, whatever may be the general rule. (R. S., c. 77.) Thus it is declared in section nineteen, that all decisions of a single justice are "subject to appeal and exceptions;"—in section twenty, that "all cases in which appeals or exceptions are taken from a final decree, shall remain on the docket," &c.;—in section twenty-five, that "such exceptions shall be taken, entered in the law court, and there heard and decided like appeals." Of course, exceptions to any part of a final decree can only present a question of law. No questions of fact are open for consideration upon exceptions. (§ 25.)

An exception to a final decree may often be preferable to a general appeal. The latter opens up the whole case for rehearing on law and facts, and requires the transmission to the law court of copies of all the pleadings, orders and evidence. The former presents solely a question of law for re-hearing and requires usually but a very small part of the record to be transmitted to the law court. A party may concede the equity and justice of the greater part of a final decree, and only desire a reversal of it or of a single feature of it, as in this case. An exception to that feature alone, if it involves a question of law only, is plainly the best mode of obtaining such a result.

II. In this case, the final decree permanently enjoined the defendant from "going into or carrying on the business of photography at Bar Harbor, either in his own name, or in the name of his minor son, or other person or as clerk or agent of his said son or other person," &c. The defendant excepted only to the clause, "as clerk or agent of his said son or other person." The question of law presented by the exception is evidently this: whether the plaintiff's bill contains allegations sufficient to support that clause of the final decree excepted to. It is an elementary principle that no final decree can be extended beyond the allegations in the bill. Decrees in equity must be secundum allegata, as well as secundum probata.

Referring to the bill in this case, (which is sent up with the exception) we find in it, inter alia, an allegation that the defendant sold his photograph business at Bar Harbor, including "the good will of the said business," to the plaintiff; and also, as a part of the consideration of the sale, agreed that he would "never go into or carry on said business of photography in future in said Bar Harbor." It is further alleged in the bill that, since said sale, the defendant "is about to open and engage in the business of photography [at Bar Harbor] either under his own name or in the name of his minor son, Harry Bradley, or colorably as clerk, agent, or instructor of his said minor son."

Under these allegations, assuming them to be fully proved, can the court, besides enjoining the defendant generally from carrying on the business in his own name, or that of his minor

son, or other person, also enjoin him specifically from carrying on the business "as clerk or agent of his said minor son or other person?"

The statement of the question discloses the answer. It must be evident that for the defendant to go into and carry on the business of photography at Bar Harbor as clerk or agent of any person, would violate the spirit and purpose of his agreement with the plaintiff. He would be carrying on the business though as clerk or agent. It does not matter how or in what name he acts, if he in fact carries on the business he agreed not to carry on. He is acting, he is breaking his promise, whether he acts as principal or agent. Located at Bar Harbor and carrying on the photograph business there as clerk or agent, he would be in direct competition with the business he had sold to the plaintiff, as much so as if he were doing the same acts in his own name.

The spirit of his agreement requires that he should not compete in this business with the plaintiff either directly in his own name, or indirectly as clerk or agent of some one else. In equity and good conscience he should abstain from both modes of competition. Under the allegations in the bill he can and should be enjoined from both. *Whitney* v. *Slayton*, 40 Maine, 224; *Dwight* v. *Hamilton*, 113 Mass. 175; *Boutelle* v. *Smith*, 116 Mass. 111.

Exceptions overruled. Final decree affirmed.

SARAH J. STAPLES *vs.* L. TAYLOR DICKSON.

Hancock. Opinion January 23, 1896.

Way. Nuisance. Negligence. Practice.

The creator of a common nuisance is liable in damages for special injury. His grantee is only liable after request to abate it.

Where the owner of premises adjoining a street built a water box within the limits of the street opposite his land for the purpose of controlling the water, from the main pipe in the street, used upon his premises, *held*; that if the box was rightfully there, it was not a nuisance per se; and that it would only become so from faulty construction or condition so as to obstruct, endanger or interfere with the public use of the street.

Whether the form, location and construction of the box was such an obstruction as to become a common nuisance would depend upon the exigencies of travel in the street. Each case would depend upon its peculiar circumstances.

Subsequently the defendant purchased the premises and made a new connection with the main water pipe in the street by constructing a new water box within his own grounds, and never made any use of the old water box, except to shut off the water in it at the time of making such new connection. At that time, and for some time after, the water box was protected with a wooden cover, but afterwards, and about a year prior to the accident sued for in this action, the cover was removed, but not by the defendant, and the box remained uncovered. No change or alteration in the old water box was made by the defendant after his purchase of the premises, nor was he requested to cover, fill, or do anything about it. *Held;* that the peculiar danger thus arising from the old water box was not the defendant's act, and he cannot be held responsible for injuries to the plaintiff who stepped into it and was hurt, while passing along the street.

When parties submit a case to the law court upon an agreed statement of facts, without a report of the pleadings, and place the case in their arguments upon the ground of nuisance, it will be considered upon that ground and none other.

AGREED STATEMENT.

The parties agreed to the following statement of facts:

The defendant, L. Taylor Dickson, of Philadelphia, in the spring of 1892 purchased the Suminsby Place, so-called, in Bar Harbor, Maine, consisting of a house and lot bordering upon and bounded by Eden street, a public highway.

At the time of his purchase, a fence existed upon his property on or near the line of the street. Since his purchase the fence

has been removed and a stone wall built following the same line. A little outside the fence, between it and the sidewalk and entirely within the limits of that portion of the street which crosses the defendant's property, a water box had been constructed before his purchase by his predecessor in title. This water box is a hole in the ground boxed up with seven-eighths inch boards so as to leave an opening five and one-fourth by seven and one-half inches, the longer dimension being at right angles with the sidewalk. The top of the box is one and one-half inches above and sets into the edge of the sidewalk one and one-half inches.

It was constructed by Suminsby, the defendant's grantor, and used by him for the purpose of shutting off and turning on the water leading to his grounds.

Soon after the defendant purchased the property, he made a new connection with the main water pipe in the street, constructed a new water box within his grounds, and has never made any use of the old water box in the street, except that some person at work upon the improvements made by him shut off the water in the old water box when the new connection was made.

At that time and for some time after the water box was covered with a wooden cover, but afterwards, and about a year prior to the accident sued for, the cover was removed and the box remained uncovered up to the time of the accident. It was not claimed that the cover was removed by the defendant or any person employed by him.

No change or alteration in the water box was made by the defendant after his purchase of the property. Neither the defendant nor any agent or servant of his was ever requested to cover, or fill, or do anything about or concerning it.

The defendant resides in Philadelphia and spends only a few months in the year at Bar Harbor. He has not personally occupied the house, nor has it been used except that during the summer of 1894 it was occupied by a tenant of the defendant. It was not occupied at the time of the accident.

During his absence from the autumn of 1893 to the autumn of

1894, Dickson gave P. W. Blanchfield authority to look out for his house and grounds. Blanchfield lives near the Dickson property, on the same street, and had passed the water box occasionally previous to the accident but had no knowledge of its existence.

Blanchfield did not, as a matter of fact, take charge of any property outside the fence or wall, but the plaintiff claims that under the authority given him by the defendant, as above stated, he should have so taken charge of land within the road as a part of the defendant's grounds.

On the eighteenth day of October, A. D., 1894, at about 7.30 o'clock in the evening, the plaintiff was passing along the said sidewalk on her way from her house to the post office, for the purpose of mailing a letter. The night was very dark, and just before reaching the water box she saw a young man and woman approaching her in the opposite direction running arm in arm, and she stepped back to the inner edge of the sidewalk to let them pass and stepped into the water box, receiving the injuries complained of.

Plaintiff had previously passed the same place occasionally, but neither she, nor defendant, had any personal knowledge of the existence of the box.

The sidewalk opposite the box is four feet and six inches wide and nearly level. In case the action could be sustained upon the facts above stated, the action was to be sent back to nisi prius for assessment of damages. If not, judgment to be entered for the defendant.

E. S. Clark, for plaintiff.

If a private citizen be guilty of a nuisance in making an excavation in a public highway, he will be responsible for injuries arising therefrom during its continuance. *Portland* v. *Richardson*, 54 Maine, 46; *Stratton* v. *Staples*, 59 Maine, 94; *Drinkwater* v. *Jordan*, 46 Maine, 433; *Readman* v. *Conway*, 126 Mass. 374.

The defendant was guilty of a nuisance in allowing this water box to remain uncovered during the year previous to the accident, as he was the owner of the soil to the center of the road.

The defendant in this case did render the highway dangerous, or less useful to the public than it ordinarily was, by allowing the water box owned by him to remain uncovered one year previous to the accident.

It is no defense that the obstruction is not in the traveled part of the way; the public have a right to use the entire width of the highway; so where a person fell into a post hole in the extreme limit of the highway, the defendant was held liable, the court holding that a person has the right to go on any part of the road. *Harrower* v. *Ritson*, 37 Barb. (N. Y.) 303; *Rex* v. *Russell*, 6 East, 421; *Dickey* v. *Telegraph Company*, 46 Maine, 483; *Wright* v. *Saunders*, 65 Barb. 214; *Davis* v. *Mayor*, 14 N. Y. 506.

It certainly is just that persons who, without special authority, make or continue a covered excavation in a public street or highway, for a private purpose, should be responsible for all injuries to individuals resulting from the street or highway being thereby less safe for its appropriate use, there being no negligence by the parties injured. *Congreve* v. *Morgan*, 18 N. Y. 79.

A man is liable for an obstruction in a highway whereby a traveler receives an injury, although he did not himself place it there. *Stoughton* v. *Porter*, 13 Allen, 192; 3 Bl. Com. 221; *Com.* v. *Wilkinson*, 16 Pick. 175; *Staple* v. *Spring*, 10 Mass. 72. One who maintains a coal-scuttle insures the public from any harm though he did not make it. *Irving* v. *Tower*, 5 Roberts, N. Y. 482. It is not necessary that the defendant should have actual notice of the existence of this nuisance. If he continue it, and one receive damage that is sufficient. *Staple* v. *Spring*, 10 Mass. 72 and 74; *Talbot* v. *Whipple*, 7 Gray, 122.

L. B. Deasy, for defendant.

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

HASKELL, J. The owner of a fee, adjoining a street, constructed a water box within the limits of the street opposite his

land for the purpose of controlling the water from the main pipe in the street, used upon the premises. If rightfully there, the box was not a nuisance per se, but only became so from faulty construction or condition so as to obstruct, endanger or interfere with the public use of the street. That it was illegally placed there does not appear, and, therefore, it may be presumed to have been lawfully there. The aperture was five and one-fourth inches by seven inches in size and covered by a wooden cover. The top of the box was about one and one-half inches above the sidewalk and about the same distance within the outer edge of the same. Whether the form, location and construction of the box was such an obstruction to the public use of the street as to become a common nuisance would depend upon the exigencies of travel in the street. In a crowded street it might be. In a street where there was little passing it might not be. All would depend upon the peculiar circumstances of the case. The court cannot say from the agreed statement, that shows none of the exigencies of the public use of the street, that the box per se became a common nuisance when placed in the street, and only one and one-half inches within the traveled portion of the same. If, then, it were not a common nuisance when constructed, it did not become so, until after its condition changed; and before this happened the defendant had purchased the estate to which the box was incident, and shortly afterwards disused the same by shutting off the water and making connections elsewhere. He then abandonded the box in the condition that it had been constructed. It was neither constructed a nuisance, nor became one while in his use. He, therefore, for these reasons, is not liable in this case.

But, in order to save further contention, it may be profitable to consider the matter as if the box had originally been constructed a common nuisance. In that case, liability attached to the person who placed it there in favor of any individual who was injured thereby. Not so with the purchaser of it. He became only liable to an individual after request to remove it. *Pillsbury* v. *Moore*, 44 Maine, 154; *Holmes* v. *Corthell*, 80 Maine, 31. No request of any kind is shown in this case. It

should be noticed that this doctrine applies only while the box remained in its original condition. If the defendant had continued to maintain the box, but changed its elements of danger,—as if he had removed the cover and left the aperture open,—then the particular danger of it would have been of his own creation, and liability would doubtless have attached to him as the creator of it. This, however, he did not do. He abandoned the box as originally constructed, and it became uncovered, not by him or by any one of his servants or agents. The peculiar danger was not of his creation, and for it he cannot be held responsible.

The pleadings are not reported, but only a statement of facts, upon which it is agreed that the case shall be decided. Both parties have placed the case upon the ground of nuisance in their arguments, and it is therefore considered upon that ground and none other.

Judgment for defendant.

AGNES WHITE *vs.* GEORGE H. OAKES, and another.

Penobscot. Opinion January 23, 1896.

Sales. Warranty. Folding-Bed. Amendment.

In the sale of chattels by the manufacturer for specific uses an implied warranty arises that the article is fit for the use intended. In the sale of chattels, without express warranty and without fraud, caveat emptor applies, and there is no implied warranty. If the sale be by description, without opportunity for inspection, the description must be met.

The defendants, being dealers in furniture, and not manufacturers, sold a folding-bed to the plaintiff without express warranty of any kind. The bed proved dangerous to the persons using it, not from defective parts, but from faulty design. It proved to be a trap, suited to crush its occupants by shutting up like a jack-knife when slept upon. The weight of its occupants, if sufficient to overcome the gravity of the upright head-piece, would cause it to trip forward and the bed collapse. This bed did so, injuring a man sleeping in it so that he became partially paralyzed. The defendants had no knowledge of this danger. *Held;* that if the plaintiff can recover in this case, it must be from an implied warranty against the dangers of its contrivance.

The mechanism of the bed could be observed by the purchaser as well as by the vendor. Neither, unless skilled in mechanics, would be likely to discover the dangers of it, unaided by any object lesson. The hinge, or

flexible joint upon which the bed hung, was a contrivance of folding iron-straps that really brought the point of support much farther front at the head than they seemed to, thereby overcoming the gravity of the head-piece and tending to pitch it forward. The bed, when sufficiently loaded, would bring the centre of gravity of the upright head-piece so far outside its base, or so nearly so, that any unusual disturbance would work that result,— especially when the castors were turned under. The sale of the bed was with full opportunity of inspection. It was shown to the purchaser, and the terms of the sale were put in writing. *Held*; that the plaintiff, therefore, took no implied warranty, or an equivalent right, unless facts were concealed from her which made the transaction fraudulent. No concealment was shown, and it did not appear that the defendants knew of the dangerous contrivance that operated the bed.

After the sale, the bed broke down, and the defendants were called upon to take it back. They said they would fix it and warrant it all right. One of the iron straps had broken and the defendants put on a new one. *Held*; that the defendants were neither bound to repair the bed nor take it back. Such repairs were gratuitous, and any warranty they might have then made would have been without consideration and not binding. *Also*, that an assurance that its mechanism had been made sound did not amount to a warranty of its safety in use, it not appearing that the defendants were informed of any inherent danger in its use from faulty contrivance.

In an action where the plaintiff's principal claim was for reimbursement of damages paid to a boarder for his injuries sustained while using a folding bed, that had been bargained for on installments, the plaintiff moved to amend the declaration by a count for the recovery of the money paid under the bargain. The plaintiff claimed that the defendants demanded payment of the overdue money, and which being refused, they took the bed. The defendants denied the demand, and said they retook the bed with the plaintiff's consent. *Held*; that under the terms of sale they could do both; and that the amendment if granted would avail the plaintiff nothing. The defendants have a legal right to the part payment and the property.

On report.

This was an action to recover damages sustained by the plaintiff by means of a folding-bed falling upon her that she alleged was sold to her with a warranty and was of faulty contrivance; also to recover damages sustained by another person, which she alleged that she was compelled to pay, happening through the same cause.

The declaration contained two counts. The first one alleged, in substance, that the defendants sold the plaintiff a folding bedstead in June, 1893; that it was made of bad materials, was not properly constructed, was unsuited for the purpose of a bedstead, and was not safe; that the defendants knew this

when they sold the bedstead to plaintiff; that in order to induce the plaintiff to buy it, defendants falsely affirmed and warranted the bedstead to be good, of good materials, properly made, and perfectly safe, and thereby the plaintiff was induced to buy the bedstead, the plaintiff being ignorant of its defective condition; that she took the bedstead home, began to use it, and a short time afterward while she and her husband were occupying it, the bedstead broke down and closed and injured the plaintiff, whereupon the defendants were notified of the defective condition of the bedstead; that they came to the house of the plaintiff, repaired the bedstead, and then and there specially and particularly warranted it again to be perfectly safe; and afterwards, on the fourth day of October of the same year, the bedstead again broke down, collapsed and closed, to the damage and injury of the plaintiff. This count did not speak of any hurt to other persons.

The second count was like the first except that it did not allege that the plaintiff was herself hurt by the bedstead, or that it broke down more than once, or that there was any warranty or representations by defendants of its safety after the bedstead was bought; and it alleged that Frank White, a boarder of plaintiff's, was by her permission and invitation using the bedstead on the night of October 4th, 1893, and it broke down, closed and injured him, whereby she became liable to Frank White in damages for it; that she settled with him for $5000, and these defendants are, as she alleged, liable to her for this sum.

The folding-bed was delivered to the plaintiff under the following writing:

"Leased of Oakes & Chandler the following articles: one folding-bed, ash, thirty-eight dollars, which article is to be used by me at No. 7 Washington street, and for which I agree to pay to the said Oakes & Chandler, or order, as follows: on delivery, the sum of ten dollars, and every month thereafter the sum of eight dollars until the said Oakes & Chandler shall receive the full sum named above. It being expressly agreed that the right

of property shall remain in said Oakes & Chandler until the same is wholly paid for; and in case of failure to pay any one of said installments after the same have become due, all of said installments remaining unpaid shall immediately become due and payable; and the said Oakes & Chandler may take, or cause to be taken, the said property, either with or without process of law, from the possession of the said subscriber or other representative to whom he may have delivered the same, without recourse against said Oakes & Chandler, or any money paid on account thereof. It being expressly understood that the money so paid on account shall be for the use and wear of said property. The articles leased cannot be sold or removed from the place designated in the lease without the lessors' written consent.

"Selling, conveying, concealing or aiding in concealing said property will subject the subscriber to liability under the provisions of the law.

"Witness my hand this tenth day of June, 1893, in presence of
G. H. Oakes.

Agnes White."

P. H. Gillin, for plaintiff.

There are two questions to be decided by the court, first: whether Oakes & Chandler are liable to plaintiff, for the injury which she received by reason of the breaking of this bed; this would embrace all damages which were caused to the plaintiff by reason of the injury she received and inconvenience and annoyance to which she was put. Secondly: Whether the defendants are liable to the plaintiff for the injury which was caused to Frank White; that is to say, whether the defendants shall make good the costs to which the plaintiff has been put by reason of the injuries to Frank White, and the damages which she has thereby sustained.

The law seems to be well settled that a manufacturer or a dealer who contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an

implied warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such a case, the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own. 2 Benj. Sales, p. 865, § 988; *French* v. *Vining*, 102 Mass. 132; *McDonald* v. *Snelling*, 14 Allen, 290 and 295, and cases cited.

In the last case the court says that this rule is an exception to the maxim of caveat emptor.

If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose. 2 Benj. Sales, § 993, p. 867; *Thoms* v. *Dingley*, 70 Maine, p. 100; *Howard* v. *Emerson*, 110 Mass. p. 320; *Bradley* v. *Rea*, 14 Allen, p. 20.

The warranty extends to latent defects unknown to and even undiscoverable to the vendor which render the articles sold unfit for the purpose intended. 2 Benj. Sales, p. 868, § 994, and cases cited.

If the vendor is informed that an article of a certain quantity, character or description, suited for some specified purpose is required, the law implies a promise from him that he will supply to the purchaser an article of the quantity, character or description ordered and reasonably fit for the purpose for which it is required. 2 Addison on Contracts, p. 215; *Hadley* v. *Baxendale*, 9 Exch. p. 353; *Winsor* v. *Lombard*, 18 Pick. pp. 57 and 62; *Brown* v. *Edgington*, 2 M. & G. 279; 1 Pars. Cont. 8 Ed. *583.

In the case of *Downing* v. *Dearborn*, 77 Maine, p. 457, the court says: "The defendants believed they were purchasing sound leather suited to manufacture into shoes, and that the plaintiffs well knew the use for which the purchase was made and sold the leather to be applied accordingly. From the terms of the sale the law implies a warranty that the leather should be reasonably fit for the purposes for which it was bought. Judge HASKELL delivered the opinion in this case and he goes on to say that, where a latent defect becomes known, they can seek their

remedy either for breach of warranty for deceit or may repudiate the sale and restore the article purchased, citing *Marston* v. *Knight*, 29 Maine, p. 314; and he cited besides this on the general proposition as to an implied warranty arising in the case of the sale of manufactured articles: *Jones* v. *Just*, L. R. 3 Q. B. 197; *Hight* v. *Bacon*, 126 Mass. p. 11; *Pease* v. *Sabin*, 38 Vt. p. 432.

The defendants, after the first breaking of the bed, made an express warranty that they would repair this bedstead so that it would be fit for use, hence in this part of the case, we have both an implied and an express warranty. The case of *Thorne* v. *McVey*, 75 Ill. p. 81, cited in 2 Benj. Sales, p. 811, states that both warranties may exist when not inconsistent, as was done in that case, and the case was left to the jury on both.

It is elementary law that if the plaintiff to this action was liable to Frank White, and these defendants liable to her, she need not wait for a suit, but could settle with Frank White and then bring her action to recover from the defendants.

In the case between the plaintiff and Frank White, there was an implied warranty that the premises of the plaintiff were reasonably safe and secure. *Francis* v. *Cockrell*, L. R. 5 Q. B. 184 and 501; 1 Addison Torts, 584.

Jasper Hutchings, for defendants.

Counsel cited: *Langridge* v. *Levy*, 2 M. & W. 519; *Carter* v. *Harding*, 78 Maine, 528; *Longmeid* v. *Halliday*, 6 Ex. 761; S. C. 6 Eng. L. & E. 562; *Winterbottam* v. *Wright*, 10 M. & W. 109; *Thomas* v. *Winchester*, 2 Selden (N. Y.), 397; *Davidson* v. *Nichols*, 11 Allen, 514; Whart. Neg. § § 134, 135, notes; *Carter* v. *Towne*, 10 Mass. 507; *Kingsbury* v. *Taylor*, 29 Maine, 508.

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

HASKELL, J. The defendants, being dealers in furniture and not manufacturers, sold a folding-bed to the plaintiff without express warranty of any kind. The bed proved dangerous to

the persons using it, not from defective parts, but from faulty design. It proved to be a trap, suited to crush its occupants by shutting up like a jackknife when slept upon. The weight of its occupants, if sufficient to overcome the gravity of the upright head-piece, would trip that forward and the bed collapse. This bed did so, injuring a man sleeping in it so that he became partially paralyzed. The defendants had no knowledge of this danger. If, therefore, the plaintiff may recover in this case, it must be from an implied warranty against the dangers of its contrivance.

The mechanism of this bed could be observed by the purchaser as well as by the vendor. Neither, unless skilled in mechanics, would be likely to discover the dangers of it, unaided by any object lesson. The hinge, or flexible joint upon which the bed hung, was a contrivance of folding iron straps that really brought the point of support much further front at the head than they seemed to, thereby overcoming the gravity of the head-piece and tending to pitch it forward. The bed, when sufficiently loaded, would bring the centre of gravity of the upright head-piece so far outside its base, or so nearly so, that any unusual disturbance might work that result, especially when the casters were turned under.

"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 and without fraud, caveat emptor applies, and there is no implied warranty. *Briggs* v. *Hunton*, 87 Maine, 145; *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 the sale be by description, without opportunity for inspection, the description must be met.

The sale of this bed was with full opportunity of inspection. It was shown to the purchaser, and the terms of sale were put in writing. She therefore took no implied warranty, or an equivalent right, unless facts were concealed from her that made the transaction fraudulent. No concealment is shown. It does

not appear that the defendants knew of the dangerous contrivance that operated the bed. They deny such knowledge. But it is said that, after the sale, the bed broke down, that the defendants were called upon to take it back and that they said they would fix it and warrant it all right. One of the iron straps had broken and the defendants put on a new one. The defendants were neither bound to repair the bed nor take it back. They gratuitously repaired it and any warranty they might have then made would have been without consideration and not binding. But the conversation testified to does not amount to a warranty of its safety in use. At most, it can only be considered an assurance that its mechanism had been made sound. It does not appear that they were then informed of any inherent danger in its use from faulty contrivance. Had they been aware of this, and concealed the danger and allowed the plaintiff to further use the bed when they knew of its dangerous character, other considerations would arise not material here. There is no phase of the case as presented that can cast any liability upon the defendants.

The plaintiff asks to amend by inserting a count for the purchase money paid. The amendment could do the plaintiff no good. The bed was bargained on installments. The plaintiff says that, after the shocking disaster with the bed, the defendants demanded payment of money overdue, which being refused, they took the bed. The defendants deny the demand, but say that they retook the bed by plaintiff's consent. In either case, under the terms of sale, they might do so. They have both part payment and the bed. That was their legal right, and a more generous course cannot be demanded by law.

Judgment for defendants.

ARTHUR W. BURDIN *vs.* WALTER ORDWAY.

Waldo. Opinion January 23, 1896.

Rent. Assumpsit.

Where the relation of landlord and tenant does not exist, the law will not imply assumpsit for rent or use and occupation.

Title to land cannot be tried in assumpsit.

ON REPORT.

This was an action of assumpsit for rent of a house. Plea, general issue, and a brief statement denying that the title to the premises was in the plaintiff, and alleging it to be in one Thompson. The plaintiff claimed title to one-fourth as heir of his father and by release of the other three-fourths from his sister, being the other heirs. The brief statement alleged that the title to the premises was formerly in one Hook who conveyed the same to one Mason in mortgage, which was foreclosed by the mortgagee, and thereafter conveyed to Thompson.

The testimony tended to show that the plaintiff's father exchanged lots with one Hook but did not take a deed. He moved a house upon the lot and occupied it several years; that when he moved out the defendant moved in under a verbal lease. After his father's death, the plaintiff demanded rent of the defendant, who on several occasions sought to purchase the premises of the plaintiff.

The plaintiff claimed that he was entitled to recover in this action, relying upon ownership as sufficiently proved by the parol conveyance in place of a deed, and a judgment against Hook, recovered by his father, in an action of forcible entry and detainer.

Wayland Knowlton, for plaintiff.

W. P. Thompson and N. Wardwell, for defendant.

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

HASKELL, J. Assumpsit for rent. No express promise is shown, and the law does not imply one from the facts in the case. The defendant was tenant of the plaintiff's father. He died, and the tenant denies the title of the plaintiff, who claims to hold as heir. As to him, the tenant has become a disseizor. There was no relation of landlord and tenant between them from which the law implies assumpsit for rent or use and occupation. *Rogers* v. *Libbey*, 35 Maine, 200; *Howe* v. *Russell*, 41 Maine, 446; *Emery* v. *Emery*, 87 Maine, 281. Title to land should not be tried in assumpsit.

Plaintiff nonsuit.

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

Washington. Opinion January 23, 1896.

Way. Nuisance. Pleading. R. S., c. 17, § 5.

A defendant justified all the acts charged in a declaration as done in the abatement of a nuisance that obstructed a way through and over which he had the right of passage. *Held*; that an obstruction placed within the limits of a public way is a nuisance by common law as well as by statute. The easement of the public is co-extensive with the exterior limits of the way, and the question of nuisance does not depend upon the interruption of travel.

If a nuisance is obstruction to travel, then the traveler's rights are interfered with and he may remove it. Where the defendant in his brief statement avers what he did, was with care and without damage more than necessary, to secure a passage for himself and his teams, agents and servants over the same, and all this is admitted by demurrer, *held*; that it is a good defense to an action of trespass for removing the nuisance.

See *Corthell* v. *Holmes*, 87 Maine, 24.

ON EXCEPTIONS.

This was an action of trespass quare clausum. The defendant pleaded the general issue, with a brief statement, and after a demurrer to the brief statement was sustained, as see 87 Maine, 24, by leave of court filed subsequently an amended brief statement of defense to which amended brief statement the plaintiffs demurred, and the presiding justice overruled the demurrer, to which ruling the plaintiffs excepted.

Amended brief statement:

"And for further defense by way of brief statement, the defendant alleges that the place where the plaintiff in his writ and declaration alleges said trespass to have been committed is, and was for more than fifty years next prior to said alleged trespass, a public way, and was during that time continuously recognized and used by the public, and by the defendant and his grantors, for travel on foot and with teams as a public way in said Eastport between Madison street and the point on Water street where defendant's store is situate; and said place of the alleged trespass was at the time named in plaintiffs' declaration a public way, to the free and unobstructed use of which the defendant was by law entitled for the purpose of passing to and fro, on foot or with teams, between Madison street and Water street, but the plaintiffs, prior to said alleged trespass, wrongfully and unlawfully encumbered and obstructed said way by placing thereon the fences, gates, clothes-dryer, platform and steps, rocks, and other material named in his said declaration as having been destroyed or removed by the defendant, and said fences, gates, clothes-dryer, platform and steps, rocks, and other material placed in said way by the plaintiff as aforesaid, encumbered the same and obstructed the individual right of defendant in its use, and prevented the use of said way by the public for the purpose of travel as aforesaid, and were a public nuisance, from which defendant suffered special damage beyond that of the public generally, and which obstructed defendant's right to use said way as a means of passing to and fro between his store and Madison street for himself, his teams, agents and servants; and defendant undertook to pass over and upon said way and was prevented by the encumbrances aforesaid, placed in said way by the plaintiff, and the defendant did thereupon enter on and pass over said way, and for that purpose did remove the encumbrances aforesaid placed there by the plaintiffs, as aforesaid, exercising due care and destroying nothing, causing no damage other than was unavoidable in said removal, which was necessary to enable him to enjoy his right to the use of said way as aforesaid for himself and his teams, agents and servants to pass over said way to and from his store."

Demurrer to brief statement:

"And for causes of demurrer the plaintiffs say that the said statement of defense does not describe the limits or state the dimensions of the public way claimed to exist in the place of said trespasses.

"Said brief statement of defense does not state any matters of fact showing any relation between himself or his property and the place of the alleged trespasses which would justify or excuse the damage and destruction of permanent and valuable erections thereon, or the cumbering the same in the manner and by the means set forth in the plaintiffs' writ and declaration.

"Said brief statement of defense states no matter of fact showing that the defendant suffered any damage or injury from the obstructions or encumbrances in any alleged public way different in its nature from what was suffered by the public.

"The allegations in said brief statement do not show that the defendant suffered any special damage from the obstruction of the alleged way, and the plaintiffs are not bound in law to litigate the question whether there was or was not a public way at said place of said alleged trespasses."

E. B. Harvey, G. R. Gardner and C. B. Rounds, for plaintiffs.

There is no public way through the plaintiffs' door yard; and they are not bound to litigate that question here.

Abatement of a nuisance, public or private, by a private person is one mode of redressing a private wrong; and the ethical foundation of the right is precisely analogous to that of the right of self defense.

The punishment of a public wrong is not an element in it. The limitation should bear the same analogy. To destroy or damage another's property by way of abating a public nuisance, merely because it is a public nuisance is no more justifiable than to forcibly take from him the amount of a fine he may have incurred by any other misdemeanor. A person who has suffered no injury for which the law will afford redress in damages in some form of action cannot justify any destruction, damage or amotion of another's property.

If the things whose destruction is complained of in the writ were a nuisance in the way, the right to abate it does not attach to a private person till he suffers a private wrong to be redressed by its abatement, and the wrong must be such as would support a private action. The assertion in the brief statement that he suffered special damages beyond that of the public generally is not an averment of a matter of fact but a conclusion of law to be drawn from facts; and there are no facts stated from which such conclusion can be drawn.

There is nothing in the brief statement inconsistent with the fact that other and easier ways leading between these streets are open to the defendant.

If by building our front yard fence and occupying it with housekeeping conveniences we have hindered or obstructed the public in the use of an easement of a public way, the means provided by law for the public redress are ample and speedy by proceedings, conducted by peaceful official authority moving first to settle judicially the question of the public right before destruction of property, as was done in this case without judicial inquiry or authority.

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

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

HASKELL, J. Trespass, q. c. The defendant, by brief statement, justifies all the acts charged in the declaration as done in the abatement of a nuisance that obstructed a public way through and over which he had the right of passage. The plaintiffs might elect to go to trial and require the defendant to prove the truth of his plea; or he might elect to admit the truth of it, and claim that, if true, it was conduct unauthorized by law and therefore no defense to the action. If the declaration had not described the close by metes and bounds, the plea very likely might be held bad for not describing the land upon which the defendant justifies the seeming trespass, and thereby give the plaintiffs opportunity to assign another close as the locus, if the defendant's

acts were not confined to the close described in his plea; but the plaintiffs did describe the close specifically upon which the supposed trespass was committed, and are met by plea justifying the acts upon that close, and, instead of taking issue before the country upon the truth thereof, elected to demur thereto and say, true, your acts were done just as you say they were, but nevertheless they were illegal and in law are no defense. So the question comes, whether the removing of obstructions from a public way by a traveler is a trespass against one who has seen fit to close the way and take possession of the land within its limits.

Any obstruction placed within the limits of a public way is a nuisance at common law, as well as by statute. R. S., c. 17, § 5. The easement of the public is co-extensive with the exterior limits of the way, and the question of nuisance does not depend upon the interruption of travel. *Commonwealth* v. *King*, 13 Met. 115. If the nuisance be an obstruction of travel, then the traveler's rights are interfered with and he may remove it. *Wales* v. *Stetson*, 2 Mass. 143. "The traveler may use any part of the way to travel upon and, if obstructed, in the exercise of that right he has a remedy against the person unlawfully placing the obstruction there." *Penley* v. *Auburn*, 85 Maine, 281. If a gate be placed across the way, as in *Wales* v. *Stetson*, supra, it would be senseless to say that the traveler by removing it would commit a trespass. Or that, as in *Dickey* v. *Telegraph Co.* 46 Maine, 483, where a telegraph wire hung so low as to catch the top of a stage and overturn it, the traveler might not lawfully have removed it and prevented the mischief resulting in that case; and, as the court say in *Banks* v. *Highland Street Railway Company*, 113 Mass. 485: "The wire, at least while looped across the street so that it might be hit by passing carriages, was a nuisance, which any person lawfully traveling on the way and incommoded by it, might remove," citing *Arundel* v. *M'Culloch*, 10 Mass. 70, and *Wales* v. *Stetson*, supra. This doctrine is the logic of *Dyer* v. *Curtis*, 72 Maine, 181; *Holmes* v. *Corthell*, 80 Maine, 31; *James* v. *Wood*, 82 Maine, 173; *Lancey* v. *Clifford*, 54 Maine 487; *Gerrish* v.

Brown, 51 Maine, 256; *Veazie* v. *Dwinel*, 50 Maine, 487; *Knox* v. *Chaloner*, 42 Maine, 157, and *Brown* v. *Chadbourne*, 31 Maine, 9.

The defendant's plea avers that he removed the incumbrances, placed in the way by the plaintiff, with due care and without damage more than necessary to secure the passage for himself and his teams, agents and servants over the same. All this is admitted by the demurrer, and it is a good defense.

Exceptions overruled.

FRANK MICHAUD, pro ami,

vs.

CANADIAN PACIFIC RAILWAY COMPANY.

Aroostook. Opinion January 23, 1896.

Negligence. New Trial.

Boys playing about moving cars must take the risk of life and limb, if they will persist in such dangerous sport.

In this case the jury returned a verdict for the defendant. The plaintiff neither took exceptions nor filed a general motion to set aside the verdict as being against evidence, etc., but moved for a new trial on the ground of newly-discovered evidence. *The court consider* that no legal cause is shown for ordering a new trial; and, *also*, if ordered, it is extremely doubtful if any other result could ever be reached.

ON MOTION FOR A NEW TRIAL.

The case is stated in the opinion.

F. M. York and J. P. Donworth, for plaintiff.

Where it is shown by a party to a suit that he was deprived of the benefit of a witness who was excusably absent from the trial, and whose testimony was material, a new trial may be granted. 16 Am. & Eng. Encyl. Law, p. 540, and cases. In *Stackpole* v. *Perkins*, 85 Maine, 298, a new trial was granted on evidence that was cumulative but tended to prove independent facts.

L. C. Stearns, F. A. and Don A. H. Powers, for defendant.

The plaintiff was a trespasser upon the defendant's train, and the conductor had a right to order him off the train, under the

circumstances shown by the evidence. The defendant company could not be liable for the act of its conductor in ordering a trespasser from its train unless his act was wanton and wrongful.

The plaintiff has not brought himself within the rules of law which the court declare entitle the losing party to a new trial. The court will not grant a new trial where the newly-discovered evidence is merely cumulative. *Warren* v. *Hope*, 6 Maine, 479; *Ham* v. *Ham*, 39 Maine, 263; *McLaughlin* v. *Doane*, 56 Maine, 289; *Atkinson* v. *Conner*, 56 Maine, 546.

The verdict will not be set aside on the ground of newly-discovered evidence upon the motion of a party who might have had the evidence at the trial by the exercise of proper diligence. *Falmouth* v. *Windham*, 63 Maine, 44; *Marden* v. *Jordan*, 65 Maine, 9; *Blake* v. *Madigan*, 65 Maine, 523; *Maynell* v. *Sullivan*, 67 Maine, 314; *Hunter* v. *Heath*, 67 Maine, 507; *Hunter* v. *Randall*, 69 Maine, 183.

The court will not grant a new trial because of newly-discovered evidence where an examination of the evidence does not lead to the conclusion that had it been before the jury it would have changed the result. *Handly* v. *Call*, 30 Maine, 9; *Snowman* v. *Wardwell*, 32 Maine, 275.

It is the province of the court to determine whether the new evidence offered is reliable in its character, whether it appears to be credible. If it does not appear to be reliable the court will not grant a new trial. *Marden* v. *Jordan*, 65 Maine, 9.

Evidence discovered, as this was, immediately after the verdict ought to be looked upon with suspicion. *Woodis* v. *Jordan*, 62 Maine, 490.

When the party asks for a new trial on the ground of newly-discovered evidence the burden is upon him to satisfy the court that the evidence is credible, that its non-production at the former trial was not owing to the want of his diligence, that the evidence in fact is newly-discovered. *Woodis* v. *Jordan*, supra, 62 Maine, 490; *Greenleaf* v. *Grounder*, 84 Maine, 50.

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

HASKELL, J. Two lads, brothers, fifteen and seventeen years old, respectively, were at the Caribou station of defendant road when the special freight of defendant arrived. They say that, as they were entering the van to see if their mother and sister had come, the conductor came along, the train then having started, and told them to get off or he would kick them off, and the younger, having a cigar box under one arm, in attempting to get off, fell under the car wheels and had both legs crushed. For that injury, $10,000 damages are demanded.

One witness, a dispatch messenger, called by the plaintiff, says that he was standing by and first saw the boys on the platform of the car, when in motion, and heard the conductor tell them to get off, and in doing so the younger boy fell under the car wheels.

In defense, the conductor testifies that the train stopped at the station four or five minutes, and that while he was in the saloon car to get his bills the train started, and as he went out the front car door he saw the boy fall on the track; that he neither spoke to him nor motioned or ordered him off; that he signalled the train to stop, and that it did stop in half a car's length.

Two other witnesses, engaged in the potato business, who were at the station, say that as the train started both boys ran to get on. The older got on and the younger, having a cigar box under his arm, grabbed the car rail with the other hand, lost his balance and fell under the car.

Another witness says that, as he came from his potato house across the track from the station, he saw the boy fall from the car then in motion; that just as he fell the conductor opened the car door and came out on the car platform. The engineer says the car did not go over twenty feet after he got the signal to stop.

Upon this evidence the jury returned a verdict for the defendant. There are no exceptions, or motion to set the verdict aside as against evidence; but a new trial is asked for evidence newly-discovered since the trial. The motion was filed within a week after the verdict. It sets out that John Monroe of

New Brunswick, if present, would testify, among other things not material, that he saw the conductor come out and heard him tell the boys to get off or he would kick them off. Monroe testifies that the conductor came out of the door and said something. He can't just say the words he said, something about the boys getting off, and made a motion with his hand. He thinks there were two or three boys, two sure. On cross-examination he said that, after the accident, he called down to see the boy, saw him and the father and mother and explained just how it happened. This evidence is not newly-discovered since the trial.

The motion avers that one Ezekiel Scott, of Connor Plantation, would testify that just as the boys got upon the car platform the train started to back up quickly and as the plaintiff boy was trying to open the car door the conductor came out and extended his hands towards the boys, saying something to them at the same time that he did not fully hear; that the boys started to get off and the smaller fell under the wheels; that he helped take him from under the car.

The witness substantially so testifies, and that about two months after the accident he went to the father's house to see the boy, saw him and the mother; told them that he helped lift him up, and he remembered it too; that he was there when the accident happened to him, and talked with his mother about it.

The witness lived ten miles away. No diligence whatever is shown in not calling the witness at the trial, the man who was known to have helped the boy from under the car.

Another motion was filed at a subsequent term, stating that William E. Wright of Perham, would testify that, as the boys were standing upon the car platform while the train was backing up, the conductor opened the door, stepped out upon the platform and extended his hands towards the boys and said: "Get off;" that the larger boy jumped off and the smaller started to get off and fell between the two cars and the wheels of the box car ran over his legs.

The witness substantially so testifies, but is so confused about the whole matter, that his testimony if newly-discovered and otherwise competent evidence could not change the result.

Some other matters are contained in the motions; but not of sufficient importance to require notice from the court. Some testimony is reported not responsive to the motion, and that need not be considered. On the whole, it must be said that no legal cause is shown for the ordering of a new trial, and, if ordered, it is extremely doubtful if any other result could ever be reached. Boys playing about moving cars must take the risk of life and limb if they will persist in such dangerous sport; and this case ought to be a salutary lesson to them and to their parents of the consequences of playing with danger.

Motions overruled.

STATE *vs.* GEORGE W. BUCKNAM.

SAME *vs.* BION B. TIBBETTS.

SAME *vs.* WILLARD E. BAILEY.

SAME *vs.* HARLEY WORCESTER.

Washington. Opinion January 23, 1896.

Game. Possession. R. S., c. 30, § 12; Stat. 1891, c. 95, § 4.

Upon a complaint charging the defendants with having in their possession, at one time during the open season when deer may be lawfully killed, eighty-nine carcasses of deer, they not being market-men or provision dealers within the terms of the statute, the only question presented to the court for decision was whether R. S., c. 30, § 12, as amended by the Stat. 1891, c. 95, § 4, made such a possession an offense. *Held*; that the object of the statute is to prevent the decimation of game by limiting the time when it may be taken or killed to the months of October, November and December in each year. During these months, under certain restrictions unimportant here, deer, moose and caribou may be lawfully taken or killed, and the various provisions of the statute aim to compass this result; *Also*, that it does not intend to interfere with foreign game, dead or alive, brought within the State, at any time, or with game lawfully taken or killed here.

While the enactment, by its letter, makes the possession of more than one moose, two caribou and three deer at any time an offense, the context of it must not be overlooked in determining the scope and meaning of the whole statute. But one penalty for killing, having in possession and transporting

could have been intended, and that applies to the illegal capture of the game. *Held*; that the other provisions were intended to aid in the enforcement of that one, by making the possession evidence of illegal capture, and compel the person charged to explain his possession of what would directly point to an illegal taking of the game. In other words, compel him to have or handle game illegally taken or killed, by any person, at his peril. Game illegally taken or killed subjects the possessor of it to the penalty for its illegal taking, just as if he had illegally taken it himself.

Allen v. *Young*, 76 Maine, 80, affirmed.

Allen v. *Leighton*, 87 Maine, 206, distinguished.

AGREED STATEMENT.

The parties agreed to the following statement:

"George W. Bucknam, Bion B. Tibbetts, Willard E. Bailey and Harley Worcester, all of Columbia Falls, in Washington county, on or before December 12th, 1894, had collected by purchase or otherwise, and had in their possession at said Columbia Falls, the carcasses of eighty-nine deer as follows: Said Bucknam, thirty-one; said Tibbetts and Bailey, twenty-one each; and said Worcester, sixteen carcasses. These they transported in the night time of December 12th from said Columbia Falls to Addison Point, three miles, not tagged as required by law, and put them down the lazaretto hatch of the schooner Monticello to be transported to Boston for sale, and they were so transported.

"For the purposes of this case it is admitted that said eighty-nine deer were lawfully killed in the open season of 1894; that each of said respondents during the open season of 1894, prior to said 12th day of December, had had in his possession the carcasses of, at least, three other deer; and that neither of said respondents were then and there market-men. Similar complaints in these cases were made against said other respondents, to which, upon arraignment, the said respondents each pleaded not guilty, waived an examination and were fined $1240, $840, $840 and $640, respectively, from which sentences each appealed and each recognized as ordered. One complaint to be copied and made a part of this case. The court upon the foregoing statement of facts are to determine whether the law applied to the said facts, no other defense being shown, would authorize

the jury to find the respondents guilty of the offense charged, or of having killed or destroyed said deer in violation of law; if so, the cases to stand for trial, otherwise the respondents to be discharged.

F. I. Campbell,
County Attorney, for the State.
George W. Bucknam,
Bion B. Tibbetts,
In presence of Willard E. Bailey,
F. H. Thompson. Harley L. Worcester,
Respondents, pro se."

(Complaint.)

"State of Maine. Washington, ss. To J. T. Campbell, esquire, one of the trial justices within and for the county of Washington. Charles F. Corliss of Cherryfield, in said county, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and ninety-five, in behalf of the State of Maine, on oath complains that George W. Bucknam of Columbia Falls, in said county of Washington, on the eleventh day of December, A. D., eighteen hundred and ninety-four, did have in his possession at Addison, in said county, parts of the carcasses of thirty-one dead deer; said George W. Bucknam not being then and there a market-man or provision dealer with an established place of business in said State, against the peace of said State, and contrary to the form of the statute in such cases made and provided.

"Wherefore, the said Charles F. Corliss prays that the said George W. Bucknam may be apprehended, and held to answer this complaint, and further dealt with relative to the same as the law directs.

Charles F. Corliss."

F. I. Campbell, County Attorney, for the State.

T. W. Vose, filed a brief and argued:

The State being the owner of the game and fish, every person who hunts, catches, kills, destroys, buys, carries, transports, or has in his possession any game or fish, is subject to the

conditions, restrictions and limitations imposed; in other words, his title to the property is of a qualified character. *State* v. *Geer*, 61 Conn. 144.

The legislature may pass laws the effect of which is to impair or even destroy the right of property. Private interests must yield to public advantage. All property is held subject to the power of the state to regulate, or control its use, to secure the general safety and the public welfare. *Phelps* v. *Racey*, 60 N. Y. 14; *Butolph* v. *O'Reilly*, 74 N. Y. 521; *Wynehamer* v. *The People*, 13 N. Y. 391; *Cottrill* v. *Myrick*, 12 Maine, 229; *Lunt* v. *Hunter*, 16 Maine, 10; *Moulton* v. *Libbey*, 37 Maine, 472; *Weston* v. *Sampson*, 8 Cush. 347; *Dunham* v. *Lamphere*, 3 Gray, 268.

It has been the policy of this State ever since 1829 to assert control over the game and protect it from general destruction.

The statement of facts shows to what an extent the slaughter may be carried on. Here were four men, who had each had in his possession, before, all the carcasses the law would allow, clandestinely buying all the carcasses in the county, holding them until a favorable opportunity to ship them to a foreign market, and then, conscious of guilt, in the dead hours of the night hauling them untagged to a vessel and secreting them in the lazaretto,—eighty-nine carcasses.

Courts will arrive at the intention of the legislature by following step by step the various enactments and amendments leading up to the act before it for construction; and will assume that the legislature by the passage of an act affecting a citizen or his property intended to promote the public interests; and when the act admits of two constructions, one which makes it applicable in furtherance of those interests, that construction will be given to it which thus sustains it. *People* v. *Ewer*, 141 N. Y. 129. And an act which the legislature in its discretion has passed, if within its constitutional authority, is not the subject of judicial review. *People* v. *Gillson*, 109 N. Y. 389.

I cite as authority on the various points raised the following: *Am. Ex. Co.* v. *People*, 133 Ill. 149 (S. C. 23 Am. St. Rep. 641); *Allen* v. *Wyckoff*, 48 N. J. L. 90 (S. C. 57 Am. Rep.

548); *State* v *Wheeler*, 25 Conn. 290; *Com.* v. *Savage*, 155 Mass. 278; *Lawton* v. *Steele*, 119 N. Y. 226; *Brown* v. *Perkins*, 12 Gray, 89: *Fisher* v. *McGirr*, 1 Gray, 1; *Com.* v. *Gilbert*, 160 Mass. 157, and cases. 28 Geo. II, Ch. 12. No person by statute however qualified could expose game for sale. 4 Bl. Com. 175.

Jasper Hutchings, for defendants.

The complaints in these cases, one of which is copied and made part of the cases, severally charge the respondents with having in possession, in open time, parts of the carcasses of a certain number of dead deer exceeding three. The complaints do not say how respondents came into possession of them, whether the deer were lawfully or unlawfully killed, with what intent respondents had them, or what they purposed to do with them. The charge is nakedly that of possession at a season when it was lawful, within certain limits, to kill deer.

Does this statute mean to make the possession alone of more than three carcasses of deer in open time a crime, as the draughtsman of these complaints seems to have supposed? Does it mean that if A and B lawfully kill three deer each and being in the lawful possession of the six carcasses, transfer the possession of them in open time to C by consent of all, that C thereby instantly becomes a criminal? This can hardly be what the statute means. Such a law would be unreasonable. The statute allows a man who has lawfully killed a deer to consume, give away or sell the carcass either in or out of the State. It would be difficult to find a statute which makes or undertakes to make the possession alone of property which has a legitimate use, in and of itself a crime. Ordinarily, possession when made criminal, is made so either because the possession is wrongfully got, or because the property had in possession is meant to be used for some wrongful purpose. The possession by one who is a receiver of stolen goods, the keeper of intoxicating liquor intended for unlawful sale in this State, are familiar examples of this. Even in the case of things that have no legitimate use, possession alone is not ordinarily, if ever, a crime. The pos-

session of counterfeit money for example, is criminal only when accompanied with an intent to utter it or to aid in its being uttered.

The prohibition against possession in excess of three carcasses is in the same sentence and paragraph, and is coupled with the unlawful killing of deer. If the statute meant to make simple possession in excess of three carcasses a crime, although lawfully killed, why did it provide and in the same paragraph, immediately following the prohibition against killing and having in possession, that "whoever has in possession, except alive, more than the aforesaid number . . . shall be deemed to have killed or destroyed them in violation of law?" The kind of possession, whatever it is, which is prohibited and made penal is punishable with the same penalty and in the same way as unlawful killing. If, therefore, possession alone is a crime, this last named provision is unnecessary and superfluous unless the statute means a double punishment of the same person, one punishment for killing and the other for having in possession, and this will hardly be contended.

It has been repeatedly asserted in both ancient and modern cases that judges may in some cases decide upon a statute even in direct contravention of its terms; that they may depart from the letter in order to reach the spirit and intent of the act. Frequently has it been said judicially that a thing within the intention is as much within the statute as if it were within the letter, and a thing within the letter is not within the statute, if contrary to the intention of it. *Holmes* v. *Paris*, 75 Maine, 559, and authorities there cited.

If, however, our legislature did mean to make it a crime for a person to have in open time the carcasses of more than three deer, which were lawfully killed, then we submit that the statute is so far of no effect; because it is not reasonable, because it deprives a man of liberty and property without due process of law, and, in its application to the agreed facts in this case, would be a violation of the laws of the United States which give to congress sole power to regulate interstate as well as foreign commerce. See also Const. of Maine, Art. 4, part. III, § 1.

If the prosecution are right in their contention as to the meaning of the statute, and the charge in these complaints really amounts to a crime, then it would follow that if a hunter in the woods should leave his game for safe keeping, which he had lawfully killed and had, with another hunter, who was in the lawful possession of game which he had killed, and go out to get a doctor to set a broken leg, the hunter left in the woods in charge and possession of the game of the two men, if the game combined amounted to more than three deer, would be subject to a criminal prosecution for having them.

As contended by the State, the statute in its application to the agreed facts in this case would violate the United States law with respect to interstate commerce. Counsel cited: *Leisy* v. *Hardin*, 135 U. S. 100; *Bowman* v. *Chicago & N. W. R. R. Co.* 125 U. S. 465; *Smith* v. *State of Alabama*, 124 U. S. 465; *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489; *Welton* v. *Missouri*, 91 U. S. 275; *The Daniel Ball*, 10 Wall. 557. That it is not necessary that goods should be in transit in order to be under the protection of Interstate Commerce law is shown by some of the above cited cases, especially *Robbins* v. *Taxing District of Shelby County*, supra.

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

HASKELL, J. The complaints charge the defendants with having in their possession, at one time during the open season when deer may be lawfully killed, eighty-nine carcasses of deer, they not being market-men or provision dealers within the terms of the statute. The only question presented is whether the statute, R. S., c. 30, § 12, as amended by the act of 1891, c. 95, § 4, makes such possession an offense. It reads as follows:

"No person shall take, kill, destroy or have in possession between the first days of October and January more than one moose, two caribou and three deer, under a penalty of one hundred dollars for every moose, and forty dollars for every caribou or deer, or parts thereof, so taken, killed, destroyed or in possession in excess of said number. Whoever has in posses-

sion, except alive more than the aforesaid number of moose, caribou or deer or parts thereof, shall be deemed to have killed or destroyed them in violation of law. But nothing in this section shall prevent any market-man or provision dealer, having an established place of business in this State, from purchasing and having in possession at his said place of business, not exceeding one moose, two caribou and three deer lawfully caught, killed or destroyed, or any part thereof, at one time, and selling the same at retail in open season to his local customers."

The object of the statute is to prevent the decimation of game by limiting the time when it may be taken or killed to the months of October, November and December, in each year. During these months, under certain restrictions unimportant here, deer, moose and caribou may be lawfully taken or killed, and the various provisions of the statute aim to compass this result. They do not intend to interfere with foreign game, dead or alive, brought within the State, at any time, or with game lawfully taken or killed here. While the enactment, by its letter, makes the possession of more than one moose, two caribou and three deer at any time an offense, the context of it must not be overlooked in determining the scope and meaning of the whole statute. But one penalty for killing, having in possession and transporting could have been intended; and that applies to the illegal capture of the game. The other provisions were intended to aid in the enforcement of that one, by making the possession evidence of illegal capture, and compel the person charged to explain his possession of what would directly point to an illegal taking of the game. In other words, compel him to have or handle game illegally taken or killed, by any person, at his peril. Game illegally taken or killed subjects the possessor of it to the penalty for its illegal taking, just as if he had illegally taken it himself. This interpretation best comports with the true intent and purpose of the statute, and works out a reasonable and just application of its provisions, at the same time obviating various difficulties in the way of a different construction of it.

Nor is this view without authority. In *Allen* v. *Young*, 76 Maine, 80, it was held that, although this very statute prohibited the transportation of the hide or carcass of deer, moose or caribou, during close time, yet, such transportation was not illegal if the game had been lawfully killed. The court say:

"The question is whether, if deer are killed during the time when it is lawful to do so, it is a crime to carry or transport the hides or carcasses from place to place in this state during the time when it is unlawful to kill them.

"We think it is not. True, the transportation at such a time seems to be within the letter of the law; but we think such could not have been the intention of the legislature. We can see no possible motive for making such transportation a crime. We can readily see that it would be in furtherance of the purposes of the act to make such transportation prima facie evidence of guilt, and thus throw the burden of proof upon the party to show his innocence, as is done in section five with respect to possession; but we fail to see any motive for making the mere transportation of the hide or carcass of a deer from one place to another a crime when the deer has been lawfully killed and is lawfully in the possession of the one who transports it. Certainly one may reasonably doubt whether such could have been the intention of the legislature; and the act being a penal one, a reasonable doubt is sufficient to make it the duty of the court to adopt the more lenient interpretation, and construe the term 'such animal,' as meaning an animal unlawfully killed, as was done in construing a similar statute in *Com.* v. *Hall*, 128 Mass. 410." See also *Bennett* v. *American Express Co.* 83 Maine, 236.

In Michigan, 71 Mich. 325, *People* v. *O'Neil*, the defendant was convicted, in the lower court, for having in possession for the purpose of selling a large number of quail in violation of a statute that prohibits selling, exposing for sale, or having in possession for the purpose of selling such birds after eight days from the time when the killing of such birds was prohibited; and on certiorari to the supreme court the conviction was reversed by construing the statute to apply to birds only, killed

in violation of law. The court says: "So construed the statute is reasonably adapted to carry out its objects, and is free from all constitutional difficulty." The court then quotes at length from *Allen* v. *Young*, supra, with approval. Campbell, J., in a concurring note says: "I do not think it would be competent for the legislature to punish the possession of game which was lawfully captured or killed. Having become private property, it cannot be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound."

In Pennsylvania, 139 Pa. 298, *Commonwealth* v. *Wilkinson*, the defendant was convicted of having in his possession, during close time, twenty quail that were not killed in the state, but had been lawfully killed in Missouri and brought into the state. The indictment was under a statute that prohibited the killing, exposing for sale, or having in possession, after the same had been killed, quail, during a specified close time of each year. The court reversed the conviction upon the ground that the act applied only to quail killed in the state out of season. The court says: "A careful reading of the language of the act shows that it applies only to game killed in this State out of season." . . . "The meaning of the act, as we view it, is that no quail shall be killed in this State between the dates specified, and no person shall have in his possession, or offer for sale any quail so killed in this State."

In Oregon, 21 L. R. A. 478, *State* v. *McGuire*, the defendants were prosecuted for having in possession and offering for sale certain salmon during close time, under a statute that prohibited the same. The defense was that the salmon had been taken in open time and kept in cold storage for sale in close time when they would bring an enhanced price. This defense was excluded in the trial courts and convictions ordered. On appeal, the decision below was reversed upon the ground that the act applied only to salmon illegally taken. *Allen* v. *Young*, supra, was cited with approval by the court and the opinion is an elaborate one.

There are cases contra. *Phelps* v. *Racey*, 60 N. Y. 10;

Magner v. *People*, 97 Ill. 333. We are aware of our own decision, *Allen* v. *Leighton*, 87 Maine, 206, but do not regard that as an authority upon the question here considered. This question was not considered in that case.

Complaints quashed.

ERNEST G. LYON *vs.* WILLIAM H. LYON, and others, Executors.

Kennebec. Opinion January 30, 1896.

Will. Nephew. Illegitimate Children. Title by Descent. R. S., c. 1, § 6; c. 24, § 1, cl. III; c. 75, § 3; Stat. 1864, c. 262; 1887, c. 14.

A testatrix made the following bequest: "I give and bequeath to each of my nephews and nieces who shall be living at the time of my decease, $2000." An illegitimate son of the brother of the testatrix was born after March 24, 1864, and its parents married subsequently to his birth. *Held*; (1) That inasmuch as the son was not specially named or designated in the bequest, his rights must be governed by c. 14, Public Laws of 1887, which was in force when the will was made and when the testatrix died.

(2) That by force of that statute he took no rights as devisee or legatee under the foregoing provision of the will of the testatrix whereby she made certain bequests to her "nephews."

(3) That the statute applies to rights by inheritance or descent of intestate and not testate property. These rights are entirely distinct.

(4) That the concluding clause of c. 262, Laws of 1864, relating to the settlement of illegitimate children wherein it was provided that they should follow and have the father's legal settlement, "and shall be deemed legitimate to all intents and purposes," related to pauper settlements, and not to the law of descent of property.

(5) The legislative intention must prevail in the construction of statutes whenever that intention can be ascertained.

Brewer v. *Hamor*, 83 Maine, 251, distinguished.

ON EXCEPTIONS.

This was an action of debt brought in the Superior Court, for Kennebec county, to recover from the executors of the will of Abigail Sanford the sum of $2000 under the following provision of her will: "I give and bequeath to each of my nephews and nieces who may be living at the time of my decease, $2000."

The plea was the general issue. The plaintiff claimed to be the illegitimate son of Tabor Lyon, who was the brother of

Abigail Sanford, and, although illegitimate, to be entitled to this legacy under Stat. 1887, c. 14.

1. On this point the presiding judge instructed the jury, pro forma, as follows: . . . "I instruct you, pro forma, that if you shall find that the plaintiff was the illegitimate son of Tabor Lyon, born after March 24, 1864, and that Tabor Lyon after the plaintiff's birth married his mother, or adopted him into his family, he thereby became to all intents and purposes his legitimate child, and therefore the nephew of Tabor Lyon's sister, Mrs. Sanford; and consequently capable of taking as legatee in the class designated 'nephews' in her will, and the term must be understood in its ordinary and usual sense."

To this instruction the defendants took exceptions.

The defendants seasonably requested the following instructions, all of which were declined by the presiding judge except as given in the charge:

(1.) "That independent of any statute, the law fixes the meaning of the word 'nephews' in clause twelve of Abigail Sanford's will, and excludes any nephew not legitimate."

(2.) "That the statute of 1887, chapter 14, confers rights in derogation of the common law, and must be construed strictly."

(3.) "That this statute governs the distribution of estates only where there is no will, and confers rights of heirship or inheritance only."

(4.) "That the legal meaning of an 'heir' or an 'inheritor' is one who takes an estate undisposed of by will, as contra-distinguished from an estate left by will."

(5.) "That the statute of 1887 does not govern this case, and that the plaintiff cannot recover here, whether he be or not the natural son of Tabor Lyon."

H. M. Heath and O. A. Tuell, for plaintiff.

Counsel argued: (1) The verdict finds that Ernest G. Lyon was born illegitimate July 3, 1865. His father, Tabor Lyon, and the mother were legally married February 20, 1873. The testatrix was his father's sister.

(2.) Chapter 262, Laws of 1864, is still in force, found in R. S., 1883, c. 24, § 1, Item III.

(3.) That children born illegitimate shall be "deemed legitimate" in case of intermarriage and adoption was the law in R. S., 1857, c. 75, § 3, and still exists as law, though inappropriately collocated in R. S., 1883, c. 24, § 1, Item III, last sentence.

(4.) The law of 1887 only repealed R. S., 1883, c. 75, §§ 3 and 4. It did not repeal c. 262, 1864, nor R. S., 1857, c. 75, § 3, both preserved in R. S., 1871, c. 24, § 1, Item III, re-enacted without change in R. S., 1883, c. 24, § 1, Item III.

(5.) By Nos. 2, 3 and 4, it is plain that the law as enacted in c. 262, 1864, to-day provides that, after subsequent marriage, illegitimate children become "legitimate to all intents and purposes."

(6.) The rule given in exception first follows, even in words, the law of 1864 and is strictly correct.

(7.) The law of 1887 and *Brewer* v. *Hamor*, 83 Maine, 251, confirm the above positions.

(8.) The requested instructions are necessarily involved in exception first. If that rule is correct, they all fail.

(9.) The word "nephew" is to receive the legal definition. The testatrix is presumed to have used the word with reference to the law.

(10.) A nephew is the legitimate son of a sister's brother. Prior to March 20, 1864, such child must have been born in wedlock. Since that date, intermarriage after birth is the full equivalent of marriage before birth.

Counsel cited: *Power* v. *Hafley*, 35 Ky. 671; *Carroll* v. *Carroll*, 20 Tex. 731; *Ross* v. *Ross*, 129 Mass. 243; *Miller* v. *Miller*, 91 N. Y. 315; S. C. 43 Am. Rep. 669; *Adams* v. *Adams*, 36 Ga. 236; *Washington* v. *The State*, Id. 242; *Graham* v. *Bennett*, 2 Cal. 503; *Brewer* v. *Hamor*, 83 Maine, 254; *Com.* v. *Munson*, 127 Mass. 461; *Burrage* v. *Briggs*, 120 Mass. 107; *Sewall* v. *Roberts*, 115 Mass. 276; *Wyeth* v. *Stone*, 144 Mass. 441; *Humphries* v. *Davis*, 100 Ind. 274; S. C. 50 Am. Rep. 788; *Estate of Newman*, 75 Cal. 213; S. C. 7 Am. St. Rep. 146; *Wagner* v. *Wagner*, 50 Iowa, 532; *Atchison* v. *Atchison*, 11 Ky. Law Rep. 705; *Rowan's Appeal*, 132 Pa. St. 299; *Brower* v. *Bowers*, 1 N. Y. Appeals (Abbott,

p. 227); *McGunnigle* v. *McKee*, 77 Pa. St. 81; S. C. 18 Am. Rep. 428; *Dickinson's Appeal*, 42 Conn. 491; S. C. 19 Am. Rep. 553; *John* v. *Sabattis*, 69 Maine, 477; *Ash* v. *Way*, 2 Gratt. 203; *Buckley* v. *Frasier*, 153 Mass. 525; *Grundy* v. *Hadfield*, 16 R. I. 579; *Rogers* v. *Weller*, 5 Biss. 160; *Estate of Wardwell*, 57 Cal. 484; *Dayton* v. *Adkisson*, 45 N. J. Eq. 603; *McCalla* v. *Bane*, 45 Fed. Rep. 828; *Re Jessup's Estate*, (Cal.) 21 Pac. (1889) p. 976; *Hartwell* v. *Jackson*, 7 Tex. 576; *Sleigh* v. *Strider*, 5 Call, (Va.) 439; *Clements* v. *Crawford*, 42 Tex. 601; *Daniel* v. *Slarus*, 17 Fla. 487.

Orville D. Baker and Leslie C. Cornish, for defendants.

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

FOSTER, J. Action of debt to recover a legacy of $2000 mentioned in the last will of Abigail Sanford, who was the sister of the plaintiff's father.

The testatrix died August 7, 1889, having in the preceding April, executed her will under which the plaintiff claims as one of her nephews, by force of the following item: "I give and bequeath to each of my nephews and nieces who shall be living at the time of my decease, $2000."

The facts present the following as the principal question: Can an illegitimate son, born after March 24, 1864, whose parents intermarried subsequently to his birth, take by the will of his father's sister a legacy bequeathed to her nephews?

As the plaintiff is not specially named in the bequest, the decision of that question depends upon the proper construction of Stat. 1887, c. 14, which was the statute in force when the will was made and the testatrix died, and was enacted in lieu of R. S., c. 75, §§ 3 and 4, which latter sections were expressly repealed.

The exceptions state that the plaintiff claimed, although illegitimate, "to be entitled to this legacy under chapter fourteen of the Public Laws of 1887."

The statute provides: "An illegitimate child born after March

24, 1864, is the heir of his parents who intermarry. And any such child, born at any time, is the heir of his mother. And provided the father of an illegitimate child adopts him into his family, or in writing acknowledges before some justice of the peace, or notary public that he is the father, such child is also the heir of his father. And in either of the foregoing cases, such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred, and these from such child and its issue the same as if legitimate."

The above statutory provisions specify three distinct conditions of fact, upon the existence of any one of which an illegitimate child becomes the heir of his father: (1) When his parents intermarry; (2) When his father adopts him into his family; or, (3) acknowledges in writing before the officer named, that he is his father.

The first condition is contained in a sentence by itself, separated from the second and third by an independent sentence which declares the child, whenever born, to be the heir of his mother. Then after that independent sentence, follow the second and third alternative conditions by adoption or acknowledgment in the manner prescribed, one or the other of which makes him the heir of his father. Next follows the sentence pertaining to inheritance, viz: "And in either of the foregoing cases, such child and its issue shall inherit," etc.

The strictly accurate and authoritative signification of the word "either" relates to two units or particulars only — "being one or the other of two, taken indifferently as the case requires; being one or the other of two; being both of two, or each of two taken together, but viewed separately." Cent. Dict. "One or the other, properly of two things." Webster.

If we were to adopt the foregoing signification, a strict grammatical construction of this sentence would restrict and confine its effects to the second and third conditions, neither of which applies to the plaintiff. But the application of the accurate signification of words as laid down by lexicographers and the strict rules of grammatical construction oftentimes fail of reaching the real intent of statutes. Hence, although "properly

either refers indefinitely to one or the other of two, it often in actual use, although inaccurately, refers to some one of many." Cent. Dict. And Webster in one definition defines "either" as "one or another of any number." And this in our opinion was the sense which the legislature intended; and the clause, therefore, should be construed as if it read — "and in either of the three foregoing cases such child and its issue shall inherit," etc. See *Messer* v. *Jones*, ante, 349, a very recent decision of this court to the same point.

It is by force of legislative enactment alone that the plaintiff is heir of his father. At common law it was otherwise, and under that law he would have no rights of inheritance. *Cooley* v. *Dewey*, 4 Pick. 93. Although an heir of his father by the provisions of the statute, can the plaintiff take under a bequest in the will of his father's collateral kindred, which gives a legacy to each of such kindred's nephews as a class, unless his name or some other designating identification is mentioned therein as the object of her bounty? By the common law he evidently could not; for legacies to nephews, like those to children, include only such as are legitimate. *Bolton* v. *Bolton*, 73 Maine, 299, and cases cited on page 309; *Re Brown*, 58 L. J. Ch. 420; *Re Hall*, 35 Ch. Div. 551; *Kent* v. *Barker*, 2 Gray, 535, 536.

But the plaintiff's learned counsel now contends, that while it is true that the case was tried upon the supposition that the foregoing statute was the only one which had any reference to the subject matter, yet in fact there were other statutory provisions which have since been discovered as existing at the time, which, together with the statute of 1887, control this case and support the ruling of the court as given at the trial. These provisions are to be found in the final sentence of chap. 262, Laws of 1864, which reads thus: "When the parents of any child which may be hereafter born illegitimate shall intermarry, such child shall be the legal heir of the father as well as of the mother; shall follow and have his legal settlement, and shall be deemed legitimate to all intents and purposes."

And it is claimed, furthermore, that in consolidating and

revising the then existing statutes upon the rights of illegitimate children, an important part of the act of 1864 was omitted from c. 75, R. S., § 3,—that after the intermarriage such children "shall be deemed legitimate to all intents and purposes;" notwithstanding the equivalent of that important element, in breaking up the chapter, was transferred to c. 24, R. S., § 1, item III, relating to paupers, where it appears in these words, "they are deemed legitimate and have the settlement of the father." It is also claimed that the dividing up of the law of 1864 was improperly done; that the words "shall follow and have his legal settlement" should have been made a part of R. S., c. 24, relating to paupers, and the words "shall be deemed legitimate to all intents and purposes," should have made a part of R. S., c. 75, § 3, relating to illegitimates. And, moreover, that as chapter fourteen of the Laws of 1887, repeals only sections 3 and 4 of chapter 75, R. S., the important element of the enactment of 1864,—"shall be deemed legitimate to all intents and purposes," which was transferred to chapter 24, R. S., § 1, item III, still remains as the law of this State, applying to illegitimates, and should govern in the decision of this case.

But, notwithstanding the very elaborate argument of the learned counsel for the plaintiff, we are not satisfied that such a construction as contended for should be applied to the Act of 1864. The legislative intention must prevail in the construction of statutes whenever that intention can be ascertained. "And if it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman*, 3 Howard (U. S.), 565.

In the first place, it will be noticed that this Act of 1864 was expressly repealed by the revision of 1871, pages 935, 936, and its parts broken up, preserved and distributed, first under § 1, par. 3, of c. 24, relating to "paupers;" and, second, under § 3, c. 75, relating to "title by descent." It never as a whole formed a part of any deliberate revision of the statutes. In the

revision it was the duty of the commissioners to codify, collocate and revise this law. In doing this, that part of the statute which under certain conditions legitimized illegitimates was relegated to the "pauper" law, and was so condensed as to make it clear that it meant to legitimize only so far as affecting the pauper settlement of the illegitimate. And all that part of the statute which the legislature intended to affect inheritance was carried to chapter seventy-five, section three, relating to "title by descent." This sundering of the different provisions of the statute is strong evidence of the legislative intent as to its meaning when considered in connection with the sanction that was given by the revisions of 1871 and 1883, whereby the legislature reaffirmed this deliberate expression of its will by re-enacting the same context and subject matter for each fragment of the Act of 1864. From 1871 to the present time the general phrase as to legitimacy has been inseparably linked by legislative enactments to the question of pauper settlement, and its meaning has been confined to that subject; and this fact is one of the strongest arguments, not only as to the legislative intent, but also as to the legislative declaration of its meaning.

The act in question made no reference to any pre-existing statute, but it necessarily altered the statute of 1857 by adding to the conditions which made an illegitimate child an heir of his father, that of intermarriage of its parents; and it also gave to him the settlement of the father. If the final clause of the Act of 1864,—"shall be deemed legitimate to all intents and purposes"—was to apply to anything further than pauper settlement, then it must be held to repeal by implication a part of the second provision of section 3 of chapter 75, of the statute of 1857, as to illegitimates born after 1864, because if the parents intermarry then the child would inherit from lineal and collateral kindred even if there were no other children, or acknowledgment, or adoption, contrary to the statute of 1857. Yet the existing statute thus to be repealed was not even alluded to in the Act of 1864, and its provisions were substantially re-enacted by the revisions of 1871 and 1883 in utter disregard of the Act of 1864, and of any supposed repeal effected by it.

The provisions of the first clause of section 3, chapter 75, in the revisions of 1871 and 1883, that such child shall be the heir of parents who intermarry, is made entirely unnecessary and useless if the construction contended for were to prevail, inasmuch as the general expression in the pauper law,—"when the parents of such children born after March 24, 1864, intermarry, they are deemed legitimate and have the settlement of the father,"—would fully cover the subject.

Why, then, has the legislature in the revisions since 1864 so carefully guarded these rights of inheritance from lineal and collateral kindred by specific provisions in the chapters on "descent," if they knew and intended that such rights had already and more broadly been given by a provision existing in the pauper law?

By examining the last clause of section 3, chapter 75, in the revisions of 1871 and 1883, it will be found to be not only inconsistent with, but repugnant to, such a construction of that provision in the pauper law. One would authorize an inheritance from lineal and collateral kindred upon the sole fact of intermarriage of parents. The other allows inheritance from such kindred only upon certain conditions expressly stated in the statute, "and not otherwise." The necessary confusion that must arise in reference to title by descent, and the uncertainty of titles which must result, were we to hold that the provision in the pauper law to which we have alluded, was to apply to the law of descent, are certainly strong arguments to show that the legislature intended to do just what was done, to limit the several provisions of the Act of 1864 to the several subjects under which it finally classified them.

Nor is there anything in the decision of *Brewer* v. *Hamor*, 83 Maine, 251, which militates in the least against the construction which we place upon the acts under consideration. The opinion does not hold that intermarriage alone gives the illegitimate full and equal rights "to all intents and purposes" with children born in lawful wedlock. But it does hold, as therein stated, that an illegitimate child born after March 24, 1864, is the heir of parents who intermarry; and such child, born

at any time, is the heir of his mother, and of any person who acknowledges himself to be his father in writing signed in the presence of and attested by a competent witness; and if his parents intermarry and have other children before his death, or his father so acknowledges him, or adopts him into his family, he shall inherit from his lineal and collateral kindred, and they from him, as if legitimate; but not otherwise. And this decision was in reference to the rights of illegitimate children prior to the statute of 1887, viz: R. S., 1883, chapter 75, section 3.

We have given this extended consideration to the Act of 1864 because of the importance attached to it by counsel for the plaintiff. We are satisfied that the plaintiff's rights must be measured, as we have before stated, by the Act of 1887. That being in derogation of the common law, while it is to be construed with reference to the legislative intent, and with a view to the object aimed to be accomplished, cannot properly be extended by construction so as to embrace cases not fairly within the scope of the language used. *Dwelly* v. *Dwelly*, 46 Maine, 377; *Swift* v. *Luce*, 27 Maine, 285; *Shaw* v. *Railroad Co.* 151 U. S. 557; *Denn* v. *Reid*, 10 Pet. 524, 527. Moreover, in the construction of statutes "words and phrases shall be construed according to the common meaning of the language. Technical words and phrases, and such as have a peculiar meaning convey such technical and peculiar meaning." R. S., c. 1, § 6. And when the language of a statute is clear and plain, the court has no authority to give it a construction different from its natural and obvious meaning. *Clark* v. *Maine S. L. R. R. Co.* 81 Maine, 477.

Recurring to the statute under consideration, it is found to contain only one objective point—heirship or the right of inheritance. Its title is "An act to provide for the descent of intestate estates of and to illegitimates;" and it was enacted in lieu of sections 3 and 4 of R. S., c. 75, which chapter is also entitled "title by descent," and its provisions exclusively confined to that subject matter. The new act also strictly follows the single subject matter indicated by its title. Through the provisions of this act alone can the plaintiff claim. He does

not claim as and because he is the heir of his father — who is not shown to be dead — or by any right of inheritance of intestate property from any lineal or collateral kindred of his father. But his only claim is for certain testate property under the designation of "nephews" found in the will of his father's sister and collateral kindred. But as seen this act has nothing to do with testate property. Even if he could be considered a nephew as to intestate property, there is no intimation that he could as to property disposed of by will. The right in the one case is absolutely distinct from that in the other. In one case his claim would be founded as heir, or by inheritance; in the other, as devisee. The words "heir," and "inherit," the subject matter of the statute in question, have acquired in law a peculiar and invariable meaning, and that meaning must be applied to this statute. It is confined to those who take intestate as distinguished from testate estates, and whoever claims under a will, claims not as heir or by descent, but by purchase as a devisee or legatee. An "heir" is "one who inherits; one who takes an estate by descent, as distinguished from a devisee who takes by will." Burrill's Law Dict. "Technically in law the person upon whom the law casts an estate in real property immediately on the death of the ancestor, as distinguished from one who takes by will, as a legatee or devisee, and from one who succeeds by law to personal property as next of kin." Cent. Dict. In *Warren* v. *Prescott*, 84 Maine, 483, the distinction is thus sharply drawn: "One who takes under a will does not inherit. To inherit is to take as an heir at law, by descent, or distribution. To take under a will is not to inherit."

As we have before remarked, this statute has provided for cases of inheritance, for the descent of intestate estates of and for illegitimates, and its language is plain and unambiguous. Its interpretation cannot be aided by reviewing or construing the various pre-existing statutes upon this subject, all of which have been repealed and merged in this final declaration of the legislative will.

A testator is presumed to have used words in their ordinary meaning, unless such a construction would conflict with his

manifest intention. *Osgood* v. *Lovering*, 33 Maine, 464; *Richardson* v. *Martin*, 55 N. H. 45; *Bolton* v. *Bolton*, 73 Maine, 299, 308. And where legacies or devises are given to a "child," or "children" of some person named, or to "nephews," these words mean, prima facie, legitimate children or nephews. *Bolton* v. *Bolton*, supra; *Kent* v. *Barker*, 2 Gray 535, 536. There is no word or phrase in that clause of the will, under which the plaintiff claims, indicating that the testatrix used the word "nephews" in any other than its ordinary and legal signification. Nor does the case disclose any facts from which we might properly draw any such inference. The plaintiff is not specifically mentioned; nor is there any designating identification by which he can be considered as the object of her bounty under that clause wherein the testatrix bequeaths the sum of $2000 to each of her nephews who may be living at the time of her decease.

Exceptions sustained.

PAUL TOURIGNY *vs.* ULDORIC HOULE.

York. Opinion February 3, 1896.

Judgment. Pleading.

The record of a foreign judgment is prima facie evidence of an indebtedness, and in the absence of proper plea and proof that shall overcome the presumptions in its favor it is sufficient to sustain an action of debt.

ON EXCEPTIONS.

This was an action of debt to recover the amount claimed to be due upon an alleged judgment rendered in the superior court for the Province of Quebec, District of Arthabaska.

Plea, nul tiel record.

The case was tried before the presiding justice in this court below without a jury.

The plaintiff introduced an exemplified copy of the record.

The defendant introduced no evidence.

The presiding justice ruled that the evidence was sufficient to prove the plaintiff's case, and gave judgment for the plaintiff.

No question was made but that the parties named in the writ and those in the documentary evidence are identical.

The defendant excepted to these rulings.

Frank Wilson, for plaintiff.

A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment, as one rendered after answer and contest. *Last Chance Mining Co.* v. *Tyler Mining Co.* 157 U. S. 683.

A judgment of a court will always be presumed to be regular, (5 Eng. and Am. Ency. p. 496 h, and cases there cited,) and a judgment erroneously entered is valid until revised. *Drexel's Appeal*, 6 Pa. St. 272.

In the case of a suit to enforce a foreign judgment, the rule is, that the foreign judgment is to be received in the first instance as prima facie evidence of the debt; and it lies on the defendant to impeach the justice of it or to show that it was irregularly and unduly obtained. 2 Kent Com. p. *120; 12 Eng. and Am. Ency. p. 147 m.

A foreign judgment is conclusive upon the merits, and can be impeached only by proof that the court in which it was rendered had no jurisdiction of the subject matter of the action, or of the person of the defendant, or that it was procured by means of fraud. *Dunstan* v. *Higgins*, 138 N. Y. 70.

In this case it was within the province of the defendant to have shown (if such was the case) that the defendant in the original action did not have personal service, which he elected not to do.

Asa Low and Leroy Haley, for defendant.

In proving a judgment for the purposes of an action thereon, whatever is made a part of the judgment roll should be proved. Abbott's Trial Evidence, page 537, and cases there cited.

A certified copy of all the papers in the case with a like copy of the record entitled "Judgment roll on failure to answer," which simply contains the names of the court, county, and parties — without showing personal service on defendant,— will not support an action against defendant without proof that by the laws of

that state such judgment might properly be rendered. *Knapp* v. *Abell*, 10 Allen, p. 485.

There is no evidence in this case, either verbal or as a matter of record, showing that the defendant in the original suit in the foreign jurisdiction was served with process, or had any notice whatever of the original suit, or that the law authorized judgment in such cases. No legal service was proved, and the foreign court, therefore, acquired no jurisdiction of the person. Such want of service is fatal to this action.

This is clearly shown in *Knapp* v. *Abell*, supra. (The original judgment in this case was joint, and the evidence showed service on but one defendant. Held, fatal.)

In the case of *Barringer* v. *King*, 5 Gray, p. 9, the whole opinion of the court goes to show that the court rendered judgment for plaintiff only after being satisfied by the evidence in the case that service in the original suit was made on the defendant.

Our State will not consider a judgment of its own, rendered in a suit where the defendant had no actual notice, as the basis of an action. *Eastman* v. *Wadleigh*, 65 Maine, 251.

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

HASKELL, J. Debt upon a foreign judgment. Plea nul tiel record. If the suit had been upon a domestic judgment rendered by a court of general jurisdiction, the only issue of fact raised by the plea would have been whether the record existed, to be proved by an authenticated copy of it; and if rendered by such court in this State, jurisdiction would have been conclusively presumed in all cases between the parties to it, whether it so appears upon the record or not. *Treat* v. *Maxwell*, 82 Maine, 76. If the record negative the jurisdiction, or if it had not been extended as in *Penobscot Railroad Co.* v. *Weeks*, 52 Maine, 456, and the original papers do so, then the supposed judgment is void. The same presumption arises prima facie as to foreign judgments. 1 Greenl. Ev. § 546. If, therefore, the validity

of the judgment in suit had been denied for fraud, want of jurisdiction, reversal, release, or execution done, the defense should have been interposed by appropriate plea, and the presumption overcome by evidence.

Nul tiel record is said to be an inappropriate plea to suits upon foreign judgments, inasmuch as they do not create a merger, and are only primia facie evidence of an indebtedness. Either debt or assumpsit may be maintained upon them, or upon the original indebtedness, if appropriate to those remedies, and the general issue in such cases is nil debet or non assumpsit as the case may be, and puts in issue both the validity of the judgment and of the debt. *Bissell* v. *Briggs*, 9 Mass. 462; *Buttrick* v. *Allen*, 8 Mass. 273; *McKim* v. *Odom*, 12 Maine, 94; *Bank* v. *Butman*, 29 Maine, 19; *Jordan* v. *Robinson*, 15 Maine, 167; *Rankin* v. *Goddard*, 54 Maine, 28; 55 Maine, 389; *Hall* v. *Williams*, 6 Pick. 232; *Gleason* v. *Dodd*, 4 Met. 333; *Wood* v. *Gamble*, 11 Cush. 8; *Carleton* v. *Bickford*, 13 Gray, 591; *Finneran* v. *Leonard*, 7 Allen, 54; *Gilman v. Gilman*, 126 Mass. 26; *Walker* v. *Witter*, 1 Doug. 1; *Galbraith* v. *Neville*, 5 East, 75; *Buchanan* v. *Rucker*, 1 Camp. 63; *Harris* v. *Saunders*, 4 B. & C. 411; *Christmas* v. *Russell*, 5 Wall. 290; *Hanley* v. *Donoghue*, 116 U. S. 1-7; *Hilton* v. *Guyot*, 159 U. S. 113 (1895); *Ritchie* v. *McMullen* (1895), 159 U. S. 235.

Exceptions overruled.

GEORGE B. BEARCE, and another, *vs.* ANSEL DUDLEY, and others.

Androscoggin. Opinion February 3, 1896.

Timber. Pulp-wood. R. S., c. 42, § 6; Stat. 1831, c. 521, § 7; R. S., of U. S., §§ 2317, 2465, 2466.

The cost of driving pulp-wood that has become so intermixed with logs that it cannot be conveniently separated may be recovered by the owner of the logs under R. S., c. 42, § 6.

The benefits of the statute are equally useful whether the drives are saw-logs, ship-timber, pulp-wood, or other wood-products suitable for commerce or manufacture that may be conveniently driven to market. The statute is remedial and should be construed liberally, when necessary to work out the purpose of the legislation.

Floatable streams are public, and being free to all, if their capacity for floating logs is inadequate to serve the purposes of all, each one must so conduct his drive as to give others a reasonable share of their benefits.

The defendants turned some of their pulp-logs into the river in advance of the plaintiff's drive and left them to make their own way down stream. The plaintiffs came along with their own drive of logs which intermixed with the defendants' so that separation was costly and vexatious. The plaintiffs drove the whole mass and brought their action, under the statute, to recover the cost of driving the defendants' pulp-wood. *Held;* that they could recover; and that it is no defense to say that it was of no benefit to the defendants, or that the plaintiffs had still another drive later when all of the defendants' logs would have been turned in.

Held; that the plaintiffs were required to drive only such of the defendants' logs at their expense as became so intermixed with plaintiffs' that they could not be conveniently separated; and were not required to make a clean drive of any other logs that had not interfered with their own.

Also, that when intermixed logs are once taken charge of to be driven at the expense of various owners, they must be driven clean; and the measure of damages is the pro rata expense of driving the mass.

ON REPORT.

This action was brought under R. S., c. 42, § 6, to recover compensation for driving a quantity of poplar pulp-logs which had become intermingled with the logs of the plaintiffs and which the plaintiffs drove from Rumford Falls down the Androscoggin river to Lewiston in the spring of 1894. The drive was composed of two lots of spruce logs belonging to the plaintiffs, one of which was from the boom at the head of Rumford

Falls, and one of which was from behind Lothrop's Island in Jay; and of different lots of poplar pulp-logs belonging to the defendants, from Bear river, Ellis river, Swift river, Webb river, Seven-Mile brook, Twenty-Mile river, and different points on the main river.

The plaintiffs introduced evidence showing that they started their drive from Rumford Falls April 18th, taking not only their own logs but all the poplar pulp-logs which were then intermingled with their own logs, and all which, during its passage to Lewiston ran into and intermingled with the drive from the rear drive, from streams tributary to the main river and from landings on the main river. The drive arrived at Lewiston, June 25. Its cost was $5554.88, and this suit was brought to recover a reasonable compensation for the labor performed and expense incurred on the defendants' logs.

(Declaration.) "In a plea of the case, for that the plaintiffs on the twelfth day of April, 1894, at or near Rumford Falls on the Androscoggin river in the town of Rumford and State of Maine, were the owners and possessors of a large quantity of logs and timber then and there being in the waters of said river for the purpose of being floated and driven from said Rumford Falls to their place of market or manufacture, to wit, to Lewiston in said State of Maine; and the logs and timber of said plaintiffs on said twelfth day of April, 1894, at said Rumford became so intermixed with certain logs and timber of said defendants then and there being in the waters of said Androscoggin river and thereafterwards at divers other places between said Rumford Falls and Lewiston with certain other logs and timber of said defendants and all of said defendants' logs and timber so intermixed consisting of poplar pulp-logs cut in lengths of four feet, and amounting in all to twenty-two thousand cords, that the logs and timber of said plaintiffs could not be conveniently separated for the purpose of being floated and driven in the waters of said river to their place of market or manufacture aforesaid, and so that said plaintiffs could drive their own logs without said logs of said defendants; and thereupon said plaintiffs, in accordance with the provisions of the

statute, in such cases made and provided, did then and there drive all of said defendants' logs and timber aforesaid with which their own logs and timber had become so intermixed from said Rumford to said Lewiston. And the plaintiffs aver that on the twelfth day of April, 1894, and at any other time during the progress of said drive from Rumford to Lewiston, no special and different provision existed or was made by law for driving said logs of said defendants.

"Whereupon, and by force of the statute in such case made and provided, the said plaintiffs became entitled to receive and recover from said defendants a reasonable compensation for so driving said defendants' logs, to be recovered after demand therefor.

"And the plaintiffs aver that they have demanded payment of said defendants who are the owners of said logs and timber so driven in the sum of thirty-five hundred dollars for driving the same as above set forth; that said sum is a reasonable compensation therefor, and that said defendants did and still do neglect and refuse to pay the same or any part thereof.

"And the plaintiffs further aver that this action is brought to enforce the plaintiffs' lien upon the logs and lumber of the defendants to recover a reasonable compensation for driving the same from said Rumford to Lewiston, and that this action is brought within thirty days after said logs and timber arrived at said Lewiston, the place of destination of the plaintiffs' logs and timber, and within thirty days after the same arrived at Topsham, being the destination on the Androscoggin river of the logs and timber of said defendants."

Wallace H. White and Seth M. Carter, Wm. H. Newell and W. B. Skelton, for plaintiffs.

Counsel argued: (1.) That plaintiffs made this drive at a reasonable and proper time.

(2.) That the spruce logs of the plaintiffs and the poplar pulp-logs of the defendants were so intermingled that the same could not be conveniently separated for the purpose of being floated to market.

(3.) That no special and different provision was made by law for driving these logs.

(4.) That these plaintiffs made a reasonably clean drive of all the defendants' poplar pulp-logs which were intermingled with their own logs when the drive started, which ran into and intermingled with the rear of this drive on its passage from Rumford Falls to Lewiston, and which were afloat within the banks of the river or stranded on obstructions in the bed of the river or on the shores between Rumford Falls and Lewiston.

(5.) That from one-half to two-thirds in amount of the whole drive was poplar wood.

(6.) That at least one-half the expense of making the drive was incurred on account of work done on defendants' logs.

(7.) That the driving was prosecuted with reasonable diligence and in a skillful manner.

(8.) That the cost of the drive was $5554.88, one-half of which at least the plaintiffs are entitled to recover from these defendants.

(9.) That demand was made on the defendants before this suit was begun.

Counsel cited: *Sands* v. *Sands*, 74 Maine, 240; *Bondur* v. *LeBourne*, 79 Maine, 21; *Kallock* v. *Parcher*, 52 Wis. 393; *Osborne* v. *Nelson Lumber Co.* 33 Minn. 285; *Foster* v. *Cushing*, 35 Maine, 60; *Wisconsin, &c. Assoc.* v. *Comstock Log Co.* 72 Wis. 321; *Beard* v. *Clark*, 35 Minn. 328; *Miller* v. *Chatterton*, 46 Minn. 338.

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

Poplar pulp-wood, cut into four-foot lengths to be ground into pulp, certainly lacks every idea which we ordinarily attach to the word "timber." When the statute was first enacted, clearly it did not apply to pulp-wood, because at that time there was none. The meaning and purpose of the statute had reference solely to trunks or stems of trees, generally as cut full length to be driven down our streams. Both the shingle rift and the railroad ties, mentioned in *Sands* v. *Sands*, 74 Maine, 240, come within the dictionary definition of timber—

materials for a structure. Pulp-wood certainly does not. To apply the statute to the driving of pulp-wood, and at the same time apply the rules of law which the court have heretofore formulated, to an action of this kind almost necessarily produces injustice.

When the statute was framed, the drives of timber were all of the same nature, and ordinarily with the same destination, and for the same use, and driven in the same manner, which is not true when we make a comparison between spruce timber and poplar pulp-wood. If there ought to be a provision in the statute broad enough to cover a case of this kind, future legislatures can supply the want. But we contend that, at the present time, the statute does not reach the case. If, however, the court think differently, and that by any intendment the statute can be made to reach a changed condition of affairs, and changed kinds of timber, and driven in changed ways, we contend that the statute should be applied in such a way as to do no wrong and work no hardship.

At the time plaintiffs drove the drive in question, they knew it would be necessary for the defendants to drive independently later in the season over the same river the entire distance. The plaintiffs claimed that they made a clean drive. This defendants denied.

1. If the plaintiffs did not drive clean they are not entitled to recover. It is the duty of a party who seeks to recover under the statute to have made a reasonably clean drive, that is, as clean as the owner would ordinarily have driven them, so clean that another drive will not be necessary to secure the same wood.

2. If it shall be found that the plaintiffs made a clean drive, it was solely for the advantage of the plaintiffs for a special purpose. They had four million feet of logs, and they had hired a mill to saw that four million feet, no more, no less. It was therefore necessary for them to take it all on that drive, because they did not have a mill for general purposes. It was no advantage to the defendants, who must go over precisely the same ground again that year any way, which fact as we have

stated was known to the plaintiffs. This being so, we contend that the plaintiffs had no right to expend money in driving our wood clean except so far as necessary to drive their own timber clean, and that they have no right to charge us for that extra expense.

3. We contend that, if the plaintiffs are entitled to recover at all under the circumstances, it is only for the benefit which their drive was to the defendants, that is, the case must be decided on equitable principles; or at the most, that they would be entitled only to so much additional expense as they were subjected to by reason of the fact that the defendants' wood was intermingled with their logs.

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

HASKELL, J. Case under R. S., c. 42, § 6, for driving pulp-wood intermixed with logs so that it could not be conveniently separated.

I. It is denied that the statute applies to pulp-wood. Its language is, "timber so intermixed with logs . . . that it cannot be conveniently separated." Its purpose was to comprise all products of the forest conveniently floatable to market. The statute was passed in 1831, c. 521, § 7. The language there used was "all logs or other timber." The words "all logs or other" have been dropped by revision without intent to change the meaning. These words indicate an intent to include not only logs but other wood-products, and the word timber there used and retained in the revision was intended to have a comprehensive meaning suited to the purpose of the statute. In *United States* v. *Stores*, 14 Fed. Rep. 824, on an indictment for cutting "timber" upon the lands of the United States in violation of the act of March 2, 1831, that prohibits the cutting of "live-oak, red-cedar and other timber," the court says: "The term 'timber' as used in commerce, refers generally only to large sticks of wood, squared or capable of being squared for building houses, or vessels; and certain trees only having been formerly

used for such purposes, namely, the oak, the ash, and the elm, they alone were recognized as timber trees: but the numerous uses to which wood has come to be applied, and the general employment of all kinds of trees for some valuable purpose, has wrought a change in the general acceptation of terms in connection therewith, and we find that Webster defines 'timber' to be 'that sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships, and the like.' This would include all sorts of wood from which any useful articles may be made, or which may be used to advantage in any class of manufacture or construction.

"With so many peculiar significations, the intended meaning of the word usually depends upon the connection in which it is used or the character of the party making use of it,— as, for instance, a ship carpenter would understand something quite different when he made use of it from what a cabinet-maker, or last-maker or a carriage builder would,— and the question is, therefore, not what is the popular meaning as understood by any one class, but its meaning as used in the statute, and how the legislators have employed it; and this must be its most general and least-restricted sense, including in such signification what each and all classes would under such circumstances understand 'timber' to be. The language of the section under which this indictment was found mentions particularly live-oak and red-cedar trees, and then speaks of other timber, showing conclusively that it was not the intention of congress to confine the protection intended to any particular class or kind of trees, but to apply it in its most general sense." See also R. S. of U. S. §§ 2317, 2465 and 2466, giving persons planting and protecting timber patents therefor,— a use of the term in its broadest sense.

In *United States* v. *Briggs*, 9 How. 351, an indictment for cutting white-oak and hickory trees on the public lands under act of congress 2 March, 1831, to prevent cutting, destroying or removing live-oak or other timber or trees reserved for naval purposes, prohibiting the cutting of "any live-oak or red-cedar tree or trees or other timber," it was held that the cutting of

oak and hickory trees was prohibited, and the court says: "And so the cutting and using of any other description of timber trees from the public lands would be equally indictable."

In *Nash* v. *Drisco*, 51 Maine, 417, under a permit to "cut and haul all the timber and bark . . . down as small as ten inches at the stump or butt of the trees," the instruction "that the word 'timber' in its etymological sense, might embrace nothing but materials for building or manufacturing purposes," was held correct.

The trend of all the authorities is to construe the word timber, in a statute like the one under consideration, comprehensive enough to work the purposes of the enactment. The purpose of this statute was to give those using the waters of the state to float the wood-product of our forests, suited for manufacture, to market, equal rights and a convenient remedy under circumstances and conditions, where the common law remedy was inadequate, and compass a result in furtherance of the interests of all concerned. Drives of logs sometimes unavoidably intermingle, and the expense of separation is simple waste. Joining drives, by authority of law, makes a saving to somebody in the operation, and this statute fairly apportions the cost of the whole work. The benefits of it are equally useful whether the drives be of saw-logs, ship-timber, pulp-wood, or any other wood-product suitable for commerce or manufacture that may be conveniently driven to market; and whoever incumbers our rivers with material of this sort for the purpose of floating it to market ought to come within the provisions of the statute, and the legislature must have intended that they should. It could not have intended the legislation for some classes and not for all. It is remedial and must be most liberally construed when necessary to work out the purpose of the legislation.

II. The remaining question is principally of fact, best suited for the determination of a jury, but reported in order to determine the legal rules applicable to the assessment of damages. Floatable streams are public, and should afford equal facilities to all using them under the exigencies of each particular case. What

would be a reasonable use of one stream might be an unreasonable use of another, and destroy its public utility altogether; so that while some general rules of law may be applied in these cases, no rule of conduct or use can be given that will apply to all cases. If a man wishes the use of a stream, and no other person wants it, he may incumber it with his lumber in a way that could not be permitted for a moment when others at the same time need the use of the same stream. The stream is free to all, and if its capacity for floating logs be inadequate to serve the purposes of all, each one must so conduct as to give the others a reasonable share of its benefits. No man has a right to turn his lumber into a stream and leave it to itself in the way of others. He may turn it in when he pleases, but he must drive it and keep it out of the way of the one following. He cannot land some logs on the ice, turn more in at the first pitch of water, leaving them to make their own way towards market while he shall have cleaned off his operation and made it more convenient for him to make a clean drive, if others, meantime, wish the way clear for their logs. If a man turns a part of his logs into the stream and leaves them to themselves, so that the next drive be embarrassed or hindered by them, he becomes liable at common law for obstructing the common way, or under the statute to pay for driving the same, and it matters not whether such driving be of benefit to him or no. If he chooses to leave part of his logs without care to make their own way, intending to make a clean drive when the balance shall be turned in, and thereby is put to the expense of two drives when, if left the entire use of the river, he need make but one, the result is from his own conduct that has interfered with the equal use of the river to all.

In this case defendants turned some of their pulp-logs into the river in advance of the plaintiffs' drive and left them to make their own way down stream. The plaintiffs came along with a drive of logs that intermixed with defendants' so that separation was costly and vexatious. The plaintiffs drove the whole mass and seek pay for the same under the statute. They are entitled to have it; and it is no defense to say that it was of no benefit

to defendants or that the plaintiffs had still another drive later when all of defendants' logs would have been turned in. The plaintiffs had a right to make two drives or six, and a right to a reasonable use of the river for the purpose. Logs turned into a river are to be driven and are no more to be allowed to scatter along its banks, eddies, rips, falls and meadows, than a flock of sheep, when driven in the highway, can be allowed to scatter and embarrass other drovers, or depasture the herbage of the owner of the fee. Rivers, like highways, are to give passage and not to loiter upon to the annoyance of others wishing to use them.

It is said that the plaintiffs did not make a clean drive of the defendants' logs. They were not required to. They were allowed only to drive such of the defendants' logs at their expense as became intermixed with their own so that they could not be conveniently separated. Such logs they might drive and none others. They could not roll landings, clear eddies, or in any other way interfere with such of defendants' logs as had not interfered with their own. When a log once became intermixed, they might drive that log all the way, even though it afterwards cleared itself from the mass, for once intermixed the the plaintiffs' right of custody attached, and if they assumed to drive it at all, they must drive it home. They could not drive a part of the intermixed logs and scatter the rest along the river, driving only such part as was convenient. That would not be reasonable.

When intermixed logs are once taken charge of to be driven at the expense of the various owners, they must be driven clean,— all driven. The measure of damages would be the pro rata expense of driving the mass. In the present case it is clear enough that the plaintiffs drove clean those logs of the defendants that had become intermixed with their own. They were of a different kind from the plaintiffs' logs. There is much difference of opinion as to the relative cost of driving the two classes — saw-logs and pulp-logs, long logs and short logs — and a jury had better have assessed the damages. They saw the witnesses and felt the spirit of the trial. From cold type it

is hard to arrive at a satisfactory result, but, on the whole, we conclude that an equitable assessment of the damages, apportioning them pro rata as near as possible, would be $2000.

Defaulted.

BRUNSWICK GAS LIGHT COMPANY *vs.* JOHN H. FLANAGAN. BRUNSWICK VILLAGE CORPORATION, Trustee.

Cumberland. Opinion February 3, 1896.

Trustee Process. Claimant. Parties.

Where the trustee disclosed $3120.12 in his hands, but that he had become liable to other parties, on account thereof for $3327.25, who severally claim to hold adequate portions of the same under assignments, etc., from the principal defendant; and the claimants have neither been cited, nor do they voluntarily appear, *held;* the rights of the latter cannot be adjudged adversely to them when not before the court and the trustee should, therefore, be discharged.

ON EXCEPTIONS.

This was an action of trespass on the case brought in the Superior Court, for Cumberland county, against the defendant for damages done to plaintiff's property and the Brunswick Village Corporation was summoned as trustee. The trustee filed a disclosure. At a hearing before the court, the plaintiff claimed to hold the trustee on its disclosure because the balance due the defendant, according to the disclosure, was a liquidated amount in the possession of the trustee, and although not payable till a future time, yet it was an ascertained and fixed sum subject to no conditions such as would bar the plaintiff from securing the same, or a part thereof, on his attachment.

The plaintiff further contended that the orders and the assignment that appear in the disclosure were void as against this plaintiff, because said orders and assignment are ultra vires the committee of the trustee to accept under the contract between said trustee and this defendant; that the orders and assignment were manifestly a tentative effort on the part of the committee of the trustee to cover up and shield the said balance in their

hands against such claims as had been provided for in said original contract between said defendant and the Brunswick Village Corporation, and therefore void.

The court overruled the points made by plaintiff and ordered the following entry: "Trustee discharged with costs."

To all which rulings and refusals to rule the plaintiff took exceptions.

George E. Hughes, for plaintiff.
Barrett Potter, for trustee.

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

HASKELL, J. The trustee discloses in its hands $3120.12, being twenty per cent of the contract price retained as security for the completion of the same; $1500 of this is held by a trustee under an assignment for the benefit of defendant's contract creditors, who had become parties to the assignment; *Pleasant Hill Cemetery* v. *Davis*, 76 Maine, 289; $827.25 more is held by the payee of an order accepted by the trustee, and $1000 upon still another order, also duly accepted. All these sums aggregate $3327.25, or $207.13 more than the sum in the trustee's hands, and, therefore, he was properly discharged below. *Jenness* v. *Wharff*, 87 Maine, 307.

Moreover, the plaintiff has elected to proceed with his case without making the claimants of the fund parties to the suit, and, therefore, cannot adjudicate their rights adversely to them. *Jordan* v. *Harmon*, 73 Maine, 259.

The word "charged" in *Haynes* v. *Thompson*, 80 Maine, 128, line eleven from the top of the page, is a misprint. It should be discharged. The context corrects the error. The correct reading is—Ordinarily, the burden rests upon trustees to clear themselves from being charged. *Barker* v. *Osborne*, 71 Maine, 69; *Toothaker* v. *Allen*, 41 Maine, 324. So when they disclose a sum due the defendant and an assignment of the same, unless the assignee is summoned, or voluntarily appears and claims the fund, they (the trustees) must be discharged. R. S., c. 86, § 32. But

when the assignee does appear and claims the fund, the burden rests upon him to establish his claim. *Thompson* v. *Reed*, 77 Maine, 425.

Exceptions overruled.

ARTHUR MEGQUIER *vs.* ELISHA GILPATRICK.

Aroostook. Opinion February 7, 1896.

Logs. Timber. Waters. R. S., c. 42, § 6.

In an action under R. S., c. 42, § 6, to recover for services in driving the defendant's logs that had become intermixed with the plaintiff's logs so that they could not be conveniently separated, it appeared that the plaintiff had logs upon the same stream both above and below the logs of the defendant, and that the plaintiff rolled in his logs below, and while rolling in those above, the defendant turned in his logs and began to drive and they became intermixed with the plaintiff's logs. The defendant continued driving his own logs regardless of the plaintiff's logs and without any effort to drive them. The plaintiff put his crew upon the intermixed mass and drove the same towards the market. Both crews worked upon the mass, the plaintiff driving the whole and the defendant driving only his own. *Held;* that if the plaintiff conducted with reasonable prudence in starting his whole drive, under all the exigencies of the case, then he subjected the stream to a reasonable use as he had a right to do; and if the defendant under such conditions and circumstances interjected his logs in the midst of the plaintiff's logs, then the plaintiff might drive the mass at the expense of both owners; nor could the defendant prevent this course by attempting to drive his own logs only to the added expense of driving the whole mass.

A refusal to rule that the action could not be maintained, it appearing that appropriate instructions were given, was not erroneous.

A motion for a new trial will not be sustained when it appears that the verdict is reasonable in amount and grounded on just and legal principles.

See *Bearce* v. *Dudley*, ante, p. 410.

ON MOTION AND EXCEPTIONS.

The plaintiff recovered a verdict of $63.87, in this action, for his services in driving the defendant's logs. The action, was brought under R. S., c. 42, § 6, and the defendant filed a motion for a new trial and took exceptions as appear in the opinion.

F. A. and Don A. H. Powers, for plaintiff.

Louis C. Stearns and Walter Cary, for defendant.

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

PETERS, C. J. This is an action under R. S., c. 42, § 6, to recover for services in driving the defendant's logs that had become intermixed with plaintiff's logs so that they could not be conveniently separated.

The plaintiff had logs upon the stream both above and below the logs of defendant. The plaintiff rolled in his logs below, and while rolling those above, the defendant turned in his logs and began to drive them and they became intermixed with the plaintiff's logs. The defendant continued driving his own logs regardless of the plaintiff's logs and without any effort to drive them. The plaintiff put his crew upon the intermixed mass and drove the same towards market. Both crews worked upon the mass, the plaintiff driving the whole and the defendant only driving his own.

The defendant contended that under these circumstances the action could not be maintained, but the court ruled otherwise, and gave appropriate instructions not excepted to. To the ruling that the action could be maintained the defendant excepts.

The law of this case is stated in *Bearce* v. *Dudley*, ante p. 410, and need not be repeated here. Of course, if the plaintiff did not use reasonable prudence in rolling in his lower batch of logs and left them to unreasonably obstruct the stream, so that defendant's equal right to use it was invaded, then the intermixture of logs arose from the plaintiff's own misconduct from which he can reap no benefit. But if, on the other hand, he conducted with reasonable prudence in starting his whole drive, under all the exigencies of the case, then he subjected the stream to a reasonable use, as he had a right to do. He could not know when the defendant might turn in his logs, and being the first to operate had a right to manage his whole drive as was most advantageous to himself, provided he did not unreasonably appropriate the stream; if he did not do this, and the defendant saw fit to interject his logs in the midst of the plaintiff's logs, then the plaintiff might drive the mass at the expense of both

owners, and the defendant could not prevent this course by attempting to drive his own logs only to increase the expense of driving the whole mass. Such conduct was largely waste of effort to accomplish the common purpose.

Instructions to this effect, being appropriate, must have been given to the jury as appears from the bill of exceptions. The refusal, therefore, to rule that the action could not be maintained under appropriate instructions was not erroneous.

A careful consideration of the evidence shows that the verdict was reasonable in amount and grounded on just and legal principles.

Motion and exceptions overruled.

W. L. BLAKE COMPANY *vs.* FRED L. LOWELL.

Cumberland. Opinion February 11, 1896.

Insolvency. Discharge. Composition. Estoppel. R. S., c. 70, § 62.

An insolvent debtor, who has obtained his discharge on composition proceedings, is estopped from pleading such discharge in bar of the suit of his creditor, who has proved his claim and is not chargeable with laches so long as he withholds the percentage due on the creditor's claim.

Payment of the same into court with interest from the time of demand and costs will operate as a tender.

ON EXCEPTIONS.

This was an action of assumpsit tried in the Superior Court, for the county of Cumberland, in which judgment was rendered for the defendant, and the plaintiff excepted.

The facts are found in the opinion.

Benjamin Thompson, for plaintiff.

J. W. Symonds, D. W. Snow and C. S. Cook, C. L. Hutchinson, with them, for defendant.

Effect of R. S., c. 70, § 63, is to give the creditor for whom a deposit is made but six months within which he may prove his claim. Neglect to make proof within that time is fatal to the right to recover, and the creditor stands in the same position

as one neglecting to file a claim against an insolvent estate until after the assignee has distributed the funds.

The provision is analogous to the statute of limitations.

This position is strengthened by the clause which provides that the court may at its discretion make distribution. During the first six months after the deposit is made the court holds the funds as trustee for the benefit of the several creditors named in the schedule. After the expiration of six months the creditors either have the right to receive the money upon making proof of their debt, or they have not. If they have the right to the money, how can we reconcile this right with the right of the court to make distribution? If the creditor is still the "cestui que trust" of the amount deposited with the court to secure his claim, it is impossible to justify a diversion or distribution of the funds. But the court has the right to make distribution, for it is expressly so provided in the section under discussion. We claim, therefore, that the creditor after the expiration of six months from the time of deposit is no longer entitled to demand the amount deposited as security for his claim, but is barred by his own laches.

The statute is dealing not only with the creditor "who cannot be found," and who therefore is necessarily ignorant of the proceedings, but also with the creditor who "*refuses* to accept the percentage due him under the proceedings." No distinction is made between them. Both must be treated the same.

The regularity of the proceedings before the insolvent court are not impeached.

Section 49, c. 70, R. S., provides that a discharge in insolvency, "shall bar all suits brought on any such debts, claims or liabilities as were or might have been proved" against the estate in insolvency. It provides that the certificate given to the insolvent "shall be conclusive evidence" in his favor "of the fact and regularity of such discharge."

The Chief Justice in *Cobbossee National Bank* v. *Rich*, (81 Maine, 164,) speaking of this section says: "The plaintiff's counsel contends that this provision applies only to a certificate obtained in regular insolvency proceedings and not to one

under a composition. We think it applies to all certificates and can see no reason why it should not. Protection against the mistakes of the court or its officers, is as desirable in one case as in the other. The section has both a general and a special application. Its provisions apply generally as far as appropriate and consistent with other sections. The only provision in the chapter in relation to the manner of pleading a discharge is contained in this section, and certainly, that simple and useful provision applies to all cases."

SITTING: WALTON, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

HASKELL, J. Assumpsit to recover the contents of three several promissory notes aggregating $186.87. Defense, discharge in insolvency granted on composition proceedings. Reply, failure to pay the composition percentage.

The case shows that plaintiff had no actual notice of the insolvent proceedings or of the proposed composition, until after the percentage belonging to it had been returned from the registry of the court to the insolvent, who, on demand for the same promptly made as soon as the plaintiff knew of the insolvency proceedings, and had proved his debt, refused to pay the same.

Composition is based upon an offered percentage. Revised Statutes, c. 70, § 62, provides that the judge being satisfied that the insolvent has either paid or secured the percentage due all the creditors named in the schedule annexed to the insolvent's affidavit required by the statute (the plaintiff's name appeared in such schedule) shall give the insolvent a discharge from all his debts named in such schedule; that if any such creditor cannot be found or refuses to accept such percentage, the insolvent may deposit the same in court as security for his debt, and that after six months, if the creditor fails to prove his debt and accept such percentage, "the court may order the same to be repaid to such insolvent or, after notice to him, make such disposition thereof as justice requires."

In this case, the plaintiff's percentage was ordered to be paid, and was paid to the insolvent without any knowledge by the plaintiff of the insolvent proceedings, and the insolvent refused to pay over the same prior to this suit.

The moving consideration for the discharge was the payment of percentages and, in the absence of laches by the creditor, on refusal by the debtor to work out the beneficent provisions of the statute wholly for his benefit, he ought not to be permitted to avail himself of the same so long as he contumaciously refuses to comply with the duty imposed upon himself. It is inequitable that he should do so, and an equitable estoppel just fits such a case and prevents the working of a fraud. This view does not impeach the regularity of the discharge that is made conclusive, nor conflict with the doctrines of *Bank* v. *Rich*, 81 Maine, 164, but simply withholds the use of it for the time being against a particular creditor, the same as the judgment of any court may be restrained of execution until equitable interests shall have been protected.

The bankrupt act of 1874 provided for composition proceedings by way of resolution passed by certain of the creditors, and provided: "And such resolution shall, to be operative, have been passed by a majority in number, and three-fourths in value, of the creditors of the debtor assembled at such meeting, either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor." It further provided: "Such resolution, together with a statement of the debtor as to his assets and debts, shall be presented to the court, and the court shall" upon notice and hearing "inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interests of all concerned, cause such resolution to be recorded, and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity." The statute then makes such resolution binding upon all the credi-

tors placed upon the schedule presented at the meeting when the resolution was passed.

It is held that this resolution takes effect from and by virtue of the judgment of the court approving the same. *Guild* v. *Butler*, 122 Mass. 498; *Farwell* v. *Raddin*, 129 Mass. 8, and cases cited; *Bank* v. *Carpenter*, 129 Mass. 5. To be sure, no formal discharge was given, as under our statute, but the resolution confirmed by the court operated as a discharge. Nor was there any provision for the payment of percentages into court as in our statute, but the methods of both statutes were intended to compass the same result, viz: to discharge the debt on payment of the percentages. Under our statute payment into court in some cases is made a pre-requisite to a discharge, that the same may become, in the words of the statute, security for the debt. This security may be returned to the debtor after the lapse of six months if the creditor fails to prove his debt and accept the same. No discharge shall be granted unless the debtor has either paid or secured the percentage. The whole trend of the statute is to require payment of the percentage before the discharge shall avail the debtor. If he has not secured the percentage he shall not have his discharge, and if he withdraws the percentage and withholds it he shall not use the discharge to accomplish his own fraud. That is a reasonable construction that works equity.

Under the bankrupt act it was uniformly held that judgment of court confirming the composition could not be successfully pleaded in bar of the debt until the percentage had been paid or tendered, unless the same had been waived, or the creditor had taken part in the composition proceedings. *Pierce* v. *Gilkey*, 124 Mass. 300, and cases cited, both English and American.

In this case, therefore, a new trial should be ordered, and if the defendant purges his inequitable conduct by paying the percentage into court, with interest from the time of demand, and costs, it should operate and have the same effect as a tender.

Exceptions sustained.

C. DAVIS MILLER, in equity, *vs.* MARK H. HILTON, and wife.

Somerset. Opinion February 11, 1896.

Equity. Voluntary Conveyance. Payment. Presumption.

Circumstances may rebut the presumption that a note given for an antecedent debt is intended as a payment. Such presumption is overcome when the circumstances show that it was merely a renewal of the same indebtedness and was so intended by the parties.

A deed was given by husband to wife subsequent to his debt to the plaintiff. *The court considers*, upon the evidence, that it was a voluntary conveyance, without consideration and in fraud of the plaintiff.

IN EQUITY.

This was a bill in equity praying that a deed from the defendant, Mark H. Hilton, to his wife, Mary H. Hilton, dated July 21, 1881, might be declared fraudulent and void as to the plaintiff. At the hearing on bill, answers, and oral evidence in the court below, the presiding justice dismissed the bill and the plaintiff took an appeal.

The case appears in the opinion.

E. N. Merrill and G. W. Gower, for plaintiff.

S. J. and L. L. Walton, for defendants.

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

HASKELL, J. The plaintiff had levied an execution against Hilton upon land previously conveyed by him to his wife, and brings this bill in equity to perfect his title upon the ground that the conveyance was fraudulent as to him. The conveyance was given July 21, 1881. Prior to the conveyance Hilton was owing two promissory notes to one Folsom, who had indorsed and delivered the same to the plaintiff, of which Hilton was well aware. February 27, 1887, Hilton gave the plaintiff a new note in exchange for the two Folsom notes held by the plaintiff, and upon this note judgment has been rendered for damages and

costs amounting to $592.39. It was satisfied by execution and levy upon the land in question.

I. It is said that the new note, given after the conveyance to the wife, was payment of the two Folsom notes and became a debt contracted since the conveyance to the wife; but that is not the effect of the transaction. All the circumstances rebut any presumption of that sort, and show that it was merely a renewal of the same indebtedness and was so understood by the parties.

II. It is said that the deed to the wife was for $3000 consideration paid at the time. The wife claims to have had $1000 in a stocking bag that she began to accumulate soon after their marriage in 1860, and that it was in old state bills; $1000 more in a calico bag, greenbacks and national bank bills; and another $1000 in a pillow case. She claims to have accumulated this by wages at two dollars and fifty cents a week that her husband had paid her, and from $600 that she had when married. She says that the $600 was put into the stocking bag and savings added until $1000 had been accumulated, and then she began her deposit in the second bag; that the money in the stocking bag was in old state bills.

When the deed was given Hilton was owing considerable money. He had no other real estate. The wife was called as a witness by the plaintiff, and her evidence is so incredible that we cannot think it is true. If she had, in 1881, $1000 in old state bills, certainly they could not have been negotiated without remark, and without proof of the fact now in existence. The defense relies upon the payment of the $3000 taken from the three bags as a consideration for the deed to her. We cannot rely upon testimony so incredible to substantiate a consideration that would change the conveyance from a voluntary one into a bona fide sale.

After the conveyance the husband seems to have paid quite an amount of debts, and says that he had no other source from which to obtain the money. But, of course, if the defense of receiving the bag money is not believed, it is easy to see how another false theory could be set up to sustain the probability

of that one. If false, the husband must have known it and been a party to it, and, therefore, if both parties would devise that theory, they would not hesitate to invent one to show how he disposed of the money. He may have paid his debts, but concealed the source from whence he obtained it. The payments could easily be proved. The source from which the money was obtained to make them could just as easily be concealed.

The decree below must be reversed and the bill be sustained.

Decree below reversed. Bill sustained with costs.

JAMES H. HEWETT, Administrator, *vs.* FRANCES E. HURLEY.

Knox. Opinion February 11, 1896.

Trust. Equity. Law. Evidence.

The administration of a trust fund may be directed or controlled in equity.

The plaintiff's intestate, shortly before his death, gave his daughter a check of one thousand dollars for a monument fund. *Held*; that the fund cannot be recovered by the administrator in an action at law and the trust thereby destroyed.

The plaintiff claimed that the check was void from incapacity of the maker. *Held*: that this fact must be shown by evidence; that the jury must judge from facts, not from opinions stated as conclusions of facts drawn from other facts.

This was an action for money had and received in which the presiding justice ordered a nonsuit and the plaintiff excepted.

The case appears in the opinion.

D. N. Mortland and M. A. Johnson, for plaintiff.

The action for money had and received is an equitable action and requires no privity of contract to support it, except what results from defendant's having money of the plaintiff which in equity he ought to pay over to him. *Concord* v. *Delaney*, 58 Maine, 309; *Lord* v. *French*, 61 Maine, 420; *Howe* v. *Clancey*, 53 Maine, 130.

It is well settled that "a nonsuit will not be ordered, when there is any evidence competent to be submitted to a jury." *Union Slate Co.* v. *Tilton*, 69 Maine, 245; *Page* v. *Parker*, 43 N. H. 363.

It certainly cannot be said that the plaintiff offered no evidence. The check itself, especially in connection with the testimony of the attending physician, Dr. Hitchcock, as to the deceased's mental capacity, raises a suspicion of fraud on its face. The check itself shows that it was not a payment, because the defendant is named therein as a trustee and the amount is designated as a fund. A fund is stock or capital for certain purposes. Men with ordinary intelligence would not be likely to attempt to appoint a trustee and designate a certain fund and the purposes for which it is to be used, all in an ordinary bank check. This check, as it shows upon its face, was not drawn by Samuel Pillsbury but by the defendant herself.

Note the language written by this defendant in the check: "For a monument fund, to act without bonds." Is that language sufficient to designate the object for which the money was to be used? What monument? Whose monument, or was it monuments in general? Or was it nothing at all but a deception and fraud committed upon a dying man?

Even if there were no evidence of mental incapacity on the part of Samuel Pillsbury at the time, the document itself shows an illegal transaction so far as the purported intention goes. But it does show this fact, that the defendant has got one thousand dollars of the money that rightfully belongs to the estate and has converted it to her own use. *Tobey* v. *Miller*, 54 Maine, 480; *Allen* v. *Kimball*, 15 Maine, 116.

It was in violation of the statute of wills.

W. H. Fogler, for defendant.

The check raises no presumption of any liability of the defendant to the drawer or to his estate. There is no such presumption even in the case of a check in the ordinary form. 2 Parsons on Notes and Bills, 84. The check in the case at bar, on its face, negatives any presumption of liability on the part of the defendant to pay the amount therein named or any part of it.

The check upon its face purports to be drawn to provide funds for a monument for the drawer and his family. The presumption which the check carries with it is not rebutted, nor is there any attempt to refute the presumption.

The question on the issue of the drawer's capacity was not whether he was capable of transacting business, but whether he was capable of understanding and reasonably comprehending the act performed by him, the transaction of this check. This was an act testamentary in its nature, the act of a man upon his death-bed, making arrangement for the erection of a suitable monument for himself and family.

The lowest amount of capacity requisite to the execution of a valid will, is that the testator was able to comprehend the transaction. 1 Redf. Wills, 125.

A less degree of mind is requisite to execute an act of that nature than a contract. Id. p. 126. If the testator was incompetent to make a valid contract, yet if he had the capacity to know his estate, the object of his affections, and to whom he desired to leave his property, his will must stand. Id. See *Whitney* v. *Twombly*, 136 Mass. 145; *Converse* v. *Converse*, 21 Vt. 168.

An amusing, but accurate definition of testamentary capacity is laid down in Swinburne on Wills, p. 2, par. 4, as follows: "If a man be of mean understanding, neither wise nor foolish, but indifferent as it were between a wise man and a fool; yea, though he rather incline to the foolish sort, so that for his dull capacity he may be termed grossum caput, a dunce, such a one is not prohibited to make a testament, unless he be yet more foolish, and so very simple and sottish that he may easily be made to believe things incredible or impossible, as that an ass can fly, or that trees did walk, beasts and birds could speak, as it is in Æsop's Fables."

Extreme old age, even when accompanied by disease and great suffering, is not sufficient evidence of testamentary incapacity.

The plaintiff undertakes the burden of removing the presumption of sufficient capacity on the part of his intestate to perform an act which in itself is not only reasonable and proper, but which under the circumstances of the case is such an act as the brightest intellect would naturally dictate.

This burden is not sustained by the testimony of a physician,

himself not even an expert in questions of mental capacity, that he does not think the man performing such act was capable of transacting business.

SITTING: WALTON, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

HASKELL, J. Samuel Pillsbury died February 6, 1890. On January 28, previous, he signed a check payable to his daughter, Frances E. Hurley, of the following tenor: "Rockland, Me., Jan. 28, 1890. Pay to the order of F. E. Hurley, Trustee, one thousand dollars for a monumental fund. To act without bonds."

The check was afterwards paid to the trustee. The administrator of Pillsbury brings assumpsit against the payee of the check for money had and received. A nonsuit was ordered below, and the case comes up on exceptions.

The check created a trust in the daughter for a specific purpose, and she may in equity he compelled to administer the same, but the fund cannot be recovered from her in an action at law by the adminstrator and the trust destroyed. As to the creation of trusts, see *Bath Savings Institution* v. *Hathorn*, 88 Maine, 122.

It is contended that the check is void from the incapacity of the maker to execute the same. If this were so, the contention might be sound, but it must be shown by evidence. The only witness called was the physician attending him during the last fourteen days of his life, and that witness does not pretend to have been present when the check was made, nor does he describe the mental condition of the maker at that time or at any other time. He says that the patient was afflicted with "disease of the kidneys, and diseases incident to old age — wearing down," and that for fourteen days prior to his death, it was necessary to administer morphine; and that he did not think during that time the patient was capable of transacting business. Purely an opinion of no legal consequence. If the check would be avoided for incapacity of the maker, his condition should be shown, so that a jury might judge of the capacity for themselves. They

must judge from facts, not from opinions stated as conclusions of fact drawn from other facts. A resultant fact drawn from other facts is to be sometimes found by the jury, and sometimes by the court as circumstances may require. *Lasky* v. *C. P. R. Co.* 83 Maine, 461; *Morey* v. *Milliken*, 86 Maine, 481. It is not to be proved directly by witnesses in the form of an opinion. *Hall* v. *Perry*, 87 Maine, 569.

Exceptions overruled.

JARVIS C. PERRY, and others, in equity,

vs.

WILLIAM T. COBB, and others.

Knox. Opinion February 11, 1896.

Insurance,— marine. Perils of the Sea. Proximate Cause. Action. Arbitration. Equity.

Where the plaintiffs and defendants under articles of association were copartners in insuring each other upon cargoes, *held*; that an action at law cannot be maintained upon such contracts of insurance because the promise is joint and not several and the assured cannot be both plaintiff and defendant. The only remedy is in equity.

A stipulation in such articles of association that the members shall finally determine the amount of any loss is not strictly an arbitration clause so as to oust courts of their jurisdiction in the matter, but a regulation inter sese that will control except for equitable cause shown.

Held; in this case, that insurance is not on the voyage, but for the voyage, and damage to the cargo from a protracted voyage is not a sea peril.

Upon a bill in equity it appearing that the associates rightly applied the law to the facts of the case and their decision is supported by the evidence that the plaintiffs have no claim beyond the particular average exempted by the terms of the insurance; *also*, that the principal damage to the cargo resulted from its own inherent qualities excited by the long continued transit, *held*, that the bill be dismissed.

ON REPORT.

This was a bill in equity, heard on bill, answer and proof, in which the plaintiffs claimed to recover of the Knox Lime Insurance Association upon two contracts of insurance on a cargo of lime shipped at Rockland in February, 1893, on board the Brig, Caroline Gray.

The Knox Lime Insurance Association is a voluntary association, or partnership, of whom the plaintiffs and defendants are the members.

The articles of agreement by which the association is organized, and under which its business is carried on are as follows:

"Knox Lime Insurance Association.

"Mutual agreement of lime manufacturers of Knox county, Maine, for insuring all lime shipped by them, for one year, each kiln to be entitled to one vote.

"Article 1st. A committee of nine to be chosen who shall employ a Secretary or Agent for the Association.

"Article 2nd. All lime shipped under deck to ports within the following three districts to be insured at the rate named.

"First District, Portland, Me., to Cape Cod, one per cent.

"Second District, Cape Cod to Cape Hatteras, two per cent.

"Third District, Cape Hatteras to St. Augustine, Fla., all inclusive, three per cent.

"Article 3d. The parties hereto to deposit with the committee their notes on demand for fifty dollars for each kiln represented, to be used or returned to makers as hereinafter provided; also a deposit of twenty-five dollars in cash for each kiln.

"Article 4th. As soon as the loading of a cargo is completed a report of the same shall at once be returned to the Secretary or Agent at Rockland. The payment of all premiums due shall be promptly made to the Secretary or Agent on the last day of every month, unless funds should sooner be required to pay a loss, in which case any sum due the Association from any member shall be paid when called for by the committee or their representative. The cash deposits to be subject to check signed by the Chairman of Committee and Secretary of Association, but no check to be drawn without a vote of the committee.

"Article 5th. In case a member refuses or neglects to pay the premium due, no further risks to be taken after such refusal or neglect until he pays, and unless paid the committee may proceed to collect so much of his note as may satisfy the claim. No shipment to be covered nor loss paid on lime not returned.

"Article 6th. If a shipper receive notice of a cargo in trouble

he is to notify the secretary or one of the committee in writing, but he, the shipper, to take full charge of the interest, and act for the best interests of all concerned with the advice of the committee or their agent, and when closed, to submit the result to the committee, and they are to determine the amount due, if any, and pay the same at their first regular meeting after the claim for loss is presented, unless the Association has insufficient funds, in which case thirty days time for payment shall be granted. An appeal may be made to a majority of two-thirds of the votes of the Association, whose decision shall be final. Should the losses exceed the premiums collected, then the cash deposits for each kiln to be used, and if insufficient then proceeds of notes, and finally an assessment on each kiln shall be made to pay losses if necessary.

"Article 7th. No risks to be taken, under this agreement, after December 31, 1893, and when the last risk has expired, this to absolutely end the Association, except so far as the committee are concerned, they to close its affairs within thirty days thereafter, by returning the notes to makers, and dividing the cash on hand, if any, in an equitable manner.

"Article 8th. The committee are to fix the value of shipments per cask.

"Article 9th. No risk except on lime under deck shall be taken, and no losses to be paid unless it be five per cent of the whole aggregate value of the cargo under deck, and no general average charges shall be added to particular average to make the amount five per cent.

"Article 10th. The Agent or Secretary with two members of the Committee of Association shall be chosen from Rockland, two from Thomaston, and two from Rockport, to decide upon all shipments in an outside vessel before chartering, and if such vessel is objected to, the shipper to be notified in writing or verbally at once.

"Article 11th. No suit in law shall be begun or maintained by one or more members against any other member or members of this Association, on account, or for any claim growing out of same, except for the collection of the demand notes.

"Article 12th. Any matters not provided for in this agreement shall be left to the committee to adjust and regulate.

"Dated at Rockland, December 31, 1892."

The plaintiff's case was as follows:

The cargo insured consisted of 2566 casks of common lime and 1344 casks of lump lime.

The brig is double-decked with a break of about two feet in the upper deck aft, so that the space between decks aft is about two feet deeper than it is forward.

About 1400 casks of the cargo were shipped between decks, and the balance, about 2500 casks, in the hold under the lower or main deck.

The loading of the vessel was completed February 14th, on which day the bill of lading bears date.

The brig sailed from Rockland, February 17th. On the morning of the 18th she took a severe gale which was followed by a succession of gales in which the brig labored heavily, shipped large quantities of water and was driven a great distance out of her course, and finally, after having been given up for lost, arrived in New York on the 21st day of March.

On arrival the cargo was found to be in a damaged and unmerchantable condition, and was sold for about half the price of merchantable lime at the time of arrival.

The plaintiffs claimed that the damage was caused by perils of the sea, in part by the violent motion and laboring of the vessel, and in part by the action of sea water coming to the cargo causing some portion of the casks to become on fire.

The contract for insurance of the cargo was evidenced by two instruments, one dated February 13, 1893. and the other dated February 15, 1893. By the first instrument the Association insured the plaintiff in the sum of $2464 and by the second in the sum of $84. The policies insured the plaintiffs in the sums named "On lime on board Brig Caroline Gray under deck, at and from Rockland, Maine, to New York." The only condition specified was that "there shall be no claim on the Association unless the particular average amounts to five per cent of the whole aggregate value of the cargo on board; and no gen-

eral average charges shall be added to particular average to make the amount five per cent."

The plaintiffs conceded that, under the condition above named, they were not entitled to recover of the defendants unless they prove a partial loss equal to five per cent of the whole aggregate value of the cargo.

Subject to the condition above referred to, the plaintiffs claimed that the policies constituted a general and unlimited insurance of the cargo against the perils of the sea, or, in other words, a general maritime risk.

W. H. Fogler, for plaintiffs.

Perils of the sea: *Gage* v. *Tirrell*, 9 Allen, 299-307-308; 1 Phil. Ins. §§ 1042, 1099.

Cause of Damage: 2 Phil. Ins. § 1053. "If the damage can be accounted for by the perils of the sea, it will be presumed to have so happened, unless it is proved to have been caused by culpable misconduct."

The defendants are liable not only for those casks of lime which were in actual contact with sea water, or actually on fire, but also for all damage coming to the remaining portion of the cargo through the immediate effect of such contact with sea water or burning, for all damage of which the water and fire were the proximate cause.

Proximate cause: *Aetna Ins. Co.* v. *Boon*, 95 U. S. 117; *Ins. Co.* v. *Tweed*, 7 Wall. 44; *R. R. Co.* v. *Kellogg*, 94 U. S. 469; *Montoya* v. *London Assurance Co.* 6 Exch. 451; *Cory* v. *Boylston Ins. Co.* 107 Mass. 145; *Neidlinger* v. *Ins. Co. of North America*, 11 Fed. Rep. 514; Hopkins Average, p. 189.

If the inherent tendency is set in operation or made active and destructive by a sea peril, the underwriters are liable for all loss which occurs over and above such loss or damage as would have been suffered but for such a sea peril. 2 Pars. Cont. 374.

The defendants are liable for such loss or damage which came to the cargo by the laboring and pitching of the vessel, in addition to such damage as was occasioned by fire and water. 1 Phil. Ins. § 1090, and cases.

Damages: 2 Phil. Ins. § 1460; *Lewis* v. *Rucker*, 2 Burr. 1172.

Remedy: *Stephenson* v. *Piscat. Ins. Co.* 54 Maine, 69-70.

Form of judgment: If apportioned, should be by a master acting under the direction of the court.

C. E. and A. S. Littlefield, *Eugene P. Carver*, of the Boston Bar, with them, for defendants.

Perils: *Parkhurst* v. *Gloucester Mut. Fishing Ins. Co.* 100 Mass. 302; *DeGrove* v. *Met. Ins. Co.* 61 N. Y. 504; *Hartshorn* v. *Union Mut. Ins. Co.* 36 N. Y. 172; *Duncan* v. *China Union Mut. Ins. Co.* 129 N. Y. 244; *Coit* v. *Commercial Ins. Co.* 7 John. 385; *Taunton Copper Co.* v. *Merchants Ins. Co.* 22 Pick. 108; 3 Kent's Com. p. 300; *Baker* v. *Manuf. Ins. Co.* 12 Gray, 603; 1 Parsons on Ins. p. 541; *Cory* v. *Boylston Ins. Co* 107 Mass. 140; *Libby* v. *Gage*, 14 Allen, 266; *Smith* v. *Universal Ins. Co.* 6 Wheat. 176; *Jordan* v. *Warren Ins. Co.* 1 Story, 342; *Providence Wash. Ins. Co.* v. *Adler*, 65 Md. 162 (S. C. 57 Am. Rep. 314); *Taylor* v. *Dunbar*, L. R. 4 C. P. 206; *Tatham* v. *Hodgson*, 6 T. R. 656; *Snowdon* v. *Guion*, 101 N. Y. 458; *Cator* v. *Great Western Ins. Co.* L. R. 8 C. P. 552; *Fleming* v. *Marine Ins. Co.* 3 Watts. & S. 144 (S. C. 38 Am. Dec. 747); *Chandler* v. *Worcester Mut. Fire Ins. Co.* 3 Cush. 328; *Newark*, 1 Blatch. 203; *Spence* v. *Union Ins. Co.* L. R. 3 C. P. 427; *Everth* v. *Smith*, 2 Maule & S. 278; *Montoya* v. *London Assn. Co.* 6 Exch. 451.

Until the committee or a majority of two-thirds of the votes of the Association determine an amount to be due, there is no obligation on the Association to pay anything. *Scott* v. *Avery*, 5 H. L. C. 811; *Spackman* v. *Plumstead Board of Works*, 10 App. C. 229 (House of Lords, 1885,); *Trodman* v. *Holman*, 1 H. & C. 72 (1862 Exch. Cham.); *Elliott* v. *The Royal Exch. Assn. Co.* L. R. 2 Exch. 237 (1867); *Collins* v. *Locke*, 4 App. C. 674 (1879, Privy Council); *Perkins* v. *U. S. Electric L. Co.* 16 Fed. R. 514; *U. S.* v. *Robesan*, 9 Pet. 319; *Del. & H. Canal Co.* v. *Pa. Coal Co.* 50 N. Y. 250; *Fenlon* v. *Monongahela Nav. Co.* 4 Watts & Serg. 205; *Snodgrass* v.

Davit, 28 Pennsylvania St. 221; *Preble* v. *City of Bangor*, 64 Maine, 115; *Edwards* v. *Aberayror Mut. Ship. Ins. Soc.* L. R. 1 Q. B. Div. 563; *London Tramway Co.* v. *Bailey*, L. R. 3 Q. B. Div. 217; *Fox* v. *The Railroad*, 3 Wall, Jr. 243; *White* v. *Middlesex R. R. Co.* 135 Mass. 216; *Brown* v. *Leavitt*, 26 Maine, 251; *Sonneborn* v. *Laverello*, 2 Hun, (N. Y.) 201; *Cushing* v. *Babcock*, 38 Maine, 452.

Mr. Fogler, in reply.

There is no stipulation in the articles of association by which the parties agree expressly or impliedly to refer any matters to arbitration. Article six which counsel for defendant treat as containing a stipulation for arbitration, contains no provision to submit any matter to referees or arbitrators. It provides what acts shall be performed by a shipper who claims to have met with a loss for which the association is liable. He is to present his claim first to the committee or their agent; second, he may appeal from the decision of the committee to a vote of the association. He is obliged merely to present his claim to the parties liable and obtain their action upon his claim. This is a far different thing from arbitration.

But where a contract contains a stipulation for a submission of disputes or disagreements to arbitrators, it is well settled that such a stipulation does not preclude the parties from seeking redress in court.

This court in *Dugan* v. *Thomas*, 79 Maine, 223, says: "Such a clause of arbitration cannot bind parties. The right of free access to courts is inalienable. Parties may by agreement impose conditions precedent with respect to preliminary and collateral matters, such as do not go to the root of the action. And men cannot be compelled, even by their own agreements, to mutually agree upon arbitrators whose duties would, as in this case, get to the root of the principal claim or cause of action, and oust the courts of their jurisdiction."

The doctrine above laid down is fully sustained in this State and in Massachusetts by the following authorities: *Robinson* v. *Georges Ins. Co.* 17 Maine, 131; *Hill* v. *More*, 40 Maine, 515-523; *Buck* v. *Rich*, 78 Maine, 431-437; *Wood* v. *Humphrey*,

114 Mass. 185; *Pearl* v. *Harris*, 121 Mass. 393; *Rowe* v. *Williams*, 97 Mass. 163-165; *Cobb* v. *N. E. Mut. M. Co.* 6 Gray, 192.

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

HASKELL, J. The plaintiffs and the defendants, lime burners in the county of Knox, formed a business company to continue one year for the purpose of insuring each other upon cargoes of lime shipped by them coastwise. The business was to be conducted by a committee of members, who, in case of damage to any cargo underwritten, were to "determine the amount due and pay the same at their first regular meeting after the claim for loss is presented, unless the association has insufficient funds, in which case thirty days' time for payment shall be granted. An appeal may be made to a majority of two-thirds of the votes of the association whose decision shall be final." Each kiln was entitled to one vote. All suits at law between members were prohibited, except on demand notes.

No action at law could be maintained upon any policy, because the promise was to be joint, and not several as in the Lloyd's method, and the assured would become both plaintiff and defendant; so the prohibition against suits at law on policies was but declaratory of the law itself and, therefore, has no significance.

The stipulation in the articles that the association shall finally determine the amount due on any loss, is not strictly an arbitration clause, because it is an agreement inter sese, between associates, and does not purport to submit controversies to disinterested persons. An arbitrator is said to be "a private extraordinary judge, chosen by the parties, who have a matter in dispute, invested with power to decide the same." *Gordon* v. *United States*, 7 Wallace, 194. He should be disinterested, "for no man can lawfully sit as a judge in his own case." *State* v. *Delesdernier*, 2 Fairf. 473; *Friend, appellant*, 53 Maine, 387. "An interest that disqualifies from judicial action may be small, but it must be an interest, direct, definite, and capable

of demonstration; not remote, uncertain, contingent or unsubstantial, or merely speculative or theoretic." *Andover* v. *County Commissioners*, 86 Maine, 185; *Fletcher* v. *Railroad*, 74 Maine, 434; *Jones* v. *Larrabee*, 47 Maine, 474; *Warren* v. *Baxter*, 48 Maine, 193. The duties of an arbitrator are judicial; and while many cases hold that interest, known to the parties, is waived by the submission, it would be going very far to say that the interest of a debtor, who was to determine his own liability, finally, should have been waived by it. But, however that may be, it has been settled law in this State for more than a quarter of a century that an arbitration clause in a contract, ousting the courts of jurisdiction over the liability, is ineffectual for the purpose. *Stephenson* v. *Piscataqua F. & M. Ins. Co.* 54 Maine, 55. That case, like this, was upon a policy of marine insurance, and it was cited with approval in *Buck* v. *Rich*, 78 Maine, 437.

The stipulation in question differs from an arbitration clause in that it is an agreed method of procedure between associates, partners, joint promisors, where the claimant is himself one of them. Viewing it thus, what good reason can be given why they should not be held to their agreed methods of procedure? It is very like the by-laws of a benefit corporation that bind the members to their observance, as a prerequisite to a forum in the courts. *Jeane* v. *Grand Lodge, &c.*, 86 Maine, 434. It is certainly a reasonable requirement, consistent with the purposes of the association, to mutually indemnify each other in the specific transit to market of their manufactured goods, upon equitable conditions. Equity alone has jurisdiction over their matters, because of mixed interests in all controversies that may arise.

No point is made but that the terms of the stipulation have been complied with. The associates considered the plaintiff's claim, after investigation by the committee and a full hearing and decided that he had none. In this proceeding, the decision was in the nature of an award; each associate was an insurer. All participated and determined the whole matter, not effectually,

either as to liability or damages, so as to preclude all judicial investigation; but they did pass upon the whole matter as the very terms of their existence provided they might do; and the question arises, what effect, if any, shall be given to their decision. No suit at law can be maintained. Relief in equity, suited to the conditions of the controversy, is the only remedy. That is never given when equities are balanced, or when a sound judgment may not be moved to interfere. The decision was by all the associates, standing together for a common purpose, men well versed in shipping lime and familiar with precautions necessary for its safe carriage and discharge, and with matters that do or do not injure its quality or value and affect its price in the market. Why, then, should not this method, agreed to by the associates, have such force and effect upon a court of equity as the fairness of the investigation and deliberation of the decision indicate would be safe, work justice and save expensive litigation to the parties, as it was originally intended that it should do? No good reason suggests itself, and some of the rules touching awards may safely apply. The opinion of the court in *Burchell* v. *Marsh*, 17 How. 349, upon a bill in equity to set aside an award of arbitrators is very instructive. It holds that an honest decision upon a fair hearing should stand, although the court feels that it could have arrived at a better result, for otherwise, it would be the "commencement, not the end of litigation." A judgment of Lord Thurlow is cited in confirmation of the doctrine. *Knox* v. *Symmonds*, 1 Ves. Jr. 369.

In this cause, the decision of the associates is not an award in the strict sense, but a procedure in an equitable controversy, between joint associates, that determines their rights inter sese, and it should bind them, except for cause shown to the contrary. They were all interested parties, and that fact and the evidence adduced may show a denial of equitable relief that should be given, and it may show the reverse. At any rate, the whole cause may be heard anew to see if any such error or mistake intervenes as should change the result. The relief prayed for is equitable relief, and will be granted or withheld as sound discretion may demand.

The plaintiffs contracted with the association for insurance to the amount of $2548, on a cargo of lime on board ship, under deck, at Rockland for New York. There were no conditions in the contract except that five per cent particular average on the whole value of the cargo was exempted from insurance. The vessel was thirty-six days at sea, an unusually long time for the vogage, occasioned by rough weather, head winds and successive gales. She sailed the fourteenth of February, and arrived the twenty-first of March. She labored heavily and strained somewhat, but arrived tight and with no special damage in the hull, save the loss of a skylight, some sails and a compass box. On the twenty-seventh of March, she was given a berth and broke cargo. Some seventy-five barrels of lime were discharged. About the fourteenth of April, she was moved and began the further discharge of cargo that was all out on the twenty-eighth. A few of the casks may have been stove. A few more showed signs of fire, and a few were bursting from swollen contents. The balance of the cargo was in bad condition in that staves had shrunken and hoops loosened, allowing the lime to sift out and fall through the tiers of barrels to the deck or floor of the hold. No sea water reached the cargo, unless in a few instances when a hatch had been taken off, or when the cabin was flooded once. The damage from sea water must have been very slight, and did not affect the cargo beyond the few barrels that it touched.

The insurance was against perils of the sea for a particular voyage. A voyage policy does not attach unless the vessel be sea-worthy at the inception of the voyage, which is presumed, but may be rebutted. *Dodge* v. *Ins. Co.* 85 Maine, 215; *Hutchins* v. *Ford*, 82 Maine, 370. It is so whether the insurance be upon the ship, or upon the cargo, or upon freight. *Van Wickle* v. *Mechanics Ins. Co.* 97 N. Y. 350; *Higgie* v. *American Lloyds*, 14 Fed. Rep. 143; *Higgie* v. *National Lloyds*, 11 Biss. 395; *Daniels* v. *Harris*, L. R. 10 C. P. 1. "She must not be overloaded and the cargo must not be badly stowed." Arnould, 649.

In this cause, the insurance was "at and from Rockland to New York," meaning until safely landed in New York, or for a reasonable time to land there under the usages of

that port. The sea risk continued until the goods might be put on shore by reasonable dispatch. On the sixth day after arrival the vessel was given a berth at the wharf and the hatches were opened. No damage to the cargo is claimed after that time, and no point is made that the insurance ended before. During the voyage the decks had been awash, and the cabin once flooded. Some sea water found its way to the cargo and may have caused the bursting of a few casks, and the scorching of a few more, but this damage was far below the particular average, or in this instance partial loss, that had been excepted from the insurance, so that the remaining loss or damage was from the shrinking of the staves of the barrels, and slacking up of the cooperage, allowing their contents to sift out and fall through the tiers of barrels to the deck or floor of the hold, and leaving the barrels so tender that they could not easily be hoisted out of the hatch without danger of falling to pieces. This condition is claimed to have resulted from the rolling and pitching of the vessel caused by the storms and bad weather of an unusually protracted voyage; and the question is, was it caused by a peril of the sea?

Tempests and rough weather are common incidents in sea transit. How long a voyage may continue is beyond the power of prophecy to foretell at the inception of it. Fair winds may serve or head winds may drive the vessel off her course. The voyage policy continues until the port of discharge shall have been reached, and, if upon goods, until they may have been safely landed. If the goods be of a perishable nature, and decay from a protracted voyage before they can be landed, the loss would not be from a peril of the sea. If the cargo be shaken and stove from the inherent weakness of the packages unsuited to withstand the roughness of sea transit, or caused by the effect of their contents during the voyage, it would not be from a sea peril, but from natural causes produced either by the fault of the shipper or by the inherent nature of the goods. The condition of the cargo when landed does not raise the inference that its injury resulted from a sea peril, but the burden rests upon the plaintiff to prove the fact.

No case has been cited at the bar that brings this loss within the hazard underwritten. *Insurance Co.* v. *Boon*, 95 U. S. 117, is a suit upon a fire policy on goods ashore. So is *Insurance Co.* v. *Tweed*, 7 Wall. 44. So is *Railway Co.* v. *Kellogg*, 94 U. S. 469. *Montoya* v. *London Assurance Co.* 6 Excheq. 451, is upon a marine policy on tobacco shipped with hides. Sea water caused the hides to putrify and injure the tobacco, and it was held a sea peril; but the damage by sea water in the cause at bar did no mischief to the bulk of the cargo, and none resulted from the small part injured. In *Cory* v. *Boylston Ins. Co.* 107 Mass. 140, it is held that underwriters "do not assume the risk of ordinary perils incident to the course of the voyage, nor of damage arising from intrinsic qualities or defects of the thing insured," nor of "ordinary dampness of the hold, though aggravated by the length of the voyage and the variety of climate through which the vessel has passed in consequence of perils of the sea," because the result is attributable to the goods themselves and not to sea perils as the proximate cause. In *Neidlinger* v. *Ins. Co. of North America*, 11 Fed. Rep. 514, the policy was upon barley with a clause excepting damage from must or mold, unless from actual contact with sea water, and the hazard was limited to that part of the barley actually wetted. *Taylor* v. *Dunbar*, L. R. 4 C. P. 206, holds that the decay of meat during a voyage protracted by tempestuous weather is not within the terms of a marine policy. In *Boyd* v. *Dubois*, 3 Camp. 133, Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and did effervesce and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot recover for a loss which he, himself, has occasioned." *Crofts* v. *Marshall*, 7 C. & P. 646, is an insurance of thirty-six casks of oil, and the cargo not having shifted, a part of them were found empty and others had lost a part of their contents. The jury disagreed as to whether the leakage was from perils of the sea, and the court gave judgment for defendant by consent. These are all the cases cited by the plaintiffs.

The general rule is that everything which happens through

the inherent vice of the thing, or by the act of the owners, master or merchant shipper, shall not be reputed a peril, if not otherwise borne on the policy. Emerigon, 290; *Providence Washington Ins. Co.* v. *Adler*, 65 Md. 162; *Baldwin* v. *London C. & D. Railway Co.* L. R. 9 Q. B. 582; *Baker* v. *Insurance Co.* 12 Gray, 603; *Cory* v. *Boylston Ins. Co.* 107 Mass. 140; *Boyd* v. *Dubois*, 3 Camp. 133. If the inherent vice be stimulated by a protracted voyage, it is still no loss from a peril of the sea. *Cory* v. *Boylston Ins. Co.* supra; *Taylor* v. *Dunbar*, L. R. 4 C. P. 206. So it is if the loss be from some other intervening cause, as where slaves die from starvation from the failure of provisions during an unusually long voyage, occasioned by bad weather. *Tatham* v. *Hodgson*, 6 D. & E. 307.

Lord Ellenborough in *Cullen* v. *Butler*, 5 M. & Sel. 461, distinguishes between perils on the seas and perils of the seas. Lord Herschell says the latter phrase "does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril of the sea." . . . "There must be some casualty, something that could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against accidents which must happen." *The Xantho*, L. R. 12 App. 503.

It is not always easy to mark the line between the ordinary operation of the elements and their perilous action. The latter must be the proximate cause of the loss. Lord Bacon's reason is: "It were infinite for the law to consider the causes of causes, and their impulsions one on another; therefore it contenteth itself with the immediate cause." Gow on Insurance, §§ 92, 137.

In applying this rule to the cause at bar, the only direct damage to the cargo clearly shown is that resulting from the contact with sea water, amounting to less than the particular average excepted. The remaining damage to the cargo is not shown to have resulted but from the unexpectedly long voyage, that may have excited the internal qualities of the goods, causing the packages to shrink and scatter their contents so as to need

cooperage before they could be safely raised through the hatch. All authorities agree that a protracted voyage is not a sea peril within a marine policy, because it is not an unusual event, but one of the natural incidents to sea transit. Insurance is not on the voyage but for the voyage. *Pole* v. *Fitzgerald*, Willes, 644. If damage to the cargo resulted from its inherent vice that worked the mischief under natural conditions, it was not a sea peril. Had the voyage been performed in a week, such results would not have been expected. The evidence is conflicting as to the proximate cause for the condition of the cargo upon its arrival. The associates, to whom it was agreed to submit the question of liability, are men of large experience in burning and shipping lime. They are all fair men and appear to have heard the controversy with patience, and, after full investigation, all but the plaintiff agreed that he had no claim, and so decided. Their decision must have great weight upon the fact as to whether the condition of the cargo, upon its arrival in New York, was other than what might have been expected from ordinary sea weather at that time of year, February and March, during a voyage of thirty-six days, without any unusual sea peril. The cargo arrived all in position. It had not shifted or been knocked to pieces by the vessel having been thrown on her beam-ends, or wrecked or stranded.

But it may be said that the damage within the particular average clause, gave the cargo a bad reputation and thereby lessened its market value; this result might be, and yet not be within the terms of the policy. Benneke, 438. No case is cited that holds such doctrine; on the contrary, *Cator* v. *The Great Western Ins. Co. of New York*, L. R. 8 C. P. 552, holds the reverse. That was insurance upon packages of tea. Some were damaged and others were not, but the damage was restricted to the former, although there was a clause in the policy excepting damage other than by contact with sea water. The court held the rule would be the same without the clause, for insurance covers actual damage, and not suspicion of damage. *Montoya* v. *Royal Exchange Ins. Co.* 6 Ex. 451, supra,

comes the nearest to an authority for the contention; but there the tobacco was actually injured from the fumes of the putrefying hides. So in *Lawrence* v. *Aberdein*, 5 B. & A. 107, approved in *Gabay* v. *Lloyd*, 3 B. & C. 793.

The plaintiffs were compelled to pay damages for delay in discharging cargo, and claim that as an element of damages. But, if all the damage to cargo was less than the particular average excepted, so that no liability on account of cargo attached to the underwriters, it would be singular to hold them for the plaintiffs' fault in delaying to seasonably unlade their cargo.

The decision of the association weighs heavily in determining this cause, especially as the evidence warrants the result arrived at upon the application of the law of the case. There is conflict of testimony and the association heard and considered it all, and all its members were practical men in the handling of lime and knew its peculiar qualities and dangers, and they must have considered that the principal damage to the cargo came from its own inherent qualities, excited by the long continued transit.

Bill dismissed with costs.

CHARLES GOSLEN *vs.* GEORGE CAMPBELL.

Kennebec. Opinion February 12, 1896.

Sales. Payment. Waiver.

It is a question of fact for the jury, whether an oral contract of sale of chattels was on the condition that the title should not pass until payment was made.

It is also a question of fact for the jury to determine upon the evidence whether such condition was waived. When the evidence upon both points is not so clear and free from doubt as to justify ordering a nonsuit, the whole case should be submitted to the jury.

ON EXCEPTIONS.

This was an action of replevin of four cords of wood. It was tried in the Superior Court for Kennebec county, where the presiding justice ordered a nonsuit.

The plaintiff introduced evidence tending to show that he agreed to sell defendant four cords of wood to be delivered at defendant's house and that defendant said the pay should be ready when the wood was hauled.

Under the agreement, plaintiff's hired man delivered the wood, and on unloading the last of it knocked at the door of the house and called for his money. Defendant's wife told him her husband was at the office and to go there for the pay. The man went and was told he must wait until Saturday as defendant had no money. On Saturday he was told practically the same thing and then the plaintiff Goslen, himself, called and repeated his call seven or eight times in two weeks. This replevin suit was then brought on the theory that the title never passed to defendant.

Harvey D. Eaton, for plaintiff.

Where a sale is agreed upon and nothing is said about payment, the law will presume that payment is to be made on delivery, and on failure to comply with a request therefor the seller may at once retake possession of his goods even though he have actually delivered them. *Robbins* v. *Harrison*, 31 Ala. 160, 497; *Hundley* v. *Bucknor*, 14 Miss. 70; *Genin* v. *Tompkins*, 12 Barb. 275. Counsel also cited: *Leven* v. *Smith*, 1 Denio, 573; *Wilmarth* v. *Mountford*, 4 Wash. 79: *Peabody* v. *Maguire*, 79 Maine, p. 585. Waiver: *Peabody* v. *Maguire*, supra; *Hill* v. *Hobart*, 16 Maine, 168; *Diehl* v. *Adams County Mut. Ins. Co.* 58 Pa. 452.

W. T. Haines, for defendant.

The time of payment was not a condition of the trade upon which the wood was sold, but simply a casual remark of the defendant after the trade was made and the plaintiff had agreed to deliver the wood, such as any man would make in buying an article in a store, or anywhere else, meaning and being understood that he would pay for the same promptly; such remarks do not make a cash trade or a sale of goods for cash.

The first time the plaintiff asked the defendant to pay for the wood and the defendant didn't have the money to pay, he told

the defendant that it was all right and that he would wait till Saturday. This point was not argued as a waiver, but as showing that the original sale was not intended for cash; that he was willing to wait in accordance with the intended terms of the sale.

The question of intent is what will govern in regard to the sale. What did the parties mean when they traded? Was it the intention of the plaintiff to sell his wood only on condition that he should have his pay on the delivery? Is that the fair import of the contract as gathered from his own testimony and that of his witnesses? This is the question and the only question. In other words, was the sale executed or executory? Benj. Sales, §§ 313-317.

The fundamental rule as stated in 2 Kent Com. p. 492, is as follows: "When the terms of the sale are agreed on and the bargain is struck and everything that the seller has to do with the goods is completed, the contract of the sale becomes absolute between the parties without actual payment or delivery." Whereas, in an executory agreement the goods remain the property of the seller until the contract is executed.

But in those cases which hold that, when the sale is for cash, payment is a condition precedent to passing of title, it has been uniformly held that the seller waives the condition when he makes complete delivery without expressly reserving title to himself. But in case where immediate payment is required by the contract, and the buyer upon obtaining possession of the goods refuses to pay, the seller may then rescind the contract and retake possession.

The conduct of the plaintiff and the manner in which he delivered the wood and that of his agent in not trying to collect for it immediately, evidently being willing to wait for his pay until such a time as he wanted the money to buy grain for his horse, would plainly establish a waiver no one can doubt, if there was any evidence in the case to show at the outset that there was any condition of the sale to be waived.

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

STROUT, J. The contention in this case is whether title to the wood delivered by plaintiff to defendant, passed upon the delivery and before payment. Plaintiff claimed that payment was to be made immediately upon delivery, and that such payment was a condition upon the performance of which defendant should acquire title. The contract was verbal. It was for the jury to determine what the contract was. Its terms, as stated by the plaintiff and his witnesses, would authorize a jury, if they believed the testimony, to find that payment was to be concurrent with delivery, and that the title did not pass until payment was made. The rule of law is fully stated in *Ballantyne* v. *Appleton;* 82 Maine, 573. See also *Furniture Company* v. *Hill*, 87 Maine, 22.

It was also claimed that if the sale was originally conditioned upon payment, the condition had been waived by the plaintiff; that his conduct after the delivery was evidence of such waiver. Whether he intended to waive the condition, and change a conditional to an absolute sale on credit, was a question of fact to be determined from the evidence. His acts, as testified to, subsequent to the delivery, were to be weighed, as bearing upon that question. They were not of such a character as to amount to clear proof of waiver, but were explainable, consistently with his claim of a conditional sale. Its determination fell peculiarly within the province of the jury. Upon neither question, was the evidence so clear and free from doubt, as to justify ordering a nonsuit, but the whole case should have been submitted to the jury.

Exceptions sustained.

EDMUND MILLER *vs.* WILEY L. DAVIS.

Androscoggin. Opinion February 12, 1896.

Tax. Arrest. Demand.

The demand by a collector for the payment of a tax need not be in absolute words. It will be sufficient if the collector intimates that the payment is desired; anything that informs the tax payer that the collector has a warrant and desires payment; and anything that plainly brings home to the tax payer that the collector is there officially.

ON MOTION AND EXCEPTIONS.

The case appears in the opinion.

J. W. Mitchell, for plaintiff.

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

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

STROUT, J. Trespass against a tax collector for an alleged wrongful arrest upon a warrant for taxes. Motion for new trial, and exceptions to the charge of the presiding judge.

Upon the Motion.— The evidence was contradictory, but the preponderance was in favor of the defendant, for whom the jury returned a verdict. We perceive no reason to disturb the finding of the jury.

Upon the Exceptions.— The question was, what constituted a sufficient demand of payment of the taxes. The instruction was: "What is a sufficient demand? Any intimation to the tax payer that a payment is desired. It need not be in absolute words a demand; he need not go to the tax payer and say, I hereby demand of you payment; but anything that informs the tax payer that the collector has a warrant and desires the payment of his taxes, is a demand. He may say, will you be good enough to pay this tax, or, can I have this tax to-day? or can't I have it? Anything that plainly brings home to the tax payer that the collector is there officially."

This instruction was in accordance with law, and fully protected the plaintiff's rights.

Exceptions and motion overruled.

CAROLINE M. COOK *vs.* GEORGE D. BATES.

Franklin. Opinion February 13, 1896.

Contracts. Mutual Services. Payment. Judgment.

In an action of assumpsit to recover board furnished by the plaintiff to the defendant, it was admitted by the plaintiff that she did not expect to charge the defendant for board, as she understood that it was to be offset by the defendant's labor; but the defendant had nevertheless charged her, the plaintiff, for labor on her farm during the time that he boarded with her. It appeared that the defendant had sued the plaintiff for the labor; that judgment was rendered against her upon default and through a mistake upon her part in allowing the action to be defaulted; and that having paid the judgment and in consequence thereof she had paid the defendant more than his labor was worth and consequently she brought this action charging him for board during the time claimed in this action, to reduce the amount of his wages. *Held*; that the following instruction to the jury was unobjectionable: "On the face of this record, I can say to you, as a matter of law, that it is not necessarily conclusive, against the right of this plaintiff here to recover for board, if you find she is entitled to recover for any board. This is not conclusive against her, because it does not say that this was to include board, and, as I have already indicated, there is nothing on the record to show that he was to board there at all during that period. Therefore, this judgment is not conclusive against her right to recover as to the first item in the account annexed to this writ."

ON MOTION AND EXCEPTIONS.

This was an action of assumpsit on an account annexed, to wit: one item of which was: "To 34 weeks board, from Nov. 6, 1888, to July 2, 1889, at $2.50, $85."

It was admitted by plaintiff in evidence that there was no expectation at the time, of charging defendant for board during the time covered by this item in plaintiff's writ as she understood that his board was to be offset by his labor, but that defendant had charged her for labor at the rate of twenty dollars per month on her farm during the time that he boarded with her; that defendant had sued her for the labor; that the action was entered in court and through mistake upon her part the action was defaulted and that she had paid the execution issued upon the judgment, and that in consequence of said action being

defaulted, under the circumstances, she had paid him more than his labor was worth and consequently she then turned round and charged him for board during the time covered by this item, in this action, to reduce the amount of his wages.

Upon this branch of the case the court instructed the jury as follows:

"It is said that, according to the testimony of the plaintiff herself, she did not definitely intend to charge for board during this time, that it was in her mind that the board during these winter months especially, should offset the labor; that it would be a fair offset; that he needed a home and needed board and he had it all at this house, and that she and her father needed some service in doing the chores, and caring for the stock and other services about the house, furnishing the wood usually required under such circumstances. Now, then, it is said that he has repudiated that mutual understanding, which they believed to have existed, by obtaining and enforcing by aid of her own misapprehension and mistake, as it is said, this judgment for the full sum of twenty dollars per month, which they say must have been, not only as a matter of law on the record, but as a matter of fact on the probabilities, full compensation for his services, his labor, even if he had paid his own board, that it is compensation for his services and board,— in other words, that it would be full compensation for any one who was boarding himself. Therefore, they say they are now let in to recover a just and reasonable compensation for his board during this time in order to do justice between these parties; and I say to you, as a matter of law, if you find such to have been the mutual understanding between these parties, he having by the admitted facts and upon the record here obtained judgment for the full amount due him for labor as though he had boarded himself, she will be entitled to recover just and reasonable compensation during that period for his board.

"But you will be careful, of course, not to give an unreasonable or excessive price for any of these items. Then what would be a fair compensation? having reference, under the evidence before, you, to what is usual and customary in that community and to

the character of board probably furnished for this George Bates, that brings you down to April 23d.

"On the face of this record, I can say to you, as a matter of law, that it is not necessarily conclusive against the right of this plaintiff here to recover for board, if you find she is entitled to recover for any board. This is not conclusive against her, because it does not say that this was to include board, and, as I have already indicated, there is nothing on the record to show that he was to board there at all during that period. Therefore, this judgment is not conclusive against her right to recover as to the first item in the account annexed to this writ."

The verdict was for the plaintiff.

To which ruling and instructions of the court the defendant took exceptions.

Other facts are stated in the opinion.

S. Clifford Belcher, for plaintiff.

Joseph C. Holman, for defendant.

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

STROUT, J. This case comes before us on exceptions to the charge (the entire charge being made part of the exceptions), and on a motion for new trial. We have carefully examined the charge, and find that it stated the law correctly, and clearly pointed out the legal rights of the parties, and fully protected them. The exceptions therefore must be overruled.

Upon the motion for a new trial. The case shows that defendant, a brother of plaintiff, went to her house to live on or about November 7, 1888, and remained there till about September 13, 1889. There was no agreement in regard to board or labor. In the late winter or early spring, defendant took to plaintiff's farm, a yoke of oxen, a horse and four sheep. These animals were kept in plaintiff's barn and fed from her hay, till they went to pasture on her farm. The sheep remained there till the autumn of 1889; the horse till the last of August, 1889; and both oxen till after the spring's work, and one of them till

November, 1889. From the time defendant went to the plaintiff's in November, until spring, the only work defendant did for her was the chores about the house and barn, and getting up a portion of the wood for the house. From the spring until early in July, defendant did some work ploughing, and cut a little hay,—one witness says about a ton and a half,—and perhaps some other work. The oxen and horse did some work, apparently not very much. Early in July defendant was taken sick, and for some weeks required care and nursing, and was unable afterward to perform any labor. All this time he boarded with plaintiff. She says that she did not expect to pay him for work nor charge him for board.

It is apparent that, if harmonious relations had continued, no charge would have been made by either party, the board being regarded as sufficient compensation for the small amount of labor required or performed.

After defendant left plaintiff's house, he sued her for "labor of self from November 7, 1888, to April 23, 1889, at twenty dollars per month," one hundred and seven dollars and seventy-two cents. To this was added three items of cash amounting to five dollars and sixty-five cents. Plaintiff did not defend, but was defaulted and has paid the judgment. She says she did not think it necessary to defend that suit, that she was informed that Mr. Pike would take care of it. In August, 1889, defendant brought another suit against plaintiff for "labor of self from April 23, 1889, to July 10, 1888, $60;" and $10 for use of oxen from March 5, 1889; and $12 for use of horse from January 26, 1889. This suit was defended, and the jury rendered a verdict for $21.33.

After judgment in defendant's first suit against plaintiff, she brought this suit for board, nursing, keep of horse, oxen and sheep, and recovered a verdict for one hundred and eighty-one dollars and thirty-four cents.

There was nothing in defendant's first suit against plaintiff to show that the price charged included or excluded board, nor that the labor was upon a farm. The kind and amount of service rendered in the time covered by that suit, as disclosed by

the evidence in this case, would appear to be amply compensated by twenty dollars a month, if the defendant boarded himself. Upon all the evidence, it is the opinion of the court that for this period the plaintiff is entitled to recover for defendant's board. He had repudiated the apparent understanding which existed while the services were being rendered, and had recovered full compensation for them, if he had boarded himself. Justice requires that he should pay for the board furnished by plaintiff.

For the period covered by defendant's second suit, from April 23, 1889, to July 10, 1889, the amount of the verdict indicates that the jury deducted board. How much, if anything, was allowed for use of oxen and horse does not appear. If his labor on plaintiff's farm for nearly three months in summer, was worth only twenty-one dollars in excess of board, twenty dollars a month for doing the chores in winter would appear very large. From early in July, when defendant became sick, until he left in September, he did nothing for plaintiff, and is clearly liable for his board and whatever care and nursing he received.

Plaintiff's verdict is manifestly too large. To effectuate the evident understanding of the parties, while their relations were friendly, defendant's labor and the use of his oxen and horse should offset the charge for board, nursing, and the keep of the oxen, horse and sheep. Defendant's two judgments against plaintiff amount to one hundred and forty-four dollars and fifty-six cents. In these were included cash items amounting to five dollars and sixty-five cents, which left for defendant's labor and that of his horse and oxen, one hundred and thirty-eight dollars and ninety-one cents. It will be equitable, and undoubtedly in accordance with the understanding of the parties, for the plaintiff to recover that sum for board, nursing, and keep of oxen and horse. She has received ten dollars and sixty-nine cents paid by defendant for her taxes, and this should be deducted. The balance of one hundred and twenty-eight dollars and twenty-two cents she is entitled to recover. If within sixty days after announce-

ment of this decision, plaintiff will remit fifty-three dollars and twelve cents of her verdict, as of its date, the entry will be,

Motion and exceptions overruled;

otherwise,

Motion sustained, and new trial granted.

EMERY O. BEAN, Administrator,

vs.

AUGUSTUS R. HARRINGTON.

Kennebec. Opinion February 15, 1896.

Deed. Notes. Failure of Consideration.

Partial failure of title has always been held in this State to be no defense to a suit upon notes given for the purchase of land; but a total failure may be.

ON REPORT.

The case appears in the opinion.

Fred Emery Beane, for plaintiff.

L. T. Carleton, for defendant.

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

HASKELL, J. Writ of entry to foreclose a mortgage. On motion for conditional judgment, the defendant seeks to reduce the amount due by deducting the damages suffered for breach of the covenants in a warranty deed to him from the plaintiff's intestate, the consideration for which was the note secured by the mortgage sought to be foreclosed. The breach of covenant set up was the right of a stranger to flow some part of the land conveyed.

To proceedings of this sort it is said that the same defenses, except the statute of limitation, may be made as if the suit were upon the mortgage notes. *Ladd* v. *Putnam*, 79 Maine, 568; *Fuller* v. *Eastman*, 81 Maine, 286.

Partial failure of title has always been held in this State no defense to a suit upon notes given for the purchase of land. *Hodgdon* v. *Golder*, 75 Maine, 293; *Thompson* v. *Mansfield*, 43 Maine, 490; *Morrison* v. *Jewell*, 34 Maine, 146; *Wentworth* v. *Goodwin*, 21 Maine, 150; *Lloyd* v. *Jewell*, 1 Greenl. 352. A total failure may be. *Jenness* v. *Parker*, 24 Maine, 289. So a partial failure, other than failure of title, may be. *Ladd* v. *Putnam*, supra; *Herbert* v. *Ford*, 29 Maine, 546; *Hammatt* v. *Emerson*, 27 Maine, 308.

Conditional judgment for plaintiff.

CHARLES A. CARLETON *vs.* INHABITANTS OF CARIBOU.

Aroostook. Opinion February 15, 1896.

Town. Way. Defect. Proximate Cause. Notice. R. S., c. 18, § 80.

A bridge across a highway was sixteen feet in length and the same in width, without a railing, and about five feet above the bed of the stream. Near the northeast corner there was a hole about two or three feet long and a foot or more in width, where the plank had become broken, leaving sufficient space on the south side for teams to pass. As a warning to travelers, a plank had been thrust into the hole, so that it stood perpendicularly from the bed of the stream, extending four or five feet above the bridge.

The plaintiff's statement of the accident was this: "As I drove up on the bridge the plank was stuck up into the hole, and my horse stepped on the first plank that this rested against, and when she stepped on that it tipped over and struck my horse a little and fetched up on the end of the plank. It touched my horse, and my horse sheered out round and ran the forward wheel off between these planks which were of different lengths, and kept right on going." *Held*; that the proximate and responsible cause of the injury was the hole in the bridge with the plank standing endwise in it, but as no municipal officer of the defendant town, highway surveyor or road commissioner, had twenty-four hours' actual notice of the defect that caused the injury, the town was not liable.

Quære; whether, if it were to be held that the want of a railing was the proximate cause of the accident, the following notice is a sufficient compliance with the statute: "The injury was caused by a broken plank or hole in the bridge crossing said brook, and a piece of board placed endwise in the hole and projecting upward above the road several feet, causing my horse to pass on one side of the traveled way throwing my wagon wheel off the end of the bridge, which at that point is narrow, and without any railing or safeguard of any kind."

Spaulding v. *Winslow*, 74 Maine, 528; *Aldrich* v. *Gorham*, 77 Maine, 287 affirmed.

ON MOTION AND EXCEPTIONS.

This was an action brought to recover damages for injuries sustained by reason of an alleged defective highway. The jury returned a verdict for the plaintiff.

The plaintiff contended, and his evidence tended to show, that the defect consisted in a lack of a railing on a certain bridge. To satisfy the statute requirements of notice, the plaintiff offered the following, viz.:

"To the municipal officers of the town of Caribou, county of Aroostook, State of Maine.

"You are hereby notified, that I, Charles A. Carleton, of Woodland, on Tuesday, the thirtieth day of May, A. D., 1893, at about 12 M., of that day while crossing the Mile Brook bridge, so-called, on the Woodland Center road in the town of Caribou was thrown violently from my carriage and seriously injured in my stomach, chest, and back, receiving a severe concussion of spine and injury to stomach, causing intense pain, soreness, and spitting or raising of blood, and receiving internal injury, by being violently shaken up and jarred in my fall.

"The injury was caused by a broken plank or hole in the bridge crossing said brook, and a piece of board placed endwise in the hole and projecting upward above the road several feet, causing my horse to pass to one side of the traveled way, and throwing my wagon wheel off the end of the bridge which at that point is narrow and without any railing or safeguard of any kind. The fore wheel of my wagon went off the side of the bridge, and I was thrown forward upon the wheel and dragged some distance between the wheels of my carriage, receiving the injury as above. I claim ($1,000) one thousand dollars damages therefor, and you are hereby notified to settle and make payment of the same forthwith.

Charles A. Carleton."

"Woodland, June 2, 1893."

Defendants seasonably objected to this paper being received, on the ground that it did not allege a want of railing as the defect causing the injury, but the court overruled the objection, and allowed the paper to be read in evidence.

The plaintiff offered evidence tending to show that the bridge was defective, and that there was no railing thereon.

Defendants seasonably objected to the evidence being received, on the ground that the paper read in evidence, as a notice, required by statute to the municipal officers of the town or highway surveyor, did not set forth as a defect the want of railing on said bridge. The court overruled the objection and received the evidence. To both of these rulings the defendants seasonably excepted, and also filed a motion for a new trial.

V. B. Wilson and C. B. Roberts, for plaintiff.

Every defect and want of repair in the bridge in question, which was directly or indirectly connected with the injury, including the lack of railing on said bridge, is particularly specified, and all the purposes of the statute requiring said notice are fully complied with. *Chapman* v. *Nobleboro*, 75 Maine, 430; *Miles* v. *Lynn*, 130 Mass. p. 401; *White* v. *Vassalborough*, 82 Maine, p. 75.

All of the defects covered by the evidence in the case are specified in the notice, and, if the defects mentioned in said notice had not existed, the accident would not have happened. "The notice would not be vitiated if it included other places as well as the one in question; and it is none the less a notice of the defect which caused the injury, because it is at the same time a notice of others." *Rogers* v. *Shirley*, 74 Maine, 144.

It is for the jury to determine, upon the whole evidence, whether the proper officer had actual notice of the particular defect causing the accident. Ibid.

It is not material whether the broken plank, or hole in the bridge and the piece of plank placed endwise in the hole and projecting up above the road, was a legal defect or not, for, if the jury found that the lack of "any railing or safeguard of any kind" was a legal defect, and found that the lack of a railing was the legal cause of the injury, and that the hole in the bridge and the upright plank aforesaid were the remote, but not the proximate cause, then the plaintiff, if in the exercise of due care, was entitled to recover. *Spaulding* v. *Winslow*, 74

Maine, p. 534; *Stark* v. *Lancaster*, 57 N. H. 92; *Aldrich* v. *Gorham*, 77 Maine, 288.

And there was abundant evidence in the case that the plaintiff had previously notified one of the municipal officers of the town of the defective condition of the planking on the bridge, as well as of the lack of a railing.

"While towns are under no obligation to erect barriers of any description merely to prevent travelers, in the absence of any dangerous place in close proximity to highways from straying therefrom, they are bound by the spirit of the statute of ways to erect suitable railings on causeways constructed as this was, five or six feet above the natural surface of the earth." *Haskell* v. *New Gloucester*, 70 Maine, p. 306.

This case differs from *Spaulding* v. *Winslow*, 74 Maine, 528, in the fact that where the wagon dropped off and the accident occurred, the lack of railing was a legal defect, of the existence of which the municipal officers of Caribou had previous to the accident been notified by the plaintiff. Counsel also cited: *Morse* v. *Belfast*, 77 Maine, p. 46; *Farrar* v. *Greene*, 32 Maine, 574; *Garmon* v. *Bangor*, 38 Maine, 443.

If the plaintiff had reasonable cause to believe that he could pass the obstruction in safety, and use reasonable care in the attempt, he is entitled to recover. *Mahoney* v. *Metrop. R. R. Co.* 104 Mass. p. 75; *Thomas* v. *W. Un. Tel. Co.* 100 Mass. 156; *Coffin* v. *Palmer*, 162 Mass. p. 196.

Louis C. Stearns and A. L. Lumbert, for defendants.

Written notice: This statute notice means something, as is stated in *Greenleaf* v. *Norridgwock*, 82 Maine, 62, by Mr. Justice WALTON. Such a statute is not directory merely; it is mandatory.

It must be affirmatively set out; positively stated, with nothing left for argument or inference.

By the express terms of the statute, the nature and location of the defect to be set forth are of the defect that caused the injury and none other. And it would seem, in all fairness, that the plaintiff should be bound by his own statement in the written notice of the defect that caused his injury, and should not be

allowed to recover because of some other defect as being the cause of his injury.

The courts have more than once declared the necessity of setting forth the nature and location of the defect causing the injury, in cases of this kind, as will appear from the following citations: *Hubbard* v. *Fayette*, 70 Maine, 121; *Rogers* v. *Shirley*, 74 Maine, 144; *Greenleaf* v. *Norridgwock*, 82 Maine, 62; *Larkin* v. *Boston*, 128 Mass. 521; *Smyth* v. *Bangor*, 72 Maine, 249.

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

FOSTER, J. The plaintiff was thrown from his carriage and injured while passing over a bridge in the defendant town. For this injury he has recovered a verdict for four hundred and fifty dollars. The case is before the law court on motion and exceptions by the town.

A careful examination of the evidence has satisfied us that the verdict is clearly wrong, and that the motion must be sustained.

The bridge was sixteen feet in length and the same in width, without railing, and about five feet above the bed of the stream. Near the northeast corner there was a hole about two or three feet long and a foot or more in width, where the plank had become broken, leaving sufficient space on the south side for teams to pass.

As a warning to travelers, a plank had been thrust into the hole, so that it stood perpendicularly from the bed of the stream, extending four or five feet above the bridge.

The plaintiff's statement is this: "As I drove up on the bridge the plank was stuck up into the hole, and my horse stepped on the first plank that this rested against, and when she stepped on that it tipped over and struck my horse a little and fetched up on the end of the plank. It touched my horse, and my horse sheered out round and ran the forward wheel off between

these planks which were of different lengths, and kept right on going."

There is no evidence that any municipal officer, highway surveyor or road commissioner of the defendant town had twenty-four hours' actual notice of the defect that caused the injury.

The defendant within fourteen days from the time of receiving his injury served notice in writing upon the municipal officers setting forth his claim for damages, and specifying the nature of his injuries, and therein stated that: "The injury was caused by a broken plank or hole in the bridge crossing said brook, and a piece of board placed endwise in the hole and projecting upward above the road several feet, causing my horse to pass on one side of the traveled way throwing my wagon wheel off the end of the bridge, which at that point is narrow, and without any railing or safeguard of any kind."

The evidence is conclusive that the proximate and responsible cause of the injury was the hole in the bridge with the plank standing endwise in it. It was the efficient, proximate cause of the injury. It was not a mere agency through which another defect operated to produce the injury. *Spaulding* v. *Winslow*, 74 Maine, 528. It had more than a casual or accidental connection with the injury. The plaintiff, himself, in his written notice to the municipal officers states that it was the cause of the accident, and he was undoubtedly correct as the evidence clearly shows. In his testimony, in answer to the question, "what was the real cause there that produced the accident?"—his answer is—"I think it was the plank that fell against my horse that started her to shy."

For the existence of this hole, with the plank standing in it, the town was not legally liable; for the evidence absolutely negatives the fact that the town ever had the twenty-four hours' actual notice of this defect as required by statute.

Had this defect not been the real, true, efficient cause of the accident, but merely an agency which induced, influenced the accident, a medium or inducement through which another and independent defect produced the injury, then the case would be different, and the town might be liable for the injury resulting by means of such other and independent defect.

This distinction is clearly laid downin the opinion drawn by Chief Justice PETERS, in *Spaulding* v. *Winslow*, supra, where he says: "Here, then, must be the proper distinction. If the hole or the horse's fright at the hole, was the proximate cause of the injury, the plaintiff cannot recover. If it by chance became merely an agency through which another defect operated to produce the injury, then he can recover."

The same distinction was observed in *Aldrich* v. *Gorham*, 77 Maine, 287, wherein it was held that if any other efficient, independent cause, for which the town is not responsible, contributes directly to produce such injury, then the town is not liable.

The plaintiff, however, contends that the cause of the injury was the lack of a railing on said bridge, and that the want of such railing is sufficiently set forth in the written notice to the municipal officers.

But we are not inclined to take this view of the case. For, as we have distinctly stated, we have no doubt that the proximate, efficient cause of the injury was the hole, with the plank in it which struck the horse and caused it to sheer out and run the wheels off the bridge. This was "the nature and location of the defect which caused such injury" (R. S., c. 18, § 80) as set forth in the written notice to the municipal officers. But the case is barren of any twenty-four hours' actual notice to the town of *this* defect. Consequently, there is no liability attaching to the town, for, by the statute, that is a fact that must be established affirmatively before the plaintiff will be entitled to recover. It is a condition precedent to a right of recovery.

It is a very serious question whether, if it were to be held that the want of a railing was the proximate cause of the accident, the notice in writing to the municipal officers was sufficient to comply with the statute in reference thereto; but upon the sufficiency of this part of the notice it is unnecessary to express any opinion.

Motion sustained. New trial granted.

EDWARD E. CHASE *vs.* INHABITANTS OF SURRY.

Hancock. Opinion February 15, 1896.

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

As a condition precedent to the plaintiff's right to recover, in an action for injuries received on account of a defective highway, the statute declares that he shall within fourteen days after the injury notify the municipal officers of the town "by letter or otherwise, in writing," setting forth his claim for damages, and specifying the nature of his injuries and the nature and location of the defect which caused such injury.

Where such notice is mailed within the fourteen days, but is not actually received till after the expiration of that time, it is not a compliance with the terms of the statute.

ON EXCEPTIONS.

This was an action of case for injury to a horse alleged to have been caused by a defective highway in the defendant town.

The evidence disclosed that in March, 1894, at the annual town meeting, the defendant town elected several highway surveyors, assuming to elect them for the several districts in the town.

The surveyor elected for district No. 4 did not qualify and refused to serve. Whereupon the selectmen verbally appointed one Reuben G. Osgood as highway surveyor for district No. 4. He was duly sworn as appears by the oath recorded in the town records, and acted as highway surveyor within said district for the year 1894.

The other surveyors elected by the town were duly qualified and served during said year, but not within the limits of district No. 4. Within the limits of said district Reuben G. Osgood acted exclusively.

The alleged defect causing the accident and injuries complained of was within the limit of said district.

No twenty-four hours' actual notice of the defect was had by any officer of the town except Reuben G. Osgood. The evidence tended to show and the jury found that he had such notice, and upon notice to him the plaintiff relied. Upon this point the presiding justice instructed the jury as follows:

"It is necessary, then, that one of the municipal officers, and by that is meant selectmen, highway surveyors or road commissioners, had twenty-four hours' actual notice of the defect which caused the injury. It is only claimed that one Reuben G. Osgood had this notice. No testimony has been introduced that any one of the selectmen, or any other of the officers named, had any notice, but that Reuben G. Osgood did have notice. And the first question to arise is, was he a highway surveyor within the meaning of the statute on the 30th day of May, and for twenty-four hours at least prior to that time, or as this was caused as claimed by the plaintiff on the 28th day of May, was he, on the 28th day of May a highway surveyor within the meaning of the language of the statute.

"Now, officers are ordinarily elected, or appointed, in accordance with the requirements of the statute, which points out the method in detail of their election or appointment, and a person who is so elected or so appointed, speaking now of a public officer, is what is known to the law as a de jure officer, that is, one that is legally elected and lawfully acting and holding the office. But I instruct you for the purposes of this case, that the notice which I am speaking about now, namely, the twenty-four hours' prior notice, will be sufficient if it is had by a de facto officer of the town, one of those named in the statute. In other words, that if Reuben G. Osgood on the 28th day of May, was the de facto road commissioner or highway surveyor, that notice to him would be sufficient. Now, you see, it becomes, necessary for me to explain what I mean by the use of that word. I do not instruct you that Reuben G. Osgood was the highway surveyor, or was the de facto highway surveyor at that time. That is a question of fact, if there is any dispute about the facts, for you to pass upon.

"By this term I mean this: A person, who, although not regularly elected or appointed in strict conformity to the requirements of the law, yet has some color of title or right to the office and claims to hold it and performs its duties with the knowledge and acquiescence of the electing or appointing power, so that as to the public such person is held out as a lawful officer.

"And I instruct you that if Reuben G. Osgood was a de facto officer within the meaning of this instruction, which I have given you, then that notice to him would be in compliance with the statute which I have referred to and read.

"I do not mean by this that it is sufficient for a person simply to be acting as an officer, without any right or authority, to assume to be an officer merely because he takes the idea into his head, without the knowledge or the acquiescence of the appointing power of the community. Mere acting as a highway surveyor in and of itself is not sufficient, but it is one of the steps and requisites which help to show whether or not a person was a de facto officer within the meaning of this instruction. And further, if Mr. Reuben G. Osgood, prior to the 28th day of May, was appointed verbally by the selectmen of the town of Surry, either to fill a vacancy or otherwise, and if he then and there or afterwards attempted to qualify himself by taking the oath of office, and then did claim to hold the office of highway surveyor, did perform its duties, did take direction of the work of repair upon the highways within the limits of his territory, held himself out and was permitted and allowed to hold himself out by the selectmen of Surry as the lawful incumbent of that office, then I say that he would be a de facto officer, and the town would be estopped from saying that he was not such an officer to whom the statutory notice might be given.

"I do not know that there is any question about the facts in regard to Reuben G. Osgood's position. There is question about the law raised by the counsel for the defense. I have given it to you and it is your duty to take it for the purposes of this trial."

The defendants contended that the fourteen days' notice of the injury required by the statute was not shown.

The evidence disclosed that the injuries were received on May 30th, 1894. On June 12th, 1894, the plaintiff mailed a notice, sufficient in form to comply with the statute, directed to E. H. Torrey, chairman of selectmen, South Surry, Maine. Torrey was chairman of the selectmen. This notice was mailed at Bluehill on June 12th, and by the regular and ordinary course

of the mail would have reached South Surry on the 13th. The evidence tended to show that the notice did reach the post-office at South Surry on the 13th. But the notice was not received by Mr. Torrey, or any other town officer, until June 14th. The South Surry post-office was three miles from the residence of Mr. Torrey, the chairman of the selectmen, and was the post-office in the town nearest his residence. But the "Surry" post-office, a half a mile further from his residence, was his regular post-office address.

At the time of mailing the notice, the plaintiff did not know Mr. Torrey's post-office address and made inquiries concerning it, and as a result of information received, directed his notice to "South Surry," as the post-office nearest his residence. No reason was shown why the notice could not have been given earlier.

No other fourteen days' notice of injury was shown. Upon this point the presiding justice instructed the jury as follows:

"It is admitted, there is no dispute about it, that upon the 12th day of June, which was within the fourteen days, Mr. Chase mailed a notice sufficient in form and as required by this statute. The form of the notice is not questioned; or that it specified the nature and location of the defect and the nature of the injuries. That was mailed on the 12th day of June, and I give you for the purposes of this trial this instruction:

"That if this notice was mailed by Mr. Chase at such a time that by the usual and ordinary course of mail it would reach a post-office in the town nearest to the municipal officer to whom it was directed, that that would be a sufficient performance of the duty required by statute, even if that notice was not received by the municipal officer to whom it was directed or any other municipal officer, until after the fourteen days.

"Now it is not denied that on the 12th day of June this notice was mailed at Bluehill; it is not denied, if I understand correctly, that this was not received by Mr. Torrey, to whom it was directed, until the 14th day of June; and the 14th day of June would be after the fourteen days after the accident.

"But if it was mailed at Bluehill in season so that by the ordi-

nary and due course of mail it would reach the office to which it was directed, and that office was the nearest one to the place of residence of the municipal officer to whom it was directed, I instruct you that that would be a sufficient compliance. And as to this matter, while there is much question of law between the parties there is no question, as I understand, of facts whatever; and if the law is incorrectly given upon this question the counsel have a method, as I have before said, well known to them whereby it may be rectified."

The verdict was for the plaintiff.

To these rulings and instructions the defendants took exceptions.

A. W. King, for plaintiff.

A de facto highway surveyor is an actual highway surveyor; a highway surveyor in fact. So far as his acts, or his occupancy of the office, concern the rights or interests of the public or individuals, he is regarded by the law as the officer he appears and assumes to be, and, with color of title, exercises the duties of. *Brown* v. *Lunt*, 37 Maine, 423; *Cushing* v. *Frankfort*, 57 Maine, 541; *State* v. *Carroll*, 38 Conn. 449; *Hooper* v. *Goodwin*, 48 Maine, 79.

The purpose of the statute in requiring this twenty-four hours' actual notice to be proved is to restrict rights of action, against towns for damages for such injuries, to cases where the person or persons, whose duty it is to keep highways in safe condition have with knowledge of a defect, neglected their duty for at least twenty-four hours.

Osgood was the man whose duty it was to keep this road in repair. He had knowledge of the defect twenty-four hours before the injury. The town could have been no more protected, if his appointment had been in writing instead of verbal, had he been a de jure instead of a de facto officer.

Counsel also cited: Dill. Mun. Corp. §§ 275, 531 n, 892 n; R. S., c. 3, § 14; *Belfast* v. *Morrill*, 65 Maine, 580.

Fourteen days' written notice: The primary object of the statute was to limit the time when the claimant should make the detailed statement rather than the time of its receipt by the

specified officer. The legislature provided first that the claimant, within the fourteen days, should "notify" the required officers, and it then provided the manner or means of notice, viz: "by letter or otherwise, in writing." When the legislature fixed the manner and means of the notice to be "by letter," it intended that the term "letter," should have its usual and generally accepted signification, to wit, a communication by mail in the ordinary way.

Words are to be understood as used in their customary signification, unless from the context a different meaning is apparent. *Union Ins. Co.* v. *Greenleaf*, 64 Maine, p. 129.

The entire expression "by letter or otherwise, in writing" shows that the term "letter" as used there imports something more than a mere writing, else why the expression "or otherwise in writing."

Our contention is that the legislature imposed upon a claimant for damages, as a condition precedent to his right of action against the town, the duty, within fourteen days after his injury, of 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, and of sending that detailed statement by mail as a letter properly directed to the specified officer.

The regularity and safety with which letters are transported by the mails are such that the law raises a presumption that they are duly received by the person to whom they are properly addressed and sent.

It was competent for the legislature to provide, as the means of sending the notice in such cases as this, the mail. Publication is very commonly provided by the legislature as a means of notice. There is more certainty that a person will actually receive a notice sent by mail than that he will have actual notice of a publication.

If the provision had been that the claimant should notify the specified officer by a certain statement in writing "sent by mail" it would not be contended that proof should be required that the statement sent was actually received within the time.

The language of the statute should be construed to mean

nothing more than that the letter, containing the proper statements, should be sent properly addressed by mail within the time.

L. B. Deasy, for defendants.

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

FOSTER J. This was an action for an injury to the plaintiff's horse alleged to have been caused by a defective highway in the defendant town.

The verdict was for the plaintiff and the town brings the case before the law court on two exceptions.

I. The first relates to the instruction given to the jury in relation to the twenty-four hours' actual notice to a highway surveyor acting by appointment as an officer de facto, and not as an officer de jure.

Although this question has been elaborately discussed by the counsel on each side, it becomes unnecessary to consider it here, from the result to which we have arrived in reference to the other exception.

II. No notice of the injury was received by any town officer for more than fourteen days after the accident occurred. It is admitted that the written notice was not received until after the expiration of the fourteen days allowed by statute (R. S., c. 18, § 80) for giving notice to town officers. But the plaintiff contends that he mailed a notice in writing directed to the chairman of the municipal officers of the defendant town, postage prepaid, and properly addressed, within the fourteen days and that such mailing is a legal notification within the purview of the statute, whether actually received by the town officers or not.

Upon this point the presiding justice instructed the jury: "That if this notice was mailed by Mr. Chase at such a time that by the usual and ordinary course of mail it would reach a post-office in the town nearest to the municipal officer to whom it was directed, that that would be a sufficient performance of the duty required by statute, even if that notice was not received by the municipal officer to whom it was directed, or any other municipal officer, until after the fourteen days."

As a condition precedent to the plaintiff's right to recover, the statute of the State declares that he shall within fourteen days after the injury notify the municipal officers of the town "by letter or otherwise, in writing," setting forth his claim for damages, and specifying the nature of his injuries and the nature and location of the defect which caused such injury.

Was the mailing of the notice, which was within the fourteen days, and its reception after fourteen days, from the time of receiving the injury, a compliance with the statute?

We think it was not.

The statute expressly provides the time in which such notice may be given, and also the manner of giving it. The time is fixed by the words "within fourteen days thereafter." The manner is determined by the words, "by letter or otherwise, in writing." The words "by letter," etc., relate to the manner and not to the time of giving notice.

The duty imposed by statute upon the party injured is to "notify" one of the municipal officers of the town, and this duty is imperative if he seeks to recover of such town. It is not directory, but mandatory. To "notify" is "to make known." The statute requires that the municipal officers should have information, or knowledge within the time stated. It requires the party injured to communicate that information, or knowledge; and it is not enough for him to write a notice, however formal; it is not enough for him to mail it, even within the fourteen days. The writing and mailing a notice within the time is not notifying the officers of the town as the statute requires.

True, the deposit of a letter, properly addressed and stamped, in the post-office, may be prima facie evidence of its receipt by the addressee by due course of mail, for the law assumes that government officers do their duty. *Huntley* v. *Whittier*, 105 Mass. 391; *Rosenthal* v. *Walker*, 111 U. S., 185, 193; *Briggs* v. *Hervey*, 130 Mass. 186; although this doctrine is limited by some decisions to matter expressly authorized by statute, or to the law merchant. *Groton* v. *Lancaster*, 16 Mass. 110; *Freeman* v. *Morey*, 45 Maine, 50; *Bank* v. *Crafts*, 4 Allen, 447. However that may be, it is immaterial in this case, as it is shown

that the notice was not, as a matter of fact, received until after the expiration of the fourteen days, and the rule of presumptive evidence applicable to cases falling within the peculiar doctrine of the law merchant, and those expressly authorized by statute, as in the pauper law, does not apply in the case at bar. *Shea* v. *Mass. Benefit Association*, 160 Mass. 289, 295.

There is some analogy between this case and cases where a demand must be made or notice given. In such cases it is held that merely mailing the demand or notice would not be a communication to the person addressed and would be ineffectual unless it was shown that the same was received. *Castner* v. *Farmers Ins. Co.* 50 Mich. 273, 277.

It is for a wise purpose that the law requires a notice of injury upon the highway to be given the officers of the town. It is to enable the town to investigate the circumstances while the facts are yet fresh in the memory of witnesses, as well as to protect itself by providing for the enforcement of its rights against other parties who may be liable over to the town for causing the defect.

Exception sustained.

LUCY P. CURTIS, Administratrix, *vs.* EUGENE NASH.

Washington. Opinion February 15, 1896.

Notes. Payment. Indorsement. Limitations. Nonsuit. Practice.

It is payment upon a promissory note, and not indorsement of such payment, that operates as a renewal of the promise, and removes the bar of the statute of limitations.

Evidence of application of payments may be shown either by direct testimony, or it may be implied from circumstances, if sufficient to satisfy the jury.

If there is any evidence which, if believed by the jury, would authorize a verdict for the plaintiff, a nonsuit should not be ordered.

ON EXCEPTIONS.

This was an action of assumpsit on a promissory note. Plea, general issue and the statutes of limitations. At the conclusion of the plaintiff's evidence, on the defendant's motion, the plaintiff was ordered to become nonsuit and thereupon took exceptions.

The case is sufficiently stated in the opinion.

Chas. Peabody, for plaintiff.

H. H. Gray, for defendant.

The only evidence offered as to payment is that of Wilmot Plummer: "Well I heard Mr. Eugene Nash say that he had some bills, little bills, and he would get them all together and come down and have it indorsed on the note."

There was no appropriation, no payment. At most, only a naked statement of defendant that he would do a thing which he never did. If there were any agreement it was executory and something further was to be done. There was no adjustment of accounts, neither was the amount of the bill settled, nor known so far as it appears. The note still existed as it stood before, and could have been transferred and the account assigned and collected. The parties might never have agreed as to the bills nor the amount. No evidence that Mr. Curtis assented to defendant's statement.

There must be the concurring intention of the party making and the party receiving payment. *Cushing* v. *Wyman*, 44 Maine, 121.

The agreement was an executory one and never executed. *Noble* v. *Edes*, 51 Maine, 34; *Weeks* v. *Elliott*, 33 Maine, 488; *Cary* v. *Bancroft*, 14 Pick, 315; *Winchester* v. *Sibley*, 132 Mass. 273; *Cushing* v. *Wyman*, supra; *Richardson* v. *Cooper*, 25 Maine, 450. The right of appropriation by the creditor should be exercised within a reasonable time after payment and by performance of some act which indicates an intention to appropriate. *Starrett* v. *Barber*, 20 Maine, 457.

Appropriation cannot be made by creditor at a time when a controversy has arisen thereon. *Milliken* v. *Tufts*, 31 Maine, 497.

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

FOSTER J. Action of assumpsit on a promissory note dated March 21, 1877, with several indorsements on the back of the same. The last indorsement was for fourteen dollars, dated February 22, 1884.

The plaintiff's intestate died May 30, 1890, more than six years after the last indorsement.

The defense is the statute of limitations.

To this the plaintiff replies that payments had been made by the defendant within the six years, but not indorsed upon the note. Upon the plaintiff's evidence a nonsuit was ordered, and exceptions taken.

If there was any evidence which, if believed by the jury, would authorize a verdict for the plaintiff, then a nonsuit should not have been ordered. It is payment, not indorsement, that operates as a renewal of the promise, and removes the statutory bar. *Egery* v. *Decrew*, 53 Maine, 392; *Evans* v. *Smith*, 34 Maine, 33; *Manson* v. *Lancey*, 84 Maine, 380, 382.

We think there was some evidence tending to prove payment on the part of the defendant. He had worked hauling wood, farming, planting a few potatoes, and making a garden for Curtis, plaintiff's intestate, in 1889, and the evidence shows that he stated to Curtis "that he had some other bills, little bills, and he would get them all together and come down and have it indorsed on the note." He had also worked out a road tax for Curtis that same year, amounting to $6.31.

If this labor was understood by the parties when it was performed to be applied on the note, or to go in part payment thereof, then it would so operate, whether it was evidenced by any written indorsement or not. The indorsement would be evidence only, but this fact may be established by other evidence, and if it is so established, it is equally effective to save the case from the operation of the statute. The evidence of application of payments may be shown either by direct testimony, or it may be implied from circumstances, if sufficient to satisfy the jury. *Foster* v. *Inhab. of Dixfield*, 18 Maine, 380. Here was evidence of more or less weight tending to show payment upon the note by the defendant within the period of six years from the last indorsement. It was not evidence of an executory promise, but of executed labor. We think there was evidence that should have been submitted to the jury. It was withdrawn from them, and the entry must be,

Exception sustained.

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

Waldo. Opinion February 15, 1896.

Insurance. Legal and Equitable Estates.

Real estate charged with the payment of a legacy under a will was conveyed while this lien for the payment of the legacy was still upon it. The purchaser procured an insurance in his own name upon the property. The buildings were afterwards destroyed and the insurance paid to the purchaser.

Held; that the purchaser was not accountable for the insurance to the party entitled to the legacy.

The contract of insurance is one of indemnity only, does not run with the land, and does not indemnify any one having only an interest as mortgagor, redemptioner, attaching creditor or otherwise.

The holder of a mere equitable lien, cannot compel the owner of the legal estate to account for the rents and profits received by him while occupying the premises.

See *Whitehouse* v. *Cargill*, 86 Maine, 60.

On REPORT.

Bill in equity, heard on bill, answer, demurrer, and agreed statement of facts.

Agreed Statement of Facts.

"Ambrose A. Whitehouse, father of the plaintiff, devised to his son, Preston Whitehouse, certain real estate, and directed said Preston Whitehouse to pay the plaintiff five hundred dollars when she became eighteen years of age.

"Ambrose A. Whitehouse died on the tenth day of November, 1871, and his will was duly admitted to probate.

"On the second Tuesday of September, 1873, Ambrose P. Cargill, this defendant, was appointed guardian of the plaintiff and continued to be her legal guardian till February 28th, 1890, when she arrived at the age of twenty-one years.

"On the second day of October, 1876, the defendant bought said real estate of Preston Whitehouse, taking from him a warranty deed of the same, and occupied the real estate, and received the income thereof, from that date till its sale by the master in chancery, as hereinafter stated.

"On the fifteenth day of October, 1891, the defendant procured in his own name an insurance of five hundred dollars on

the store which was a part of said real estate. Said store was burned on the nineteenth day of January, 1892, and the defendant collected said insurance of five hundred dollars.

"On the sixteenth day of August, 1892, the plaintiff brought a bill in equity against this defendant, which was entered at the October term, 1892, of this court, and at the January term of this court, 1893, was reported to the Law Court by agreement. That case, as reported in 86 Maine, 60, is referred to and made a part of this agreed statement.

"At the January term of this court, 1894, a master in chancery was appointed to sell the land. The master sold the land in accordance with the decree of the court for one hundred and sixty dollars, and made his report at the April term, 1894, of this court. The expenses of sale were seventeen dollars, leaving one hundred and forty-three dollars, net, which the master paid to the plaintiff. The defendant paid the costs in said action, as taxed by the clerk, amounting to forty-nine dollars and ninety-three cents.

"No decree has been filed since the master's report, and no further proceedings have been had in said case. Copy of the writ and bill in equity and pleadings in this case are made a part of this agreement."

J. W. Knowlton, for plaintiff.

R. F. Dunton, for defendant.

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

FOSTER, J. The father of the plaintiff devised certain real estate to his son, and in his will directed that the son pay to the plaintiff five hundred dollars when she should become twenty-one years of age.

The father died November 10, 1871, and his will was duly admitted to probate.

The defendant was appointed guardian of the plaintiff in 1873, and continued to be her legal guardian till she arrived at the age of twenty-one years in 1890.

On October 2d, 1876, the son conveyed by warranty deed the real estate to this defendant.

This real estate, upon a former bill in equity, brought by the plaintiff against the defendant, was charged with the payment of said legacy, (*Whitehouse* v. *Cargill*, 86 Maine, 60,) and by a decree of the court was sold by the master and the proceeds, amounting to $143, was paid to the plaintiff.

After the termination of defendant's guardianship he procured an insurance of five hundred dollars on the store which was a part of the real estate conveyed to him by his warranty deed from the testator's son. The store was burned and defendant collected the insurance.

The present case raises two questions: (1) Is the defendant accountable to the plaintiff for the insurance which he procured in his own name, and has collected? (2) Is he accountable to the plaintiff for the rents and profits of the real estate prior to the sale by the master?

Both questions we think must be answered in the negative.

When the real estate was sold by the master and the proceeds paid to the plaintiff, her remedy against this defendant was exhausted, unless there might be a remedy upon the guardian's bond.

The nature of the plaintiff's claim upon the real estate was a lien thereon for the payment of her legacy, enforceable in equity. *Merritt* v. *Bucknam*, 77 Maine, 253; *Same* v. *Same*, 78 Maine, 504; *Taft* v. *Morse*, 4 Met. 523; *Thayer* v. *Finnegan*, 134 Mass. 62.

The contract of insurance is one of indemnity only. The defendant had an insurable interest, and could recover only to the extent of his loss. The contract of insurance does not run with the land, and is an agreement to indemnify the assured against any loss which he may sustain, and not any loss incurred by another having an interest as mortgager, redemptioner, attaching creditor or otherwise. *Cushing* v. *Thompson*, 34 Maine, 496; *White* v. *Brown*, 2 Cush. 412; *Donnell* v. *Donnell*, 86 Maine, 518.

There was no privity of contract in fact or law between the plaintiff and the defendant by which this insurance, placed by the defendant at his own expense and upon his interest, should be held under the lien that existed upon the real estate. *Donnell* v. *Donnell*, supra; *McIntire* v. *Plaisted*, 68 Maine, 363; *Cushing* v. *Thompson*, 34 Maine, 496; *White* v. *Brown*, supra.

The plaintiff had an equitable lien upon the estate, a charge upon it rather than any title to or legal estate in it. *Taft* v. *Morse*, 4 Met. 523; *Merritt* v. *Bucknam*, 78 Maine, 504, 507; *Bailey* v. *Ekins*, 7 Ves. 323; *Gardner* v. *Gardner*, 3 Mason, 178.

The holder of an equitable lien, with no legal estate, cannot call the owner of the legal estate to account for the rents and profits received by him while occupying the premises.

Bill dismissed.

FRANKLIN LAWRY *vs.* STILLMAN J. LAWRY.

Penobscot. Opinion February 15, 1896.

Trespass. Possession. Remainder-man. Amendment. Practice.

Trespass quare clausum being a possessory action, it is necessary to show possession in the plaintiff, and the injury committed.

The exception to the rule is where it may be maintained by the owner of land for an injury to the freehold, when it is in the occupation of a tenant at will.

A remainder-man who is not entitled to possession cannot maintain such action.

An amendment changing a declaration from quare clausum to case is not allowable.

ON REPORT.

This was action of quare clausum fregit.

The trespass complained of consisted in cutting standing trees on a lot of land which the plaintiff owned in remainder, the widow of his father having a life estate therein as her dower. The question was whether the action can be maintained by the plaintiff whose interest is only in remainder, a remainder-man. The parties agreed that "if it cannot be, then the action is to be

nonsuited, unless the full court determine that an amendment may be made by adding a count in case, and if an amendment may be thus made, the court to determine, whether it shall be allowed and upon what terms.

"If the case in the present form cannot be maintained and the court do not see fit to allow an amendment, the plaintiff shall be nonsuited. If it can be maintained in its present form, or by amendments, and the court allow the amendment, then the action to stand for trial."

T. W. Vose, for plaintiff.

P. H. Gillin, for defendant.

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

FOSTER, J. Trespass quare clausum for cutting standing trees on a lot of land the plaintiff owned in remainder, the widow of his father having a life estate therein as her dower.

The question is, whether this action can be maintained in its present form by the plaintiff whose interest is only that of remainder-man. We think it cannot.

Trespass quare clausum is a possessory action. To maintain it, it is necessary to show possession in the plaintiff and the injury committed. *Jones* v. *Leeman*, 69 Maine, 489, and cases cited; *Bartlett* v. *Perkins*, 13 Maine, 87; 1 Ch. Pl. 175*.

Though quare clausum may be maintained by the owner of the land for an injury to the freehold, when it is in the occupation of a tenant at will, (*Bartlett* v. *Perkins*, 13 Maine, 87; *Davis* v. *Nash*, 32 Maine 411; *Kimball* v. *Sumner*, 62 Maine, 305, 309; *Starr* v. *Jackson*, 11 Mass. 519,) yet we do not think this doctrine is to be extended so as to apply to the remainder-man who is not entitled to possession. It has been held that such an action will not lie by the reversioner for waste committed by a person acting under authority of the tenant for life. *Shattuck* v. *Gragg*, 23 Pick. 88. But the reversioner or remainder-man is not without remedy when the injury is of a permanent character affecting the inheritance, for an action

would lie, either on the case or for waste. *Stetson* v. *Day*, 51 Maine, 434; *Shattuck* v. *Gragg*, supra.

The amendment changing the declaration to case ought not to be allowed.

True, the statute has abolished the distinction between actions of trespass and trespass on the case. But this relates to the distinction in form only. In cases where the distinction is really of substance, rather than of form, the statute is inapplicable. *Place* v. *Brann*, 77 Maine, 342; *Sawyer* v. *Goodwin*, 34 Maine, 419; *Kelly* v. *Bragg*, 76 Maine, 207.

Such an amendment is more than a matter of form. It changes the nature of the action. *Sawyer* v. *Goodwin*, supra. This is not allowable. *Milliken* v. *Whitehouse*, 49 Maine, 527; *Farmer* v. *Portland*, 63 Maine, 46, 48.

It will not be wise to depart too far from the established rules of pleading. Constant departures from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them. *Shorey* v. *Chandler*, 80 Maine, 409, 411.

Plaintiff nonsuit.

FRANK SMITH *vs.* WILLIAM MINNICK.

Cumberland. Opinion February 17, 1896.

Auditor. R. S., c. 82, § 69.

Where the plaintiff sues upon an account annexed for work done and materials furnished, and the defense set up is that there was a special contract for a specific sum, the auditor is authorized to determine whether or not the work was done and materials furnished under such contract.

An auditor is authorized to consider and determine such questions of fact as are necessarily involved in stating the accounts and which are essential to a correct determination of the matters submitted by the court.

ON EXCEPTIONS.

This was an action of assumpsit on account annexed to recover the sum of $381.82, balance claimed to be due for labor and materials furnished by plaintiff in building a house for defendant

in Westbrook in the summer of 1893. The case was tried in the Superior Court for Cumberland county.

Plaintiff declared on account annexed in usual form with itemized statement of labor and materials.

The action was sent to an auditor by the court under a commission containing the usual clause, "to hear the parties and examine the vouchers and proof and to state the accounts in said case and make a report thereof to this court."

After hearing the parties and their witnesses, the auditor stated the accounts annexed to the writ as required by statute, and reported the same to the court.

At the trial of the case, among the items of evidence offered by the plaintiff was so much of the auditor's report as stated the accounts.

The auditor further found and reported to the court as follows:

"From all the evidence in the case, I find that there was a special verbal contract between the parties, by which the plaintiff agreed to build the house and ell according to the plan upon which it was in fact built, for the sum of $1450, and was to receive pay for such extra labor and material, as he might furnish in making changes or additions to such plan after agreement therefor with the defendant, and that such changes and additions as were so made, amounted to $130.50, making of total for contract price and extras of $1580.50.

"Upon all the evidence in the case, I find that the house and ell described in plaintiff's writ, was built under a contract, as claimed by the defendant, and that plaintiff was entitled to receive therefor the contract price of $1450, and the amount of his bill of extras of $130.50, amounting to $1580.50, and that he has in fact received by payments to or for him the sum of $1778.10, and accordingly, I find and so report, that at the date of the writ in this case, there was nothing due from the defendant to the plaintiff."

At the trial of the case before the jury, the defendant offered the foregoing portions of the auditor's report in evidence, wherein he found that there was a special verbal contract between the parties for building said house and ell, etc.

The plaintiff objected to the admission of the same in evidence, upon the ground that all said matters were matters in defense and went in bar of plaintiff's suit, and were beyond the power and authority of the auditor, as conferred upon him by the statute and specified in the commission to him.

The presiding justice admitted the same, subject to the plaintiff's objections.

To all these admissions and rulings the plaintiff excepted.

Verdict was for the defendant.

M. P. Frank and P. J. Larrabee, for plaintiff.

William Lyons, for defendant.

SITTING: WALTON, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. By R. S., c. 82, § 69, the court, in proper cases "may appoint one or more auditors to hear the parties and their testimony, state the accounts, and make a report to the court upon such matters therein as may be ordered by the court."

It is within the power of an auditor to hear the parties and such testimony as may be presented bearing upon the issues involved; to summon witnesses and compel their attendance.

As incident to his duty he has power to pass upon the facts in controversy, and settle them so far as may be necessary to ascertain the correctness of any debit or credit claimed by either party. *Howard* v. *Kimball*, 65 Maine, 308, 328. He is authorized to consider and determine such questions of fact as are necessarily involved in stating the accounts and which are essential to a correct determination of the matters submitted by the court. In doing this he may, if it becomes necessary, determine whether or not there was a special agreement between the parties in reference to the subject matter even though such agreement, if found, would defeat a right of action, or defense.

Thus, an auditor is authorized to consider and determine whether an individual was the authorized agent of one of the parties, when the action is upon an account for goods sold

(*Locke* v. *Bennett*, 7 Cush. 445); to allow or disallow notes or vouchers which enter the account between parties (*Barnard* v. *Stevens*, 11 Met. 297); to determine whether a corporation was "in funds" where it had accepted a draft conditionally (*Gould* v. *Norfolk Lead Co.* 9 Cush. 338); or, whether there was a special agreement, in a suit to redeem a mortgage, between mortgagor and mortgagee, to treat the principal and accrued interest as a new principal upon which interest should thereafter be computed (*Quimby* v. *Cook*, 10 Allen, 32); or, in a suit to enforce a lien, to determine whether petitioner's certificate was seasonably filed, whether he has wilfully claimed more than was due, and all matters of fact bearing upon the question of the lien (*Corbett* v. *Greenlaw*, 117 Mass. 167).

Where the plaintiff sues upon an account annexed for work done and materials furnished, and the defense set up is that there was a special contract for a specific sum, the auditor is authorized to determine whether or not the work was done and materials furnished under such contract. *Lowe* v. *Pimental*, 115 Mass. 44.

In the case at bar, the suit was upon an itemized account for labor done and materials furnished and the defense was that there was a special contract under which the labor was performed and materials furnished. The auditor so found, and that at the date of the plaintiff's writ there was nothing due from the defendant to the plaintiff.

This was clearly within his province, notwithstanding it defeated the plaintiff's right to recover.

Exceptions overruled.

BENJAMIN L. FLANDERS *vs.* ORLANDO COBB.

Somerset. Opinion February 17, 1896.

Practice. Amendment. Assumpsit. Deceit. Action.

An amendment of a declaration which changes the nature of the action from assumpsit to tort is unauthorized.

The case of *Rand* v. *Webber*, 64 Maine, 191, was never intended to authorize amendments to the extent of allowing the form or nature of the action to be changed.

Plaintiff and defendant traded horses, and defendant turned out a negotiable promissory note signed by a third party, as boot between horses, and defendant indorsed the same in blank. The note was not paid when it became due, nor was the defendant seasonably notified so as to hold him as an indorser, and the plaintiff claimed to recover against the defendant in an action of deceit for false representations made by defendant in reference to the financial responsibility of the maker of the note.

Held; That the evidence was such as to warrant the court in coming to the conclusion that plaintiff was not deceived by the alleged misrepresentations and that the action could not be maintained.

Rand v. *Webber*, 64 Maine, 191, distinguished.

ON EXCEPTIONS AND REPORT.

This was an action of assumpsit on an account annexed, and the following special count:

"Also, for that at said Hartland on November 23rd, A. D., 1892, the plaintiff was then and there the owner and possessor of a certain horse of great value, to wit, of the value of one hundred and seventy-five dollars, and the said defendant being then and there the owner of a certain other horse of the value, to wit, of one hundred dollars, it was then and there agreed between said plaintiff and defendant that they should exchange said horses and that the defendant should pay to the plaintiff the sum of seventy-five dollars difference between said horses. And the said defendant being then and there the owner and possessor of a certain promissory note dated September 21, A. D., 1892, signed by one Joseph Frost, whereby the said Joseph Frost for value received promised the said Orlando Cobb to pay to him or his order the sum of eighty dollars with interest in one year from

the date of said note. And the said defendant then and there intending to deceive and defraud the plaintiff then and there falsely and fraudulently represented to the plaintiff and then and there promised the plaintiff that the said note was perfectly good; that the said Joseph Frost, who was then and there unknown to the plaintiff was then and there a man owning considerable property and responsible and good for the payment of said note and that the said Joseph Frost would pay said note at its maturity. And the said plaintiff relying upon the said promises so made by the defendant to the plaintiff as aforesaid did then and there exchange said horses with the defendant, and then and there received of the defendant the defendant's said horse and the aforesaid promissory note, and gave in exchange therefor the plaintiff's said horse and the sum of five dollars and eighty-two cents, the sum last named being the then difference between the said agreed boot money of seventy-five dollars and the amount of the principal and interest then accrued on said note.

"And the plaintiff avers that the said Joseph Frost on said November 23rd, 1892, was not then and there a man owning considerable property and responsible and good for the payment of said note and that the said note was not then and there perfectly good, and that the said Joseph Frost did not pay said note at its maturity although requested and that the said Joseph Frost on said November 23rd, and long before was and ever since has been utterly worthless and insolvent, all of which was then and there unknown to the plaintiff."

At the second term, the following amendment was allowed after striking out the foregoing counts. The amendment was allowed against the defendant's objections, and to granting which he took exceptions:

(Amended Declaration.)

"For that at said Hartland on November twenty-third, A. D., 1892, the plaintiff was then and there the owner and possessor of a certain horse of great value, to wit: of the value of one hundred and seventy-five dollars and the said defendant then and there being the owner of a certain other horse of the value

of one hundred dollars, it was then and there agreed between the plaintiff and defendant that they should exchange said horses and that the defendant should pay to plaintiff the sum of seventy-five dollars difference or boot between said horses. And the said defendant being then and there the owner and possessor of a certain promissory note dated September 21st, 1892, signed by one Joseph Frost, whereby the said Joseph Frost for value received promised the said Orlando Cobb to pay to him or his order the sum of eighty dollars with interest in one year from the date of said note, and the said defendant then and there intending to deceive and defraud the plaintiff then and there falsely and fraudulently represented to the plaintiff that the said note was perfectly good, that the said Joseph Frost who was then and there unknown to the plaintiff was then and there a man owning considerable property, a farm near Harmony village and a stage line, and responsible and good for the payment of said note and that the said Joseph Frost would pay said note at its maturity. And the said plaintiff relying upon the said false and fraudulent representations so made by the defendant to the plaintiff as aforesaid did then and there exchange said horses with the defendant and then and there received of the defendant the defendant's said horse and the aforesaid promissory note and then and there gave in exchange therefor the plaintiff's said horse and the sum of five dollars and eighty-two cents, the sum last named being the then difference between the said agreed boot money of seventy-five dollars and the amount of the principal and interest then accrued on said note. And the plaintiff avers that said Joseph Frost on November 23rd, 1892, was not then and there a man owning considerable property, a farm near Harmony village and a stage line, and was not responsible and good for the payment of said note and that the said note was not then and there perfectly good and that the said Joseph Frost did not pay said note at its maturity although requested and that said Joseph Frost on said November 23rd, 1892, and long before said last named date was and ever since has been utterly worthless and insolvent, all of which was then and there unknown to the plaintiff but was at the time of said representations well known

to the defendant. And so the said defendant by means of his said false affirmation, hath greatly injured and defrauded the plaintiff."

After the testimony in the case was taken out, it was by agreement of the parties submitted to the full court for decision upon so much of the evidence as was competent and admissible, the law court to render such judgment as the legal rights of the parties might require.

The case is stated in the opinion.

E. N. Merrill and G. W. Gower, for plaintiff.

Courts are very liberal in the allowance of amendments, where the "persons and case can be rightly understood." *Solon* v. *Perry*, 54 Maine, 493.

"No process or proceeding in courts of justice shall be abated, arrested, or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood." Such errors and mistakes may be amended on motion of either party, on such terms as the court orders. R. S., c. 82, § 10. An amendment should be allowed or disallowed, according as it is, or is not, in the furtherance of justice. There can be no other rule to guide the court in exercising its discretionary power in such cases. *Hayford* v. *Everett*, 68 Maine, 505.

Cases of amendment: In *Perrin* v. *Keene*, 19 Maine, 358, K. and W., late partners, dissolved the copartnership. W., without authority, then gave a firm note for a firm indebtedness. In an action on the note, it was held, that the note being unauthorized, was not payment, and plaintiff was allowed to amend by declaring on the original debt, being the same subject matter. *Haynes* v. *Jackson*, 66 Maine, 93, an action of trespass, q. c., an amendment was allowed describing the close as situate in a different town than that alleged. In *Cameron* v. *Tyler*, 71 Maine, 27, an amendment was allowed changing a capias writ to a capias or attachment. *Walker* v. *Fletcher*, 74 Maine, 142, was an action of case for the negligent burning of property. An amendment was allowed substituting "birch," for "ash" lumber.

In *Pullen* v. *Hutchinson*, 25 Maine, 252, the court said: "A

declaration so defective that it would exhibit no cause of action, may be cured by an amendment without introducing a new cause of action. In *Rand* v. *Webber*, 64 Maine, 19, Webber sold Rand some land. A ten acre piece was omitted, either by mistake or fraud. Rand brought an action of assumpsit to recover back so much of the purchase money as said omitted parcel was actually worth.

The court held that assumpsit could not be maintained, and allowed plaintiff "to have his writ amended and his pleadings reformed conformably to an action of tort, by paying costs and recovering none up to the date of the amendment."

The above named cases are not cited as authorities directly, for the question we are discussing, but as illustrating the departure from the original declaration allowed by the courts. The case of *Rand* v. *Webber*, however, we regard as an authority for our position, and as conclusive.

The amendment in this case introduces no new cause of action. It is for the same cause of action set out in the original writ and declaration. The original declaration definitely informs defendant of the charge brought against him, viz: "And the said defendant then and there intending to deceive and defraud the plaintiff then and there falsely and fraudulently represented to the plaintiff, . . . that the said note was perfectly good; that the said Joseph Frost who was then and there unknown to the plaintiff was then and there a man owning considerable property and responsible and good for the payment of said note and that said Joseph Frost would pay said note at its maturity," etc.

S. S. Brown, for defendant.

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

FOSTER, J. The plaintiff and defendant traded horses. The defendant was to pay seventy-five dollars to the plaintiff as the difference between horses, and in lieu of the money turned out a negotiable promissory note of eighty dollars, which he held against one Joseph Frost. The note was not then due, and the defendant indorsed it in blank. The note was not paid at

maturity, nor was the defendant seasonably notified so as to hold him as an indorser.

The plaintiff claims that while the trade was going on the defendant represented that the maker of the note was a man of means and financially responsible, and that these statements were false and fraudulent, and made with intention of deceiving him, and that he relied upon them and was thereby deceived and injured.

On the other hand, the defendant asserts that he made no misrepresentations; that what he said was but the honest expression of an opinion; that the plaintiff neglected seasonably to notify him so as to hold him as an indorser of the note, and that in consequence of that neglect this suit was brought in which he seeks to collect his debt.

The action was originally framed in assumpsit, the declaration containing three counts. At the second term the presiding justice allowed an amendment of the writ by striking out the three counts in assumpsit and substituting therefor a count in case for deceit. To the allowance of this amendment the defendant's counsel seasonably objected, on the ground that it changed the form as well as introduced a new cause of action.

The case is before us upon exceptions as well as report.

I. The first question, and one of vital importance, is, whether this amendment was allowable.

We think it was not.

Our attention has been called to no case under our system of practice that goes to the extent of authorizing the court to allow an amendment which changes the nature of the action from assumpsit to tort. The case of *Rand* v. *Webber*, 64 Maine, 191, was never intended to authorize amendments to the extent of allowing the form or nature of the action to be changed. Upon examination of the facts in that case, it will be found that the amendment there was but the correction of an error in the writ, the correction of an amendment (improperly made) to the original declaration, so as to restore the declaration as originally framed and prevent a change in the nature of the action from what seemed to be its form as originally drawn, and to escape

the statute of limitations that might be pleaded to another suit. The original count was more in the nature of deceit than assumpsit, and the last amendment was but a restoration to its former self — the spirit taking on form "in the furtherance of justice." "As the special count stood," say the court, "it could easily be amended so as to have been an action of deceit." In *Dodge* v. *Haskell*, 69 Maine, 429, 434, this court, in referring to *Rand* v. *Webber*, supra, remarked that it "has been erroneously supposed to allow an amendment to the extent of allowing the nature of the action to be changed. That case merely allowed a correction of the writ, already improvidently and improperly amended, that such a result might be avoided."

In the present case, the change is absolute from assumpsit to an action on the case for deceit. It is not a restoration of form as originally drawn. The cause of action, as originally stated, was clearly and distinctly set forth in appropriate counts based upon an alleged promise. There was no defect to be amended, or correction of the cause of action as originally stated, as in *Rand* v. *Webber*, supra. The amendment was not the correction of a defect in pleading, but the addition of a cause of action not set forth in the original declaration, as well as a change of the nature of the cause of action. This was clearly wrong. While the greatest liberality is allowed in the matter of amendments, the authorities are abundant and uniform, that no new cause of action can be introduced by way of amendment against the objection of the defendant.

In *Houghton* v. *Stowell*, 28 Maine, 215, it was held that a change in the form of action from debt to case was unauthorized, and that the court had no authority to allow it.

A fortiori, in the present case, would it be unauthorized to allow an amendment which changes the nature of the action from assumpsit to an action on the case for deceit. The plea of the defendant in the former case is "never promised," while in the latter, it is "not guilty." At common law the court had no power to allow an amendment which introduced a new cause of action. Com. Law Pl. § 142. Nor has this been extended by statute in this State. *Farmer* v. *Portland*, 63 Maine, 46;

Cooper v. *Waldron*, 50 Maine, 80. Neither can counts which are in form ex contractu be joined with those in form ex delicto. *Corbett* v. *Packinton*, 6 Barn. & Cress. 268; 1 Ch. Pl. 201*. Unless this rule is observed confusion would arise in the forms of pleas and judgments which the different forms of actions require.

The remedies and forms of action which have been afforded to parties, and which have been sanctioned by long usage and approved by the highest authorities, should be adhered to, and it is not the province of the court, upon reasons of supposed convenience or occasional hardship, to dispense with them, and to substitute one for another, varying the rights of one or both of the parties.

II. But notwithstanding the result to which the court may have arrived upon the amendment to the writ, the plaintiff claims to recover upon the alleged false and fraudulent misrepresentations made by the defendant in reference to the financial responsibility of the maker of the note at the time the trade was concluded.

We have examined the report of the evidence and feel satisfied that instead of relying upon the statements of the defendant and being deceived thereby, the plaintiff relied upon the defendant as an indorser to pay the note when it became due; and had he pursued the course prescribed by law in regard to negotiable paper, this suit would never have been instituted. Having failed to comply with the law in not giving notice of the dishonor of the note, and thus lost his claim upon the defendant as an indorser, this suit is brought upon the alleged misrepresentations of the defendant.

The evidence, however, in our opinion, does not sustain the plaintiff in this position. He testifies, in substance, that the defendant said he could not trade because the plaintiff asked so much "for boot," and wanted to know if plaintiff would take a note and he replied that he could get along if the defendant had a good one. Defendant said he had one against Joseph Frost. Plaintiff told him he didn't know anything about him, and asked defendant if he would not give him his. The defendant replied

that he would rather let the note go. The plaintiff asked what Frost's business was, and to this defendant replied that he owned a stage line and a farm, and was perfectly good. To this the plaintiff replied, that if he was perfectly good and he could have his pay without running round, — no trouble, — he would take the note if the defendant would put his name on it. In the house while looking for a pen, plaintiff says that the defendant said: "It won't make any difference with the note, it won't do any good if I put my name on it." "I says, I guess we will have your name on it, and he put his name on it."

The defendant's testimony is substantially this. "He asked me about Mr. Frost, and I told him as far as I knew, ... that I took the note supposing the note was good, and that Frost said, when I took the note, that he was driving the stage line and expecting to get the money to pay for the horse that I let him (Frost) have out of driving the stage . . . . . and wanted me to wait a year for the pay for the horse, or I could have half of it in June, and then the balance of it for the year." He says further in answer to plaintiff's inquiry, Mr. Flanders, I don't know anything in particular about this man, but I suppose it is good." He also testifies that the plaintiff said: "I don't know this man very well, but if you indorse the note, I will take it," and thereupon he indorsed the note, delivered it to the plaintiff and the trade was concluded.

From the terms of the stipulation in the report, the entry should be,

Exceptions sustained.
Judgment for defendant.

ELBRIDGE D. LINSCOTT
vs.
THE ORIENT INSURANCE COMPANY.

Knox. Opinion February 18, 1896.

Insurance. Fraud. New Trial.

A policy of insurance contained a clause that the policy should be void if the insured has concealed or misrepresented any material fact or circumstance concerning the insurance, or in case of any fraud or false swearing touching any matter relating to the insurance or the subject thereof.

In such case false swearing consists in knowingly and intentionally stating upon oath what is not true.

A false statement intentionally and knowingly, or fraudulently made, constitutes fraud; and the statement of a fact as true which a party does not know to be true, and which he has no reasonable ground for believing to be true is fraudulent.

"Fraud and false swearing" has the same significance as "fraud or false swearing" taken in connection with this issue.

In deciding motions for new trials on account of newly-discovered evidence, courts find it necessary to apply somewhat stringent rules to prevent the endless mischief which a different course would produce. A new trial will not be granted on the ground of newly-discovered evidence unless it seems to the court probable that it might alter the verdict; or, it should be made to appear that injustice is likely to be done by refusing it.

State v. *Stain*, 82 Maine, 472, affirmed.

ON MOTION AND EXCEPTIONS.

The case is stated in the opinion.

Wm. H. Fogler, for plaintiff.
C. E. and A. S. Littlefield, for defendant.

SITTING: WALTON, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. The plaintiff was insured in the defendant company to the amout of five hundred dollars upon his stock of goods contained in a frame store. This store with all its contents was wholly destroyed by fire. The policy of insurance contained the following clause: "This entire policy shall be

void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, or in case of any fraud or false swearing touching any matter relating to this insurance or the subject thereof, whether before or after the loss."

The defendant claimed that the plaintiff had been guilty of false swearing within the meaning of this provision in the contract, both in connection with his proofs of loss and in his testimony as a witness on the stand, and was not therefore entitled to recover.

The verdict was for the plaintiff for $520, and the case comes before this court on exceptions, and motion for a new trial.

Exceptions. Among other things the court instructed the jury, upon the question of fraud and false swearing, as follows: "And if a man attempt to defraud the company by reason of false swearing, then by our statute he has forfeited his whole claim. . . . . If he is blameless in these particulars, but although inaccurate, although he has made misstatements that are not chargeable to his dishonesty, not chargeable to his falsehood, not chargeable to his desire and determination to cheat and defraud, and deceive, but are mere mistakes of either judgment or memory, then gentlemen you will deal with the witness accordingly. Punish no man for mistake, but visit condemnation upon men who are false and fraudulent, and upon such only. . . . . The whole matter is for you, and it is for you to say whether this man has met with a loss by misfortune and has not attempted by false swearing to defraud the insurance company. If a preponderance of the evidence in the case satisfies you that, having met with a loss by fire that occurred by misfortune, without fraud on his part, why, ... then, gentlemen, he is entitled to recover in this case. . . . . And if you find his claim honest, untainted by fraud and false swearing, it is your duty to remunerate him."

These disconnected portions of the charge of the presiding justice form the basis of the defendant's bill of exceptions; and the gravamen of the defendant's complaint is that "fraud

and false swearing" are terms that the court used conjunctively and not disjunctively ;—that the court should have discriminated between fraud and false swearing by employing the disjunctive "or" instead of the conjunctive "and," and the language of the charge should have been that the duty of the jury was to remunerate the plaintiff if they found his claim honest, untainted by fraud *or* false swearing, instead of "untainted by fraud and false swearing."

But this is a discrimination altogether too subtle and refined in its application to the case under consideration. The fraud relied on by the defense, so far as it relates to these exceptions, is false swearing, and false swearing is fraud. False swearing consists in knowingly and intentionally stating upon oath what is not true. A false statement intentionally and knowingly, or fraudulently made, certainly constitutes fraud ; and the statement of a fact as true which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent. *Leach* v. *Insurance Co.* 58 N. H. 245 ; *Harding* v. *Randall*, 15 Maine, 332 ; *Hammatt* v. *Emerson*, 27 Maine, 308. It was immaterial, therefore, whether the language employed was "fraud and false swearing," or "fraud or false swearing." The significance of these expressions is the same when taken in connection with the issue before the jury, and the subject matter to which they related.

There is no contention but that the court gave the jury instructions that if the plaintiff had knowingly made a false statement upon oath in reference to some material matter, it would avoid the policy. But it is insisted that these portions of the charge excepted to really modify that proposition by requiring the jury to find, as a requisite to fraud and false swearing, that the statement or testimony must not only be false, but made with an intent to defraud the company.

We do not so understand the instructions. The court defined the difference between a misstatement honestly made, a mistake either of judgment or memory, and statements that were knowingly and intentionally false. Upon examination of the charge in connection with the fragmentary portions about which com-

plaint is made, we think it was in accordance with the law as laid down in *Dolloff* v. *Insurance Co.* 82 Maine, 266, and *Claflin* v. *Insurance Co.* 110 U. S. 81, which hold that where a clause like the one mentioned is contained in the policy, and the insured knowingly and purposely makes a false statement on oath, concerning the subject matter, it vitiates the policy and bars his right of recovery, whether his purpose was to deceive the company or not, for it is "so nominated in the bond."

The exceptions, therefore, must be overruled.

Motion. We have examined the evidence with care, and that which is set forth in support of the motion as newly-discovered. It is unnecessary and would be unprofitable to epitomize the testimony in an opinion. From an examination of that upon which the verdict was based, we by no means can say that the verdict was clearly wrong, or that the jury must have been influenced by any improper bias or prejudice in arriving at their conclusion. In reference to the newly-discovered evidence, we are not so strongly impressed as to feel warranted in granting a new trial. It has long been the settled doctrine of this court that a new trial will not be granted on the ground of newly-discovered evidence unless it seems to the court probable that it might alter the verdict. *Snowman* v. *Wardwell*, 32 Maine, 275; *Handly* v. *Call*, 30 Maine, 9; *Todd* v. *Chipman*, 62 Maine, 189. The court very pertinently remarked in *State* v. *Carr*, 21 N. H. 166, that "in deciding motions for new trials on account of newly-discovered evidence, courts have found it necessary to apply somewhat stringent rules, to prevent the endless mischief which a different course would produce." And this court, in the recent case of *State* v. *Stain*, 82 Maine, 472, 490, had occasion to consider the question and state the doctrine somewhat fully, applicable to cases of this nature, and the decisions are there referred to, which hold that the rule is applicable alike in civil and criminal cases. "Notwithstanding the discretion of the court in such cases," remark the court, "is very broad, and will be exercised by the court in granting a new trial whenever a proper case is presented, yet there are well-settled rules by which the court in this as well as all other cases should be governed. In

order to warrant a new trial upon the ground of newly-discovered evidence, it should be made to appear that injustice is likely to be done by refusing it, and therefore it becomes necessary for the court to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of the witnesses." Tested by these rules, the case before us is one where the verdict should not be disturbed. Much of the alleged newly-discovered evidence is negative in its character,—that which the witnesses did not see or notice. With all of this applied to the evidence in the former trial, its bearing would not, in our opinion, be of sufficient weight to change the result.

In considering the motion we are not to inquire whether taking the newly-discovered evidence in connection with that given on the former trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would require a different verdict. *Com.* v. *Flanagan*, 7 Watts & Serg. 423; *State* v. *Stain*, 82 Maine, 472, 491.

Exceptions and motion overruled.

FRANK S. CAIRNS, and others, *vs.* CHARLES T. WHITTEMORE.

Somerset. Opinion February 19, 1896.

Pleading. Demurrer. Scire Facias. Trustee Process.

A general demurrer to a written statement of matter in defense does not question the form, or formalities of the statement, but only its sufficiency in substance.

The plaintiff, in an action of scire facias against the trustee of his judgment debtor, demurred generally to a written statement filed by the defendant's attorney, without the signature or affidavit of himself. The statement showed sufficient matter in defense. The plaintiff having admitted the truth of the matter by his demurrer, cannot have judgment as for an insufficient plea or answer.

ON EXCEPTIONS.

The case is stated in the opinion.

E. N. Merrill and G. W. Gower, for plaintiffs.

Trustee process is a statute remedy and the statute must be followed. *Hanson* v. *Butler*, 48 Maine, 81. Whittemore should answer. R. S., c. 86, § 71.

He shall be examined as he might have been in the original suit. Ib. § 71.

If he might, he should be defaulted. Ib. § 68.

He cannot answer and disclose by attorney,—only corporations, foreign or alien companies and trustees living out of the county may appear and disclose by attorney. Ib. §§ 8 and 24.

The disclosure should be signed and sworn to by Whittemore. Ib. § 15.

The case shows that Whittemore resides in the county, and that he has not answered personally, or signed the disclosure, or sworn to it.

All this he attempted to do by attorney, a proceeding unauthorized by statute, and therefore equivalent to no answer or appearance,—hence a default for the full amount should have been ordered, or the demurrer should have been sustained.

Forrest Goodwin, for defendant.

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

EMERY, J. The present defendant was summoned, in a former action against one Creighton, to show cause why execution in that action should not issue against Creighton's goods, effects and credits in his, the present defendant's, hands. He did not appear in that action but was defaulted. He is now summoned in this action of scire facias to show cause why the plaintiffs should not have execution directly against him for the amount of their judgment against Creighton, which is some eighty dollars. In obedience to this latter summons, he has appeared by attorney, and by way of answer, or as showing cause, has filed by attorney a written allegation in the form of a plea, that at the time of the service upon him of the writ in the original action he had in his hands belonging to Creighton the sum of nineteen dollars. The plaintiffs filed a general demurrer to this written statement, and

asked for a ruling upon the issue thus formed. The ruling being against them, they have brought the same issue before the law court upon exceptions.

The plaintiffs now contend in argument that the defendant, being a resident of the same county, could not appear and answer by attorney, but could only appear in person, and could only defend by answer or disclosure signed and sworn to by him in person. They claim that the paper filed by the defendant's attorney should be disregarded and the defendant defaulted as if no defense had been offered.

But, at nisi prius, the plaintiffs took no steps to have the defendant's written statement struck out of the case, or taken from the files as an unauthorized mode of making a defense ;—nor did they move for a default for want of a properly offered defense. They sought no further discovery from the defendant. They took the ground that the matters alleged showed no cause against their claim. They demurred to the allegation and thus themselves tendered the issue formed by the demurrer, which is, whether the matters alleged in the statement show any cause why execution should not issue against the defendant personally for the full amount of the original judgment.

The plaintiffs, as against this defendant, are entitled to execution only for the amount of Creighton's property they attached in his hands at the time of the service upon him of the original writ. His default in the original action does not estop him from alleging and showing the truth. That default is only evidence against him which may be rebutted. *Townsend* v. *Libby*, 70 Maine, 162. He now alleges, in writing, even if informally, that the amount of Creighton's property then attached in his hands is nineteen dollars. The general demurrer admits this to be true. It follows that execution against him must be for nineteen dollars with costs.

Exceptions overruled.

HASKELL, J. I concur in the result. There is no other defense on the merits than disclosure on oath as permitted by statute. Defendant, by plea, appears and "submits himself to ex-

amination on oath." This, the plaintiffs refuse to accept by their demurrer and waive the same. The statement in the plea may, therefore, be considered as if on oath, and shows a defense pro tanto.

STROUT, J., concurs.

GEORGE TYLER, and another, *vs.* CITY OF AUGUSTA.

Kennebec. Opinion February 19, 1896.

Sale. Warranty. Rescission. Recoupment.

The defendant purchased of the plaintiffs two road machines in Boston with special warranty as to quality and effectiveness in operation. The sale was absolute and the title passed to the vendee upon their delivery to the carrier in Boston. *Held*; that if the defendant would rescind the sale for breach of warranty it must return the machines to the vendors in Boston. This it did not do, nor offer to do.

The defendant declined to recoup damages in this action. *Held*; that the plaintiffs may recover, therefore, the price of the machines.

ON REPORT.

This was an action of assumpsit on an account annexed to recover five hundred dollars, the price of two American Champion road machines sold by the plaintiffs to the defendant on the second day of April, 1894. The plea, the general issue.

The plaintiffs' testimony showed as follows: They reside in Boston, and in the spring of 1894, were the general agents for the sale of the American Champion road machines, so-called. On the second day of April, 1894, their traveling salesman, Mr. Piers, came to Augusta and met by appointment the mayor of the city, Mr. Milliken, and Mr. Davis, the chairman of the committee on highways, on the part of the city government. The meeting took place at the store of Mr. A. W. Brooks who had interested himself somewhat in the matter of the purchase of the road machine by the city, and was himself to receive a commission in case a sale was effected, as all the parties to the trade understood. After considerable conversation, the representatives of the city concluded to purchase one American Champion machine for the sum of two hundred and fifty dollars, f. o. b.

boat at Boston, with a discount of 5 per cent for cash in ten days, and Mayor Milliken then and there signed the following order:

"Augusta, Me., April 2, 1894.

"Messrs. George Tyler & Co.,
43 & 45 South Market Street, Boston, Mass.

"Gentlemen:

"Please ship on or about as soon as possible to (first boat leaves Boston, April 10th). By boat:

1 American Champion Road Machine, @ $250 00

5 per cent off cash ten days.

"Machine warranted by you for one year to be of good material and workmanship and to do as claimed for them in your circular.

Chas. A. Milliken, Mayor."

On the back of the order was the following:

"Warranty for the American Champion and Steel Champion Reversible Road Machines.

"1st. To be the Lighest Draft Machines on the market.

"2d. To be of the very best material and workmanship.

"3d. To be simply and thoroughly constructed on mechanical principles.

"4th. To move as much earth in the same time as any competing machines, and to plow successfully in any soil, whether baked clay, gumbo or prairie soil.

"5th. To be successful graders, levelers and earth carriers.

"6th. To be easily operated under all conditions.

"7th. To be reversed in less time than competing machines.

"8th. To run more steadily than competing machines.

"9th. To make from one-half to a mile of road per day, according to width of road, condition of soil, etc.

"10th. To operate successfully in all work of road building and repairing, moving earth to the right or left or directly forward, to plow their own ditches, cut down banks, widen roads and in short do any work that can be done by any road machine.

"11th. To be less liable to side-slewing or slipping than any competing machine.

"12th. To operate successfully in difficult places.

"13th. To effect a saving of at least 75 per cent in the cost of building and repairing roads of over the old methods.

"14th. We warrant these machines to be free from imperfections in material and manufacture, and agree to make good any parts that may prove defective by reasonable usage, after a fair trial within one year.

"Geo. Tyler & Co., Boston, Mass."

Subsequent to this, but on the same day, some parties on the east side of the city expressed a desire to have another road machine for that side, and after a conference among the representatives of the city, the mayor directed Mr. Brooks by telephone to sign a second order for another road machine of the same kind; it being arranged with Mr. Piers that the price for the two machines should be two hundred and thirty-five dollars net, f. o. b. boat at Boston, which would be a discount of six per cent provided the payment was made within ten days. Mr. Brooks signed the second order under the direction of the mayor in the name of his firm, but it was understood at the time between the mayor and himself that he did this in behalf of the city and there was no dispute between the parties that this was the fact. Mr. Piers sent both orders on to his firm in Boston by mail that same night and they were received in Boston on April 3d.

On the same day the machines were delivered by Tyler & Co. to the Kennebec Steamboat Co. at their wharf in Boston to be shipped by the first boat to Augusta. The first boat left Boston on Saturday, April 14th, arriving in Augusta the following day, April 15th, and the two machines reached Augusta at that time. On arrival in Augusta they were taken by the city authorities and removed to the east side of the river. It was the understanding, when the sale was made, that if two machines were taken, the plaintiffs should send some one to set up the machines and start them without expense to the city.

After this purchase by the city, a representative of the Western Reversible Machine Co. came to Augusta and saw the authorities with relation to showing them one of his machines

and about the 20th of April brought one of his machines from Portland to Augusta for the purpose of showing its workings to the city authorities. About that same time one Mitchell, an employee of Tyler, Conant & Co. of Bangor, was sent by direction of the plaintiffs to set up and start the Champion machines, the plaintiffs having no idea that there was to be any competitive trial between the Champion and the Western. Both machines, however, were tried at the same time. Kimball, the representative of the Western operated his machine for a half day near the mayor's house and in the presence of the street commissioner, but the Champion was not used at all. On the subsequent day both machines were used, one by Kimball, and the other by Mitchell who came to set up the Champions, in the presence of a large number of people and the Western machine seemed to please the people better than the Champion. No word was sent by the city to the Boston house in regard to this decision, but Mr. Piers was in the city some time afterwards and the mayor told him that he had decided that the other machines were preferable, and had taken them and that his machines, the Champions, were subject to his order. Mr. Piers replied that the machines had been sold to the city and he should expect the city to pay for them.

Both Champion machines are still in possession of the city, never having been returned to the plaintiffs, and have not been paid for.

The defendant introduced evidence of the conversation at the time of signing the orders, claiming that it was admissible to show its acceptance and its terms; and contending that the orders were mere offers; that the defendant objected to buying a machine without seeing it operate; also that plaintiffs' agent said that unless it fulfilled the warranty on the back of the order, the city was under no obligation to take the machine. The defendant also introduced the circulars referred to in the order quoted above. The defendant declined to set up a claim in recoupment.

Leslie C. Cornish, for plaintiffs.

The written order with the warranty on the back and the cir-

cular, constituted the completed contract between the parties, and certainly there is no suggestion of any condition whatever in this.

The order for goods to be paid for in cash in ten days is hardly consistent with a conditional sale such as is claimed here.

The defendant and the plaintiffs are bound by the written contract which they themselves made and the warranties accompanying, and there is no warranty whatever as to perfect satisfaction: a very risky guaranty to be made in any trade.

The sale was absolute and unconditional but accompanied with the warranty set forth, and with the further warranty that the machine would do as claimed in the circular, this warranty to continue for the term of one year.

The sale not properly rescinded: *Conner* v. *Henderson*, 15 Mass. 319; *Henderson* v. *Sevey*, 2 Maine, 139; *Kimball* v. *Cunningham*, 4 Mass. 502; *Dorr* v. *Fisher*, 1 Cush. 274; *Thayer* v. *Turner*, 8 Met. 550; *Morse* v. *Brackett*, 98 Mass. 205; *Snow* v. *Alley*, 144 Mass. 546.

H. M. Heath and C. L. Andrews, F. J. C. Little, with them, for defendant.

Rejecting the oral contract, and confining the contract to the order and warranty upon the back of the order, we contend that, properly construed, the order is conditional. The paper offered is signed by the mayor alone. Nothing is offered signed by the plaintiffs. The paper is defendant's offer or proposition. The acceptance was in sending goods. Our offer, so made, was conditional.

It is immaterial whether the phrase is construed as a condition precedent to vesting of title, or a warranty. If condition precedent, plaintiffs must prove compliance or fail here. If warranty, we must prove breach and rescission before suit brought.

Before acceptance, the city had a right to test the machine to see if it would do as claimed in the circular.

The machine did not do as claimed for it in the circular. Defendants properly exercised their right of rescission. These facts as to the rescission are uncontradicted. The method was

ample. Formal tender at any particular place or in any particular manner became unnecessary, when plaintiffs said they would not take them back, claiming that the sale was absolute.

If the machines were sold subject to their giving satisfaction, our right to rescind was clear, for they gave satisfaction to no one.

If the oral representations are to be rejected and the contract construed as a sale with a warranty of quality, then, under *Marston* v. *Knight*, 29 Maine, 341, we had a right to rescind the contract and return the property as we did.

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

WHITEHOUSE, J., did not sit.

HASKELL, J. Assumpsit for the price of two road machines. The defendant claims the contract of sale to have been partly oral and partly in writing, but the court considers the same to be wholly written. The price was two hundred and fifty dollars per machine, delivered free of charge on board boat in Boston, discount for cash within ten days. The machines were seasonably delivered to the carrier and received by the defendant. The contract contained special warranty of excellence in quality and effectiveness in operation. It is contended that the sale was conditioned upon the machines meeting the terms of the warranty, but the contention is unsound. The sale became absolute upon the delivery of the machines to the carrier in Boston. The title then passed to the defendant and the machines became its property and the purchase money became due. If the machines did not meet the terms of the warranty, the defendant might rescind the sale and return the machines to the vendor and become absolved from liability for the price of them. Nothing short of a return of the machines, or an offer to return them and a refusal to receive them by the vendor, would so operate. There must be actual restoration or its equivalent. *Norton v. Young*, 3 Maine, 30; *Marston* v. *Knight*, 29 Maine, 341; *Houghton* v. *Nash*, 64 Maine, 477; *Sharp* v. *Ponce*, 76 Maine,

350; *Downing* v. *Dearborn*, 77 Maine, 457; *Snow* v. *Alley*, 144 Mass. 551; *Morse* v. *Woodworth*, 155 Mass. 249.

Sometime after the machines had been received, defendant's mayor met the agent of plaintiff and told him: "We decided that the other machine [a machine of other manufacture] was preferable and had taken the other machines and that his machines were subject to his order." Ques. "The plaintiffs refused to take them back, did they?" Answer. "Yes." On cross-examination he testifies, in substance, that plaintiffs' agent claimed that the machines had been sold to the defendant and that the plaintiffs would collect the purchase money if they could.

The plaintiffs' place of business was in Boston. The machines were sold there. There is where they must be returned if defendant would rescind the sale. Notice that the machines were subject to plaintiffs' order in Augusta is neither a return nor an offer to return them; and a refusal to receive them there might well be made. The refusal to take them relates to the place where they were tendered, in Augusta, where plaintiffs were not bound to take them. Had the offer been to return the machines to the plaintiffs in Boston, may be they would have been received. Until they were confronted with a legal offer of rescission, plaintiffs were not required to reject the machines at their peril. The sale was not rescinded, and therefore this action for the purchase money may be maintained.

The defendant might recoup the damages sustained, if any, for breach of plaintiffs' warranty of the machines if it had elected so to do; but its counsel, at the bar, and in his brief, declines, preferring to rely upon his action to that end. He admits that the plaintiffs are entitled to recover their whole claim if entitled to recover any of it. The discount for cash in ten days is not available to the defendant here.

Defaulted.

ALBERT W. LARRABEE, Administrator, *vs.* JAMES A. HASCALL.

Androscoggin. Opinion February 25, 1896.

Gift. Trust. Savings Bank Deposit. Assignment.

The defendant nursed and cared for the deceased for three months prior to his death, and about six weeks before his death the deceased drew his order and delivered it, together with the bank book, to the defendant, saying: "Take this, Jim, when I am gone draw the money, put a monument over my brother Stillman's grave, pay my funeral expenses, and the rest is yours." The order was as follows:

"West Durham, April 25, 1894.

"To the Treasurer of the Auburn Savings Bank:

"Pay to James A. Hascall two hundred dollars, and charge the same to deposit book No. 11875.

John P. Larrabee."

"Witness, Charles H. Hascall."

The amount of deposit as represented by the bank book was $486.26. The defendant took the order and book and retained them in his possession till after the decease of the said Larrabee. Two days after his decease defendant presented the order and book to the bank and drew the amount of the order, and afterwards surrendered the book with the remainder of the deposit therein to the administrator.

Held; that the defendant having executed the trust with which he was charged, could not be held to pay back the money drawn on the order to the administrator of deceased.

Held; further, that the order accompanied by delivery of the bank book constituted a valid transfer of the amount represented by the order, notwithstanding it was not for the full amount of the deposit.

It was for a specific sum, and was certainly an equitable assignment thereof.

There was accompanying the delivery of the order and bank book a declaration of trust.

This delivery of the evidence and means of reducing the gift to possession, was sufficient, so far as the element of delivery was concerned, to pass the title as a gift causa mortis.

Such delivery accompanied by the declaration of trust was an unmistakable manifestation of the intention of the donor of making a final disposition of the two hundred dollars represented by the order and bank book, and was a valid gift causa mortis.

The fact that a gift is made upon terms and qualifications annexed to it as prescribed by the donor, will not defeat it, or affect its validity as a gift causa mortis.

In order to constitute a gift causa mortis, it is not necessary that the gift should be made in extremis, and when there is no time or opportunity to

make a will; it is sufficient to render the gift effectual if, before the donor's recovery from the disease from which he apprehended death, he should die from some other disease existing at the same time; that it should be made under apprehension of death from some present disease, or impending peril, but there is no specific limit of time within which the donor must die to make such a gift valid.

AGREED STATEMENT.

This was an action in which the plaintiff, as administrator of John P. Larrabee, deceased, declared on the money counts, and claimed to recover of the defendant the sum of two hundred dollars, with interest thereon, for money of the estate of the said John P. Larrabee, deceased, drawn by said defendant from the Auburn Savings Bank after the death of said John P. Larrabee, to wit, on the thirteenth day of June, A. D., 1892, without right or authority, and by him wrongfully detained and withheld from the plaintiff in his said capacity.

Plea, general issue.

The parties agreed to the following statement of facts:

"It is agreed that John P. Larrabee died on June 11, 1892, aged seventy-two years. That he lived alone, and was sick for some six months prior to his decease, from the sickness of which he died; that at the time of signing the order he was confined to his house, but not to his bed. That the defendant, James A. Hascall, nursed and cared for him during about three months prior to his death. That on the twenty-fifth day of April, 1892, the said Larrabee gave the said Hascall an order, of which the following is a copy.

"West Durham, April 25, 1892.

"To the Treasurer of the Auburn Savings Bank:

"Pay to James A. Hascall two hundred dollars, and charge the same to Deposit Book No. 11875.

John P. Larrabee."

"Witness, Charles H. Hascall.

"That John P. Larrabee then had a savings bank book, on the Auburn Savings Bank, numbered 11875, upon which at the time of the decease of John P. Larrabee there was due $486.26; that after signing this order, the said Larrabee delivered the order and savings bank book to the said Hascall, then saying

to him: "Take this Jim," (meaning the defendant,) "when I am gone draw the money, put a monument over my brother Stillman's grave," (meaning Stillman Larrabee,) "pay my funeral expenses and the rest is yours."

"The defendant Hascall took the order and savings bank book and retained them in his possession until after the decease of the said Larrabee. Two days after the decease of Larrabee, on June 13, 1892, the said Hascall presented the savings bank book and order to the Auburn Savings Bank and drew two hundred dollars and surrendered the order to the bank, the bank officials not then knowing of Larrabee's death. He afterwards surrendered the bank book, with the remainder of the deposit thereon, to the administrator, who demanded that said sum of two hundred dollars should be paid to him by Hascall.

"Subsequently Hascall paid out of the two hundred dollars the following sums, without any authority from the administrator.

June 13, 1892, for casket and robe,	$29 00
Expenses for singing, clergyman at funeral, digging and filling grave,	9 00
November 16, 1893, for grading lot of Stillman Larrabee,	5 00
November 10, 1893, for monument, verse and lettering for the said Stillman Larrabee,	145 00
	$188 00

"After the death of John P. Larrabee, James A. Hascall presented the following account against the estate, which was referred to commissioners, who allowed $78.61, expressly excluding any consideration of the present claim of two hundred dollars by the administrator against said Hascall, as not being within their jurisdiction to determine.

"Durham, Me., May 15, 1893.

To nursing, care and attendance of the deceased in his last sickness, from and including March 10, 1892, to and including May 20, 1892, during each day, at $1 per day, $72.00

To nursing, care and attendance of the deceased in his last sickness, from and including May 21, 1892, to June 11, 1892, during each day and night, at $2 per day and night,	42.00
To labor furnished on the farm, of the deceased, located at West Durham, for the year 1892,	6.00
Total,	$120.00
Credit by hay to E. W. Libby,	4.50
	$115.50"

Upon so much of the foregoing statement as might be admissible and material, the law court was to render such judgment as the law and the facts require.

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

Counsel argued that this was a futile gift inter vivos.

As a trust, the objects are not specifically distinct or proper in their nature, and wanting in a completed delivery; and that under the express terms of agreement between Larrabee and Hascall, it was not intended to give Hascall the right to the possession or the control of the money until after Larrabee's death, thus being an incomplete gift, and therefore invalid.

Gift causa mortis: Burden on claimant to show that all necessary conditions existed. *Parcher* v. *Saco*, 78 Maine, 470.

Donor must be in last illness and in apprehension of approaching death. Thornton on Gifts and Advancements, §§ 21 and 28; *Parcher* v. *Saco*, supra; *Emery* v. *Clough*, 63 N. H. 552; *Basket* v. *Hassell*, 107 U. S. 602; *Dresser* v. *Dresser*, 46 Maine, 48. Gift must be intended as revocable by donor. Woerner, American Law of Administration. *Basket* v. *Hassell*, supra.

Gift inter vivos: Must be good to pass title to all the property in question or fails entirely. *McGrath* v. *Reynolds*, 116 Mass. 566; *Curry* v. *Powers*, 70 N. Y. 212; *Irish* v. *Nutting*, 47 Barb. 370.

Donor must part with all present and future dominion and control over the property, and gift must take effect at once.

Thornton on Gifts and Advancements, § 76; *Carleton* v. *Lovejoy*, 54 Maine, 445; *Northrop* v. *Hale*, 73 Maine, 66; *Dole* v. *Lincoln*, 31 Maine, 422; *Reed* v. *Spaulding*, 42 N. H. 114; *Allen* v. *Polereczky*, 31 Maine, 338; *Frost* v. *Frost*, 33 Vt. 639; *Basket* v. *Hassell*, supra; *Curry* v. *Powers*, 70 N. Y. 212; *Craig* v. *Kittredge*, 46 N. H. 57; *Gerry* v. *Howe*, 130 Mass. 350; *Carr* v. *Silloway*, 111 Mass. 24; Woerner, American Law of Administration, p. 119; *Waynesburg College Appeal*, 111 Pa. St. 130 (S. C. 56 Am. Rep. 252 and note). Incomplete gift cannot be construed as a trust. Thornton on Gifts and Advancements, §§ 410, 415, 416. *Gerry* v. *Howe*, 130 Mass. 354.

Check revoked by death of donor. *Curry* v. *Powers*, 70 N. Y. 212; *Basket* v. *Hassell*, supra; *Simmons* v. *Cincinnati*, 31 Ohio St. 457 (S. C. 27 Am. Rep. 521).

W. H. Newell and W. B. Skelton, for defendant.

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

FOSTER, J. The plaintiff as administrator of John P. Larrabee, deceased, brings this suit to recover of the defendant the sum of two hundred dollars which he claims to belong to the estate of the deceased, drawn by the defendant from the Auburn Savings Bank, two days after the decease of the intestate, upon the following order:

"West Durham, April 25, 1892.

"To the Treasurer of the Auburn Savings Bank:

"Pay to James A. Hascall two hundred dollars, and charge the same to Deposit Book No. 11875.

John P. Larrabee."

"Witness, Charles H. Hascall."

The case shows that deceased was seventy-two years old, lived alone, and had been sick for about six months prior to his decease, and from this sickness he died. It appears that the defendant nursed and cared for him for about three months

prior to his death, which occurred June 11, 1892. When the order was drawn, and at the time of his death, the deceased had a deposit in the Auburn Savings Bank for $486.26. At the time the order was drawn and signed, the deceased delivered it together with the savings bank book to the defendant, saying to him: "Take this, Jim, when I am gone draw the money, put a monument over my brother Stillman's grave, pay my funeral expenses, and the rest is yours."

The defendant took the order and book, and retained them in his possession till after the decease of said Larrabee. Two days after his decease the defendant presented the order and book to the bank and drew the two hundred dollars, and afterwards surrendered the bank book, with the remainder of the deposit therein, to the administrator, who demanded that he should pay over the two hundred dollars to him.

Subsequently the defendant paid out from the sum, thus drawn upon the order, all but twelve dollars for the funeral expenses of the deceased and for the monument of his brother Stillman, in accordance with the request of said deceased at the time the order and bank book were delivered to him.

We do not think, from the facts as they appear, that the plaintiff is entitled to recover.

Had the order been for the full amount represented by the savings bank book, there could be no question but that such an order, accompanied by the bank book, would constitute a valid transfer of the funds, without further notice, or even an acceptance of the order by the bank. *Kingman* v. *Perkins*, 105 Mass. 111; *Kimball* v. *Leland*, 110 Mass. 325; *Foss* v. *Savings Bank*, 111 Mass. 285.

In *Kimball* v. *Leland*, supra, a depositor delivered an order for the payment of the deposit, and also the bank book, to a person for the purpose of transferring the money represented by the order and book. The order and bank book were not presented to the bank till after the death of the donor, and it was held that such order and delivery of the bank book constituted a complete transfer as against the next of kin of the donor, notwithstanding the money was not drawn during the life of the

donor. Nor is there any doubt that an order for a specific fund, which is identified by the order itself, would constitute a valid assignment of that fund, as was held in *Kingman* v. *Perkins*, supra; *Holbrook* v. *Payne*, 151 Mass. 383, 384. And so would an order for a part only of an entire debt, or demand, constitute an equitable assignment to a party so as to be good as between him and the debtor upon trustee process in cases where just and equitable results may be accomplished thereby. *Exchange Bank* v. *McLoon*, 73 Maine, 498; *Roberts* v. *Noyes*, 76 Maine, 590, 593; *Horne* v. *Stevens*, 79 Maine, 262; *Dana* v. *Third National Bank*, 13 Allen, 445, 447; *James* v. *Newton*, 142 Mass. 366, 374.

In the case at bar, the order, it is true, was not for the full amount of the deposit represented by the bank book, but notwithstanding that fact the intention of the deceased is clearly manifest, and that was to transfer a specific and definite sum. With the delivery of that order and the bank book to the defendant, we are unable to perceive any valid reason why the deceased did not thereby transfer his title to that specific sum as effectually as though it had been for the entire amount of the deposit. *Brill* v. *Tuttle*, 81 N. Y. 454. Such was undoubtedly his intention, manifested by the language of the order itself and the attendant circumstances. It was certainly an equitable assignment, and it is held both in England and this country, that any delivery of property which transfers to the donee either the legal or equitable title, is sufficient to effectuate a gift. *Ridden* v. *Thrall*, 125 N. Y. 572, 577, and cases there cited; *Basket* v. *Hassell*, 107 U. S. 602, 610. In *Brill* v. *Tuttle*, supra, the New York decisions are reviewed, and it is there held that if the language is ambiguous, and the order not negotiable "the attendant circumstances may be shown to determine the intention and understanding of the parties." There is a distinction to be noticed between those instruments which are in form negotiable, and on their face show that they were drawn upon a particular fund, and those that are not negotiable. *Holbrook* v. *Payne*, supra; *Whitney* v. *Eliot National Bank*, 137 Mass. 351, 355.

In this case the order was not negotiable. It was signed by the deceased, and the same, together with the bank book, was delivered to the defendant in the presence of the person who witnessed it. At the same time there was a declaration of trust, that the defendant was to take the same, and when the deceased was gone, to draw the money, put a monument over his brother's grave, pay his funeral expenses, and the rest to keep for himself. This was a gift coupled with a trust, which the defendant has executed.

This delivery of the evidence and means of reducing the gift to possession, was sufficient, so far as the element of delivery was concerned, to pass the title as a gift causa mortis. There was actual delivery so far as the nature of the property would admit of. *Hatch* v. *Atkinson*, 56 Maine, 324; *Hill* v. *Stevenson*, 63 Maine, 364; *Curtis* v. *Portland Savings Bank*, 77 Maine, 151, 153; *Barker* v. *Frye*, 75 Maine, 29, 33; *Drew* v. *Hagerty*, 81 Maine, 231; *Pierce* v. *Five Cents Savings Bank*, 129 Mass. 425.

In *Borneman* v. *Sidlinger*, 15 Maine, 429, it was held that a negotiable promissory note payable to order, may be the proper subject of a gift causa mortis without indorsement; that the equitable interest passes to the donee, and that if there is a mortgage given as collateral security, it would be held in trust for his benefit, and may be enforced in the name of the representative of the donor, as the note may be, also, if necessary. The same doctrine is established in several Massachusetts cases, among which are *Bates* v. *Kempton*, 7 Gray, 382, and *Pierce* v. *Boston Five Cents Sav. Bank*, 129 Mass. 425, 433.

So delivery of a bank book, without an assignment even, passes an equitable title to the fund which it represents. *Grover* v. *Grover*, 24 Pick. 261; *Parish* v. *Stone*, 14 Pick. 198; *Basket* v. *Hassell*, 107 U. S. 602, 611.

Applying to this case the strictest rules laid down in the decided cases as necessary to constitute a valid gift causa mortis, and it will stand the test. This delivery accompanied by the declaration of trust was the unmistakable manifestation of the intention of the donor of making a final disposition of the two hundred dollars represented by the order and bank book,

and was a valid gift causa mortis. The defendant held the same in trust upon the terms expressly prescribed by the donor at the time the gift was perfected by delivery to him. *Clough* v. *Clough*, 117 Mass. 83; *Sheedy* v. *Roach*, 124 Mass. 472.

Nor does the fact that the defendant as donee took the gift upon the terms and qualifications annexed to it, as prescribed by the donor, defeat it, or affect its validity as a gift causa mortis. *Dresser* v. *Dresser*, 46 Maine, 48; *Borneman* v. *Sidlinger*, 15 Maine, 429; *Same* v. *Same*, 21 Maine, 185; *Curtis* v. *Portland Savings Bank*, 77 Maine, 151, 153: *Clough* v. *Clough*, 117 Mass. 83; *Hills* v. *Hills*, 8 Mees. & Wels. 401.

In the case of *Curtis* v. *Portland Savings Bank*, supra, there was a delivery of the bank book, and accompanying the gift was this language by the donor: "Now keep this, and if anything happens to me, bury me decently, and put a headstone over me, and anything that is left is yours." The court there held that the gift was valid as causa mortis, and that it was coupled with the trust that the donee should provide for the funeral expenses of the donor, and see that a headstone was furnished in accordance with the declaration of trust.

A gift of this nature cannot avail against creditors, and the donee would take it subject to the right of the administrator to reclaim it if necessary for the payment of debts of the deceased. *Mitchell* v. *Pease*, 7 Cush. 350. But there being no creditors whose rights could be affected by it, the transaction was one where the administrator stands in no better position than would the deceased himself, and is equally effectual whether with or without consideration.

It is true that the donor did not die for a month and a half after the gift was made, yet at the time it was made he was suffering from the sickness from which he died. He was under the apprehension of death, and was then so sick that he required a nurse, and this sickness continued to increase until it terminated in death.

In *Ridden* v. *Thrall*, 125 N. Y. 572, in an action to determine the title to certain funds deposited in various savings banks, where the donor had delivered a box containing his bank books

to the donee, the court, in discussing the elements necessary to constitute a gift causa mortis, held that to sustain such gift it must be made under apprehension of death from some present disease, or other impending peril, though it was not necessary to the validity of the gift that the donor should die of the disease from which he apprehended death; and that the gift would become void by recovery from the disease, or escape from the peril; but that it was not necessary that the gift should be made in extremis and when there is no time or opportunity to make a will, and that it would be sufficient to render the gift effectual if, before his recovery from the disease from which he apprehended death, he should die from some other disease existing at the same time. "In many of the reported cases," say the court, "the gift was made weeks, and even months, before the death of the donor when there was abundant time and opportunity for him to have made a will." 2 Kent's Com. 444; Story Eq. Juris. §§ 606, 607; 3 Pomeroy's Eq. Juris. § 1146; *Grymes* v. *Hone*, 49 N. Y. 17, 21. In the case last cited, the court say: True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness." See also *Williams* v. *Guile*, 117 N. Y. 343.

In the case before us the gift was made during the last sickness of the donor; it was evidenced by every element necessary to constitute a valid gift; it was coupled with a trust reposed in and conferred upon the defendant to perform certain duties, the terms of which were to be performed after the decease of the donor. That trust appears to have been fully and faithfully executed. The title to the property, therefore, so far as the deceased, his administrator, and the bank were concerned, was by the order in writing and the delivery of the same together with the savings bank book, vested in the defendant.

Judgment for defendant.

SAMUEL R. BEARCE, and another,

vs.

JOSEPH P. BASS, and another.

Androscoggin. Opinion February 29, 1896.

Libel. Privileged Communication. Innuendo.

The plaintiffs had contracted to build the Bangor City Hall, a public building designed to be used and occupied by the government of the city for public purposes, estimated to cost one hundred thousand dollars. While the construction of this building was in progress, an article was published by the defendants in their paper, and that portion of which, claimed to be libelous, is as follows: "The mason work is of the poorest quality and it should not be accepted by the city. Too much sand has been used in the mortar, and to such an extent, that it does not prevent the alkali, which is the life of the mortar from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together, and the contractors should be obliged to take down and replace the imperfect sections of the walls. The doings of the old Tweed ring in New York, were no worse than much that has been done in connection with our city building."

Held; That the language complained of was but a fair and reasonable criticism upon the work which entered into the construction of this public building, and constituted no attack upon the character of the plaintiffs, either as individuals or in their business as contractors.

The character of the construction of such a building was a matter of public importance and interest to the inhabitants and tax payers, and was therefore a matter of legitimate public discussion by the defendants as well as all others who had, in common with the rest of the community, a public and a private pecuniary interest in this important public work.

Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose.

Such comments or criticisms are not libelous, unless they are written maliciously, or there is averment and proof of special damage, or unless they go further and attack the individual.

There is a material difference between criticisms or attacks upon a public work, and upon the individual.

Every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested, and to state his own views for the consideration of all or any of those who have a common interest in the subject.

So long as the criticism is confined to the work, and does not attack the moral character or professional integrity of the individual, and is fair and reasonable, it is not libelous, because it is no defamation of the individual.

But when the comment or criticism of the man's work becomes an attack on his private or business character, then the element of malice comes in and stamps the language as libelous.

Language cannot become libelous where the malice is shown to be against the private or business reputation of some person other than the plaintiff's, no matter to what extent such malice may exist.

In regard to matters of public interest, all that is necessary to render the words spoken or published privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds.

When the matter complained of is privileged, the burden of proving malice lies on the plaintiff, and the defendant cannot be called on to prove that he was not actuated by malice until some evidence of malice towards the plaintiff, more than a mere scintilla, has been adduced by the plaintiff.

The office of an innuendo is to explain what is already expressed, but not to enlarge or change the sense of the previous words.

On motion and exceptions.

This was an action of libel, brought by the plaintiffs, who are contractors, against the defendants, who are proprietors and publishers of the Bangor Daily Commercial. The alleged libel was published March 28, 1894, during the progress of a municipal campaign in Bangor in which the election of F. O. Beal for mayor was pending. Plea, general issue and brief statement of special matters in defense. The jury returned a verdict of $1508.03, and the defendants moved for a new trial and filed exceptions.

The alleged libel as stated in the declaration is as follows: . . .

"The mason work" (meaning the mason work of the said City Hall, which was in process of construction by the plaintiffs as aforesaid), "is of the poorest quality" (meaning and intending that said work was inferior in quality to that called for by the contract aforesaid), "and it" (meaning said mason work) "should not be accepted by the city" (meaning the city of Bangor aforesaid, and meaning and insinuating that the said work should not be accepted because of the said inferior quality thereof, and because it was not in accordance with said contract). "Too much sand has been used in the mortar," (meaning the mortar used in the construction of said City Hall, and meaning and intending that said mortar had too large a proportion of sand among the ingredients thereof, and meaning that the said mortar

was improperly mixed and prepared for use in said building) "and to such an extent that it does not prevent the alkali, which is the life of the mortar" (meaning the mortar used in the construction of said City Hall) "from running out" (meaning that some supposed substance called alkali in the said mortar used in the erection of said City Hall, was not prevented from running out of said mortar by reason of said improper mixing of said mortar and putting therein of too much sand) "as can be seen by the white appearance of the building" (meaning the said City Hall, and meaning that by reason of the putting in of an excessive amount and improper proportion of sand in the said mortar, the said City Hall had a white appearance caused by the running out of the alkali from said mortar). "Very many of the bricks" (meaning the bricks theretofore used in the construction of said City Hall) "are loose" (meaning and intending thereby that the said bricks were not properly laid by the plaintiffs and had become loose by reason thereof) "the mortar," (meaning the aforesaid mortar used in the construction of said City Hall in which said bricks were laid) "being too lifeless to hold them together" (meaning and intending that said mortar had been improperly mixed by the putting in of too much sand, and that thereby the said mortar was not strong enough to hold the said bricks together, as laid in said building) "and the contractors" (meaning the plaintiffs) "should be obliged to take down and replace the imperfect sections of the walls" (meaning and intending the walls of said City Hall, heretofore already constructed by the plaintiffs, and meaning and intending that sections of said walls had been imperfectly constructed by said plaintiffs and contrary to the contract for constructing the same). "The doings of the old Tweed ring in New York" (meaning and intending and referring to a certain combination and conspiracy of men in the city of New York, being the officers, agents and servants of said city, who corruptly and wickedly, and for their own corrupt gain, conspired with contractors, who had contracted to erect public works for said city of New York, whereby said contractors corruptly divided the proceeds of their said contracts with the men composing said corrupt combination

and conspiracy) "were no worse than much that had been done in connection with our City Building" (meaning said City Hall and meaning and intending and insinuating that the plaintiffs had corruptly conspired with the agents and servants of said city of Bangor with reference to said contract, and to divide the proceeds thereof). . . .

The following is the entire article in the Commercial:

"Local Contractors Not Considered.

"We are informed by a former member of the city government who was a member of the committee having charge of matters connected with the new City Building, that he was not allowed to see all the bids which were made by Bangor contractors. He also says that, under the direction of the king boss, our Bangor contractors were requested to hand in their bids for a completed building and in making them to include separate bids for carpenter, mason, plumbing work, etc., and that several of these bids were open, but not shown to other members of the committee.

"Only a few minutes before the expiration of the time to receive bids, the gentleman imparting this information saw the architect, who was allowed to see all the bids of the Bangor contractors, write and seal what appeared to be a proposal, which he handed to the city clerk.

"He also says he made a few suggestions to the mayor relating to the manner in which the business was being done, and what the people were saying about it, to which the mayor replied, 'What in h—l have the people to do about it?' and that he wanted them to understand that he proposed to take charge of all the affairs connected with the new City Building.

"Mr. W. N. Sawyer says he put in a bid for the mason work, but his bid was not placed before the committee. All the Bangor contractors complain of the treatment they received.

"In the spring of 1893 many changes were made in the plans and specifications and to such an extent that such a reliable man as C. B. Brown says would reduce the cost of the building about $15,000, and still the Bangor contractors were not allowed to

put in new bids, but the out of town contractors were allowed to have the contract at their old figures.

"The mason work is of the poorest quality and it should not be accepted by the city. Too much sand has been used in the mortar, and to such an extent that it does not prevent the alkali, which is the life of the mortar, from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together, and the contractors should be obliged to take down and replace the imperfect sections of the wall.

"The doings of the old Tweed ring in New York, were no worse than much that has been done in connection with our City Building. It is in the hands of a wrecker and how long will the tax-payers of Bangor allow the present state of affairs to exist?"

Defendants' Exceptions.

The defendants contended,

First. That what they said in the alleged libelous publication was only fair and reasonable comment and criticism upon a a matter of public interest, and under circumstances authorizing the making of the publication, and requested the court to instruct the jury as follows, upon this branch of the case. "That so much of said alleged libel as reads as follows, 'The mason work is of the poorest quality and it should not be accepted by the city. Too much sand has been used in the mortar and to such an extent that it does not prevent the alkali, which is the life of the mortar, from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together, and the contractors should be obliged to take down and replace the imperfect sections of the wall,' was but a comment upon a public matter which the defendants had a right to make as they did, and for which the defendants are not liable"—which requested instruction, the court refused to give.

The defendants contended,

Second. That the alleged libel was a privileged communication, and that this action was not maintainable without proof of

actual malice from these defendants toward the plaintiffs, and that the burden of proving such actual or express malice was upon the plaintiffs. Upon this point, the court instructed the jury as follows:

"Now, gentlemen, it seems to me that the great question in the case, and the one to which your attention should be directed more especially, is with respect to the motive of Mr. Bass. What were his feelings? What were his motives when he penned and published that article? . . . You must read it in the light of the surrounding circumstances and determine as a question of fact, what his real motive was. Was it spite to gratify ill will towards Mr. Beal, or was it a publication made in good faith, without malice, founded on an honest belief, and the belief itself founded on reasonable grounds? If it was, it was a privileged communication, and there is no doubt that the defense is complete."

Again the court said: "But if on the other hand, as is claimed by the plaintiffs, you are satisfied that it was a malicious publication, made out of ill will towards Mr. Beal, or from any other bad motive, and was not in good faith, and was not for the public interest, and was to gratify his ill will towards Mr. Beal, and without belief that the same was true, or without probable cause to believe that it was true, then it was not privileged; and, as it was an attack directly on the plaintiffs, in their capacity as contractors, and if you are satisfied that it did affect them directly and injuriously, and was naturally calculated to have that effect, why then, it was a libel. The justification fails and the plaintiffs are entitled to maintain their action."

"To illustrate what I mean, and that you may see it more clearly, if a man should fire a gun aimed at A, with a malicious intent to kill and murder A, and he should miss him, and the bullet that is fired should hit one of his nearest friends and kill him, it would be murder. It would be the malicious killing of B, his friend. He had no malice against him, but the shot was fired maliciously. The malice towards A would constitute legal malice towards B, although he did not kill the man he intended, and killed one of his friends."

"Precisely so in this case. If these charges were knowingly false, and Mr. Bass had no good reason for believing them to be true, and they were not made in good faith, and the charge was aimed more especially at Mr. Beal, on account of his ill will towards Mr. Beal, if it existed, then the fact that he may have had no ill will towards the plaintiffs is no defense. The ill will or malice which actuated him in publishing the article at all so as to injure Beal, supplies in law the want of malice against these plaintiffs." And the court failed to instruct the jury, that the burden of proving express malice on the part of these defendants towards these plaintiffs was upon the plaintiffs.

And the court further instructed the jury: "If a man makes a publication, knowing it to be false, which is injurious to another's business and reputation, the law implies malice; no direct evidence other than the article itself is needed to prove malice; because every one is supposed to intend the natural consequences of his acts."

The defendants further contended that the allegations in the alleged libel were true and called a large number of witnesses to substantiate the truth of the allegations. The question of their truth or falsity was not submitted to the jury by the court, unless it was submitted in the following instruction to the jury, and other portions of the charge:

"Generally speaking, the truth is a complete justification for the publication of a matter of this kind under our statute. The statute says that in a suit for writing and publishing a libel, evidence shall be received to establish the truth of the matter charged as libelous, and if its truth is established, it is a justification unless the publication is found to have originated in corrupt or malicious motives. . . This right on the part of a citizen and tax-payer of a town or city to express his opinion on public matters honestly and in good faith is only a qualified privilege. It is not an absolute privilege. It depends upon the truthfulness, or his honest belief of the truthfulness, of the statement, and the absence of malice; but you will see by the language of this statute it is a justification unless the publication is found to have originated in malice. In some cases the statute implies that

even the truth is libelous. The truth will be libelous sometimes when published from improper or bad motives. One of the most common illustrations is this: We will say that a young man, beginning in life, has been guilty of some criminal offense committed in his youth and before his judgment and his morals have become fixed. He has been confessedly guilty of some misdemeanor or criminal offense, but in after life he becomes an upright, moral man, is married and has a family of children and it is of no concern or interest to the public that he committed this offense in his youth. And anyone who published it to the world in the form of a writing, may be convicted not only upon criminal prosecution, but the party injured may recover damages, notwithstanding the truth of the writing.

"But, generally, assuming the facts to be as they are claimed to be here, I do not think that that rule would apply. I mean to say to you distinctly, that if the truth of the defendants' brief statement, which I have read to you, is sustained, the article which was published in the Commercial was privileged, because there is no evidence that would justify you in finding that it is a case belonging to the class which I have just given by way of illustration. Being citizens, tax-payers, and publishers of a newspaper in Bangor, admittedly so, it gave them a right to express their opinions on public matters in which the city was interested, and in which they were personally interested, provided they were honestly published and with an honest belief of their truth."

And the court further instructed the jury: "I have endeavored to state to you the hinge of the case; it is not merely whether the charges were true or were false in this publication. Really, it is the honest belief of Mr. Bass, and whether such belief was founded on reasonable and probable cause." . . .

The defendants requested the following instruction: "That plaintiffs are bound by their innuendoes and the meanings ascribed therein to the words published and if the jury find that the plaintiffs have ascribed a wrong meaning to any of the words, or find that any charge as laid in the innuendoes is true, as to such charge, plaintiffs cannot recover," which said instruction the court refused to give.

The defendants requested the court to instruct the jury as follows: "The fact that the City Hall has been accepted by the city has no bearing upon this case whatever," which requested instruction the court refused to give.

The defendants also requested the court to instruct the jury as follows: "That so much of said alleged libel as reads as follows: 'The doings of the Old Tweed Ring in New York were not worse than much that has been done in connection with our City Building,' are not susceptible of the meaning ascribed to them in plaintiffs' declaration," which requested instruction the court refused to give.

The defendants requested the court to instruct the jury as follows: "That the words, 'The doings of the Old Tweed Ring were no worse than much that has been done in connection with our city building,' do not apply to plaintiffs," which requested instruction the court refused to give.

To all these instructions and omissions and refusals to instruct the defendants took exceptions.

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

What the "Tweed ring" was is now common history. The term "Tweed ring" has been so long and so often used by our people everywhere, that whenever a newspaper charges a combination with being like the "Tweed ring," it suggests to the mind municipal corruption.

That Tweed was a political boss, no one denies; but that he formed a ring for the purpose of political bossism is not true. The ring was formed in order to enable him to steal from the city of New York by means of public contracts.

Beal, as a boss, could have little to do with the city building after the contract was let; but as a member of a ring, he might, by dividing the spoils with his co-conspirators.

The plain inference is that there was corruption. In New York the Tweed ring consisted of municipal agents on the one side, and contractors on the other. So in Bangor the ring must necessarily consist of the municipal agents, or agent on the

one side, and the contractors (these plaintiffs) on the other. There is no other reasonable interpretation to be placed upon the language. As the maximum amount to be taken from the city of Bangor was fixed by the contract, the only way Beal and his alleged co-conspirators could wreck or steal was by reducing the quality, and thereby the expense of the work.

Counsel for the defendants, in his argument to the jury, contended that the expression "no worse than" did not imply "the same as." But the mind of the reader of this article would inevitably go out to the history of municipal affairs in New York. It would convey to the ordinary reader no other meaning than that Mr. Beal, who was a candidate for re-election as mayor, had corruptly conspired with Bearce & Clifford for financial gain, growing out of the contract for the building of the new City Hall.

Right in the same connection, Mr. Bass charged that the building was in the hands of a "wrecker," and asked "how long will the tax-payers of Bangor allow the present state of affairs to exist."

If there was no corruption, if the contract financially was being carried out honestly, of what concern would it be to the tax-payers? How would they be affected? The contract had already been made, the sum had been fixed. But, says Mr. Bass, "Mr. Beal is a wrecker." So was Tweed. But Tweed was a wrecker in the corrupt sense; he was wrecking the city treasury. And if Mr. Beal was a "wrecker," there is no other interpretation to be placed upon the language than that he was wrecking the pockets of the tax-payers of Bangor, a la Tweed.

The article goes on to say, "Very many of the bricks are loose, the mortar being too lifeless to hold them together;" and ends by saying, "The contractors should be obliged to take down and replace the imperfect sections of the walls." That is, that the work had been faultily, negligently, carelessly, ignorantly constructed, that the work should be torn down. And herein is the gist of the libel.

Words not libelous when merely spoken, often become so when written and published. *Tillson* v. *Robbins*, 68 Maine, 295.

In an action for written or printed slander, though no special damage is alleged, and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule or deprive him of the benefits of public confidence and social intercourse. *Tillson* v. *Robbins*, supra.

Language which concerns a person in a lawful employment is admissible, if, as a natural consequence, it prevents him from deriving therefrom that pecuniary reward which probably otherwise he might have obtained. *Missouri Pacific Railway Co.* v. *Richmond*, 73 Texas, 568; *Hayes* v. *Press Company*, 127 Pa. St. 642.

Words are libelous if they affect a person in his profession, trade or business, by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof. Starkie on Slander, § 188.

Words written or spoken of a man, in relation to his business or occupation, which have a tendency to hurt, or are calculated to prejudice him therein, are actionable, though they charge no fraud or dishonesty, and were uttered without actual malice; and, when proved, unless the defendant shows a lawful excuse, the plaintiff is entitled to recover, without allegation or proof of special damages, as both the falsity of the words and resulting damage are presumed. *Moore* v. *Francis*, 121 N. Y. 199.

To write or publish anything that imputes insolvency, inability to pay one's debts, the want of integrity in his business, or personal incapacity or pecuniary inability to conduct it with success, or which impute to him fraud or dishonesty or any mean and dishonorable trickery in the conduct of his business, or which in any other manner are prejudicial to him in the way of his employment or trade, is libelous per se, if without justification and general damages may be recovered. Such publication necessarily, in legal contemplation, tends to injure the credit and standing of the party of whom it is made. 13 Am. & Eng. Ency. of Law, page 314.

The distinction is made that words relating to the quality of articles made, produced, furnished, or sold, are not actionable without special damage, unless they go further and attack the individual. *Dooling* v. *Budget Publishing Co.* 144 Mass. 258.

And the same case holds that a reflection upon the plaintiff in the conduct of his business is actionable per se, because it is an attack upon the individual.

To say of a contractor "he used the old materials," when his contract was for new, is actionable. *Barboneau* v. *Farrell*, 15 C. B. 360.

In order to justify the defendant in the utterance of words otherwise slanderous, it is necessary that the facts proved by him should be co-extensive with the charge; and he can not protect himself from the consequences of having made it by showing that he believed it to be true, even if such belief was induced by misconduct or impropriety on the part of the plaintiff, which fell short of that which he had seen fit to impute. *Clark* v. *Brown*, 116 Mass. 504.

Reasonable ground for belief in the truth of the statements is not admissible in mitigation of damages. *Alderman* v. *French*, 1 Pick. 1; *Watson* v. *Moore*, 2 Cush. 133; *Parkhurst* v. *Ketchum*, 6 Allen, 406.

Hostility to partner in offense charged, let in to show malice. *Robbins* v. *Fletcher*, 101 Mass. 115.

The defendants in their answer set up the truth in regard to the manner in which plaintiffs were constructing the City Hall.

The building, at the time of the publication of the article in question, was only partially constructed; the tower was incomplete, and had been covered in for the winter; temporary layers of brick had been laid, in order that it might be covered in, with the intention that they should afterwards be taken down and replaced, as was subsequently done; and this was all apparent to any observer.

The defendants do not claim to have any positive knowledge of many of these allegations, and in fact, a large proportion of them were not known even by reputation until after the publication of the article; so these, at least, did not enter into the mind of Mr. Bass when he wrote it.

At the conclusion of the trial, on the motion of the plaintiffs, the jury were permitted to go to Bangor and personally inspect the building with reference to each of the defendants' allegations. They saw the building in its entirety and in all of its parts.

It is not claimed that the building was a perfect one. In fact, no such building ever is. It was not an expensive building. But we make bold to say that it was the best building for the money that was ever built in New England. Some members of the court have seen it and know of their own knowledge that what we are saying is true.

The plans and specifications did not call for the highest quality of work, either in labor or materials. That could not be expected for the money.

F. H. Appleton and H. R. Chaplin, *Seth M. Carter*, with them, for defendants.

Counsel argued: First: That the words set out in the declaration are not actionable and constitute no libel upon the plaintiffs in the way of their trade, business or occupation as contractors, as alleged.

Second: That the last allegation does not refer to them, and that the rest of the article is only fair and reasonable comment and criticism upon a public work made to the public by interested citizens and tax-payers.

The plaintiffs by their form of pleading, concede that the words about the Tweed ring are not defamatory of them on their face, and they bring in by way of inducement, extrinsic facts, which coupled with the language published, renders it, as they claim, actionable. They say by way of inducement that the words "the doings of the old Tweed ring" mean and refer to a gang of corrupt public officers of New York city who wickedly and corruptly conspired with certain contractors, who had contracted to build public works, to divide with them the proceeds of their contract and that the words, "were no worse than much that has been done in connection with our city building," they say, by their innuendo, mean and insinuate that the plaintiffs

had corruptly conspired with the agents and servants of the city of Bangor with reference to said contracts and to divide the proceeds thereof."

For the purpose of its construction, language is to be regarded not merely in reference to the words employed, but according to the sense of meaning which, all the circumstances of its publication considered, the language may be fairly presumed to have conveyed to those to whom it was published. Townsend, § 133.

The plaintiffs' whole scheme of defamation depends upon the alleged charge of conspiracy between the agents or servants of the city of Bangor and themselves, in pursuance of which, they were to corruptly divide with said agents or servants the proceeds arising from their contract to build the City Hall. This is the intrepretation they choose to put by their innuendo upon the language used, and they must abide by it. Newell, p. 629; Townsend, § 338, and cases cited; Odgers, 102.

Now there is no suggestion of the charge of conspiracy to be found anywhere in the published article. It protests against bossism, and the manner in which the contract for building the City Hall was awarded, charging that the local contractors were not fairly treated, this is the bone and marrow of the article — but it nowhere charges any conspiracy, either to divide the proceeds of the contract, or anything else, nor attributes this bad treatment of the local contractors to these plaintiffs directly or indirectly — on the contrary, it excludes the plaintiffs from even the inference of such an imputation by charging the whole matter upon the mayor who was then a candidate for re-election. The article is headed "Local Contractors Not Considered." The other portions of the article the plaintiffs do not pretend are libelous; and they constitute, with one exception, with what is included in the writ, the whole article.

The interpretation of the plaintiffs is contrary to the whole spirit of the publication, and perverts the idea which its language palpably conveys. It contains no insinuation of fraud, or criminal intent, or moral turpitude on the part of the plaintiffs. It does arraign Mr. Beal — it charges him with bossism

—with a contemptuous indifference to public opinion and the rights of the public—with an arrogant assumption of power and control over the disposition of submitted bids—it censures his methods, it calls him a king boss and makes him responsible for the alleged unfair treatment of the local contractors. It compares these acts of his, with the doings of the Tweed ring. It does not pretend they are the same; it does not say they are the same. It says, that the doings of the old Tweed ring were no worse than much that has been done in connection with our city building.

In this case the plaintiffs' innuendo puts upon the words used a charge of criminal conspiracy, treating the language as a positive assertion of a thing instead of a comparison. But slanderous words uttered in a conditional or hypothetical statement will not support an averment of slanderous words laid as a direct or positive assertion. *Evarts* v. *Smith*, 19 Mich. 55; *Randall* v. *Eve. News Assoc.* 101 Mich. 561.

If there can be any doubt that the alleged imputation is made against Mr. Beal and not against these plaintiffs, all uncertainty is removed by the sentence which immediately follows: "It is in the hands of a wrecker, and how long will the tax-payers of Bangor allow the present state of affairs to exist?" Not in the hands of wreckers as argued to the jury. The court will particularly note that Mr. Bass used the word "wrecker" in its singular sense, meaning Mr. Beal; but if he had intended to include in the expression, the "Tweed ring" with Beal, the plaintiffs as contractors also, he would have used the plural number, and this is in consistency with the whole spirit of the article. And that the words the "Tweed ring" were used in a collective sense to emphasize and reflect the spirit of bossism, so offensively exhibited in the person of Mr. Beal, and with no reference whatever to these plaintiffs, either as individuals or as contractors, is further evidenced by the expression: "How long will the tax payers of Bangor allow the present state of affairs to exist?" The article is written to the tax-payers of Bangor—an election is pending—Beal is a candidate—an appeal is made to them to destroy bossism and prevent his fur-

ther abuse of power and his further continuance in public office. This could only be done by defeating Mr. Beal at the polls in the coming election, and the tax-payers of Bangor could not prevent the present state of affairs from existing, except by electing another mayor and ex-officio chairman of the building committee in his stead.

Instructions: The court, in effect, says that Mr. Bass' defense is not complete unless he satisfied the jury what he claims in his brief statement, to wit, that the publication complained of was made without malice, is true, etc. Upon whom is the burden to satisfy the jury of the existence of actual malice? The authorities are unanimous that this burden is upon the plaintiffs; but the court in its instruction reverses the order of things and shifts the burden and says, in essence and effect, that Mr. Bass' defense is not complete unless, among other things, he satisfied the jury that the publication complained of was made without malice. Supposing the jury were not satisfied upon the evidence that the publication complained of was made with malice, then what? Why, it follows on the language of this instruction that the defendants' defense is not complete, unless they satisfy the jury that the publication complained of was made without malice. And we submit, that the language of this instruction is fairly susceptible of no other meaning, and that it could have conveyed no other meaning to the jury than that the defense was not made out, unless the defendants satisfy the jury that the publication was without malice. We submit, that this instruction was equivalent to saying, and in effect did say, to the jury that the burden of proof upon the question of malice rested upon the defendants. That is, that the burden of disproving malice rested upon the defendants rather than that the burden of proving malice rested upon these plaintiffs. If this is so, and to our minds, there is no escape from this conclusion, then it follows that this instruction was manifestly wrong.

The court will observe that there is no instruction to the jury, that the burden of proving that it was a malicious publication rested on the plaintiffs.

The charge squarely says that malice on the part of defendant

towards Beal would be, in contemplation of law, the same as malice towards the plaintiffs. The exact language of the instruction is as follows: "If on the other hand, it was published from spite as is claimed by the plaintiffs, although he had no direct ill will toward them, yet if you are satisfied that it did implicate them recklessly, and that in carrying out his ill will toward Mr. Beal, he made these charges against the plaintiffs as well as against Beal in order to implicate Beal, his malice toward Beal would be in contemplation of law, the same as malice toward the plaintiffs. If these charges were knowingly false, and he [meaning Bass] had no good reason for believing them true, they were not made in good faith and though the charge was made at Mr. Beal more especially on account of his ill will toward Beal, then the fact that he had no ill will toward the plaintiffs is no defense."

This proposition of law, that the plaintiffs can destroy the privilege arising from the occasion by proof of malice on the part of the defendants toward any person or persons other than themselves, is entirely unsupported by the authorities. After a careful and exhaustive examination, we have been unable to find a single case which expresses the doctrine laid down in the charge; and we think it is safe to say that, if an isolated case could be found, sustaining the rule laid down by the presiding judge, still the weight of authority is overwhelmingly the other way.

Malice must be personal between the parties, and none others: Odgers, pp. 269-70; Townsend, p. 297; *Howard* v. *Sexton*, 4 Comst. 157; *Haley* v. *State*, 63 Ala. 89; *Stowell* v. *Beagle*, 57 Ill. 97; *Bacon* v. *Mich. C. R. R. Co.* 55 Mich. 224; Newell, p. 323; *Robertson* v. *Wylde*, 2 Moo. & Rob. 101; *Clark* v. *Newsam*, 1 Exc. 131-139; *Carmichœl* v. *Waterford, etc.*, 13 Ir. L. R. 313; *York* v. *Pease*, 2 Gray, 282.

Malice: *Hankinson* v. *Bilby*, 16 M. & W. 442; 18 How. Prac. Rep. 550; *People* v. *Freer*, 1 Caines, 485; *Root* v. *King*, 7 Cow. 633; *Bromage* v. *Prosser*, 4 B. & Cr. 247; *Huson* v. *Dale*, 19 Mich. p. 35; *Wilson* v. *Noonan*, 35 Wis. 321; *Lewis* v. *Chapman*, 16 N. Y. 372; *N. R. R. Co.* v. *Miller*, 10 Barb. 260; *Mahan* v. *Brown*, 13 Wend. 261; *South*

Royalton Bank v. *Suffolk Bank*, 27 Vt. 505; *Benjamin* v. *Wheeler*, 8 Gray, 409; *Manby* v. *Witt*, 18 C. B. 544; *Fahr* v. *Hayes*, 50 N. J. 275; Townsend, (4th Ed.) §§ 90 and 91.

Under our interpretation of the word "malice," we say that the jury should have been instructed that the defendants were entitled to a verdict unless the plaintiff proved that the article was untrue to the knowledge of Mr. Bass, or unless plaintiff proved that Mr. Bass did not believe the article to be true, or unless he made the statement therein recklessly.

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

FOSTER, J. This is an action of libel brought by the plaintiffs for the recovery of damages for defamation of themselves in their business, as contractors, against the defendants as proprietors of the Bangor Daily Commercial, by means of an article published in that paper, on March 28, 1894.

A verdict of $1508.03 was found for the plaintiffs, and the case comes before this court upon motion and exceptions by the defendants.

The publication of the alleged libel was during the progress of a municipal campaign in Bangor in which the election of F. O. Beal for mayor was then pending. The plaintiffs had contracted to build the Bangor City Hall, a public building designed to be used and occupied by the government of the city for public purposes, estimated to cost one hundred thousand dollars, but ultimately costing considerable more than that amount. The mason work had been suspended during the cold weather, and at the time of the publication of the alleged libel, the building, although in the process of construction, was in an incomplete and unfinished condition. The character of the construction of such a building was a matter of public importance and of interest to the inhabitants and tax-payers of Bangor and was, therefore, a matter of legitimate public discussion by the defendants as well as all others who had, in common with the rest of the community, a public and a private pecuniary interest in this important public work.

While the construction of this building was in progress, and while an election for mayor was pending, who was to be ex officio chairman of the building committee, an article was published by the defendants in their paper, and that portion of which claimed to be libelous, is as follows:

"The mason work is of the poorest quality and it should not be accepted by the city. Too much sand has been used in the mortar, and to such an extent that it does not prevent the alkali, which is the life of the mortar, from running out, as can be seen by the white appearance of the building. Very many of the bricks are loose, the mortar being too lifeless to hold them together, and the contractors should be obliged to take down and replace the imperfect sections of the walls.

"The doings of the old Tweed ring in New York, were no worse than much that has been done in connection with our city building."

The defendants contend that these words are not actionable and constitute no libel upon the plaintiffs in the way of their trade, business or occupation as contractors as alleged; and, moreover, that the last allegation does not refer to them; and that the article as a whole is only fair and reasonable comment and criticism upon a public work made to the public by interested citizens and tax-payers.

Two things are necessary for the maintenance of this defense. First, that the comment or criticism upon the plaintiffs' work should be fair and reasonable: Second, that it should be without malice toward them individually or in their business as contractors.

The question is, therefore, whether the the language used imports any personal reflection or attack upon the character of these plaintiffs, either as individuals or in their business as contractors, or whether it is merely a disparagement of the work done by them.

Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. Thus

it has been held that books, prints, pictures and statuary publicly exhibited, and the architecture of public buildings, are all the legitimate subjects of newspaper criticism, and such criticism, fairly and honestly made, is not libelous, however strong the terms of censure may be, without the averment and proof of special damage, unless it goes further and attacks the individual. *Dooling* v. *Budget Publishing Co.* 144 Mass. 258; *Gott* v. *Pulsifer*, 122 Mass. 235; *Tobias* v. *Harland*, 4 Wend. 537; *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* L. R. 9 Ex. 218; *Merivale* v. *Carson*, 20 Q. B. Div. 275.

In *Crane* v. *Waters*, 10 Fed. Rep. 619, it was held that the safety of a bridge on the line of a railroad was matter in which the public were concerned; and that a newspaper might discuss the construction of the bridge, even though the effect of such discussion and criticism was, to some extent, a reflection upon the character of the builder.

So, too, upon the same principle, it has been held to be within the proper limits of criticism to publish of a newspaper that it is the most vulgar, ignorant and scurrilous journal ever published in Great Britain; for this affected the character of the newspaper only, and not, except remotely, the character or reputation of the person publishing it. *Heriot* v. *Stuart*, 1 Esp. 437.

The cases are numerous where this principle has been applied, and the doctrine upon which they are founded is one of universal application, that the public convenience is to be preferred to private interests, and that every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested, and to state his own views for the consideration of all or any of those who have a common interest in the subject. *Henwood* v. *Harrison*, L. R. 7 C. P. 606, 621, 622.

Applying this rule to the case at bar, we think the language complained of is but a fair and reasonable criticism upon the work which entered into the construction of this public building. The mason work is criticised as being of the poorest quality, and ought not to be accepted by the city. The mortar

is criticised as containing too much sand. Criticism is also made that very many of the bricks are loose, the mortar being too lifeless to hold then together, and that the imperfect sections of the wall should be taken down by the contractors. No attack is made upon the character of these plaintiffs, either as individuals or in their business as contractors. The criticism is not of them, but of the work done by them.

But the plaintiffs contend that these assertions charge the plaintiffs with not doing the work according to contract, and that, therefore, the words become defamatory of the plaintiffs in their business. If this be true, then it must follow, as a legal conclusion, that no criticism however fair and reasonable could ever be made upon the work which entered into the construction of any public building, built under contract. To say that an individual, or the public press, should be dumb upon a matter which is of public interest, on the ground that any criticism would impute a breach of contract, and consequently affect the business of the contractors, would amount to an abrogation of that rule of law to which we have referred; and deprive the public of the right of criticism altogether, and that too, in reference to matters in which individuals, cititizens and tax-payers have a common interest.

Certainly, such comment or criticism would seem to be fair and reasonable when temperately written and applied to a state of facts such as this case develops, — for a full report of the evidence in relation to the construction of the building is before us, — and where the language of the criticism does not go beyond the work and attack the person.

It is sometimes said that fair and honest criticism in matters of public concern is privileged. But this is not true in a strict legal sense. The distinction between fair and reasonable comment and criticism, and privileged communications, is this. That in the latter case, the words may be defamatory but the defamation is excused or justified by reason of the occasion; while in the former case, the words are not defamatory of the plaintiff, and hence not libelous,— the stricture or criticism is not upon the person himself, but upon his work. So long,

therefore, as the criticism is confined to his work and does not attack the moral character or professional integrity of the individual, and is fair and reasonable, there is no libel because there is no defamation of the man himself. But, when the comment or criticism of the man's work becomes an attack on his private or business character, then the element of malice comes in and stamps the language as libelous. *Fraser* v. *Berkeley*, 7 C. & P. 621.

In this case, it is conceded that the defendants bore no malice whatever toward these plaintiffs, the evidence being that they were not acquainted with each other and never had either social or business relations. If, therefore, the defendants' criticism of the plaintiffs' work was fair and reasonable, and had no reference to their private or business character, and there was no proof of actual malice on the part of the defendants towards the plaintiffs, then, however much malice may have existed between the defendants and Mr. Beal, cannot make the defendants' criticism libelous. If the criticism of the defendants was fair and reasonable and in reference to a matter of public concern, and the plaintiffs are not attacked either in their private or business reputation, then it constitutes no libel because not defamatory; and it cannot be made libelous by any attack upon the private or business reputation of some person other than the plaintiffs, no matter to what extent such malice may exist. Odgers on Libel, 39, 268. Newell on Libel, 324.

Moreover, we are of opinion that the alleged libel was a privileged communication. The principle applicable to cases in which the claim of privilege is set up is well settled. The difficulty more frequently lies in its application.

In general, an action lies for the publication of statements which are false and injurious to the character of another, for the reputation and character of individuals should not be wantonly and unnecessarily assailed. And the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs where his interest is

concerned. In regard to matters of public interest, all that is necessary to render the words spoken or published privileged is, that they should be communicated in good faith, without malice, to those who have an interest in the subject matter to which they refer, and in an honest belief that the communication is true, such belief being founded on reasonable and probable grounds. In such cases, the occasion rebuts the inference of malice, which the law would otherwise draw from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any such occasion or exigency as we have named, and honestly made, upon reasonable and probable grounds, such communications are protected for the common protection and welfare of society.

Upon a careful consideration of the circumstances attending the publication of the article in question, as disclosed from the evidence offered at the trial, we feel warranted in the conclusion that the occasion was one that rendered the publication justifiable and privileged. The defendants were citizens, tax-payers and publishers of a newspaper in Bangor. The city building was then in process of construction. It had not been accepted by the city. There was indubitable evidence that the mason work was of poor quality and not in conformity to the contract; that the mortar used in the construction of certain parts of the building and the foundation walls was poor and lifeless and in many instances the bricks were loose, on account of the inferior quality of the mortar.

The building was of a public nature in which not only the defendants but every citizen of Bangor was interested. It was a legitimate subject of criticism by those interested in its construction.

The people have a right to know how their municipal affairs are being conducted; how the money which they have contributed by way of taxes is being expended; and they have a right to know how the duties of those whom they have entrusted with the expenditure of such money are being performed, and it is one of the privileges of newspapers to give the people this information; and if the information so given is true, or if the

publishers act in good faith, without malice, believing it to be true, and have reasonable and probable cause for so believing, the law protects them. *Gott* v. *Pulsifer*, 122 Mass. 235.

When the matter complained of is privileged, the burden of proving malice lies on the plaintiff, and the defendant cannot be called on to prove that he was not actuated by malice until some evidence of malice more than a mere scintilla has been adduced by the plaintiff.

In this case we are unable to discover any evidence of malice between the defendants and the plaintiffs. There is nothing upon which a verdict could legally be sustained, and if there is evidence of any malice, it relates to other parties than these plaintiffs.

In relation to that portion of the alleged libel wherein the "Tweed ring" is referred to, all that need be said is, that it is not susceptible of the meaning ascribed to it by the plaintiffs' innuendo.

By no fair construction of the article can these words be held to apply to the plaintiffs or either of them. The whole trend of the article is in another direction. The plaintiffs are not spoken of; their names are not given, nor is there any reference to their occupation, directly or indirectly.

The rule is too well settled to need citation of authority, that an innuendo "is only explanatory of some matter already expressed; it serves to point out when there is precedent matter, but never for a new charge; it may apply to what is already expressed, but cannot add to, or enlarge, or change the sense of the previous words." 1 Ch. Pl. 407; 1 Wm. Saunders, 243 a n. 4; *Emery* v. *Prescott*, 54 Maine, 389.

It is the province of the court to determine in the first instance whether the language published is reasonably susceptible of the meaning ascribed to it by the plaintiffs' innuendo. If it is not susceptible of such meaning, and the language is not upon its face defamatory of the plaintiffs, then they have no ground of action in reference to that particular charge.

The construction to be put upon this particular part of the alleged libelous publication must be that which is consistent

with the whole article, that which follows as well as that which precedes. When viewed in this light, it will be found that it will not reasonably bear the meaning attributed to it by the innuendo. The plaintiffs' whole scheme of defamation, upon this point, depends upon the alleged charge of conspiracy between the agents or servants of the city of Bangor and themselves, in pursuance of which they were to corruptly divide with them the proceeds arising from their contract to build the city hall. This is the interpretation they place upon the language by their innuendo, and by it they are bound. *Williams* v. *Stott*, 1 Cr. & M. 675. But there is no suggestion of the charge of conspiracy to be found anywhere in the published article, either to divide the proceeds of the contract or anything else; nor does it attribute the ill treatment of the local contractors to these plaintiffs either directly or indirectly. On the contrary, it excludes the plaintiffs from such an imputation by charging the whole matter upon the mayor who was then a candidate for re-election.

The interpretation which the plaintiffs have seen fit to ascribe to it is contrary to the whole spirit of the publication, and perverts the idea which its language plainly conveys. It contains no insinuation of fraud, or criminal intent, or moral turpitude on the part of the plaintiffs. It does arraign the mayor, charging him with bossism, with a contemptuous indifference to public opinion and the rights of the public, with an arrogant assumption of power and control over the disposition of submitted bids, and censures his methods, calling him king boss and charging him as responsible for the alleged unfair treatment of the local contractors. It compares these acts of his with the doings of the Tweed ring.

It is the opinion of the court that the motion for a new trial should be sustained and a new trial granted.

Motion sustained.

WINSLOW B. MARSTON *vs.* NELSON DINGLEY, JR., and others.

Kennebec. Opinion February 29, 1896.

Evidence. Expert. Libel. Presumption.

Whether a witness called as an expert possesses the requisite qualifications to enable him to testify, is a preliminary question addressed to the discretion of the court.

That decision must be final and conclusive unless it is made clearly to appear from the evidence that it was not justified, or was based upon some error in law.

A photograph of the plaintiff was sent to a newspaper with the full knowledge on his part that it was to be used for reproduction in that paper.

The "chalk process" was used by the artist in making the reproduction.

In that case, where suit was brought against the paper for alleged libelous words and caricatures, it was proper for the defense to ask an expert whether or not the cut was a good result, as taken by the process mentioned, from the photograph.

In proof of the truthfulness of the description of the condition of the plaintiff's place of abode, evidence was allowed as to the condition a short time after the publication of the alleged libel. This was admissible only for the purpose of describing the permanent features of the abode, as reflecting light on the real condition upon the day of the publication.

The habits and personal appearance of a person being shown, there is a presumption that they continue the same unless the contrary is proved.

ON EXCEPTIONS.

This was an action on the case for slanderous words alleged to have been published in the Lewiston Journal, which words the plaintiff claimed had damaged the plaintiff. The words were descriptive of the filthy or unclean condition of the plaintiff's person and the unclean condition of the habitation of the plaintiff at the time of the publication of the article in the paper complained of as slanderous. The date of the publication was February 24, 1894. The defendants claimed in the defense that the words published were true, and faithfully and truthfully described the condition of the place of habitation, or abode of the plaintiff, at the time when the article was published and that the same was published without malice. In proof of the truthfulness of the description of the condition of the plaintiff's place of abode at the date of the publication, the court under the

seasonable objections of the plaintiff allowed the defendants to introduce testimony to show the condition of the place of abode at a time after the date of said publication.

The plaintiff also complained in the declaration in his writ that the defendants published in said newspaper, as a part of said publication, a scandalous and libelous caricature grossly misrepresenting the personal appearance of the plaintiff. Harry E. Andrews, one of the defendants, was called as a witness for the defendants and was shown a photograph of the plaintiff and was shown the alleged caricature of the plaintiff and was then allowed under the objection of the plaintiff's counsel to testify as follows: . . .

"Ques. I will ask you whether or not the cut in the newspaper which I have shown you is a good result, as taken by the process you have mentioned, from the photograph which you have seen? Ans. I consider it a good result of the chalk-plate process."

"Ques. State whether or not the chalk-plate process, which you have mentioned, is the most approved process used by the Maine newspapers? Ans. It is the quickest and most satisfactory process that newspapers have yet been able to get."

The objection of the plaintiff to Andrews' testimony was that he was allowed to express his opinion on the alleged caricature.

Exceptions were also taken to the admission of other testimony as stated in the opinion.

The verdict was for the defendants.

S. S. Brown and F. A. Waldron, for plaintiff.

Witness cannot be allowed to testify as an expert and give his opinion upon any subject matter that is open to and within the common knowledge and observation of all men and which does not involve any special skill or experience.

The question was not how this alleged caricature was made, what process was used, or what is the best method of reproducing such pictures, but was in fact a caricature such as the plaintiff had a right to complain of.

It was stated by the court in *Lyman* v. *Insurance Co.* 144

Allen, 329, that "it is quite clear that no witness can be permitted to testify to his own individual opinion merely, upon an issue that depends upon facts which involve no particular science or information but are within the common knowledge of man."

Counsel also cited: *Lewis* v. *Brown*, 41 Maine, 448; *Mulry* v. *Insurance Co.* 5 Gray. 541; *Perkins* v. *Insurance Co.* 10 Gray, 312; *Nowell* v. *Wright*, 3 Allen, 166; *White* v. *Ballou*, 3 Allen, 408; *Raymond* v. *Lowell*, 6 Cush. 531; *Mayhew* v. *Mining Co.* 76 Maine, 100; *State* v. *Watson*, 65 Maine, 74; *Lincoln* v. *Barre*, 5 Cush. 590; *Robertson* v. *Stark*, 15 N. H. 109-113.

What the condition of the premises, or room occupied by the plaintiff, was at the time described in the publication defendants' witnesses knew nothing about; nor did they claim to know anything about its condition at that time.

The period of time that had elapsed between the publication and the respective visits of these witnesses was so great that, upon all principles of law bearing on the subject, the testimony should not have been received. The condition of a room as found to-day has no tendency to prove what its condition was six months or a year ago. *Hutchinson* v. *Methuen*, 1 Allen, 33.

H. M. Heath and C. L. Andrews, for defendants.

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

FOSTER, J. Whether a witness called as an expert possesses the requisite qualifications to enable him to testify, is a preliminary question to be decided by the court. That decision must be final and conclusive unless it is made clearly to appear from the evidence that it was not justified, or that it was based upon some error in law. *State* v. *Thompson*, 80 Maine, 194; *Chase* v. *Springvale Mills Co.* 75 Maine, 156; *Jones* v. *Roberts*, 65 Maine, 276.

The exceptions in this case afford no ground for a decision that any such error was committed by the justice presiding at the trial.

This action was for alleged libellous words and caricatures published in the Lewiston Journal on the 24th day of February, 1894. One count in the plaintiff's writ alleged that a cut printed in the defendants' paper so grossly misrepresented him that it was a libellous caricature.

A photograph of the plaintiff was sent to the Journal with the full knowledge on the part of the plaintiff that it was to be used for reproduction in that paper. The "chalk-plate" process, so-called, was used by the artist in reproducing the plaintiff's picture. From the testimony of Harry E. Andrews, one of the defendants' witnesses, it appears that it is the quickest and most satisfactory process in use in newspaper offices in this state.

This witness called as an expert, was asked whether or not the cut in the newspaper was a good result, as taken by the process mentioned, from the photograph.

Objection was interposed and exception taken to the admission of the question and answer on the ground that the opinion of the witness was called for and given in reference to the alleged caricature. But that is not so. The witness was not asked to compare the cut with the plaintiff's features, nor whether it was, in his opinion, a good likeness. It called for his opinion only in reference to the artist's skill, whether or not the cut was a "good result" from the process.

The witness was properly qualified as an expert. He had made a special study in regard to the method of obtaining reproductions. Whether the artist in applying his skill to the chalk-plate in that process, by the use of lines alone, skillfully reproduced the photograph from which he worked, was a question that became material upon the issue raised. If the work was done with reasonably good skill, the result would be called good; and the defendant had a right to introduce the testimony of competent experts upon the question. It in no way infringed upon the allegation in the writ, that the cut grossly misrepresented the plaintiff's real features. It had reference to the care, skillfulness and artistic science involved in reproducing a given photograph by the chalk-plate process in a particular case.

Such evidence was clearly admissible. It related to facts

pertaining to a particular science, art or business not within the common knowledge of men.

Another exception is taken to the admission of certain evidence bearing upon the unclean condition of the habitation of the plaintiff at a time subsequent to the publication of the alleged libellous words.

The charge in the writ was in reference to the words which purported to describe the condition of the plaintiff's place of abode at the time when the article was published,—that he had his horse in the house, a room with bed, stove and stand, and walls and ceiling black with soot.

In proof of the truthfulness of the description of the condition of the place at the date of the publication, the court allowed the defendants to introduce testimony to show the condition of the premises some months after the publication.

The question before us is in reference to the correctness of this ruling.

We certainly can see no error in admitting the testimony.

This evidence from one witness was in relation to what he saw there but a short time after the publication. He describes certain partitions as set off for the use of the horse. The walls and ceiling are described as black with soot. Nothing is said about the cleanliness of the bed or other articles of furniture. That they were there is undisputed, not only at the date of the publication, but also afterwards, at the time the witness refers to. The witness testified to seeing the horse as he looked in where the plaintiff was accustomed to live. This was objected to by counsel for the plaintiff, and the court limited its application to showing the interior condition of the building, partitions, stalls, etc., for general uses. The testimony of the witness was limited by his answers to merely a description of the permanent features of the abode, with no reference to their cleanliness and omitting all temporary or changeable features. To be sure, he described the walls and ceilings as black with soot. This was of matters decidedly permanent, for soot accumulates by the slow deposit of time.

This testimony, as that also of the other witness upon the same point, was confined to the permanent features of the abode,

and although it was given as of a date subsequent to the publication, it was clearly relevant, as reflecting light on the real condition upon the day when the publication was made. It tends to show the probable condition of the plaintiff's abode at that time. Much discretion must be allowed to the court in matters where the question relates to the relevancy of testimony as tending to show the probable condition of things at a particular date, which are permanent in their nature, and not liable to sudden changes in their condition or appearance.

Certain presumptions become applicable in such cases,—the presumption of uniformity and continuance. But as such presumptions are of fact, their effect depends upon the extent to which the quality of permanency enters into the nature of the matter in question. They are much stronger in matters that are of a continuous and permanent nature, than those that are changeable and transitory. *Greenfield* v. *Camden*, 74 Maine, 56, 65.

Thus, where it has been shown what the habits and personal appearance of a person are, the presumption is that such habits and appearance continue the same unless proved to the contrary. 2 Whart. Ev. § 1287. Lawson on Presumptive Evidence, 184. *Eureka Ins. Co.* v. *Robinson*, 56 Pa. St. 256; *Wood* v. *Matthews*, 73 Mo. 482; *Hine* v. *Pomeroy*, 39 Vt. 211; *McMahon* v. *Harrison*, 6 N. Y. 443.

This testimony, therefore, which tended to show that, after the publication of the alleged libel, he continued to live in a house with partitions and stalls for a horse, sooty walls and ceiling, had a legitimate bearing upon the condition at the time in issue, and was admissible under the issue presented where truth was pleaded, and want of any express malice.

Exceptions overruled.

BRUNSWICK GAS LIGHT COMPANY
vs.
UNITED GAS, FUEL AND LIGHT COMPANY.

Cumberland. Opinion March 3, 1896.

Pleading. Practice. Costs. R. S., c. 82, § 124.

Where a plaintiff has become nonsuit in an action for covenant broken, the declaration being upon an indenture, or lease, under seal, and afterwards commences another action in assumpsit upon an account annexed for rent, the cause of action is not the same within the meaning of R. S., c. 82, § 124, which provides that where a "second suit has been brought for the same cause before the costs of the former suit are paid, further proceedings shall be stayed until such costs are paid."

There is a material difference in the form of action, the declaration, the plea, the measure of damage, and the form of judgment.

See *Bruns. G. L. Co.* v. *United Gas, &c., Co.* 85 Maine, 532.

ON EXCEPTIONS.

This was an action of assumpsit with an account annexed, for one thousand dollars for rent of plaintiff's gas plant in Brunswick, also a count for use and occupation. The action was commenced June 11th, 1894, entered at the September Term, 1894, of the Superior Court for Cumberland County, and tried by the presiding justice without the intervention of a jury, at the October Term, 1894, subject to exceptions in matters of law.

Before proceeding to trial, the defendant seasonably filed a motion to stay further proceedings until the costs allowed in a previous suit between the same parties, for the same cause of action, as claimed by the defendant, and in which a nonsuit had been entered at the May term, 1894, of said Superior Court, were paid; and that the suit be dismissed unless said costs were paid at such times as the court should appoint, which motion was denied by the presiding justice who then heard the case and rendered a decision in favor of the plaintiff, awarding damages in the sum of nine hundred seventy-two dollars and sixty-two cents.

To the ruling of the presiding justice, denying said motion, the defendant excepted.

Barrett Potter, for plaintiff.

There is such a difference between the two causes of action that the law gives its support to one and withholds it from the other. The covenant is void and the breach of it gives the plaintiff no remedy. If this action were for the same cause, we should be equally without remedy now.

The plaintiff relies on cases that merely allow an amendment to correct a defective statement of the plaintiff's case, without changing the form of action. If *Rand* v. *Webber*, 64 Maine, 191, seems to go farther than that, *Dodge* v. *Haskell*, 69 Maine, 434, reconciles the doctrine of *Rand* v. *Webber*, with the other cases, when the court say: "*Rand* v. *Webber*, 64 Maine, 191, has been erroneously supposed to allow an amendment to the extent of allowing the nature of the action to be changed. That case merely allowed a correction of the writ, already improvidently and improperly amended, that such a result might be avoided."

The only cause of action we had was the breach of an implied assumpsit. The damage we suffered by that breach was the vital point that was not put directly in issue and determined in the former action. *Long* v. *Woodman*, 65 Maine, 56.

As the defendant owes the plaintiff more than four times as much as the plaintiff owes the defendant, (the judgment for costs amounting to $229.94,) it would seem, if money is to be paid by one of the parties to the other, as if it should be by the defendant to the plaintiff, thus affirming *Long* v. *Woodman*, supra.

George W. Heselton, for defendant.

Object of R. S., c. 82, § 124: *Morse* v. *Mayberry*, 48 Maine, 161; *Smith* v. *Allen*, 79 Maine, 539. It is not the form but the cause of action that is the gist of the statute. Cause of action: *Howell* v. *Young*, 5 B. & C. 259; *Bank* v. *R. R. Co.* 10 How. Pr. 1; *Borst* v. *Corey*, 15 N. Y. 505; *Veeder* v. *Baker*, 83 N. Y. 160.

Whenever the cause of action defectively set forth in a declaration can be distinguished from any other cause of action, then an amendment may be allowed. *Annis* v. *Gilmore*, 47 Maine, 158; *Pullen* v. *Hutchinson*, 25 Maine, 249; *Rand* v. *Webber*, 64 Maine, 191; *Dodge* v. *Haskell*, 69 Maine, 434.

If the ground on which the cause of action could be maintained appeared in the declaration, it is under this provision of the statute, the same cause of action.

The best test of whether the first suit was for the same cause of action would be, could it have been maintained, would it have been a bar to this second suit? One of the elements of damage asked for under the first suit was: "The plaintiff says that after the making of the said indenture, and during the said term hereby granted, to wit, on the fifteenth day of June, A. D., 1890, a large sum of money, to wit, the sum of three hundred and one dollars for rent then due, because it was and still is in arrears and unpaid." Another element was the unpaid taxes. The rental agreed upon in the lease was based largely upon these two elements and the lease by the dicta of the court in *Gas Light Company* v. *United Gas, Fuel and Light Company*, 85 Maine, 541, might be used "as evidence, in nature of an admission, of what is a reasonable rent" and was so used at the second trial.

Then the very elements of the verdict, in the second trial, were included in the first action, and had the agreement not been ultra vires, and void, would have acted as a bar to this second action.

In *Howard* v. *Kimball*, 65 Maine, 330, the court said: "To ascertain whether a former judgment is a bar to present litigation the true criterion is found in the answer to the question: was the same vital point put directly in issue and determined. 8 Am. Jur. 330-335. *Outram* v. *Morewood*, 3 East, 346; 1 Greenl. Ev. §§ 528, 529, 530; *Lord* v. *Chadbourne*, 42 Maine, 429, p. 443."

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

FOSTER, J. The question in this case is, whether the defendant has been twice sued "for the same cause."

Revised Statutes, c. 82, § 124, provides that: "When costs have been allowed against a plaintiff on nonsuit or discontinuance, and a second suit has been brought for the same cause before the costs of the former suit are paid, further proceedings shall be stayed until such costs are paid."

In this case a motion was seasonably filed to stay the proceedings until the costs allowed in a previous suit between the same parties upon nonsuit, should be paid. The motion was overruled, and the case proceeded to trial, and exceptions being taken to the overruling of that motion, the case is before this court.

The present action is assumpsit upon an account annexed for one thousand dollars for rent of plaintiff's gas plant in Brunswick, also a count for use and occupation, both counts being founded upon an implied promise to pay a reasonable sum for rent. The former suit was for covenant broken, and the declaration was upon an indenture, or lease, under seal, made between the plaintiff and defendant. The covenants on the part of the defendant were set out and breaches thereof alleged. The case went to the law court (85 Maine, 532) and a new trial was granted because the lease of the plaintiff of its corporate franchises was ultra vires and void.

It is admitted by counsel that in that suit, among other things, an agreed compensation for use and occupation of the same plant for the same time was claimed.

But the cause of action in that suit, as the record discloses, was for breaches of several covenants contained in the lease.

In the present case, the cause of action is implied assumpsit.

The cause of action was not the same in each. There was a material difference in the form of action, the declaration, the plea, the measure of damages, and the form of judgment.

The forms of action are so dissimilar that they could not be properly joined in the same suit. In an action of covenant, evidence of a parol contract is not admissible. *Phillips, etc. Construction Company* v. *Seymour*, 91 U. S. 647, 654. In

Long v. *Woodman*, 65 Maine, 56, it was held that this statute did not apply where the declaration in the former action was in tort and disposed of on demurrer, and the latter action was in assumpsit.

While it is true, as stated in *Smith* v. *Allen*, 79 Maine, 536, that this statute should be interpreted liberally in behalf of defendants, yet in the present case we feel that the cause of action is not the same as that in the former suit, and therefore the statute does not apply.

Exceptions overruled.

ALFRED SHRIMPTON AND SONS, Limited,

vs.

WILLIAM W. PENDEXTER.

Sagadahoc. Opinion March 2, 1896.

Practice. Exceptions. Presiding Justice. Findings of Fact.

It is a firmly established principle that the decision of a presiding justice as to matters of fact, in cases referred to him with the right of exceptions, is conclusive; and in such case exceptions to the law court do not lie to his findings of any matters of fact.

Pettengill v. *Shoenbar*, 84 Maine, 104, affirmed.

ON EXCEPTIONS.

This was an action of assumpsit on account annexed to recover $110.88 for goods sold and delivered. The case was referred to the court with the right to except. Judgment being rendered in favor of the plaintiff, the defendant filed exceptions.

It appeared from the testimony that on November 18th, 1893, the plaintiff received by mail from the defendant, an order signed by the defendant under the name of H. E. Palmer & Co., for two great gross cards of Kantopen hooks and eyes, the cards to have printed thereon the name, address and advertisement of the defendant, as directed by him in the order. The goods were to be prepared and then shipped to the defendant, under the name of H. E. Palmer & Co., by the cheapest way.

The order was partly in printed form and partly written, was signed by the defendant under the name of H. E. Palmer & Co. and was received by the plaintiff, as stated, on November 18th, 1893, through the mail.

This order is as follows:

"Date, Nov. 16, 1893.

"Alfred Shrimpton & Sons, Ltd.,
273 Church street, New York City.

"Please put up for us as soon as possible two great gross cards of your Kantopen hooks and eyes, assorted in the following sizes and colors: one each three-fourths black.

"One-half of the order in number four.

"One-half of the order in number three.

"One-sixth of the order in number two.

"In each of the above sizes give me three-quarter black and one-quarter white.

"You may change this assortment to suit yourself.

"Print my advertisement on the centre of each card, as written in the space below:

H. E. Palmer & Co.,
Dealers in
Dry Goods and Small Wares,
26 Centre Street, Bath, Maine.
Terms, net thirty days, one per cent ten days.

"When ready, ship by the cheapest way to:
(Signature of firm) H. E. Palmer & Co.
Town, Bath, State of Maine."

The plaintiff thereupon wrote the defendant as follows:

"New York, Nov. 20th, 1893.

"H. E. Palmer & Co.,
Bath, Me.

"Gentlemen:

"We are in receipt of your esteemed order for two great gross cards of Kantopen hooks and eyes, to be put up as soon as we can prepare the goods with your name and special advertising matter printed thereon. We read the advertisement as follows:

H. E. Palmer & Co.,
Dealers in
Dry Goods and Small Wares,
26 Centre Street, Bath, Maine.

"Please check this all over carefully, making any changes or corrections you desire, and if O. K. sign and return to us by first mail, in the enclosed stamped envelope, and we will proceed with the order. It usually requires from thirty to sixty days to get out this class of goods, but we will hurry the order, and ship at the earliest possible date. Thanking you for the favor, we are,

Yours respectfully,
Alfred Shrimpton & Sons, Ltd."

"We have checked this all over carefully, and find it correct in every particular, H. E. Palmer & Co."

"Date, Nov. 22, 1893."

The president of the plaintiff corporation testified:

"Ques. What was then done by the plaintiff in regard to the defendant's orders? Ans. When the confirmation letter was signed and returned to the plaintiff, I at once gave instructions to have the special advertising matter and the goods ordered by the defendant on the order prepared; each one of the cards to be printed with the name, address and advertisement as directed on the order."

"Ques. Are these goods put up and prepared according to order only? Ans. Yes, sir, they are put up specially and by order only, and for that reason, the letter was sent to the defendant to have the order confirmed, as the cards, when once printed with the name, address and advertisement of the merchant ordering them, are by reason of the printed matter thereon, rendered unsalable to any other merchant, and the goods become worthless and cannot be disposed of. For this reason the letter was sent to the defendant to apprise him of the goods, and the amount he had ordered, with a request for him to confirm it before we proceeded with the order. As I have said, he confirmed the order, — signing the confirmation letter, and returning it by mail to us."

"Ques. Did you see the goods after they were prepared, and before they were shipped to the defendant? Ans. Yes, sir, I did. On December 14th, 1893, the goods were all prepared and ready for shipment. I examined them carefully as is my custom with all goods prepared specially, by order such as these were, and found that the advertising matter had been printed exactly as the defendant had ordered the same to be done, and that the goods had been prepared in every particular, according to the order and as confirmed by him in the confirmation letter. Each and every card containing the hooks and eyes, had the defendant's advertisement printed on it as follows: 'H. E. Palmer & Co., Dealers in Dry Goods and Small Wares, 26 Centre Street, Bath, Maine,' and the goods in all respects, were exactly according to order. On December 14th, 1893, I caused the goods to be shipped to the address given upon the order, Bath, Maine, addressed to the defendant under the name of H. E. Palmer & Co.

"Ques. Then the goods ordered by the defendant, two great gross cards of Kantopen hooks and eyes, were prepared and shipped to him as per contract? Ans. Yes, sir, they were."

"Ques. Has any portion of the said goods ever been received or accepted back by the plaintiff or by any one in its behalf? Ans. No, sir."

The plaintiff wrote the defendant as follows:

"New York, Jan. 22nd, 1894.

"H. E. Palmer & Co.,
Bath Maine.

"Gentlemen:

"We received yours of January 16th, enclosing check $10.08, which *you say*, (is to settle for amount of goods kept out of our bill of December 14th, 1893). Our bill was an entire one, and not to be paid for piecemeal. We have not received any goods from you. We have placed the amount to your credit, and we enclose you herewith a statement for the balance due to us. This amount is now past due, and unless we receive your remittance to balance, by return of mail, we shall place the matter in the hands of our attorney for collection.

Yours respectfully,
Alfred Shrimpton & Sons, Ltd."

The defendant testified: . . .

"Ques. You signed the order; is that like the order you signed? Ans. I should say that was the order. That wasn't what we received at first. We made that out to show what we wanted for printing. That was a blank.

"Ques. State if you can consecutively and concisely just what you did after you received that first circular? Ans. I received the sample of hooks and eyes and examined them carefully, and thought we could use some of them. The price of the hook and eye according to their circular was three and a half cents a card. I think I figured them up. That is something we never do, buy a hook and eye by the card. I never heard of their being sold by the card; they are always sold by the gross. They came to $2.52 a gross, the way we always buy them. I ordered one gross each."

"Mr. Trott: Was the order in writing? Ans. Yes, sir."

"Mr. Trott. I object to his stating the contents."

"Ques. Did you order two great gross? Ans. I did not order in great gross cards."

"The court: The order as read was two great gross? Ans. Yes, sir."

"The court: Do you say that that wasn't the order, do you say that it was two gross or two great gross? Ans. I couldn't say how it was written, whether we wrote it one gross or one great gross. We meant a great gross, but sometimes we don't always put the "great" on. But what I ordered and intended was a great gross of each size."

"Ques. You are talking about a great gross of hooks and eyes? Ans. Yes, sir, that is what I am talking about."

"Ques. When you made your order, what did you understand you were ordering? (Objected to.)"

"The court. Here is a written order which speaks for itself.

"Ques. When you signed an order for two great gross of Kantopen hooks and eyes, what did you understand you were signing? (Objected to.)"

"The court. You understood what was meant by gross, and what by great gross perfectly? Ans. Yes."

"The court. I understand that you received a sample card like this that they sent you? Ans. Yes, sir, a sample card the same as that."

"Ques. So you knew that they put them up on a card; are they always put up on a card? Ans. Yes, sir. There is a very large hook and eye that is put up loose in a box, but not on a card." . . .

"Ques. After you had received these goods, what did you do? Ans. I opened a case and examined them, and I was perfectly astonished to see the quantities of hooks and eyes there. I didn't know what it meant. And I took out what I ordered, nailed up the case, and returned them to the firm that they came from, and sent them a check for what I ordered." . . .

"Ques. Did you ever hear of anybody selling or anybody buying, for the thirty years that you have been in trade, hooks and eyes by the gross cards or by the great gross cards? Ans. No, sir, nor no one else. They never were sold that way before." . . .

Cross-Examination.

"Ques. On November 13th, didn't you write to Alfred Shrimpton & Sons something like this: 'Please send me one gross each of Kantopen hooks and eyes like sample sent with advertisement on the cards, and oblige H. E. Palmer & Co. Print the ad. as follows: H. E. Palmer & Co., dealers in dry goods and small wares?' Ans. Yes, sir."

"Ques. Didn't you on the 15th receive a reply to that from the plaintiff? Ans. Yes, sir, with this printed matter." . . .

"Ques. Didn't they write in reply, 'Yours of November 13, to hand, and in reply will say, we could not print your order one dozen cards, nor do we think you meant it so; we enclose you an order blank, which please fill it out as wanted, and write the advertising matter very plainly, and we will proceed with the order?' Ans. Yes, sir. I didn't order one dozen cards."

"Ques. You received that and with it came this blank order? Ans. Yes."

"Ques. You filled out the blank order? Ans. I filled out the blank order the same as I did in the first place."

"Ques. As shown here in the deposition read? Ans. Yes."

"Ques. And signed it and sent it? Ans. You see what they say; I didn't order a dozen cards."

"Ques. They called your attention particularly to the fact that one gross of three and four Kantopen hooks and eyes would simply be a dozen cards in their reply, and sent you a blank order for you to fill out, and you filled it out and sent it to them? Ans. No, sir, one gross of hooks and eyes isn't a dozen cards."

"Ques. My point is that your attention was directly called to how much you had ordered? Ans. My attention wasn't called at all to it."

"Ques. Was that not the reply to your letter of the 13th? Ans. That is the reply to the letter, but you construe it different."

"Ques. That is the language they used? Ans. As far as I recollect, yes."

Joseph M. Trott, for plaintiff.

C. W. Larrabee, for defendant.

Plaintiff lacked the clear and expressive words, such as both parties understood, necessary to form a legal contract. 1 Comyn on Contracts, p. 2. The assent of both contending parties to the unmistakable meaning of this contract, is wanting in this case, and unless it was so, there was never a contract binding on the defendant.

The construction of the contract in writing, and verbal testimony belongs to the court, to give to the writings or letters, such meaning taken in connection with the evidence, as shall seem consistent with the requirements of law. Am. & Eng. Ency. Contract, 42; Construction.

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

FOSTER, J. Assumpsit on an account annexed for goods sold and delivered.

The case was heard by the presiding justice with right of exceptions.

Judgment being for the full amount sued for, the defendant excepts, "because the judge erred in his construction and interpretation of the evidence."

The exceptions challenge the correctness of the decision of the presiding justice based upon the result of evidence and matters of fact.

The principle is too familiar and too firmly established to need the citation of authorities, that the decision of a presiding judge as to matters of fact, in a case referred to him with right of exceptions, is conclusive. *Pettengill* v. *Shoenbar*, 84 Maine, 104; *Berry* v. *Johnson*, 53 Maine, 401; *McCarthy* v. *Mansfield*, 56 Maine, 538; *Haskell* v. *Hervey*, 74 Maine, 192, as to the effect of testimony; *Edmundson* v. *Bric*, 136 Mass. 189; *Coolidge* v. *Smith*, 129 Mass. 554, 557. And in such case exceptions do not lie to his finding of any matter of fact. *Curtis* v. *Downes*, 56 Maine, 24.

Exceptions overruled.

WILSON S. CHENEY, and others,

vs.

LEROY P. GOODWIN, and others.

York. Opinion March 5, 1896.

Voluntary Associations. Contribution. Equity. Practice.

To hold persons liable to contribution in equity as members of a voluntary unincorporated association for debts and expenses authorized at meetings of the association, it should appear that the association is one with a determinate membership differentiated from the general public, and that the meetings authorizing the expenditure were limited in participation to such members. *Held;* that in this case neither condition is shown.

A bill in equity against thirty-four respondents to enforce thirty-four individual and separate though similar contracts is bad for multifariousness.

ON REPORT.

This was a bill in equity, heard on bill, answers and proofs, in which the complainants, being members of a committee who

claim to have acted as the agents of the respondents for the purchase of a lot and erection of a shoe shop thereon in the village of Springvale, sought relief by contribution and account for money advanced and debts contracted in the purchase of the lot and the erection of the shop, over and above the amount of the fund subscribed for that purpose by the respondents and others, and also praying for an adjustment of all the affairs of the enterprise,—the collection of unpaid subscriptions of parties, the restraint of further vexatious litigation at law and such other relief as equity might find necessary, etc.

The case is stated in the opinion.

The following is the material and important allegation in the bill: "Seventh — That the defendants participated in said meetings, assented to said votes, were subscribers to the fund and pledges raised on said subscription book, and became by these and other acts in furtherance of said objects, members of said voluntary association, known as the 'Springvale Industrial Association,' and with the complainants and one Narcissa J. Pelletier, then of Sanford, now of St. Anne Lapocatiere, in the Province of Quebec, and said Edmund Goodwin, now deceased, composed and formed said association and became liable for the indebtedness incurred by the same."

Samuel M. Came, B. F. Hamilton and B. F. Cleaves, for plaintiffs.

Geo. F. Haley, A. Low and Leroy Haley, J. W. Symonds, D. W. Snow and C. S. Cook, for defendants.

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

EMERY, J. After reading the mass of conflicting and contradictory testimony contained in this printed record of nearly six hundred pages and the numerous exhibits, we are not satisfied that the plaintiffs' essential propositions of fact are established by any fair preponderance of the evidence. This result would justify the dismissal of the bill without further remark, since reasons for conclusions of fact are not expositive

of the law. But inasmuch as no reasonable inference from the evidence supports the legal position taken by the plaintiffs in their bill, our judgment can be rested as well on that conclusion.

Assuming the material facts as favorably for the plaintiffs as the evidence will permit, the statement is substantially this: In the summer of 1889, some active, public spirited citizens of Springvale became inpressed with the idea that the material prosperity of that village would be increased by bringing there the business of the E. & A. Mudge Shoe Company from Rochester, N. H. A self-constituted committee of citizens invited the officers of the shoe company to a conference, and finally procured from them a memorandum of the terms on which they would transfer their business to Springvale. These terms, in brief, were the construction of a specified shoe factory building by the citizens, on a selected lot to be purchased by them, and then the gift of the land and building to the shoe company,— the latter to contribute $5000 toward the cost.

An informal public meeting of the people of Springvale was then called and held at the town hall August 12, 1889. At this meeting the attendance was large and general,— a chairman and secretary were chosen,— the proposition of the shoe company was discussed,— and a soliciting committee was chosen to procure subscriptions for the purpose of meeting the shoe company's proposition. The meeting then adjourned to the next Saturday evening. At the adjourned meeting a committee was chosen to procure similar subscriptions in Portland.

The soliciting committees immediately prepared a subscription paper with a heading reciting the proposition of the shoe company, and concluding with the following contract of subscription,— "Now, in consideration of said offer and for the purposes of carrying the same into effect, we the undersigned do hereby agree to pay to a person to be hereafter elected by the subscribers hereto, as treasurer to receive and collect the amount of money hereto subscribed, the sum set against our respective names, at such time or times as the subscribers hereto direct. Dated at Springvale, this 14th day of August, 1889." This subscription paper was industriously circulated in Spring-

vale and Portland and two hundred signatures, more or less, were obtained for sums aggregating about $8000.

This sum of $8000, was not considered sufficient for the purpose, and another general meeting was informally called and held at the town hall on August 23, and was numerously attended. At this meeting the whole matter was talked over, and an effort was made to increase the subscriptions to $10,000. Speeches were made, and the paper was passed round in the meeting for such an increase in the subscription. At length the soliciting committee reported that the desired $10,000 could be relied upon as forthcoming. It was then voted to accept the proposition of the shoe company, and a committee was chosen to notify the shoe company of this action of the meeting. It was further voted "to stand back of the committee." The meeting then adjourned to August 24th.

At the adjourned meeting, the committee of notification reported that they had notified the shoe company as instructed, and that the officers of the company would shortly come to Springvale to prepare and sign a draft of the contract. This report was accepted. It was then voted to give to the association, or enterprise, the name of "The Springvale Industrial Association." An executive committee was chosen and empowered to meet the officers of the shoe company, bind the agreement with them, and carry the same into effect. It was further voted "to stand behind the committee." This meeting adjourned without day.

At all these meetings many signers of the subscription paper were present and took part, but it does not appear as to any meeting, that the call, the attendance, the discussion, or the voting was limited to such signers. They were all meetings open to participation by the general public. All the votes were passed by general consent without division.

The executive committee, chosen at the last meeting, began work at once, — signed the contract with the shoe company (in which they described themselves as acting as a committee of citizens chosen by the subscribers to the fund,) — purchased the lot, — built the factory, and conveyed the whole to the shoe

company, which thereupon transferred its business to Springvale as agreed. The committee transacted most of the business in this connection under the name of the "Springvale Industrial Association." Several of the subscribers to the fund, including some of the defendants, actively co-operated with the committee.

The cost of the land and buildings exceeded the amount subscribed, and the committee was unable to collect all that was subscribed. There resulted a deficit of about $4000, for which the members of the committee were personally responsible. Efforts were made to procure contributions from the former subscribers and the general public to relieve the committee from this deficit. Two public meetings, of a character in call and attendance similar to those in August, were called and held in November and December to arouse public interest, and induce further contributions. All these efforts failed however, and the members of the committee finally brought this bill against thirty-four signers of the original subscription paper to compel a contribution. Some of these defendants were active participants in the meetings of August and in other ways pushed along the enterprise, but it does not appear that all of them were present at any meeting, or did more than sign the subscription paper.

The only position taken by the plaintiffs in their bill, as the basis of their claim for contribution from these defendants, is that stated in the seventh paragraph of the bill. It is there stated that the plaintiffs and defendants composed and formed a voluntary association known as the "Springvale Industrial Association," and as members thereof became all liable for the indebtedness of the association thus incurred by the executive committee, and also liable to contribute among themselves for such indebtedness.

A person may become a member of a voluntary unincorporated association, and make himself liable to third parties upon contracts authorized by a vote of the association within its scope at a meeting of the association, even though he did not vote to give such authority, or did not attend the meeting. In winding up the affairs of such an association, each member may become

liable to make contributions to equalize among the members the losses of the association. Masonic Lodges, Agricultural Societies Fire Companies, Boards of Trade, etc., are familiar instances of such associations.

But, in all such cases, it will be found that the association had a definite and determinate membership,— that there was a clear line of demarcation between members and non-members,—that there was an organization which differentiated the association from the people at large. Again, in all such cases the authorizing vote was passed at a determinate meeting of the association, called and held as such, and limited in participation to members of the association. In the most extreme case we have found, that of a college class (*Wilcox* v. *Arnold*, 162 Mass. 577,) both of these conditions of liability were fulfilled. So also in *Robinson* v. *Robinson*, 10 Maine, 240, where the personal liability was merely suggested. These conditions are in reason, as well as authority, essential to personal liability as a member of a voluntary unincorporated association.

Recurring now to the facts of this case, neither of these conditions appears to be fulfilled. The signing the subscription paper did not constitute the signers an association. There is no contract of association in that paper. Each subscriber only promised to pay a fixed sum of money to such person as a majority of the subscribers should appoint to receive it, and at such times as a majority should fix. There is no stipulation for any other individual or collective action by the subscribers. Nor did the votes of the various meetings constitute an association with a determinate membership. No criterion of membership was established. Not all the signers of the subscription paper were thereby made members, since many did not attend, and there was no stipulation in their subscription for forming such an association. On the other hand, membership was not limited to signers of the subscription paper. It does not appear that the signers present at any meeting were even a majority of those present and participating in the meeting.

But, if the first condition was fulfilled, the second was not. If it could be correctly said that an association with a determinate

membership was formed, there was no determinate meeting of that association which could pass votes binding on its members. None of the calls were for an association meeting. All were to the public generally for a public meeting. Participation in none of the meetings was limited to members of the association. Discussion, voting and all other action could be, and, so far as appears, was shared by other persons. The votes of such meetings cannot bind individuals as members of an association.

It must be apparent that upon the facts, these defendants cannot be held liable to contribution as co-members with the plaintiffs of a voluntary unincorporated association. No other ground is pointed out, upon which this bill for contribution can be sustained against these defendants. Either defendant may have made himself liable to pay fixed or proportional sums to the plaintiffs by his individual action, but such liability would be individual, and distinct from that of every other defendant.

A single bill in equity against all the defendants to enforce thirty-four separate individual contracts, would be multifarious and unsustainable.

Bill dismissed. One bill of costs only against the plaintiffs.

JAMES F. DARRINGTON *vs.* ALBERT C. MOORE, land and buildings.

ELBERT L. RICHARDSON *vs.* SAME.

Androscoggin. Opinion March 5, 1896.

Lien. Revival.

The lien of a laborer upon a building lost by the lapse of time cannot be revived by subsequent labor upon the building not performed by virtue of a contract with owner.

ON EXCEPTIONS.

The case is sufficiently stated in the opinion.

A. K. P. Knowlton, for plaintiffs.

The plaintiffs ceased to labor on the premises within thirty days of the time when the notices of liens were filed in city

clerk's office. *Turner* v. *Wentworth*, 119 Mass. 464; *Miller* v. *Batchelder*, 117 Mass. 179.

Tascus Atwood, for owners.

Work under an entire contract may be suspended under some circumstances by the sub-contractor for more than thirty days without being fatal to his lien; but these claimants had no contract existing, when leaving at their respective dates, that required them to resume work there or would even justify them in assuming they might return. The resumption of work in November, fifty-three and thirty-seven days respectively, after once taking their tools away, was a new contract so far as it pertained to the building and the right to maintain liens. Jones on Liens, § 1431.

If the work was done or the materials furnished for separate and distinct purposes, or under distinct contracts or orders, though in executing one and the same contract with the owner, there is no presumption of a continuous account, and the right of lien must date from the time of doing the different jobs of work, or furnishing the different parcels of materials. Jones on Liens, § 435; see also *Baker* v. *Fessenden*, 71 Maine, 292.

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

HASKELL, J. Laborers' lien upon a building. Plaintiffs worked in the repair of the buildings of the defendant under the employment of one Moore by whom they were employed by the day, one prior to September 12, the other prior to September 28th. At those dates they were respectively dismissed from that service and sent to work elsewhere. More than thirty days elapsed after their dismissal, and on November 4th, Moore set them at work for one hour each, and on November 6th for three hours each. Within thirty days after the work in November they recorded their claims for a lien; and the question is, did the work in November revive their liens for previous work then already lost. We think not. The labor performed was not by virtue of any contract with the owner of the building.

That, prior to September 28th, was continuous, and when it ceased the time within which it must be enforced began to run and expired before any more labor was performed, and the lien was lost. The employer's lien for the labor might continue because he was still completing his work. Suppose, after the thirty days had elapsed, the owner of the building had paid the employer of plaintiffs for their labor, should the owner be compelled to pay them also? He could examine the records and see that their lien had expired and ought to be allowed to pay their employer with safety. We think he could. In this respect the ruling below was error.

Exception sustained.

NEW SHARON WATER POWER COMPANY

vs.

THOMAS R. FLETCHER.

Franklin. Opinion March 5, 1896.

Lease. Water. Dam. Rental.

In an action for use of water drawn from plaintiff's dam by virtue of a written agreement or lease, it appeared that the instrument amounted to an agreement of certain mill-owners to give a company their dam so long as the company should maintain it in an improved condition only. The mill-owners agreed to pay the company the whole rental to be apportioned among them yearly according to the water each one should draw. No term was mentioned; and *it was held*; that the fair inference, therefore, is that it shall be from year to year, when each mill-owner is to pay for the proportion of water he shall have used. If one mill-owner shall have drawn no water he is still deprived of the use of his interest in the dam so long as it shall be maintained in the condition named. The other mill-owners may continue to receive their shares of water by paying the whole rental apportioned among them.

This construction comports with the respective rights of joint owners in a dam. When one ceases to use it, he cannot be compelled to contribute to its repair. That must be borne by the other owners. He loses the use of his property and they assume the costs of its maintenance.

AGREED STATEMENT.

This was an action of assumpsit upon the following account annexed to the writ:

"New Sharon, January 1, 1894.

"Thomas R. Fletcher:

To New Sharon Water Power Co., Dr.

"Balance due for rent and use of water from dam to January 1, 1893, as per contract,	$199 79
"Rent and use of water power from January 1, 1893, to January 1, 1894, as per same contract,	138 89
Due January 1, 1894.	$338 68"

There was also a special count in the declaration upon the agreement in writing, called lease or agreement, found below. The parties agreed upon the following facts:

"The dam was constructed by the company, and the mill-owners commenced to use the water from the bulkhead about the first of October, 1889. The mill-owners agreed among themselves to employ William Sewall and one Joseph Keith to measure and apportion the volume of water used by them respectively, who attended to that duty and reported to the mill-owners that the defendant was using 279 inches; William Croswell, 200 inches; Young & Hutchinson, 250 inches, and Nathaniel Harding, 150 inches. December 26, 1891, the defendant Fletcher paid the company on account his share for the water used, $136.39, and February 6, 1892, he paid on account $111.09, and took receipts therefor from the treasurer of said company. . . . Defendant has paid nothing more. January 8, 1891, the defendant's mill was burned. He made partial arrangements to rebuild, got out part of his lumber, but abandoned the purpose and the mill has not been rebuilt, and in the fall following the fire, the water was shut off by Mr. Harding and Mr. Hutchinson, by arrangement with Mr. Fletcher, to protect the mills below till the mill of defendant should be rebuilt or the flume repaired, and was not used by the defendant after that time. Mr. Fletcher died March 1, 1894. No complaint is made but that the company has sufficient water to meet the demands of the mill-owners and has always been ready to furnish the same. The full court is to render such decision as the law and facts require."

(Lease or Agreement.)

"This indenture — made this twenty-seventh day of March, A. D., 1889, between the New Sharon Water Power Company of the first part, and the present mill-owners at New Sharon village of the second part. Witnesseth:

"That the New Sharon Water Power Co., for the consideration hereinafter mentioned, doth covenant and agree to construct and maintain a dam and bulkhead across the Sandy river at New Sharon village, near by the mills now situated thereon, and to use all due care and diligence in keeping the same in good repair, and upon their failure or neglect to make necessary repairs on the same, the mill-owners shall have the right to make such repairs after giving the said Water Power Co. reasonable notice that such repairs are needed, and to deduct the cost of said repairs from rents due from them to said Water Power Co., and the said Water Power Co. doth demise and lease to said mill-owners the right to draw water as follows:

"The grist-mill to draw water in quantity sufficient for the purposes of the mill in supplying the demands of its patrons, not to exceed six hundred (600) square inches.

"The saw-mill to draw water in quantity sufficient for the purposes of the mill in supplying the demamds of its patrons, not to exceed the number of inches now drawn.

"One chair-factory to draw water in quantity sufficient for its own use, not to exceed the number of inches now drawn.

"Harding's mill to draw water in quantity sufficient to run the mill and business now connected with the wheels, not to exceed the number of inches now drawn.

"And the said mill-owners, T. R. Fletcher, Wm. Croswell, Young & Hutchinson and Nath'l Harding of the second part in consideration of the foregoing do hereby covenant and agree to lease of said Water Power Co. the right to draw and use water in manner and amount as aforesaid, and to pay for the same as follows: for the whole amount of water so drawn said mill-owners to pay the annual rental of five per cent on the cost of said dam and bulkhead not to exceed six [amended 'not to exceed seven'] thousand dollars, each separate mill-owner to

pay as his part of said sum, the same per centage as the number of inches drawn by his mill shall be of the whole number of inches drawn by the four mills. Said payment well and truly to be made at the office of the treasurer of said Water Power Co., at New Sharon, on the first day of January of each year.

"And said mill-owners do further covenant and agree that any other party leasing the right to draw surplus water of said Water Power Co., shall have the right to draw water from the flume by paying their proportional part of the expense of maintaining said flume.

"And in further consideration of the foregoing agreement, on the part of the said Water Power Co., the said several mill-owners do hereby bargain, sell and convey, and forever quit-claim to the said Water Power Co., all the rights and privileges in and to the old dam and its connections with the shores, together with the several rights to draw water in connection with said mills and as now held and conveyed to said mill-owners by deed.

"The conditions of this conveyance are such that should the said Water Power Co. neglect or refuse to well and truly perform the obligations of the foregoing contract of the first part, then this conveyance to be null and void, otherwise to remain in full force and effect.

"Said mill-owners further agree that in case at any time they shall neglect or refuse to pay the annual rental as aforesaid, then said Water Power Co. shall have the right to prevent such mill from drawing or using any water until said rent is paid." . . .

E. O. Greenleaf, for plaintiff.

Upon a covenant in a lease of a mill for years to pay rent, the rent may be recovered after a destruction of the mill by fire, although the lessor does not rebuild. *Fowler* v. *Bott*, 6 Mass. 63; *Hallett* v. *Wylie*, 3 Johns. 44 and cases.

Where a party, by his agreement voluntarily assumes or creates a duty, or charge upon himself, he should be bound by his contract, and the non-performance of it will not be excused by accident or inevitable necessity. *Adams* v. *Nichols*, 19 Pick. 276.

If the lessee desired an exception, he should have provided for it in his contract. *Phillips* v. *Stevens*, 16 Mass. 238.

This indenture between the parties was, in operation, a deed of this right to use water as settled in *Mill Dam Foundery* v. *Hovey*, 21 Pick. 431.

Counsel also cited: *Davis* v. *Alden*, 2 Gray, 313; *Kramer* v. *Cook*, 7 Gray, 553; *The Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S., 665; *Warren* v. *Wagner*, 75 Ala. 188 (51 Am. Rep. 446); *Crocker* v. *Hill*, 61 N. H. 345 (60 Am. Rep. 322); 3 Kent Com. (12 Ed.) § 465 and notes; Taylor L. & T. (7 Ed.) §§ 372, 373; 1 Wash. R. P. (4 Ed.) § 4, p. 505; *Sheets* v. *Selden*, 7 Wall. 424.

Not only was there no destruction of the subject matter of the lease, but the tenant has not shown that he surrendered or offered to surrender, the benefits thereunder. *Coogan* v. *Parker*, 16 Am. Rep. 659 (2 S. C. 255).

A tenant cannot abandoned his title and go out unless the surrender is accepted by his landlord. His right of possession remains the same. *Welcome* v. *Hess*, 25 Am. St. Rep. 145 & note (90 Cal. 507); also note to *Bowen* v. *Clarke*, 29 Am. St. Rep. 625 (22 Oregon 566).

If the tenant be not relieved from rent, after destruction of his landlord's property, a fortiori, he cannot obtain absolution, when the property destroyed is his own, and within his own control and option to rebuild.

H. L. Whitcomb, for defendant.

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

HASKELL, J. The defendant and associates being the owners of a certain dam, inferentially insufficient for their use, conveyed the same to the plaintiff company on condition that the conveyance should be void if the plaintiff failed to rebuild and maintain the same according to its covenants so to do; and agreed to take the water at an annual rental of five per cent on the cost of the new dam, not to exceed seven thousand dollars,

each defendant to pay his proportional part of the same in January annually, measured by the proportion of water he shall have drawn during the year.

Defendant's mill burned in January, 1891, and since that date has taken no water, although he paid his rental until sometime after that. This suit is for rent in arrears.

The agreement provided that plaintiff might sell to other parties any surplus water in the flume on payment of their proportional part of the cost of maintaining the same. It also provided that if the mill-owners failed to pay the stipulated rent the water might be withheld in the meantime; that the grist-mill might draw not over six hundred square inches, the saw-mill, the chair-factory, and Harding's mill, sufficient for their purposes not exceeding "the number of inches now drawn."

When the agreement was made the dam had not been rebuilt, and although it contains the words "doth demise and lease to said mill-owners the right to draw water as follows," yet, there were no premises to be let, and the mill-owners do not accept the premises supposed to be granted, but "agree to lease" "the right to draw and use water" at an annual rental.

The instrument amounts to an agreement by the mill-owners to give the new company their dam so long as they shall maintain it in an improved condition only, and to pay the whole rental to be apportioned among them yearly according to the water each one shall have drawn. No term is mentioned, and the fair inference, therefore, is, that it shall be from year to year, when each mill-owner is to pay for the proportion of water he shall have used. If one mill-owner shall have drawn no water he is still deprived of the use of his interest in the dam so long as it shall be maintained in the condition named. The other mill-owners may continue to receive their shares of water by paying the whole rental apportioned among them. This construction is much more reasonable than it would be to hold each mill-owner liable for rent indefinitely after his use of the water had ceased, as in this case.

Moreover, it comports with their respective rights as joint owners in the old dam. If one ceased to use the dam, he could

not be compelled to contribute to its repair; meantime, the cost would be thrown upon the other owners. He would lose the use of his property and they would assume the cost of its maintenance.

The defendant's mill had burned and presumably could not be rebuilt and run at a profit, so that he had no further use for the water. It would be an extremely harsh construction to hold him for water rent indefinitely when he shall have received no water.

The terms of the agreement are not happily expressed and do not plainly meet contingencies that were not expected when it was written; its construction, therefore, must be that which is most reasonable, and will bear the least heavily on any one. This construction saves the dam company from loss so long as any mill owner continues to draw water, and, if none take water, then the dam company simply meets the chances of investment that it saw fit to assume. It was a joint undertaking that the mill-owners should assume the rental to be severally apportioned according to their respective necessities, and that the dam company should take the risk of their taking the water. If they take none, the dam company must lose its rental. If some part of them take water, they are burdened with the whole rental. On the whole, this is the most equitable construction of which the agreement is susceptible.

The defendant has paid more than appears to be due for rental during the last year that he took water.

Plaintiff nonsuit.

HARVEY D. EATON *vs.* FRED MCINTIRE.

Kennebec. Opinion March 6, 1896.

Railroad. Mileage Book. Custom.

Mileage books contain a contract between the railroad and the passenger, to which the latter affixes his name, and expressly provide that the coupons shall be detached by the conductor. *Held*, that this provision fairly implies that the conductor has the right to determine from what part or parts of the book the coupons shall be taken.

The plaintiff handed his mileage book to the conductor and requested him to take his fare from the back part of it. The coupons were numbered in regular order from front to back and a portion of the leaves in the back part only had been detached, leaving six or eight coupons that were a part of the last leaf. The conductor took off these coupons from the last sheet and the remainder of the passenger's fare from the front of the book. *Held*, that the plaintiff had no right to determine from which part of the book his fare should be taken; and that the conductor in detaching coupons from the front part of the book, contrary to the passenger's request, did not exercise an unlawful dominion over the book.

ON REPORT.

This was an action of trover for the conversion of a railroad mileage book issued by the Maine Central Railroad Company to the plaintiff. The action was entered in the Municipal Court of Waterville where judgment having been rendered for the defendant, the plaintiff appealed to the Superior Court for Kennebec county and reported by that court for the decision of the Law Court.

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 above pleaded, the said defendant further says: that if he took the Maine Central railroad mileage tickets as alleged in the plaintiff's writ, he took them in his capacity of servant and conductor of the Maine Central Railroad Company, and took them from a mileage book presented to him by the plaintiff as payment of the plaintiff's fare, as a passenger on a passenger train of said railroad company, running from Augusta Maine, to said Waterville, and that the defendant took

such coupons for the payment of the plaintiff's fare on said railroad from said Augusta to said Waterville as required by said company and by virtue of a contract between said railroad company and said plaintiff, and that the number and amount of coupons so taken by said defendant amounted to the lawful and established fare for a passenger (and for the defendant's fare) between Augusta and Waterville."

The plaintiff introduced the mileage book, containing a contract of which the following is a copy.

"CONTRACT.

"In consideration of the reduced rate at which this ticket is sold by the Maine Central Railroad, it is accepted by the purchaser subject to the following conditions, viz:

"1. That this ticket entitles the purchaser to stop only at stations which by the time-card are designated as regular stopping places for the train on which it is presented.

"2. That one coupon shall be detached by the conductor for each mile traveled, except that for distances less than three miles, three coupons shall be surrendered, and that all fractions of a mile shall be computed a mile in calculating distances traveled. All distances traveled shall be computed and determined by the mileage tables issued by the Maine Central Railroad, to conductors, and the computation of distances exhibited therein is hereby accepted by the purchaser of this mileage ticket as the basis for estimating the amount of transportation to be performed hereon.

"3. That whenever during a passage made on this book a change of conductors is made, each conductor must detach one coupon for each mile, or fraction thereof traveled on the train while under his charge.

"4. That detached coupons will not be received for passage.

"5. That if the coupons remaining attached hereto at any time are insufficient to carry the purchaser to destination such coupons will be good only for the distance to the farthest station which they represent, and full local fare will be paid from such station for the remainder of the journey. Coupons remaining in this book may be used in connection with another book.

"6. That this ticket will be surrendered to the conductor when the last coupons are detached.

"7. That this ticket will not be honored unless officially stamped.

Harvey D. Eaton."

The plaintiff also testified: . . .

"On the afternoon of the 25th of June, 1894, I got on board the train at Augusta, bound for Waterville, No. 11, I believe it is called, and had with me this mileage book. There had been taken from it at that time some five or six leaves from the back part of the book. No coupons had been taken from the front part of the book. It had originally, I suppose, fifty leaves. There were somewhere in the neighborhood of forty-five leaves left in the book. There were six or eight coupons that were a part of a leaf, the rest of the leaf having been torn off, the same as it is now. The conductor, Mr. McIntire, came along and in his round of taking the tickets, I handed up this book open at the back, I think I held it in that way, with one whole leaf open and that portion of the leaf there. I held it up and said: 'Take my fare from the back, please.' He took the book in his hand and said: 'What did you say?' I said, 'Take my fare from the back, please.' He said, 'I will take off those loose ones there and the rest from the front.' I said, 'Take the rest of my fare from the back, please.' He said, 'I have no such orders,' turned the book over and took off twelve or fourteen coupons from the front of the book, and handed it back to me. That was the transaction substantially as it took place and all that there was to it."

"The court. Do you make any point here that any more coupons were taken than were actually required for the fare. Ans. Not in the least." . . .

The defendant testified: . . .

"State what happened? Ans. He asked me to take his mileage from the back of his book. I said it was not the custom but I would clean up the back leaf. I took that off, and the remainder of the mileage from the front leaf of the book."

"Ques. What did you do with those coupons? Ans. I punched them and returned them to the general office."

"Ques. Are you requested by the railroad company to do that? Ans. Yes."

"Ques. Do you know what is the custom of the conductors in taking out coupons? Ans. Always commencing at the front part of the book."

"Ques. I will inquire of you what the reason of that is, why they are taken from the front part instead of the back. Ans. It is a great deal easier to take the mileage that way."

"Ques. State why. Ans. If you commence from the front part of the book, you can count up your leaves faster than to commence at the back. When there are any odd miles, it is easier to get the correct ones." . . .

Harvey D. Eaton, for plaintiff.

The plaintiff being the legal owner of the book and having a reasonable desire to preserve the unused portion in a certain form, the defendant cannot be allowed without having or giving any reason whatever to disregard the plaintiff's wishes. The defendant's claim is the right to arbitrarily mutilate books regardless of all desires of owners.

Edmund F. and Appleton Webb, for defendant.

The contract is to be construed according to the intention of the parties. *Ames* v. *Hilton*, 70 Maine, 36.

If the words in the contract are of doubtful import, or susceptible of different constructions, the circumstances under which it was made, and the object to be obtained, may be considered to enable the court more intelligently to ascertain from the language used the meaning of the parties. *Veazie* v. *Forsaith*, 76 Maine, 179.

The plaintiff has only a special property in the mileage book, the general property or title being in the railroad company.

True, when the plaintiff bought his mileage book he might destroy it, he might keep it and never present it to the railroad company, and not incur any legal liability, yet he has but a special property in the book.

Benjamin on Sales, § 2, says: "In law, a thing may in some cases be said to have, in a certain sense, two owners, one of whom has the general and the other the special property in it; and a transfer of the special property is not a sale of the thing." . . . "When goods are delivered in pawn or pledge, the general property remains in the pawner, and the special property is transferred to the pawnee."

When the railroad company delivered the mileage book to the plaintiff, it was only for a special purpose, viz: that the plaintiff when he rode might deliver it to the conductor for him to detach the necessary number of coupons to pay his passage. The conductor was the only person who had the right to detach coupons. It is in the contract signed by the plaintiff, that detached coupons should not be received by the company for passage. The plaintiff could not detach them.

The word "surrendered" in the sense it is used in this contract is significant of title to the mileage book in the railroad company.

Parol evidence is admissible to prove the custom or usage testified to.

It does not contradict the contract, but is admissible to ascertain and explain the meaning and intention of the parties. It is also admissible and competent on the point that the plaintiff knew of the existence of the custom and usage and must be presumed to have contracted in reference to it when he signed the contract June 5th, 1894. *Robinson* v. *U. S.* 13 Wall. 363.

The office of custom or usage in part is to ascertain and explain the meaning of the parties to the contract. It is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it.

It is often employed to explain words or phrases in contracts of doubtful signification, or which may be understood in different senses, according to the subject matter to which they are applied. *Barnard* v. *Kellogg*, 10 Wall. 390.

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

WALTON, J. This is an action of trover against a railroad conductor for the alleged conversion of a mileage book. The plaintiff handed his mileage book to the conductor and requested him to take his fare from the back part of it. The conductor complied with the request in part and disregarded it in part. That is, he took part of the plaintiff's fare from the back part of the book and part from the front. The plaintiff claims that he had a right to determine from which part of the book his fare should be taken, and that the act of the conductor in detaching coupons from the front part of the book, contrary to his (the plaintiff's) request, was an unlawful exercise of dominion over the book; and, in law, a conversion of it to the defendant's use.

We do not think this proposition can be sustained. We think it was the right of the conductor to determine from what part or parts of the book he would take the plaintiff's fare. The contract of the parties annexed to the book, and signed by the plaintiff, expressly provides that the coupons shall be detached by the conductor, and we think this fairly implies that the conductor shall have the right to determine from what part or parts of the book they shall be taken. The work of collecting fares must sometimes be performed very rapidly; and to compel conductors to listen to the requests of passengers as to the manner in which the work shall be performed would necessarily be attended with some inconvenience and delay; and, so far as we can discover, with very little, if any, benefit to the passengers. It therefore seems to us that upon principle the right to determine from what part or parts of a railroad mileage book a sufficient number of coupons shall be taken to pay a passenger's fare, ought to belong to the conductor. The act is his, and it seems to us that, upon principle, the choice should be his. And this conclusion is supported by what has heretofore been customary. The evidence shows what our own observation confirms, that ever since these mileage books came into use, the custom has been for the conductor to detach a sufficient number of coupons to pay the passenger's fare from the front part of the book. Not always taking the entire number consecutively; but by detaching whole leaves and such fractions of leaves as he

deems best calculated to make the computation easy and the removal convenient. And what is customary is generally lawful. Custom makes law. As said by Chief Justice WHITMAN more than half a century ago, and confirmed by a multitude of cases since that time, "every contract must have an interpretation governed in some measure by the subject matter to which it relates; and, at the same time, with reference to any known usage connected with it." *Robinson* v. *Fiske*, 25 Maine, 401.

Judgment for defendant.

INHABITANTS OF SUMNER *vs.* LOVELL L. GARDINER.

Oxford. Opinion March 6, 1896.

Tax. Ways. Towns. Highway Surveyors. Road Commissioners. R. S., c. 18, §§ 76, 79.

When a town elects more than one road commissioner, the municipal officers must name one of them to be chairman, and he is required to keep the rate bills and a record of the money received and paid, and hold the money subject to payment as the commissioners order, and he must give a bond with sureties for the faithful performance of his duties. When only one is chosen, he must give a like bond. R. S., c. 18, § 79. When no such appointment of chairman has been made, and no such bond has been given, *held*, that the persons elected as road commissioners are not legally organized or qualified to act.

In such case, and there being no highway surveyor, there is no town officer who can legally demand and collect highway taxes; or make the returns to the assessors necessary to lay the foundation for collecting the amount in money under R. S., c. 18, § 76.

A town voted to raise two thousand dollars for the support of roads and bridges to be expended in highway labor under the supervision of highway surveyors. Three road commissioners had been elected but were not organized or qualified to act. No highway surveyors were elected or appointed. In an action at law to recover a tax in money in this case, *held*, that the defendant could neither be required to work out such tax in labor, nor pay the same in money.

ON REPORT.

This was a statutory action of debt to recover of the defendant, an inhabitant of Sumner, a tax assessed in 1890 as a highway tax, and included in the assessment of 1891 as an unpaid high-

way tax. The defendant admitted his residence and liability to be taxed.

The case is stated in the opinion.

George A. Wilson, for plaintiff.

First. The only legal essentials for the maintenance of this action are a legal assessment and written direction to commence suit.

Second. That having received a return of this tax as unpaid by the road commissioners, the assessors were bound to include it in their next assessment; and the defendant is bound to pay it and cannot defeat this suit by showing any defect or informality in the action of the town officers subsequent to the assessment.

Third. That the testimony shows in fact a substantial compliance, on the part of the town officers, with all vital requirements of the statute sufficient to prevent this defendant from escaping from his just share of the public burden.

Counsel cited: *Rockland* v. *Ulmer*, 84 Maine, 508; *Norridgewock* v. *Walker*, 71 Maine, 182; *Lord* v. *Parker*, 83 Maine, 533; *Bath* v. *Whitmore*, 79 Maine, 182; *Topsham* v. *Blondell*, 82 Maine, 152; *Boothbay* v. *Race*, 68 Maine, 351, 357; *Hayford* v. *Belfast*, 69 Maine, 63, 65; *Rogers* v. *Greenbush*, 58 Maine, 390; *Gilman* v. *Waterville*, 59 Maine, 491.

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

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

WALTON, J. This is a suit to recover a tax originally assessed as a highway tax payable in labor. The town now claims to recover the amount in money on the ground that the defendant illegally refused to work out the tax or to furnish labor or materials to pay it. The defendant denies that the tax was ever legally demanded of him. The real controversy is in relation to the authority of the persons who undertook to collect the tax.

It appears that at its annual meeting held March 3, 1890, the town "voted to raise a thousand dollars for the support of roads and bridges and running of road machine." At a subsequent

meeting held March 24, 1890, the town voted to rescind the vote whereby a thousand dollars was raised for the support of roads and bridges, and voted to raise two thousand dollars for that purpose, "to be expended in highway labor under the supervision of highway surveyors."

It is the latter clause of this last vote that creates the controversy. At the first meeting the town had elected three road commissioners, and notwithstanding the town at its last meeting had expressly voted that the two thousand dollars then raised for the support of roads and bridges should be "expended in highway labor under the supervision of highway surveyors," the road commissioners undertook to collect and expend the tax. The defendant denied their authority to do so, and refused to work out his tax under them.

We are forced to the conclusion that the defendant's refusal was justifiable. Not only was the tax, which the road commissioners undertook to collect and expend, burdened with the condition that it should be expended in highway labor under the supervision of highway surveyors, but the evidence fails to show that the road commissioners were legally qualified to act as such. When a town elects more than one road commissioner, the municipal officers must name one of them to be chairman, and he is required to keep the rate bills and a record of the money received and paid, and hold the money subject to payment as the commissioners order, and he must give a bond with sureties for the faithful performance of his duties. When only one is chosen, he must give a like bond. Revised Statutes, chap. 18, § 79. In the present case no such appointment of chairman appears to have been made and no such bond appears to have been given. The persons elected as road commissioners do not appear, therefore, to have been legally organized and qualified to act. It is the opinion of the court that, under these circumstances, the defendant had a right to refuse to work out his highway tax under the persons elected as road commissioners, and that his refusal can not be made the foundation for an action to recover the amount of his tax in money. Either highway surveyors should have been legally elected or appointed,

or the road commissioners should have been legally organized and qualified to act. So far as appears there were no town officers who could legally demand and collect the highway taxes of that year, or make the returns to the assessors necessary to lay the foundation for collecting the amount in money. Revised Statutes, chap. 18, § 76.

Judgment for defendant.

ORVILLE D. LAMBARD, Appellant.
In re, Collateral Inheritance Tax.

Kennebec. Opinion March 11, 1896.

Tax. Collateral Inheritance. Retroactive Laws. Stat. 1893, c. 146.

The statute of 1893, c. 146, does not apply to property collaterally devised by a testator who died before the act took effect, but whose will was not filed in the probate court until after the act took effect.

Statutes are not to have a retroactive operation unless the legislature has explicitly declared that they shall have that effect; or such intention clearly appears by necessary implication from the terms employed considered in relation to the subject matter, the present state of the law, the object sought to be accomplished, and the effect upon existing rights and obligations.

ON EXCEPTIONS.

This was an appeal by Orville D. Lambard from the probate court, Kennebec County, heard by the court below with the right to except.

Julia E. Johnson, sister of the appellant, who died in Paris, France, October 25, 1892, left a will which was filed in the probate court for Kennebec County, June 5, 1893, and under which will certain real estate in Augusta was devised to her brother, the appellant.

The judge of probate decreed that this property was taxable under the statute entitled "An act to tax collateral inheritances," and ordered the tax to be paid into the State treasury by the executor. An appeal having been taken from this decree to this court sitting as the Supreme Probate Court, the presiding justice ruled that the act of the legislature referred to was not intended to

have and does not have a retroactive effect so as to apply to any property which passed by the will of a testator who died prior to February 9th, 1893; and that the property devised to the appellant by the will of Julia E. Johnson was not subject to a tax under the act aforesaid, and directed that the entry be, "decree of the probate court reversed in whole."

To this ruling the county attorney, for the State, excepted.

Lemuel Titcomb, for appellant.

George W. Heselton, County Attorney, for the State.

This law is not retrospective, and only retroactive as regards taxing estates which had not commenced proceedings in probate court before it went into force. Retroactive laws, unless they impair vested rights, or create personal liabilities, are not unconstitutional. *Berry* v. *Clary*, 77 Maine, 482; *Coffin* v. *Rich*, 45 Maine, 507. The use of the present or future tense of the verb in statutes does not absolutely control their application to present or future transactions. Cases, supra.

In this act the legislature, after stating what estates should be taxed, then says in what cases it shall not apply. Thus by exclusion or elimination making it apply to all cases except those "now pending in the probate court."

No personal liabilities are invaded here, nor are any vested rights impaired. *Carpenter* v. *Com.* 17 How. 462, 463.

Dos Passos on Law of Collateral Inheritance, Legacy and Taxation, says on page 236: "The question as to whether an estate vesting and undistributed before the passage of the law becomes subject to taxation seems to be purely one of legislative intent. . . . Acts, however, which impose a tax upon estates vesting or undistributed before such acts become operative though retroactive, are held to be constitutional."

The appellant had no vested rights in property under the devise of Mrs. Johnson until the same was irrevocably established at the period of distribution, and was therefore taxable in the hands of the executor.

If the estate does not pass to the donee until distribution and, while in the control of the court, and its appointees, taxes can

be imposed, then certainly no rights are vested in the donee; and none can be impaired by the enforcement of this law just as the intention of the legislature has provided by its application to all estates not pending in probate court, February 9th, 1893.

"Descent is a creature of the statute and not a natural right. . . . It is entirely within the province of the legislature to determine who shall and who shall not take the estate and the proportion in which they may take. . . . In the absence of constitutional prohibition, the legislature is supreme." *State* v. *Hamlin*, 86 Maine, 505.

Accordingly, the legislature must necessarily possess the power to determine, by law, in what manner the property of the individual shall descend, and of making alterations in such laws as circumstances, or the public good may require. And it is competent for the legislature to refuse to allow any property to go collaterally or to impart it under such restrictions and modifications it thinks proper, and to change these requirements and restrictions at pleasure, provided no vested rights are impaired. Id.

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

WHITEHOUSE, J. The only question presented by the exceptions in this case is whether the act of the legislature which took effect on its approval, the ninth day of February, 1893, entitled, "An Act to tax collateral inheritances" (chap. 146 of the public laws of 1893) applies to property collaterally devised by a testator who died before the act took effect, but whose will was not filed in the probate court until after the act took effect.

Julia E. Johnson died in Paris, France, on the twenty-fifth day of October, 1892, leaving a will by which certain real estate in Augusta, Maine, was devised to the appellant. This will was filed in the Probate Court for Kennebec county on the fifth day of June, and admitted to probate on the fourth Monday of June, 1893.

On appeal from the Probate Court below, the presiding justice in this court ruled that the act of the legislature above specified was not intended to have and does not have a retroactive effect so as to apply to any property which passed by the will of a testator who died prior to the ninth day of February, 1893, and that the property devised to the appellant by the will of Julia E. Johnson is not subject to a tax under the act in question.

The case comes to the law court on exceptions taken to this ruling by the county attorney, that official being expressly charged in the act with the duty of "representing the interests of the state in such proceedings."

It is the opinion of the court that this ruling was correct.

It is said, indeed, in behalf of the State, that there is no constitutional inhibition against the taxation of estates undistributed, even if the act is passed subsequently to the death of the testator; and the authority of *Carpenter* v. *Com. of Penn.* 17 How. 462, is cited in support of this proposition. In that case, it was said by the court that, while it is in some sense true, that the rights of a donee under a will are vested at the death of the testator, nevertheless the rights of such a donee "are subordinate to the conditions, formalities and administrative control prescribed by the State in the interest of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution; and if, during this period of administration and control by its tribunals and their appointees, the State thinks fit to impose a tax upon the property, there is no obstacle in the constitution and laws of the United States to prevent it."

But whether the act would have been obnoxious to any constitutional objection, if it had been the purpose of the legislature, unequivocally expressed in the act, to bring within the scope of its provisions all estates for the settlement of which proceedings had not been commenced in the probate court February 9, 1893, the court is not here required to determine. The facts of this case do not necessarily present an inquiry into the constitutional limitations of the act, but a question involving

the intention of the legislature respecting its operation upon the estates of those who died prior to the date of the approval.

It is undoubtedly a well-settled general rule that acts of the legislature will not be so construed as to have a retrospective operation unless the legislature has explicitly declared its intention that they should have that effect; or such intention clearly appears by necessary implication from the terms employed considered in relation to the subject matter, the present state of the law, the object sought to be accomplished, and the effect upon existing rights and obligations. *Moon* v. *Durden*, 2 Exch. 22; *Queen* v. *Guardians*, L. R. 2 Q. B. Div. 269; *Gardiner* v. *Lucas*, L. R. 3 App. Cas. 582. Indeed, this rule against retroactive laws is not only of very early origin in the English law, but was recognized as a part of the Roman law; "Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit." Codex lib. 1, tit. 14, 7. It is also declared to be the settled doctrine of the federal supreme court that, "words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." *Chew Hong* v. *U. S.* 112 U. S. p. 559; *U. S.* v. *Heth*, 3 Cranch, 398. And such has repeatedly been declared to be the law of this state and Massachusetts. *Bryant* v. *Merrill*, 55 Maine, 515; *Rogers* v. *Greenbush*, 58 Maine, 397; *Dyer* v. *Belfast*, 88 Maine, 140; *Gerry* v. *Stoneham*, 1 Allen, 322; *Garfield* v. *Bemis*, 2 Allen, 445; *Kinsman* v. *Cambridge*, 121 Mass. 558. See also Cooley on Const. Lim. 455; Endlich on Inter. of Stat. §§ 271, — 293, and Wade on Retroactive Laws, § 34.

It is provided in section one of the act under consideration, that "all property within the jurisdiction of this State and any interest therein whether belonging to inhabitants of this State or not, . . . which shall pass by will or by the intestate laws of this State," &c., "shall be liable to a tax of two and a half per cent of its value, above the sum of five hundred dollars for the

use of the State," &c; and the last section provides that "this act shall not apply to any case now pending in the probate court and shall take effect when approved."

An examination of these provisions with a careful scrutiny of all parts of the act, fails to disclose any indication of a purpose on the part of the legislature to disregard the principles of just legislation and sound public policy suggested by the rules of construction above laid down. Not only is there an entire absence of any language explicitly showing an intention to make the act retrospective, but the use of the future tense in the reference, in the first section, to the property which "shall pass by will or the intestate laws of the state" and the provision that the act shall "not apply to any case now pending in the probate court," have an unmistakable tendency to suggest that the mind of the law-maker was contemplating only the estates of decedents who should die after the act took effect. Thus the construction contended for by the State seems to receive no support from the ordinary rules of interpretation respecting the natural and obvious import of the language employed in the different provisions of the act.

Nor does a consideration of the practical consequences of a retrospective operation of the act, and of the inequalities inevitably resulting from it, render it any more probable that the legislature designed it to have such a construction. No distinction is made in the act between property which "shall pass by will" and that which "shall pass by the intestate laws of the State." If the act should be held to apply to the estates of those who died before the act took effect, for the settlement of which no proceedings had ever been instituted in the probate court, and thus subject to this tax all the property of such estates which has been inherited by collateral heirs and conveyed to innocent purchasers during the preceding twenty years, numerous titles would be disturbed, and, probably, vested rights impaired. Under such a construction of the act, questions respecting its constitutional limitations would at once be raised.

Again, the practical enforcement of the act upon the estates of those who died prior to February 9, 1893, would necessarily

result in great inequality. The liability to taxation would in many instances be determined by the fact whether proceedings for the settlement of the estate were commenced before or after February 9. The estate on which administration was pending on that day would be exempt from taxation, while the estate on which the administration might from necessity or otherwise be delayed until after that date, would be subject to taxation under this act. It is unnecessary to impute to the legislature a purpose to frame legislation which would thus have the practical effect to disturb vested rights, and create a test of liability thus dependent upon accident and chance. The provisions of the act afford abundant opportunity for the fulfillment of the legislative intention by giving it a prospective operation only, and restricting its application to the estates of those dying after the act took effect.

Exceptions overruled.

HANOVER S. NICKERSON *vs.* WILLIAM H. BRADBURY.

Somerset. Opinion March 16, 1896.

Trover. Amendment. Practice.

A plaintiff, who declares for the conversion of a horse called the Smith horse, cannot be allowed to so amend his declaration as to recover for the conversion of a horse known as the Connor horse, they being different horses, and the plaintiff intending to describe the Smith and not the Connor horse, when the writ was made.

Dodge v. *Haskell*, 69 Maine, 429, affirmed.

ON EXCEPTIONS.

This was an action of trover to recover for the conversion of personal property, described in the writ as follows: "A red mare, at that date eight years old, being the same mare that George W. Pushor purchased of John Smith, of the value of fifty dollars. The plaintiff claimed to be the owner of the property described in the declaration by virtue of a chattel mortgage given by George W. Pushor to the plaintiff and others, upon various horses and other personal property, included in

which was one red mare eight years old, and being the same purchased of John Smith; and one red mare, seven years old, and being the same that I, meaning the said Pushor, purchased of James F. Connor."

At the trial the defendant claimed and introduced evidence tending to show that he never had bought, owned or had in his possession, or converted to his own use in any way, the red mare that George W. Pushor purchased of John Smith, but admitted that he had purchased of Pushor the red mare bought of James F. Connor. The plaintiff introduced evidence tending to show that the plaintiff and his counsel saw in the possession of the defendant a red mare, and that a sufficient demand was made upon the defendant for a red mare which demand was refused. There was no dispute but that the red mare in the possession of the defendant at the time of the demand was formerly owned by Pushor and was mentioned in the bill of sale, and was sold by Pushor to the defendant.

Upon the second day of the trial the plaintiff moved to amend his writ by inserting a new count. The purpose of this amendment was to cover the red mare, mentioned in the mortgage as bought by Pushor of James F. Connor, and which was subsequently sold by Pushor to the defendant.

The presiding justice ruled that, as a matter of law, the amendment could not be allowed so as to recover for the conversion of the red mare bought by Pushor of Connor, because it referred to a new and different cause of action and for this reason refused to allow the amendment. To this ruling and refusal the plaintiff excepted.

It was agreed that, if the law court should hold that this was amendable as a matter of law, the amendment should be allowed upon such terms as the law court or a single justice should determine.

S. J. and L. L. Walton, for plaintiff.

Exceptions lie to rulings in matter of law. *Rowell* v. *Small*, 30 Maine, 30; *Hayford* v. *Everett*, 68 Maine, 508.

Where the defendant is in no way connected with or liable

for the horse actually described in the writ, it can make no difference to him whether it be a horse which never existed, or one with which neither plaintiff nor himself ever had had any connection, or one which plaintiff actually did own. So far as defendant is concerned, it is exactly the same. He is liable for the horse which he actually converted. He knows that plaintiff in this action is seeking to enforce a claim for that animal because of the demand made upon him for it, and that it is the conversion of that horse that is intended to be complained of in the declaration. He is not misled by the faulty description.

Why, then, should he not be required to answer to the cause of action which he all the time has understood the plaintiff to be endeavoring to enforce against him?

But inasmuch as while they were together the demand was made for the horse then in the defendant's possession, the latter well knew, when the suit was brought against him, what horse was actually intended to be described in plaintiff's writ.

It was the horse demanded of him, and no matter what defect there might be in the description of that horse, it was simply a misdescription. He knows the cause of action and any failure to describe that horse is a mistake in pleading from which our liberal system of jurisprudence aims to relieve parties by allowing amendments either upon or without terms. Spaulding's Practice p. 313; *Ball* v. *Claflin*, 5 Pick. 303; *Walker* v. *Fletcher*, 74 Maine, 142; *Haynes* v. *Jackson*, 66 Maine, 93.

The defendant, by the demand made upon him, was informed of the claim actually made upon him. Any error made in describing the animal he knows, is a misdescription. He is not injured by this mistake, even if the description does cover another horse which some neighbor, or even the plaintiff may own.

Abel Davis and J. W. Manson, for defendant.

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

PETERS, C. J. One Pushor mortgaged to the plaintiff and others certain personal property, among which was one red

mare, seven years old, being the same purchased by Pushor of one Connor, and also another red mare, eight years old, which Pushor bought of one Smith. And the plaintiff afterwards by purchase from the co-owners became sole owner, as mortgagee, of both horses. After the mortgage was given, and subject to it, Pushor sold the Connor mare to the defendant; and what became of the other one does not here appear.

The plaintiff with his counsel went upon the premises of the defendant and there demanded a red mare of him which demand was refused. Thereupon the plaintiff brought an action of trover against the defendant for the conversion of a red mare, describing her in his declaration as "a red mare at that date eight years old, being the same mare that George A. Pushor purchased of John Smith." It becoming evident at the trial by the testimony introduced in defense of the action, that the defendant never had any possession of the Smith mare, the plaintiff asked leave to insert a new count in his writ, declaring upon the conversion by the defendant "of a red mare formerly owned by George N. Pushor." The presiding justice, as a matter of law and not merely of discretion, refused an allowance of the amendment, and the question now is whether that ruling was right or not.

More properly, perhaps, the motion should have been to be allowed to substitute the second count for the first, because under the two counts a recovery might be had for the two horses instead of one; but no such idea as that is entertained, and the real issue is whether, having declared for the horse bought by the mortgagor, Pushor, of Smith, the plaintiff can be legally allowed in any manner and under any terms to so amend his declaration as to recover for the horse which Pushor formerly purchased of Connor. We feel compelled to answer this inquiry in the negative.

The essential portion of the description, in the mortgage, of the two animals, and the only guide to distinguish between them is that one came by purchase from Smith and the other from Connor. They were of the same color, and their ages

were so nearly alike as to render that mark of description of no consequence.

One cannot sue another for one thing and recover for another and different thing. He cannot sue for the conversion of a horse and recover for the conversion of an ox, nor for one horse and recover for another horse. He cannot sue for the conversion of a horse known as the Smith horse and recover for the conversion of another horse known as the Connor horse, and still the motion by the plaintiff to amend is virtually asking leave to do so.

The cases cited in behalf of the plaintiff do not sustain his contention. In the case of *Haley* v. *Hobson*, 68 Maine, 167, relied on by plaintiff, it was held that a demand sufficiently described by the declaration in an action may be recovered in such action, although the plaintiff did not contemplate its recovery when his writ was sued out. This is because the declaration itself is the only criterion as to what is recoverable under it. Certainly that rule does not help the plaintiff in this action.

In *Walker* v. *Fletcher*, 74 Maine, 142, the authority most relied on for the plaintiff and one perhaps more nearly approaching towards supporting his proposition of amendment than any other, it was held that a plaintiff who sued another for negligently burning his "ash" lumber, might be allowed to amend by substituting in the declaration the word "birch" for "ash," the latter word having been inadvertently inserted. The amendment was allowed upon the ground that the pleader was intending to describe certain lumber but by mistake partially misdescribed it, the court holding that the amendment did not change the real cause of action at all. But it is plainly evident that, in the case at bar, the pleader in framing his declaration described the horse just as he intended to describe him. He made no mistake in his declaration. There was no slip of the mind or pen. His mistake was in supposing that the Smith horse was the one he was in pursuit of. And this very clearly distinguishes the present case from the case cited.

The limitations of the doctrine of amendment, as bearing on the present question, are stated in the case of *Dodge* v. *Haskell*,

69 Maine, 429, in the manner following: "The note was declared upon as dated November 23, 1869. The date in the count was amended so as to read August 23, 1869. The amendment was allowable. It does, in one sense, permit a new cause of action to be described, but not in the sense that the rule is to be understood. The declaration, amended, describes the note correctly; unamended, it described it incorrectly. Still, it identified it, there being but one note. As Jacob's L. Dic. has it, citing ancient authorities: 'If a thing which a plaintiff ought to have entered himself, being a matter of substance, is wholly omitted, this shall not be amended, but otherwise it is, if omitted only in part and misentered.' The reason of it is that it appears, from what is described, what was intended to be described. *Warren* v. *Ocean Ins. Co.* 16 Maine, 439. The nature of the cause of action was not changed. *Rand* v. *Webber*, 64 Maine, 191, has been erroneously supposed to allow an amendment to the extent of allowing the nature of the action to be changed. That case merely allowed a correction of the writ, already improvidently and improperly amended, that such a result might be avoided."

In *Stevenson* v. *Mudgett*, 10 N. H. 338, the idea of the doctrine is clearly expressed, where it is said: "An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes, in one sense, the cause of the action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alteration being made, not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but to cure an imperfect or erroneous statement of the subject matter, upon which the action was in fact founded. So long as the form of action is not changed, and the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed, and others superadded, in order

to cure imperfections and mistakes in the manner of stating the plaintiff's case."

It may be unfortunate that the plaintiff will be prevented by the operation of the statutes of limitation from resorting to a new action to recover for the conversion of the right horse, but that will be the penalty to be suffered by him for entering an action in court and allowing it to sleep on the docket there eight years before bringing it to a trial.

Exceptions overruled. Judgment for the defendant.

WILLIAM SILVERMAN, and others,

vs.

CHARLES E. LESSOR, and another.

Kennebec. Opinion March 24, 1896.

Insolvency. Discharge. Foreign Creditor. Constitutional Law. Stat. 1893, c. 278.

The discharge of a debtor under a state insolvency law is no bar to an action by a citizen of another state who did not in any way become a party to the insolvency proceedings.

It is not within the constitutional authority of a state to enact a law that will give such an effect to an insolvent's discharge.

The plaintiffs, citizens of Pennsylvania, sold merchandise through their agent at Waterville, Maine, in 1894, to the defendants, citizens of Maine. In 1895, the defendants obtained their discharge in insolvency under the laws of Maine and pleaded it in bar of an action subsequently brought here by the plaintiffs, who did not prove their claim or appear in the insolvency court. *Held;* that the defendant's discharge is not a bar to the action.

It is provided by Stat. of 1893, c. 278, that: "No action shall be maintained in any court in this state, against any inhabitant of this state, who has obtained a discharge from his debts under the insolvent laws of this state upon any claim or demand of any name, kind or nature, that would have been discharged by said insolvency proceedings if proved against said estate." *Held*, that this Act cannot be allowed to give the discharge in this case such an effect; and that to so construe the act would render it unconstitutional.

Pullen v. *Hillman*, 84 Maine, 129, affirmed.

ON REPORT.

This was an action reported by the Superior Court for Kennebec county. It was assumpsit on account annexed to recover seventy-three dollars and seventy-five cents for a quantity of suspenders sold to the defendants by the plaintiffs in November, 1894, or prior thereto; and it was agreed that the claim would have been discharged had it been proved against said defendants' insolvent estate, and is not one that is excepted from the operation of the insolvent laws of Maine.

Defendants admitted the correctness of the account, and that payment was due on or before December 1st, 1894.

On the second day of January, 1895, a warrant in insolvency was issued out of the insolvency court, for Kennebec county, against the defendants individually and as co-partners, and on the twenty-eighth day of January, 1895, they received a discharge in accordance with the provisions of R. S., c. 70, § 62, and amendments thereof and additions thereto.

The plaintiffs did not prove their claim or appear in the insolvency court. They admitted that the defendants duly complied with all the provisions of the insolvent law, and deposited twenty-five per cent of the claim in suit with the register of insolvency in accordance with the terms of the composition settlement made by them.

It was agreed that the contract was made with the defendants by the plaintiffs' traveling agent, duly authorized thereto, who solicited and took the order at Waterville, Maine.

The defendants set up their discharge as a bar to the maintenance of this action.

The plaintiffs replied that the discharge does not affect them, as at the time of contracting said debt and at the time of granting said discharge, they were citizens of the commonwealth of Pennsylvania, and also that their right to maintain this action is guaranteed by par. 1, § 2, Art. 4, of the U. S. Constitution; and § 1, Art. 14, of Amendments to the U. S. Constitution.

Harvey D. Eaton, for plaintiffs.

The plaintiffs have a valid and subsisting cause of action against the defendants. *Pullen* v. *Hillman*, 84 Maine, 129, and cases. The question is: has the State of Maine the right

to deny to the plaintiffs the use of its courts in which to enforce performance of the contract?

Old remedies may be abolished and new ones may be substituted therefor, and remedies may be abolished without such substitution. *Lord* v. *Chadbourne*, 42 Maine, 429; *Stocking* v. *Hunt*, 3 Denio, 274. But these principles are general and in their nature subject to certain limitations, the chief of which seems to be that parties shall never be left without some remedy for every substantial cause of action. The cases cited are perfectly compatible with the principle last stated. In *Lord* v. *Chadbourne*, the statute under discussion provided that no action of any kind should be maintained in any court in this State to enforce title to spirituous liquors held in contravention of the State law. Plainly to forbid the use of the court in such a case is no denial of a right, for no right exists. In *Stocking* v. *Hunt*, plaintiff complained of the repeal of the statute allowing distress for rent. The court said that he had left him every remedy that any ordinary creditor had, and he could not complain because his special and peculiar privileges over other creditors had been taken away.

In *Bronson* v. *Kinzie*, 1 How. 316, the court says: "Whatever belongs merely to the remedy may be altered according to the law of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

And this right to proper remedies in State courts is one of the rights guaranteed by the constitution of the United States in par. 1, § 2, Art. 4, and reaffirmed in § 1, Art. 14 of the amendments. *Corfield* v. *Coryell*, 4 Wash. C. C. 380.

The Act of 1893, c. 278, does not and cannot apply to citizens of Maine at all, and it is a matter of common knowledge to bench and bar alike, that it was expressly intended to affect only citizens of other states. It cannot apply to citizens of Maine, because under the circumstances stated in the statute itself no citizen of Maine could have "any claim or demand of

any name, kind or nature, against any inhabitant of this State." The discharge in insolvency wipes the claims and demands of citizens of Maine out of legal existence, provided they be such as could, if in existence, be affected by this statute.

The suggestion that the plaintiffs have ample remedies left because they still have open to them the courts of the United States, and of all the other individual states, is unworthy of serious consideration, because the courts of the United States do not entertain causes where so small an amount is involved; and as to courts of the other states, the defendants can defeat plaintiffs' rights by the very simple expedient of always staying within the boundaries of Maine. The statute is in direct conflict with that provision of the Federal Constitution forbidding the states to pass any law impairing the obligation of contracts. And our Maine Constitution has the same provision. We arrive at this conclusion in this way. The discharge in insolvency being of no effect, the contract is in full force, unperformed on the part of the defendants, and fully entitled to protection under the clause last mentioned. *Bronson* v. *Kinzie*, supra; *Call* v. *Hagger*, 8 Mass. 430; *Jones* v. *Crittenden*, 1 Car. Law Rep. 385; S. C. 6 Am. Dec. 531; *Bailey* v. *Gentry*, 1 Mo. 164; *Bumgardner* v. *Circuit Court*, 4 Mo. 50; *James* v. *Stull*, 9 Barb. 482. No other state has passed such a statute.

F. A. Waldron, for defendants.

We do not deny any rights to these plaintiffs that are not denied to our own citizens. In fact, they are in every respect placed on an exact level with the citizens of Maine, so that they do enjoy all the privileges and immunities of citizens of the several states, including those of Maine. Their rights have not been abridged. The law remains just as it was when the contract was made, and this very contingency was made a part and parcel of their contract, by virtue of the law then and now in force.

The mistake of counsel for plaintiffs is in treating this matter as though the law had been changed after the contract had been made.

But it is a well-settled rule of construction, that if a statute is susceptible of two interpretations, one of which will render it

unconstitutional, and the other will not, the latter should always be adopted. *State* v. *Intoxicating Liquors*, 80 Maine, 57.

In 1883, the Legislature of Michigan enacted an insolvent law which placed foreign creditors upon a better footing than domestic ones, by granting them certain rights which were denied to creditors of their own state: and the law court in the case of *Risser* v. *Hoyt*, 53 Mich. 185, pronounced the statute unconstitutional and void on that account. And yet counsel for plaintiffs asks to have the statute construed in such a way as to allow these plaintiffs to maintain a suit in our courts, simply because they are citizens of another state, while that right is denied to our own citizens. Such an interpretation would render the statute clearly unconstitutional, since then the citizens of each state would not be "entitled to all the privileges and immunities of citizens of the several states." The citizens of Maine would not enjoy, but would be deprived of the rights which would thus be enjoyed by the citizens of every state in the Union except Maine.

The statute is just. It places all creditors on the same basis, whether they reside in Maine or Pennsylvania. It has been found necessary from experience, for the protection of our own citizens, just as the law now embodied in R. S., c. 27, § 56, was found necessary from practical experience, of which Judge WALTON, in *Meservey* v. *Gray*, 55 Maine, 540, says: "It was not only competent, but wise, in our legislature to pass a law declaring that they should receive no aid from our courts in collecting pay for their liquors." The courts are expressly forbidden to enforce this claim in suit.

The statute makes no exceptions in favor of foreign creditors; nor is there any reason, either upon principle or authority, why there should be any such exception. The sole object of the insolvent laws of this State is that all creditors shall stand upon an equal footing and all fare alike.

The provision of the federal and state constitutions which prohibits a State from passing any law impairing the obligation of contracts has no application to the case under consideration.

While the obligation of contracts, wherever it exists, is

always to be protected and sheltered by the broad canopy of the constitution, yet that which is purely a matter of process or remedy is to be governed and regulated by the laws of the place where the remedy is sought. Although citizens of another State, the law was before the plaintiffs' eyes when the debt was contracted and where the remedy for its satisfaction was invoked. There had been no change in this respect. They came here and made this contract. They came here and sought the lex fori, and they must be satisfied with the law which they find here, such as the citizens of this State are obliged to submit to. Neither the comity between States, nor the constitutional provisions relating to the obligation of contracts, can be invoked in this case.

They had due notice of the insolvency proceedings of these defendants and might have proved their claim and received their proportion of the assets, but refused to do so, and claimed rights superior to those of our own citizens, simply because they did not reside in Maine. They have no just ground of complaint, because they are placed on the same plane with the citizens of our own State, and if they have lost the right to share in the estate of defendants with the other creditors, it is their own fault. The plaintiffs had ample justice done them by being allowed to enjoy equal privileges with the citizens of this State.

The law was then as it is now, and both parties must abide by it and construe their contract the same as if it were written in and formed a part of the contract, in accordance with the universal principle that the laws in existence when the contract is made enter into and become a part of such contract. *Ex Parte Christy*, 3 How. 328; *Clark* v. *Reyburn*, 8 Wall. 322; *Walker* v. *Whitehead*, 16 Wall. 317-318; *Kring* v. *Missouri*, 107 U. S. 233; *Memphis* v. *U. S.* 97 U. S. 293; *Seibert* v. *Lewis*, 122 U. S. 284-294; *Butz* v. *City of Muscatine*, 8 Wall. 575; *Mobile* v. *Watson*, 116 U. S. 305; *Curran* v. *State of Arkansas*, 15 How. 319.

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

WALTON, J. The discharge of a debtor under a state insolvent law is no bar to an action by a citizen of another state who did not in any way become a party to the insolvency proceedings. It is not within the constitutional authority of a state to enact a law that will give such an effect to an insolvent's discharge. And this is a rule of constitutional law which has already been so thoroughly examined and so fully discussed, and is now so firmly established, that a further discussion of it at this time would not only be unprofitable, but inexcusably wearisome. *Felch* v. *Bugbee*, 48 Maine, 9; *Hills* v. *Carlton*, 74 Maine, 156; *Pullen* v. *Hillman*, 84 Maine, 129, and authorities there cited.

The facts agreed upon in this case do not take it out of the operation of this rule. The defendants' discharge is no bar to the action.

The act of 1893, c. 278, can not be allowed to give it such an effect. To so construe the act would render it unconstitutional. *Fogler* v. *Clark*, 80 Maine, 237.

Judgment for plaintiffs.

SARAH F. MILLER *vs.* WALDOBOROUGH PACKING COMPANY.

Lincoln. Opinion March 25, 1896.

Law and Equity Act, 1893. Pleadings. Practice. Insolvency. Corporation. R. S., c. 46, § 47; c. 70, § 61; Stat. 1893, c. 217.

Under the Law and Equity Act of 1893, c. 217, the defendant in an action at law may require the court to consider and determine, in the same action, a claim for equitable relief against the further prosecution of the action, or against the levy of the execution upon particular property.

To obtain the consideration and adjudication of such claim for equitable relief, it is not necessary to change the form of the action from law to equity.

Such claim for equitable relief can be presented in the form of "a brief statement" filed with the general issue in the action at law.

It is not necessary that such a statement of claim for equitable relief should be signed by the party in person, or verified by affidavit.

Such statement so filed can be met by a traverse, plea or demurrer, or by a counter brief statement showing equities against the defendant's claim.

Such a statement of claim for equitable relief should contain all the facts relied upon as grounds for such relief, including those facts showing the absence of any remedy at law as required in a bill in equity for the same

purpose. If all these facts are insufficient for equitable relief, and are inconsistent with the law plea filed, final judgment should be at once awarded to the plaintiff.

But the filing of an equitable plea, or statement of claim for equitable relief, does not necessarily bar a defense under the pleas at law. The matter of the plea or statement, rather than its form is to be regarded. If the circumstances alleged in the equitable plea constitute a defense at law, and the pleader has only mistaken the mode of presenting them, the plea or statement may be reformed or treated as a plea at law.

Inasmuch as an insolvent corporation cannot receive a discharge in insolvency, the fact that a defendant corporation in an action at law has been duly declared an insolvent debtor, and its property is being administered in the court of insolvency, shows no cause for restraining the prosecution of the action at law to immediate final judgment.

The fact that the plaintiff in an action at law against an insolvent corporation, intends to levy the execution upon property which the corporation undertook to convey to other parties before its insolvency, does not show any right in the defendant corporation to restrain such levy.

If such plaintiff is thus seeking to get more than his proportional share of the insolvent estate, it is for the assignee, or other creditors, to interpose to defeat such purpose.

See *Miller* v. *Kenniston, Judge*, 86 Maine, 550.

ON EXCEPTIONS.

This was an action at law which came before this court on exceptions by the plaintiff to the overruling of her demurrer to the defendant's plea in equity filed under the Law and Equity Act of 1893, c. 217.

The action was assumpsit upon a promissory note. The defendant, under the general issue, filed the following plea in equity:

"And for a brief statement of special matter of defense, to be used under the general issue pleaded, the said defendant further says:

"That since the commencement of the plaintiff's suit in this action, and within four months next after the alleged attachment made thereon, to wit: on the twenty-fifth day of June, 1892, a petition in insolvency was duly filed in the insolvency court for this county, against the defendant corporation; upon which petition such proceedings were had in said insolvency court, that on the sixth day of September, 1892, the judge of said court of insolvency duly adjudged said corporation to be an insolvent debtor, and ordered a meeting of the creditors to be

holden at the probate court room, in Wiscasset, on Monday, the third day of October, 1892, at ten o'clock, A. M., to prove their debts and choose one or more assignees of its estate; at which meeting, held as above ordered, an assignee was duly chosen, and thereupon the said judge of insolvency made, executed and delivered an assignment in due form of law, assigning and conveying to said assignee, all the estate, real and personal, of the said corporation, not exempt from attachment and seizure on execution, together with all deeds, books of account, and papers relating thereto, which assignment was then forthwith recorded in the registry of deeds for said county of Lincoln; and that the said proceedings against said corporation are still pending in said insolvency court.

"That the entire property and estate of said corporation was sold and conveyed in good faith and for an adequate consideration, long before the alleged attachment made by this plaintiff, and before the institution of said insolvency proceedings. That there remains in the hands of the assignee a considerable sum of money, viz: about $2500.00, being a part of the proceeds of the sale of the property made by said corporation as aforesaid.

"That the plaintiff in this action, heretofore, to wit: on the fifth day of September, 1893, duly filed in said insolvency court, her proof of debt against said corporation, founded on and supported by the same claim or demand which is the subject matter of this action, as therein declared upon, and no other. And said plaintiff now demands a dividend thereon.

"That the defendant corporation, through its officers and attorneys, is informed and believes, and on such information and belief alleges, that the plaintiff seeks to maintain this action for the sole and avowed purpose of obtaining judgment and execution therein, to be levied on the property sold and conveyed by said corporation as aforesaid, besides taking an equal dividend with the other creditors from the funds in the hands of the assignee which are the proceeds of said sale.

"That the settlement of said insolvent estate is impeded and prevented by the pendency of this action; and that such settlement cannot be made with justice to the other creditors or to

the assignee, while this action, or any other action for the same cause, is pending; by reason of which no dividend has yet been made.

"And the defendant corporation avers that the matters herein set forth constitute a ground for relief in equity, and prays that it may receive such relief against the claims of the plaintiff; and especially that the plaintiff may be restrained and enjoined by the order and decree of this honorable court, from further prosecuting or maintaining the said action, or any other action for the same cause, and from making any attachment or seizure of any property, or levying any execution upon any property, as the property of this corporation; and for such other and further relief as to the court may seem meet, and for its costs.

Waldoborough Packing Company, by George B. Sawyer, its attorney."

The plaintiff filed a general demurrer by her attorneys, which having been joined by the defendant's attorney, was overruled by the presiding justice.

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

No pleadings in equity should be filed and no change of a suit at law to one in equity should be made, except first by an express order or direction of the court; and nothing of the sort appears in the record. The record of the case itself should, under the statute, show the order and direction of the court authorizing so radical a change in procedure in any given case.

A brief statement at law, which is all that this record presents, can in no sense be considered a plea in equity, or, as would be required at bar, a bill in equity. This record shows that the defendant is attempting to get the benefit of a bill in equity in aid of its defense by continuing its pleadings at law. Such a proceeding is clearly not contemplated by the statute. The statute expressly provides that the pleadings at law shall be stricken out and the parties shall begin in equity subject to all equitable rules of procedure.

The matters set up in this brief statement are in no proper, legal or equitable sense a defense to the action at law, but they

are matters entirely aliunde of the action, in no way connected with the issue, and in no sense a defense either legally or equitably, but distinct and independent matters relied upon as equitable reasons, not to defend the action at law, but to restrain its prosecution; and these matters should be availed of in accordance with the provisions of § 1, and not under the provisions of § 4, of the act.

This point can be raised by demurrer as it is apparent upon the record, and is one that should be settled by the court, as it relates to an important point of practice under this new statute.

This brief statement is a plea, or bill in equity, praying for an injunction. The act of 1893 made no change whatever in the chancery rules or in equitable procedure or, in any way, enlarged or modified equitable rights or changed the practice in equity. It will not be claimed that a defendant in a suit at law could invoke the equitable jurisdiction of the court except in accordance with the well-settled rules of practice.

Section 6 of the act is conclusive upon the proposition that no change of any kind was intended to be made by the act in the rules of chancery procedure. This provides that when ground for relief in equity is pleaded, "The Supreme Judicial Court may make such decrees and restraining orders as may be necessary to protect and preserve such equitable rights, and may issue injunctions according to the usual practice of courts of equity."

Whatever is done then by the court by virtue of the peculiar provisions of this statute, and especially in the matter of issuing injunctions, is to be done "according to the usual practice of courts of equity."

This brief statement, or plea in equity, or whatever it may be called, is wholly insufficient for the reason that it is not verified by oath. Chancery rule V.

The plea, however, only presents the naked proposition of an absolute sale by the defendant corporation of all its property, and the purpose and intent of the plaintiff to levy upon property thus sold and conveyed, — a proceeding by virtue of which the plaintiff could acquire nothing, and the rights of no one could

in any way be infringed; and the bill, therefore, sets forth no reason whatever for the interposition of a court of equity in the case at bar.

George B. Sawyer, for defendant.

The plea in equity in this case is not filed under the provisions of section one of the statute of 1893; but was filed, as a matter of right, under the fourth section of the same statute. There had been no previous pleadings at law, and there was no occasion for the intervention of the court, or the imposition of terms. But if such permission were necessary, it must be inferred from the fact that such pleadings were received and filed, and that the plaintiff, taking cognizance thereof, filed her demurrer to the same.

As already shown, there were no previous pleadings at law to be stricken out. The demurrer is general and specifies no error in the form or method of verification of the plea. Such defect, if it existed, should have been taken advantage of by a special demurrer or motion in term time. The objection is waived by the general demurrer "for want of equity," and alleging no other ground. *In re Brockway Manuf. Co.* 87 Maine, 477.

With the admitted facts as set forth in the plea, and the avowed intention of the plaintiff to prolong the litigation, involving further cost and delay to the other creditors, for which she alone is responsible, there can be no doubt of the right and duty of the court to interpose equitable relief.

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

EMERY, J. This is an action at law upon a promissory note, and was entered at the April Term, 1892. At the April Term, 1895, the counsel for the defendant filed the general issue plea denying the alleged promise. He further filed in the form of a brief statement, under the general issue, a written allegation of various matters of fact, all extraneous to the question of the defendant's alleged indebtedness. Indeed, the counsel does not claim that the allegations in his brief statement show any matter in denial or avoidance of

the plaintiff's declaration. He practically concedes that they show no ground of defense. He does claim, however, that they show good grounds in equity why the plaintiff should not have the judgment she might be entitled to at law, or, at least, should not levy her execution upon certain specified property formerly of the defendant corporation. He prays, therefore, that she be restrained from taking such judgment and making such levy.

This anomalous procedure upon the part of the defendant is now authorized by the Law and Equity Act of 1893, c. 217, § 4, that act authorizing the defendant in an action at law to bring to the notice of the court, by pleading in the same action, any matters which would entitle him to relief in equity against the claims of the plaintiff, even though they constitute no defense at law. Without that statute, the defendant would have been obliged to bring such matters before the court by a separate suit in equity. With the statute, he can require the court to consider them and afford him in the same action the relief to which they entitle him. In this case, the plaintiff has demurred to the defendant's brief statement of equitable matters; and thus, by force of the act of 1893, the question whether the defendant has any grounds for the equitable relief sought, can be determined in this action at law by a judgment that will conclude the parties finally both at law and in equity.

The gist of the matter alleged by the defendant seems to be this: The defendant corporation before the date of the plaintiff's attachment had essayed to convey for an adequate consideration its entire property. Within four months after the attachment, the defendant corporation was adjudged an insolvent debtor upon proper proceedings, and an assignee appointed. The plaintiff proved against the insolvent estate, in the insolvent court, the same note sued upon in this action. The plaintiff, however, questions the validity of the prior conveyance by the corporation, and intends, if she can obtain judgment against the corporation, to levy her execution upon that property as well as to take her dividend from the estate in the insolvency court. Such avowed purpose of the plaintiff delays and embarrasses the settlement of the estate in insolvency, inasmuch as that estate

consists almost entirely of the property so essayed to be conveyed, and hence no dividend can be safely paid so long as the plaintiff is at liberty to attempt a levy on that property.

The counsel for the defendant does not claim, in argument, that the simple facts that the defendant corporation is an insolvent debtor in the insolvent court, and that the plaintiff has proved her note in that court against the insolvent estate, are or should be a bar even in equity to her proceeding to judgment in her action at law in this court. Insolvent corporations are upon a different footing from insolvent individuals in the insolvency court under our statute. The individual debtor may be discharged from his debts. The incorporated debtor cannot be discharged from its debts. R. S., c. 70, § 61. The obligation of the corporation and its stockholders remains notwithstanding the sequestration of its property by the insolvency proceedings. The creditor's right to a judgment against the corporation is essential to his enforcement of his rights against the stockholders. R. S., c. 46, § 47. *Coburn* v. *Boston, &c., Company*, 10 Gray, 243.

The defendant's counsel insists, however, that the plaintiff's declared purpose to obtain a judgment at law and levy her execution upon the property which the corporation had conveyed before her attachment, and the proceeds of which constitute the estate now being administered in the insolvency court, does show good cause why she should not be allowed to proceed to judgment, or at least should be restrained from levying her execution upon the property conveyed. The argument is that the plaintiff is evidently seeking by means of a judgment and levy to secure an advantage over the other creditors of the corporation, and hence the court should in the interests of equality, and consequent equity, restrain her from the use of those means. As showing both the purpose of the plaintiff and the duty of the court, we are cited to the case, *Miller* v. *Kenniston, Judge*, 86 Maine, 550. It is further argued that the assignee in insolvency cannot safely proceed to make division of the money in his hands, largely the proceeds of the conveyance, until the plaintiff is restrained from attacking that conveyance.

Counsel apprehends that, if such attack should be successful, the grantee in the conveyance would recover the purchase money of the assignee, or at least fasten a lien therefor upon the proceeds.

As to the first argument, it is difficult to see what concern the defendant corporation has with the attempt or hope of the plaintiff to obtain an advantage over other creditors by the means indicated. The corporation has now no property whatever. It has all been conveyed away or assigned in insolvency. The creditors now have control over its administration, and have ample remedies to enforce its equal distribution among themselves. The defendant is interested, perhaps, in its speedy and economical administration, but not in its ratio of distribution. Its indebtedness is reduced to the same extent however the assets are divided among the creditors. If one creditor is seeking to get more than his proportional share, and is using means likely to accomplish that end, it is at the expense, not of the insolvent corporation, but of the other creditors. It is for them to interpose to defeat that purpose, if they desire. The plaintiff's efforts do not seem to have alarmed the other creditors so far.

As to the second argument, there is no statement in the equitable plea that the grantee under the conveyance would have any remedy against the corporation, or any lien upon its assets in the event of the conveyance being declared inoperative; nor is there any statement of facts which tend to show any such remedy or lien. No color of right is shown in the plaintiff to levy successfully on the property so conveyed; nor does it appear that such a levy could by any possibility prevail against the conveyance. The allegation is positive that the entire property and estate of the corporation were sold and conveyed in good faith, and for an adequate consideration, long before the plaintiff's attempted attachment. According to the allegations in the equitable plea, the plaintiff is pursuing a will-o-the-wisp, which pursuit may amuse, but cannot possibly harm the defendant.

But aside from all allegations, or lack of allegations in the

plea, ought the plaintiff at the sole instance of her debtor to be restrained from trying to collect her debt out of what she believes to be still her debtor's property, but which both the debtor and the assignee refuse to recognize as such property? As already said, the plaintiff is not attempting to levy on property to which the assignee is asserting any claim. Apparently it is precisely because the assignee will not make any claim to the property, that the plaintiff seeks to secure it for her debt. In this effort she may become involved in law suits with other parties, but in these suits the defendant, her debtor, has no occasion to interpose. It may, indeed, be pertinently questioned whether a creditor should be enjoined at the instance of anybody from attempting to show that certain property is subject to seizure upon execution for his debt. There is nothing inequitable in vigorous and persistent efforts to subject all of a debtor's property (except what is exempt by law) to the payment of his debts. The other claimants of the same property can ordinarily fully assert their rights in defense to any attack by the creditor. In this case, however, it is safe to say that until the assignee claims the property, or those claiming under the alleged conveyance seek an injunction, no reason is shown why the plaintiff should be hindered in her pursuit. It follows that the demurrer must be sustained and the relief prayed for be denied.

Having adjudicated as above upon the merits of the offered defense, it may be serviceable to consider some points in practice, suggested by counsel under the Law and Equity Act of 1893, chapter 217. The plaintiff's counsel has made three points against the defendant's procedure: (1) that the defendant could not properly allege such purely equitable matter in defense, until it had obtained an order of court requiring the parties to strike out their pleadings at law and to plead anew in equity; (2) that, inasmuch as the matters alleged by the defendant are purely equitable, they should be alleged in the form prescribed by the chancery rules, and the equity practice; (3) that, inasmuch as the relief prayed for is an order or decree against the further prosecution of the action (or practically an injunction),

the pleading should be verified by the affidavit required by the chancery rules in bills praying for an injunction.

There does not seem to be any occasion for changing the suit from one at law to one in equity. An action at law is prima facie a plain, adequate and complete remedy for the collection of a promissory note. The plaintiff is only asking for a judgment for money. It does not yet appear that the rights of these parties "can be better determined and enforced by a judgment and decree in equity." By section 4 of the act of 1893, any matter which would be ground of relief in equity against the plaintiff in an action at law, may be pleaded in the action at law. This the defendant did. As to the form of pleading such matter, the same section provides that the pleading shall be in the form of a brief statement under the general issue. This form the defendant observed. The chancery rule requiring verification applies to pleadings in an equity suit, not to statute equitable pleadings in an action at law. Through all the pleadings in this case, the action remains one at law in which usually no verification of pleadings by affidavit is required.

It is urged, however, that by section 6 of the act of 1893, the court in granting restraining orders and injunctions in actions at law under equitable pleas, must proceed "according to the usual practice, of courts of equity," and that, according to that practice no such order or injunction is ever granted except upon a bill or petition supported by affidavit. Section 6 seems limited in its application to actions at law in the superior courts in which equitable defenses are pleaded. Section 4 seems to sufficiently declare the power of the court in such actions in the supreme judicial court. Both sections, however, seem designed to declare the enlarged powers of the court, rather than to prescribe a limited procedure.

In an equity suit, the party seeking equitable relief first invokes the power of the court and brings the defendant into litigation. If he desire an injunction upon the defendant, he should support his petition by affidavit, and such is the rule in equity suits. In an action at law, the party seeking equitable relief has already been brought before the court by his adver-

sary. The relief sought is solely against that adversary and from some claim in, or from some consequence of, that action. The adversary initiated the litigation and thereby, under the act of 1893, opened up the whole matter legal and equitable, and hence should be prepared for any phase it may assume. There seems to be no great reason for imposing upon the other party, thus brought into court, the restrictions and requirements imposed upon the originator of the litigation. The court has for years summarily exercised certain equity powers in actions at law, without the forms and restrictions of equity procedure, as where the justice of the court assesses the damages in certain actions without the intervention of a jury, and thus affords equitable relief from the penalty of a bond or other covenant. *Philbrook* v. *Burgess*, 52 Maine, 271. Our view of the act of 1893 is that, in permitting equitable pleas and equitable orders and decrees in an action at law, the legislature did not intend to change the character of the action, or to import into it the peculiar formalities and technicalities of a suit in equity. The general purpose of the act is to simplify and speed procedure.

The defendant's counsel in turn has suggested that the plaintiff's counsel erred in demurring to his equitable plea, since technical demurrers to pleas in equity are not used. But the defendant's pleading is not in equity. It is a pleading in an action at law now expressly authorised by statute, and can be met like any other pleading at law by a demurrer, traverse or replication, and can be further met under the statute with a counter brief statement of matter of equitable relief against the defense thus set up.

Both parties appear to have proceeded correctly and without difficulty or hesitation. They have now received an authoritative adjudication, without being remitted to another suit or to another gate of justice.

The result of this adjudication is that judgment must now be ordered for the plaintiff. This result of invoking the statute of 1893, is perhaps unexpected, but it is logical and just. The sole foundation of a suit in equity to enjoin the prosecution of an action at law, or the enforcement of a judgment at law, is

the absence of any adequate defense at law. In a suit in equity to obtain such relief, it must be made to appear that the complainant is obliged to resort to the equity jurisdiction of the court,— that without relief in equity, he must suffer judgment and execution at law. By thus asking the court to consider the facts upon its equity side, he submits whether they entitle him to any relief from the action or judgment. If these facts show a legal defense, or do not show any defense at all, the relief in equity will be denied. It is only when the facts show an equitable defense, and further show that there is no adequate defense at law, that relief will be granted in equity. *Bachelder* v. *Bean*, 76 Maine, 370; *Hapgood* v. *Hewitt*, 119 U. S. 226; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Worthington* v. *Lee*, 61 Md. 530.

If, instead of resorting to a bill in equity, a defendant pleads the same equitable matter in the action at law under the act of 1893, the same inferences should generally be drawn. The defendant thereby usually admits that he has no defense at law.

He has, indeed, asserted by his plea of the general issue, that he has a complete defense at law in that he never made the promise declared on; but a plea of the general issue may be waived by pleading other matter inconsistent with that plea, as in the case of a plea puis darrein continuance. *Morse* v. *Small*, 73 Maine, 565. So the seeking equitable relief against the action or the judgment by pleading equitable matters inconsistent with the general issue, may be held to be a waiver of that plea.

It does not necessarily follow that every equitable plea filed under the statute of 1893, is a waiver of the general issue; or that it is always to be inferred from such a plea, that there is no legal defense. The inference should be from the matter of the plea, rather than from its form. If the circumstances alleged in the defendant's equitable plea do consitute a legal defense and he has only mistaken the proper form of pleading, then his plea may be reformed, or treated as a plea of legal matter in bar; but if those circumstances do not show any defense, either legal or equitable, the plain inference usually is that there is no defense. The act of 1893 was not enacted to permit

defendants to delay actions at law by withholding legal defenses until supposed equitable defenses were disposed of. Successive adjudications upon equitable and legal defenses were not contemplated. The purpose of section four of that act was to permit a defendant, who otherwise would be obliged to resort to a suit in equity for a defense, to interpose the facts constituting that defense directly in bar of the action. It gives him no other privilege or advantage. Since the statute, he must, as before, rely upon his legal defenses if he have any, and it is only when he has no adequate legal defense, that he can properly ask the court to consider his equitable defenses. If he be in doubt whether the facts constitute a legal or equitable defense, or any defense, he may set them out in full under the statute and submit them to the court. If it then appear to the court that the matters so set out constitute no defense, either at law or in equity, then the defendant should submit to judgment. He must be supposed to have stated his whole case. He cannot afterward be heard to say that there are other facts which he has not stated and which are a legal bar to the action. To permit him to do so, would pervert the act of 1893 from an act to facilitate the more speedy adminstration of justice as intended, to one more obstructive of justice.

In this case we infer, we think rightfully, that the defendant in its equitable plea has stated its entire defense. That statement, as we have seen, is insufficient both at law and in equity. The result is that the plaintiff should now have judgment.

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Debtor in composition insolvency estopped from pleading his discharge, *Blake Co.* v. *Lowell*, 424.
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Debtor in composition, estopped from pleading his discharge, *Blake Co.* v. *Lowell*, 424.
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defendant allowed to purge his inequitable conduct, *Ib.*
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For labor *held*, not a bar to suit for board, when contract was mutual, on the facts, *Cook* v. *Bates*, 455.

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Rent reserved was $2700, payable quarterly, *Smith* v. *Blake*, 240.

quarterly payments stated erroneously less sums, latter, *held*, a mathematical mistake, *Ib.*

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Mill-owners gave dam to water company so long as it kept it in improved condition, *Water Co.* v. *Fletcher*, 571.

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Case of privileged communication, *Bearce* v. *Bass*, 521.

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burden in, on plaintiffs to show malice, when communication is privileged, *Ib.*

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Caricature by "chalk process," *Marston* v. *Dingley*, 546.
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Lost by lapse of time, *Darrington* v. *Moore*, 569.
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Stat. 1893, c. 310, not unconstitutional, *Ib.*
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Stat. 1891, c. 124, actions for injuries causing death, limited to cases of immediate death, *Sawyer* v. *Perry*, 42.
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None in car and appliances, *Roberts* v. *R. R.*, 260.
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Notice of blast in quarries required, *Wadsworth* v. *Marshall*, 263.
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Boys playing about moving cars, take risks of life and limb, *Michaud* v. *Ry. Co.*, 381.

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Stringent rules applied in motions for, on ground of newly discovered evidence, *Linscott* v. *Ins. Co.*, 497.
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PARTITION.

Equity will make, of waters, when, *Warren* v. *Westbrook, &c., Co.*, 58.
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Marriage held valid; solemnized by proper magistrate, but no certificate of intention, *Gardiner* v. *Manchester*, 249.
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Giving note *held* not a, *Miller* v. *Hilton*, 429.
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POSSESSION.

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Demandant entitled to, although fee is encumbered with an easement, *Bank* v. *Morrison*, 162.
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Discontinuance of parties in equity, *Bradley* v. *Merrill*, 319.
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For H. M. Payson read W. H. Payson, p. 175, line 27.
For defendant read plaintiff, p. 238, line 17.
For R. S., 1871, read 1821, in head note, p. 310.

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PER CURIAM. 54 (Elections), 103 (Negligence).