MAINE REPORTS

89

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

1896—7

CHARLES HAMLIN

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1897

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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

FOR THE JUDICIAL YEAR 1896.

LAW TERMS.

MIDDLE DISTRICT, at Augusta, Fourth Tuesday of May.

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

EASTERN DISTRICT, at Bangor, Third Tuesday of June.

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

WESTERN DISTRICT, at Portland, Third Tuesday of July.

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

TABLE OF CASES REPORTED.

A.

Abbott, Dinsmore *v.* . . 373
Albee, Grant *v.* 299
Ames *v.* Coffin, ... 300
Appellants, Emery, . . . 544
Atkins *v.* Field, ... 281
Atlas Accident Company, Eaton *v.* 570

B.

Baldwin *v.* Emery, . . . 496
Bangor & Aroostook R. R. Company, Giberson *v.* . 337
Bangor & Aroostook R. R. Company, Leavitt *v.* . . 509
Bangor & Old Town Railway Co., Maine Central Railroad Company *v.* . 555
Bangs *v.* Lewiston & Auburn Horse R. R. Company, ... 194
Bath Savings Inst. *v.* Sagadahoc Nat. Bank, . . 500
Bean, Harrington *v.* . . 470
Beck, Nelson *v.* 264
Beede, Coombs *v.* 187
Belcher *v.* Knowlton, . . 93
Belfast Hotel Company, Mason *v.* 381
Belfast Hotel Company, Mason *v.* 384
Bennett *v.* Dyer, ... 17
Berry *v.* Somerset Railway, 552
Boardman, Marshall *v.* . . 87
Bradbury, Coffin *v.* 476
Bremen (Inhab. of), Friendship (Inhab. of) *v.* . . . 79
Brickett, Cayford *v.* . . . 77
Briggs, Danforth *v.* 316
Brockway Manufacturing Company, *in re*, ... 121
Brooks *v.* Libby, ... 151
Buck, Bucksport *v.* 320
Bucksport *v.* Buck, ... 320
Burnham, Maxcy Manufacturing Company *v.* . 538
Buswell *v.* Fuller, ... 600

C.

Carver, State *v.* 74
Cayford *v.* Brickett, . . . 77
Charleston (Inhabitants of) *v.* Lawry, ... 582
Clark v. Insurance Company of North America, 26
Clark, Morrison, *v.* 103
Coffin, Ames *v.* 300
Coffin *v.* Bradbury, ... 476
Condon *v.* County Commissioners, ... 409
Coombs *v.* Beede, ... 187
County Commissioners, Condon *v.* 409
Cummings *v.* Kennebec Mutual Life Insurance Company, ... 37
Cunningham, Waterman *v.* 295
Cushing (Inhab. of) *v.* Friendship (Inhab. of), 525

D.

Damon, LeBroke *v.* . . . 113
Danforth *v.* Briggs, ... 316
Darling, State *v.* 400
Day, French *v.* 441
Day *v.* Philbrook, ... 462
Dinsmore *v.* Abbott, . . . 373
Doe *v.* Roe, ... 523
Donovan, State *v.* 448
Dutton, Whitcomb *v.* . . . 212
Dyer, Bennett *v.* 17

E.

Eaton *v.* Atlas Accident Insurance Company, . . 570
——— *v.* Granite State Provident Association, . . 58
Ellis *v.* Lewiston, (City of), 60
Embden (Inhabitants of) *v.* Lisherness, ... 578
Emery, Baldwin *v.* 496
Emery, Appellant, . . . 544
Exeter (Inhab. of) *v.* Stetson (Inhab. of), . . . 531

F.

Farnsworth, Rockland, (City of) *v.* 481
Feeney *v.* Spalding, . . 111
Field, Atkins *v.* 281
Field *v.* Lang, ... 454
Finson, Wood *v.* 459
Flewelling *v.* Lewiston & Auburn Horse Railroad Company, ... 585
Flint *v.* Winter Harbor Land Company, . . . 420
Ford, Wing *v.* 140
Fraternal Accident Association, Peabody *v.* . . 96
French *v.* Day, ... 441
Friendship (Inhab. of) *v.* Bremen (Inhab. of), . 79
Friendship (Inhab. of), Cushing (Inhab. of) *v.* . 525
Fuller, Buswell *v.* . . . 600

G.

Gagne, Lewiston (City of) *v.* 395
Getchell *v.* Oakland, (Inhabitants of), ... 426
Getchell, State *v.* . . . 326
Giberson *v.* Bangor & Aroostook R. R. Company, . 337
Goodwin *v.* Smith, . . . 506
Granite State Provident Association, Eaton *v.* . 58
Grant *v.* Albee, ... 299
Griswold *v.* Lambert, . . 534
Gross, State *v.* 542

H.

Haggerty *v.* Hallowell Granite Company, . . 118
Hall, Sherman *v.* . . . 411
Hallowell Granite Company, Haggerty *v.* . . 118
Hammond *v.* Phillips, . . 70
Harrington *v.* Bean, . . 470
Hayhurst, LaFontain *v.* . 388
Hewett, Hurley *v.* . . . 100
Holway, Machias Boom (Proprietors of) *v.* . . 236
Hopkins *v.* Keazer, . . 347
Howe *v.* Klein, ... 376
Howland, Morgan *v.* . . 484
Huff, State *v.* 521
Hunter *v.* Pherson, . . . 71
Hurley *v.* Hewett, . . . 100
Hurley, Redman *v.* . . . 428
Hussey, Johnston *v.* . . 488

I.

Insurance Commissioner *v.* Provident Aid Society, . 413
In re, Brockway Manufacturing Company . . 121
Insurance Company, Cummings *v.* 37
Insurance Company of North America, Clark *v.* . . 26

J.

Jodrie, Steinfieldt *v.* . . 65
Johnston *v.* Hussey, . . 488
Judge of Probate *v.* Quimby, 574

K.

Keazer, Hopkins *v.* . . . 347
Kennebec Mutual Life Insurance Company, Cummings, *v.* 37
Kennebec Mutual Life Insurance Company, Marston *v.* 266

Klein, Howe *v.* 376
Knight *v.* Trim, ... 469
Knowlton, Belcher *v.* . . 93

L.

LaFontain v. Hayhurst, . 388
Lambert, Griswold *v.* . . 534
Lang, Field *v.* 454
Laughlin *v.* Reed, . . . 226
Lawry, Charleston (Inhabitants of) *v.* 582
Leavitt *v.* Bangor & Aroostook R. R. Co., . . . 509
LeBlanc, Tracy *v.* . . . 304
LeBroke v. Damon, . . 113
Levasseur, Plurede *v.* . . 172
Lewiston & Auburn Horse R. R. Company, Bangs *v.* 194
Lewiston & Auburn Horse Railroad Company, Flewelling *v.* 585
Lewiston (City of), Ellis *v.* 60
Lewiston (City of) *v.* Gagne, 395
Lewiston Daily Sun Publishing Company, O'Rourke *v.* 310
Libby, Brooks *v.* . . . 151
Lisherness, Embden (Inhabitants of) *v.* . . . 578
Livingston, Pulitzer *v.* . 359
Lowell, Quimby *v.* . . . 547
Lynch, State *v.* 209

M.

Machias Boom (Proprietors of) *v.* Holway, . . . 236
Maddocks *v.* Stevens, . . 336
Maine Central Railroad Company *v.* Bangor & Old Town Railway Company, ... 555
Maine Central R. R. Company *v.* Waterville & Fairfield Railway & Light Company, ... 328
Maine Red Granite Company *v.* York, . . . 54
Maine State Relief Association, Williams *v.* . . 158
Marshall *v.* Boardman, . . 87
Marston *v.* Kennebec Mutual Life Insurance Company, 266
Martin, State *v.* 117
Mason *v.* Belfast Hotel Company, ... 381
Mason *v.* Belfast Hotel Company, ... 384
Maxcy Manufacturing Company *v.* Burnham, . . 538
Miles, State *v.* 142
Milliken *v.* Randall, . . 200
Milliken *v.* Skillings, . . 180
Milliken *v.* Waldron, . . 394
Mitchell, *ex parte*, . . . 121
Morgan *v.* Howland, . . 484
Morrison *v.* Clark, . . . 103

N.

Neal *v.* Smith, ... 596
Nelson *v.* Beck, ... 264
Nelson *v.* Sanford Mills, . 219
Norton, State *v.* 290

O.

Oakland (Inhabitants of), Getchell *v.* 426
O'Rourke *v.* Lewiston Daily Sun Publishing Company, ... 310

P.

Parker, State *v.* 81
Peabody *v.* Fraternal Accident Association, . . . 96
Penley, Complt., . . . 313
Pherson, Hunter *v.* . . 71
Philbrook, Day *v.* . . . 462
Phillips, Hammond *v.* . . 70
Plurede *v.* Levasseur, . . 172
Proctor, Webber *v.* . . . 404

Provident Aid Society, Insurance Commissioner *v.* 413
Pulitzer *v.* Livingston, . 359

Q.

Quimby, Judge of Probate *v.* 574
Quimby *v.* Lowell, . . . 547

R.

Randall, Milliken *v.* . . 200
Randall *v.* Tuell, . . . 443
Redman *v.* Hurley, . . . 428
Redman, Stuart *v.* . . . 435
Reed, Laughlin *v.* . . . 226
Reed, Winslow *v.* . . . 67
Remick *v.* Wentworth, . 392
Robinson, Thompson *v.* . 46
Rockland (City of) *v.* Farnsworth, ... 481
Rockland (City of), St. George (Inhab. of) *v.* . 43
Roe, Doe *v.* 523

S.

Sagadahoc Nat. Bank, Bath Savings Inst. *v.* . . . 500
St. George (Inhabitants of) *v.* Rockland (City of) . 43
Sanford Mills, Nelson *v.* . 219
Sherman *v.* Hall, . . . 411
Shibles, Wentworth *v.* . 167
Simmons, Wilson *v.* . . 242
Sinnott and Stone, State *v.* 41
Skillings, Milliken *v.* . . 180
Small, Wellington *v.* . . 154
Smith, Goodwin *v.* . . . 506
Smith, Neal *v.* 596
Somerset Railway, Berry *v.* 552
Spalding, Feeney *v.* . . 111
State *v.* Carver, ... 74
—— *v.* Darling, . . . 400
—— *v.* Donovan, . . . 448
—— *v.* Getchell, . . . 326
—— *v.* Gross, ... 542
—— *v.* Huff, ... 521
State *v.* Lynch, ... 209
—— *v.* Martin, ... 117
—— *v.* Miles, ... 142
—— *v.* Norton, ... 290
—— *v.* Parker, ... 81
—— *v.* Sinnott and Stone, 41
Steinfieldt *v.* Jodrie, . . 65
Stetson (Inhab. of), Exeter (Inhab. of) *v.* . . . 531
Stevens, Maddocks *v.* . . 336
Stratton, Webber *v.* . . 379
Stuart *v.* Redman, . . . 435

T.

Thompson *v.* Robinson, . 46
Tracy *v.* LeBlanc, . . . 304
Trim, Knight *v.* 469
Tuell, Randall *v.* . . . 443

W.

Waldron, Milliken *v.* . . 394
Waterman *v.* Cunningham, 295
Waterville & Fairfield Railway & Light Company, Maine Central R. R. Company *v.* 328
Webber *v.* Proctor, . . . 404
Webber *v.* Stratton, . . 379
Wellington *v.* Small, . . 154
Wentworth, Remick *v.* . 392
Wentworth *v.* Shibles, . 167
Whitcomb *v.* Dutton, . . 212
Wilson *v.* Simmons, . . 242
Williams *v.* Maine State Relief Association, . . . 158
Wing *v.* Ford, ... 140
Winslow *v.* Reed, . . . 67
Winter Harbor Land Company, Flint *v.* 420
Wood *v.* Finson, . . . 459
Woodman *v.* Woodman, . 128

Y.

York, Maine Red Granite Company *v.* 54

TABLE OF CASES CITED

BY THE COURT.

Adams *v.* Conover, 87 N. Y. 422, 476
Adams *v.* Lawson, 17 Gratt. 250, (94 Am. Dec. 455), 294
Allen *v.* Railroad, 82 Maine, 111, 344
Allen *v.* Young, 76 Maine, 80, 85
Alliance Mutual Ins. Co. *v.* Swift, 10 Cush. 433, 32
Ames *v.* Hilton, 70 Maine, 36, 70
Andrews *v.* Boyd, 5 Maine, 199, 355
Andrews *v.* King, 77 Maine, 224, 451
Appleton *v.* Phœnix Mutual Life Ins. Co., 59 N. H. 541, 164
Appleton *v.* Turnbull, 84 Maine, 72, 488
Arnold *v.* Arnold, 17 Pick. 4, 579
Ash *v.* Hare, 73 Maine, 403, 25
Ashmun *v* Williams, 8 Pick. 402, 234
Atkins *v.* Bordman, 2 Met. 457, 106
Ayers *v.* Hewett, 19 Maine, 281, 183
Baker *v.* Home Life Ins. Co., 64 N. Y. 648, 272
Baldwin *v.* Emery, 89 Maine, 496, 425
Ball *v.* Hopkins, 7 Johns. 22, 580
Bamforth *v.* Bamforth, 123 Mass. 280, 136
Bangor House *v.* Brown, 33 Maine, 309, 70
Bangs *v.* Hall, 2 Pick. 368, 495
Bank *v.* Lanier, 11 Wall. 369, 504
—— *v.* Parsons, 86 Maine, 514, 337
—— *v.* Rich, 81 Maine, 164, 254
—— *v.* Wallace, 87 Maine, 33, 458
Barnard *v.* Bartholomew, 22 Pick. 291-3, 495
Barnum *v.* Barnum, 26 Md. 119, 373
Barron *v.* Burrill, 86 Maine, 66-72, 488
Barron *v.* Paine, 83 Maine, 323, 499
Bartlett *v.* Drew, 57 N. Y. 587, 126
Batchelder *v.* Ins. Co., 135 Mass. 449, 273
Bean *v.* Harrington, 88 Maine, 460, 473
Beard *v.* United States, 158 U. S. 550, 77
Bell *v.* Morrison, 1 Pet. 351, 495
Belmont *v.* Vinal Haven, 82 Maine, 524, 530
Benjamin *v.* Wheeler, 15 Gray, 486; 8 Gray, 409, 261
Bennett *v.* Dyer, 89 Maine, 17, 508
Bevin *v.* Conn. Ins. Co., 23 Conn. 244, 164
Biddle *v.* Perkins, 4 Simons, 135, 369
Bigelow *v.* Winsor, 1 Gray, 299, 107
Billings *v.* Mason, 80 Maine, 496, 461
Bird *v.* Bird, 40 Maine, 392, 381
Blanchard *v.* Blanchard, 1 Allen, 223, 134
Bliss *v.* Nichols, 12 Allen, 443, 483
Blodgett *v.* Dow, 81 Maine, 197, 580
Bohanan *v.* Pope, 42 Maine, 96, 480
Bonney *v.* Morrill, 57 Maine, 368, 325
Boston *v.* Richardson, 13 Allen, 162, 483
Boswell's Lessee *v.* Otis, 9 How. 336, 177
Bouton *v.* American Ins. Co., 25 Conn. 542, 164
Bowdell *v.* Parsons, 10 East, 359, 157
Bowditch *v.* Andrew, 8 Allen, 339, 367
Bowen *v.* Brown, 84 Maine, 376, 387
—— *v.* Payton, 14 R. I. 257, 356
Bower *v.* Peate, L. R. 1 Q. B. Div. 321, 519
Boynton *v.* Ball, 121 U. S. 457, 546
Bradford *v.* Rice, 102 Mass. 472, 545
Bradley *v.* Farwell, 1 Holmes, 433, 127
Braley *v.* French, 28 Vt. 546, 235
Brattle Square Church *v.* Grant, 3 Gray, 142, 364
Brick Co. *v.* Foster, 115 Mass. 431, 261
Briggs *v.* Nantucket Bank, 5 Mass. 97, 157
Brigham *v.* Palmer, 3 Allen, 450, 461
Bristol *v.* Water Works, R. I. (35 Atl. Rep. 884), 554
Brooksville *v.* Bucksport, 73 Maine, 111, 533
Brown *v.* Atwood, 7 Maine, 356, 480

Brown *v.* Brown, 33 N. J. Eq. 660, 25
Brown *v.* Foster, 88 Maine, 49, 250
——— *v.* Howard, 86 Maine, 342, 234
——— *v.* Lowell, 8 Met. 172, 453
——— *v.* Meady, 10 Maine, 391, 106
Bryant *v.* Westbrook, 86 Maine, 450, 427
Buckmaster *v.* Harrop, 7 Vesey, 341, 25
Burbank *v.* Bethel Steam Mills, 75 Maine, 373, 517
Burbank *v.* Gould, 15 Maine, 118, 499
Burleigh *v.* Clough, 52 N. H. 267, 137
Burnham *v.* Dorr, 72 Maine, 198, 319
Burns *v.* Daggett, 141 Mass. 373, 25
Butterfield *v.* Haskins, 33 Maine, 392, 356
Buxton *v.* Hamblen, 32 Maine, 448, 446
Byard *v.* Parker, 65 Maine, 576, 233
Cape Elizabeth *v.* Boyd, 86 Maine, 318, 156
Cassidy *v.* Bangor, 61 Maine, 434, 251
Caton *v.* Caton, L. R. 2 H. L. 127, 25
Central Bridge Corporation *v.* Lowell, 12 Gray, 122, 484
Central Nat. Bank *v.* Williston, 138 Mass. 248, 504
Chase *v.* Railroad, 78 Maine, 346, 344
——— *v.* Walker, 26 Maine, 555, 580
Circleville *v.* Neuding, 41 Ohio St. 465, 519
Clark *v.* Estate of Conroe, 38 Vt. 469, 475
Clark *v.* Parker, 106 Mass. 557, 109
——— *v.* Spratt, 10 Watts, 335, 603
——— *v.* Young, 1 Cranch, 181, 194, 579
Clementson *v.* Williams, 8 Cranch, 72, 495
Cloran *v.* Houlihan, 88 Maine, 221, 60
Coburn *v.* Travelers Ins. Co., 145 Mass. 226, 208
Cobb *v.* Covenant Mut. Ben. Ass'n, 153 Mass. 176, 41
Cochran *v.* Guild, 106 Mass. 29, 336
Cole *v.* Babcock, 78 Maine, 41, 158
Coles *v.* Pilkington, L. R. 19 Eq. 174, 22
Collins *v.* Bennett, 46 N. Y. 490, 603
——— *v.* Bernard, 63 Md. 162, 373
——— *v.* Chase, 71 Maine, 436, 564
Com. *v.* Chace, 9 Pick, 15, 86
——— *v.* Coombs, 2 Mass. 489, 257
——— *v.* Great Barrington, 6 Mass. 492, 257
Com. *v.* Hawkins, 3 Gray, 463, 149
Conley *v.* Am. Ex. Co., 87 Maine, 352, 226
Conlon *v.* Railroad, 135 Mass. 195, 520
Cuff *v.* Railroad, 35 N. J. Law, 32, 520
Conn. Ins. Co. *v.* Luchs, 108 U. S. 498, 280
Connor *v.* Henderson, 15 Mass. 319, 182
Connor *v.* Pushor, 86 Maine, 302, 468
Continental Ins. Co. *v.* Chamberlain, 132 U. S. 304, 311, 272, 276, 278, 279
Continental Nat. Bank *v.* Eliot, 7 Fed. Rep. 370, 504
Conway *v.* Lew. & Aub. R. R. Co., 87 Maine, 283, 200
Cook *v.* Bates, 88 Maine, 455, 391
Coombs *v.* Charter Oak Ins. Co., 65 Maine, 382, 276
Cooper's Estate, 150 Pa. St. 576, 367
Cope *v.* Rowland, 2 Mees. & W. 149, 447
Copeland *v.* Springfield, 166 Mass. 498, 504, 453
Corthell *v.* Holmes, 88 Maine, 376, 519
Cottle *v.* Cleaves, 70 Maine, 256, 142
Craig *v.* Craig, 3 Barb. Chan. R. 76, 356
Cressey *v.* Parks, 76 Maine, 532, 583
Crippen *v.* Morss, 49 N. Y. 67, 109
Cunningham *v.* Foster, 49 Maine, 68, 70, 579, 580
Cunningham *v.* Merrimac Paper Co., 163 Mass. 89, 226
Curran *v.* Clayton, 86 Maine, 42, 298
Currier *v.* Continental Life Ins. Co., 53 N. H. 538, 549, 552, 165
Cushman *v.* Marshall, 21 Maine, 122, 183
Cutler *v.* Gilbreth, 53 Maine, 176, 182
Davis *v.* Emery, 61 Maine, 141, 408
Day *v.* Philbrook, 85 Maine, 90, 468, 469
Dearborn *v.* Parks, 5 Maine, 81, 480, 481, 499
Decker *v.* Decker, 74 Maine, 465, 116
——— *v.* Gammon, 44 Maine, 322, 600
Deford *v.* Deford, 36 Md. 168, 373
Degnan *v.* Jordan, 164 Mass. 84, 226
DeLancy *v.* Insurance Co., 52 N. H. 581, 589, 590, 279
Dennie *v.* Williams, 135 Mass. 28, 484
Denniston *v.* Clark, 125 Mass. 219, 261
DeSollar *v.* Hanscome, 158 U. S. 26, 581
Detroit *v.* Co. Com., 52 Maine, 215, 569
Dexter Savings Bank *v.* Copeland, 72 Maine, 220, 149
Diament *v.* Lore, 31 N. J. L. 220, 356
Dickenson *v.* Central Nat. Bank, 129 Mass. 279, 504

Dorman *v.* Lewiston, 81 Maine, 411, 250
Dorr *v.* Fisher, 1 Cush. 271, 182
Douglass *v.* Reynolds, 7 Pet. 115, 56
Ducker *v.* Burnham, 146 Ill. 9, (37 Am. St. Rep. 135), 137
Duke of Norfolk's case, 1 Vern. 164, (3 Ch. Cas. 48), 364
Dunlap *v.* Glidden, 31 Maine, 510, 381
Dunlap *v.* Glidden, 34 Maine, 517, 519, 579, 580
Dunn *v.* Kelley, 69 Maine, 145, 458
Durgin *v.* Dyer, 68 Maine, 143, 446
Dutton *v.* Simmons, 65 Maine, 583, 393
Earl *v.* Rowe, 35 Maine, 414, 356
Eastman *v.* Wadleigh, 65 Maine, 251, 177
Eaton *v.* Railway, 59 Maine, 520, 518
Elliott *v.* Hayden, 104 Mass. 180, 484
Ellis *v.* Sheffield, 2 E. & B. 767, 520
Elwell *v.* Cunningham, 74 Maine, 127, 381
Elwell *v.* Hacker, 86 Maine, 416, 120
Emerson *v.* McNamara, 41 Maine, 565, 153
Emery *v.* Legro, 63 Maine, 357, 381
——— *v.* Piscataqua F. & M. Ins. Co., 52 Maine, 322, 279
Etna *v.* Brewer 78 Maine, 377, 530
Evans *v.* Walker, 3 Ch. Div. 211, 365
Farnham *v.* Davis, 79 Maine, 282, 233
Farmington *v.* Hobert, 74 Maine, 416, 498
Farrell *v.* Lovett, 68 Maine, 326, 142
Farrington *v.* Barr, 36 N. H. 86, 171
Farrow *v.* Cochran, 72 Maine, 309, 182
Ferguson *v.* Hubbell, 97 N. Y. 507, 520
Field *v.* Tibbetts, 57 Maine, 358, 142
Flanders *v.* Cobb, 88 Maine, 488, 470
——— *v.* Fay, 40 Vt. 310, 476
Flint *v.* Sheldon, 13 Mass. 448, 171
Flint *v.* Winter Harbor Land Co., 89 Maine, 420, 498
Fosdick *v.* Fosdick, 6 Allen, 41, 364, 365
Foster *v.* Stone, 20 Pick. 542, 230
Foxcroft *v.* Lester, 2 Vern. 456, 22
Freeman *v.* Travelers Ins. Co., 144 Mass. 572, 208
Frost *v.* Saratoga Ins. Co., 5 Denio, 154, (49 Am. Dec. 234), 164
Funcheon *v.* Harvey, 119 Mass. 469, 207
Gaffney *v.* Hicks, 131 Mass. 125, 499
Gardner *v.* Taturn, 81 Cal. 370, 448
Gates *v.* McKee, 13 N. Y. 232, (64 Am. Dec. 545) 57
Gerry *v.* Stimson, 60 Maine, 186, 171
Gibbens *v.* Gibbens, 140 Mass. 102, 135
Glass *v.* Hulbert, 102 Mass. 32, 25
Goddard *v.* Harpswell, 84 Maine, 499, 427
Goddard *v.* Harpswell, 88 Maine, 228, 427
Goddard *v.* Whitney, 140 Mass. 100, 364
Gœsele *v.* Bimeler, 14 How. (U. S.) 589, 367
Goodwin *v.* Bowden, 54 Maine, 424, 480
Gordon *v.* Parmlee, 2 Allen, 215, 483
Gorham *v.* Gross, 125 Mass. 232, 520
Gouldsboro *v.* Martin, 41 Md. 488, 373
Gower *v.* Stevens, 19 Maine, 92, 234
Grattan *v.* Met. Life Ins. Co., 92 N. Y. 274, 273
Graves *v.* Graves, 29 N. H. 142, 171
Gray *v.* Co. Com. 83 Maine, 429, 231
Griffey *v.* Ins. Co., 100 N. Y. 417, 32
Hall *v.* People's Ins. Co., 6 Gray, 185, 280
Ham *v.* Boston Board of Police, 142 Mass. 90, 451
Hamilton *v.* Cole, 86 Maine, 137, 67
Hamlin *v.* Treat, 87 Maine, 310, 289
Hampton *v.* Holman, 5 Ch. Div. 183, 365
Hanscom *v.* Martin, 82 Maine, 288, 576
Hapgood *v.* Needham, 59 Maine, 442, 142
Harding *v.* Hagar, 60 Maine, 340, 446
——— *v.* Hagar, 63 Maine, 515, 446
Hardy *v.* Nelson, 27 Maine, 526, 472, 475
Hargreave *v.* Smee, 6 Bing. 244, 57
Harlow *v.* Harlow, 65 Maine, 448, 116
——— *v.* Thomas, 15 Pick. 66, 476
Hart *v.* Seymour, 147 Ill. 598, 370
Haskell *v.* Thurston, 80 Maine, 129, 310
Hazen *v.* Wright, 85 Maine, 314, 468
Heald *v.* Moore, 79 Maine, 271, 263
Heaton *v.* Manhattan Fire Ins. Co., 7 R. I. 502, 165
Heilman *v.* Heilman, 129 Ind. 59, 137
Helme *v.* Phila. Life Ins. Co., 61 Pa. St. 107, 164
Hemmenway *v.* Wheeler, 14 Pick. 408, 234
Hill *v.* Morse, 61 Maine, 541, 579
Hillyard *v.* Miller, 10 Penn. 334, 366
Hinkley *v.* Fowler, 15 Maine, 289, 498
Hodsdon *v.* Guardian Life Insurance Co., 97 Mass. 144, 163
Holmes *v.* Smith, 49 Maine, 242, 470
Holt *v.* Green, 73 Penn. St. 198 (13 Am. Rep. 737), 447
Hood *v.* Hood, 110 Mass. 463, 580
Hooper *v.* Railroad, 81 Maine, 260, 344

Hopkins *v.* Fowler, 39 Maine, 568, 186
Hotchkiss *v.* Barnes, 34 Conn. 27, 57
Hovey *v.* Mayo, 43 Maine, 322, 261
Howard *v.* Lincoln, 13 Maine, 122, 408, 409
Howard *v.* Odell, 1 Allen, 85, 92
——— *v.* County Commissioners, 49 Maine, 143, 147, 252, 253, 569
Hubbard *v.* Norton, 10 Conn. 422, 472
Huff *v.* Nickerson, 27 Maine, 106, 498
Hunt *v.* Silk, 5 East, 449, 182
Huntington *v.* Saunders, 166 Mass. 92, 546
Hustis *v.* Picklands, 27 Ill. App. 270, 447
Hutchinson *v.* Chadbourne, 35 Maine, 192, 381
Hutchinson *v.* Murchie, 74 Maine, 187, 230
Ide *v.* Ide, 5 Mass. 500, 353
In re, Coulter, 5 Nat. Bank Reg. 64, 230
In re, Railroad Commissioners, 87 Maine, 254, 564
Ins. Co. *v.* Cusick, 109 Pa. St. 157, 273
Ins. Co. *v.* Ewing, 92 U.S. 377, 381, 36
Ins. Co. *v.* Mahone, 21 Wall. 152, 156, 272, 275
Ins. Co. *v.* Martin, 40 N. J. L. 568, 273
Ins. Co. *v.* Norton, 96 U. S. 234, 242, 164
Ins. Co. *v.* Stockbower, 26 Penn. St. 199, 164
Ins. Co. *v.* Throop, 22 Mich. 146, 274
Ins. Co. *v.* Wilkinson, 13 Wall. 222, 272
Ins. Co. *v.* Wolff, 95 U. S. 326, 330, 163, 165, 167
Ins. Co. *v.* Young, 23 Wall. 85, 107, 36
James *v.* Wood, 82 Maine, 173, 85
Johnson *v.* Battelle, 125 Mass. 453, 135, 136
Johnson *v.* Hulings, 103 Penn. St. 498, (49 Am. Rep. 131), 447
Johnson *v.* Kinnicutt, 2 Cush. 153, 106
——— *v.* Maine and N. B. Ins. Co., 83 Maine, 182, 188, 41, 275, 278
Johnston *v.* Laflin, 103 U. S. 800, 504
Jones *v.* Bacon, 68 Maine, 34, 353
—— *v.* Perkins, 54 Maine, 393, 396, 580
Jones *v.* Roberts, 65 Maine 273, 381
Jordan *v.* Woodward, 38 Maine, 423, 309
Judevine *v.* Goodrich, 35 Vt. 19, 409
Judge of Probate *v.* Toothaker, 83 Maine, 195, 577
Kane *v.* Fisher, 2 Watts, 246, 580
Keene *v.* Accident Association, 161 Mass. 149, 208
Kelham *v.* McKinstry, 69 N. Y. 264, 409
Kellogg *v.* Curtis, 69 Maine, 212, 142
Kennard *v.* Kennard, 63 N. H. 303, 133
Kent *v.* Weld, 11 Maine, 460, 381
Kimball *v.* Crocker, 53 Maine, 266, 364, 365
Kimball *v.* Cunningham, 4 Mass. 502, 182
Kimball *v.* Irish, 26 Maine, 444, 324
——— *v.* Thompson, 4 Cush. 445, 458
Knight *v.* The Old Nat. Bank, 3 Cliff. 429, 504
Knox *v.* Silloway, 10 Maine, 201, 380, 381
Lamb *v.* Danforth, 59 Maine, 322, 475
Lander *v.* Arno, 65 Maine, 26, 107, 580
Lane *v.* Lane, 80 Maine, 570, 578, 169, 319
LaPage *v.* Hill, 87 Maine, 158, 440
Lawrence *v.* McCalmont, 2 How. 426, 56
Leach *v.* Jay, 6 Chan. Div. 496; 9 Chan. Div. 42, 139
Lee *v.* McLaughlin, 86 Maine, 410, 518
Leighton *v.* Leighton, 58 Maine, 63, 133, 138
Leslie *v.* Knickerbocker Life Ins. Co., 63 N. Y. 27, 164
Libby *v.* Downey, 5 Allen, 299, 447
——— *v.* Mayberry, 80 Maine, 138, 337
——— *v.* Tobey, 82 Maine, 397, 488
Locke *v.* Homer, 131 Mass. 93, 498
Lockwood *v.* Lawrence, 77 Maine, 297, 309
Longfellow *v.* Longfellow, 54 Maine, 240, 325
Lord's Appeal, 105 Pa. St. 451, 25
Loring *v.* Barnes, 148 Mass. 223, 139
Lovering *v.* Worthington, 106 Mass. 86, 88, 367
Luey *v.* Bundy, 9 N. H. 298, 183
Lunt *v.* Stevens, 24 Maine, 534, 495
Lyman *v.* State Mut. Ins. Co., 14 Allen, 329, 32
Lyon *v.* Merrick, 105 Mass. 71, 600
—— *v.* Royal Society of Good Fellows, 153 Mass. 83, 165
Maher *v.* Hibernia Ins. Co. 67, N. Y. 283, 273

Mailhoit *v.* Ins. Co., 87 Maine, 374, 382, 276, 279
Manter *v.* Holmes, 10 Met. 402, 92
Marsh *v.* Hoyt, 161 Mass. 459, 134
Marsh *v.* Trumbull, 28 Conn. 183, 109
Marston *v.* Knight, 29 Maine, 341, 182
Martin *v.* Darling, 78 Maine, 78, 233
Mason *v.* Pritchard, 12 East, 227, 57
Massasoit Steam Mills Co., *v.* W. A. Co., 125 Mass. 110, 33, 35
Mayhew *v.* Sullivan Mining Co., 76 Maine, 100, 120
McCarthy *v.* Second Parish, 71 Maine, 318, 517
McClure *v.* Livermore, 78 Maine, 390, 57
McCoy *v.* Ins. Co., 133 Mass. 82, 273
McDonald *v.* Smith, 14 Maine, 99, 118
McFarlane *v.* Cushman, 21 Wis. 401, 580
McGurk *v.* Ins. Co., 56 Conn. 528, 273
McIntire *v.* Barnard, 1 Sand. Ch. 52, 409
McKowen *v.* McDonald, 43 Pa. St. 441, 25
McKowen *v.* Powers, 86 Maine, 291, 258, 289, 458
McLean *v.* Weeks, 65 Maine, 411, 116
McLellen *v.* Allbee, 17 Maine, 184, 495
Meach *v.* Meach, 24 Vt. 591, 171
Mead *v.* Phenix Ins. Co., 158 Mass. 124, 126, 36
Mellen *v.* Moore, 68 Maine, 390, 57
Merchant's Bank *v.* State Bank, 10 Wall. 604, 504
Mer. Ins. Co. *v.* Gibbs, 56 New. Jer. (Law) 679, 100
Merrill *v.* Berkshire, 11 Pick. 274, 109
Merritt *v.* Bucknam, 77 Maine, 258, 365
Metcalf *v.* Metcalf, 85 Maine, 473, 434
Methuen Co. *v.* Hayes, 33 Maine, 169, 461
Michaud *v.* Canadian Pacific Railway Co., 88 Maine, 381, 458
Mifflin *v.* Mifflin, 121 Pa. St. 205, 366
Miller *v.* Ins. Co., 107 N. Y. 292, 273
——— *v.* Lancaster, 4 Maine, 159, 495
——— *v.* Post, 1 Allen, 434, 447, 448
Mills *v.* Gilbreth, 47 Maine, 320, 603
Mitchell *v.* Morse, 77 Maine, 423, 353
Monagle *v.* Co. Com'rs, 8 Cush. 360, 253, 257
Montgomery *v.* Reed, 69 Maine, 515, 474
Moody *v.* Moody, 68 Maine, 155, 319
Moore *v.* Lothrop, 75 Maine, 302, 156
——— *v.* Moore, 38 N. H. 382, 171
Moors *v.* Bank, 111 U. S. 163–166, 504
Morrison *v.* Howe, 120 Mass. 565, 261
Morris *v.* Porter, 87 Maine, 510, 576
Morse *v.* Brackett, 98 Mass. 205, 182
——— *v.* Machias Water Power Co., 42 Maine, 119, 309
Moyer's Appeal, 105 Pa. St. 432, 25
Muhlig *v.* Fiske, 131 Mass. 113, 499
Mundle *v.* Hill Manufacturing Co., 86 Maine, 400, 120
Nashua & Lowell Railroad *v.* Boston & Lowell Railroad, 164 Mass. 222, 226, 581
New Jersey Mutual Life Ins. Co. *v.* Baker, 95 U. S. 610, 272, 274
Newbert *v.* Fletcher, 84 Maine, 408, 230, 231
New York Life Ins. Co. *v.* Fletcher, 117 U. S. 510, 277, 278
North Berwick Co. *v.* New England F. & M. Ins. Co., 52 Maine, 336, 340, 165
North Reading *v.* Co. Com'rs. 7 Gray, 109, 253, 257
North Yarmouth *v.* Portland, 73 Maine, 108, 533
Norton *v.* Soule, 75 Maine, 385, 384
——— *v.* Young, 3 Maine 30, 183
Norwalk Gas Light Co. *v.* Norwalk, 63 Conn. 528, 519
Noyes *v.* Patrick, 58 N. H. 618, 183
Oliver *v.* Woodman, 66 Maine, 54, 176
Opinion of Justices, 70 Maine, 567, 387
Orono *v.* Emery, 86 Maine, 366, 156
Ould *v.* Wash. Hosp., 95 U. S. 303, 312, 364
Packard *v.* Brewster, 59 Maine, 404, 498
Paper Stock Disinf. Co. *v.* Boston Disinf. Co., 147 Mass. 322, 499
Parks *v.* Crockett, 61 Maine, 489, 494, 178, 233
Parlin *v.* Macomber, 5 Maine, 415, 157
Parsonsfield *v.* Kennebunkport, 4 Maine, 47, 45
Patten *v.* Hunnewell, 8 Maine, 19, 323
Patten *v.* Ins. Co., 40 N. H., 375, 380, 273, 274
Patterson *v.* Snell, 67 Maine, 562, 381
Pearce *v.* Savage, 45 Maine, 90, 139
Pease *v.* Gibson, 6 Maine, 81, 407, 408, 409

Pendergrass *v.* York Mfg. Co., 76 Maine, 512, 468
Penley *v.* Auburn, 85 Maine, 278, 519
Pennoyer *v.* Neff, 95 U. S. 715, 175, 177
People *v.* Markham, 64 Cal. 157, (49 Am. Rep. 700), 149
Perley *v.* Little, 3 Maine, 97, 495
Perkins *v.* Parker, 10 Allen, 22, 580
Perry *v.* Chesley, 77 Maine, 393, 495
Pettengill *v.* Shoenbar, 84 Maine, 104, 458
Phelps *v.* Harris, 101 U. S. 370, 579
Philadelphia *v.* Girard's Heirs, 44 Pa. St. 26, 363
Phillips *v.* Sherman, 61 Maine, 551, 337
Phipps *v.* Mahon, 141 Mass. 471, 207
Phœnix Life Ins. Co. *v.* Raddin, 120 U. S. 183, 163, 280
Pickard *v.* Bayley, 46 Maine, 200, 447
Pierce *v.* Nashua Fire Ins. Co., 50 N. H. 297, 165
Pitman *v.* Albany, 34 N. H. 577, 215
Platt *v.* Jones, 59 Maine, 240, 156
Plumb *v.* Ins. Co., 18 N. Y. 392, 272
Plummer *v.* Prescott, 43 N. H. 277, 406
Pollard *v.* R. R. Co., 87 Maine, 61, 536
Porter *v.* Hill, 4 Maine, 41, 495
——— *v.* Witham, 17 Maine, 294, 309
Potter *v.* Jacobs, 111 Mass. 32, 22
Preble *v.* Portland, 45 Maine, 241, 250, 251
Prentiss *v.* Russ, 16 Maine, 30, 272
Prescott *v.* Battersby, 119 Mass. 286, 447
Prop'rs Machias Boom *v.* Sullivan, 85 Maine, 343, 237, 238, 240
Purcell *v.* Miner, 4 Wall. 513, 22
Putney *v.* Day, 6 N. H. 430, 408
Railroad *v.* Mayo, 67 Maine, 470, 549
Raymond *v.* County Commissioners, 63 Maine, 110, 410
Rea *v.* Minkler, 5 Lans. 196, 476
Redington *v.* Frye, 43 Maine, 578, 176
Reed *v.* Merrifield, 10 Met. 155, 408
—— *v.* Paul, 131 Mass. 129, 499
Reilly *v.* Stephenson, 62 Mich. 509, 176
Rendell *v.* Harriman, 75 Maine, 497, 57
Reynolds *v.* Toppan, 15 Mass. 370, 92
Rice *v.* New England Mutual Aid Society, 146 Mass. 248, 162, 164, 166
Rice *v.* Sanders, 152 Mass. 108, 499
Rich *v.* Basterfield, 4 C. B. 783, 520
Richmond *v.* Foss, 77 Maine, 590, 447
Roberts *v.* Hartford, 86 Maine, 460, 541
Robinson, Appl't, 88 Maine, 1, 105
Rockland *v.* Ulmer, 84 Maine, 503, 508, 382, 383, 583, 584
Rockland *v.* Ulmer, 87 Maine, 357, 382, 583
Rogers *v.* Libbey, 35 Maine, 200, 580
Romeo *v.* Railroad, 87 Maine, 540, 344
Ross *v.* Tozier, 78 Maine, 312, 545
Routledge *v.* Dorril, 2 Ves. jr. 266, 365
Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 272
Ruggles *v.* Coffin, 70 Maine, 468, 118
Russell *v.* Place, 94 U. S. 606, 581
Russ *v.* Steele, 40 Vt. 320, 745
Sampson *v.* Clark, 2 Cush. 173, 545, 546
Sampson *v.* Randall, 72 Maine, 109, 356
Sanborn *v.* Stickney, 69 Maine, 344, 177
Sanger *v.* Upton, 91 U. S. 60, 126
Sargent *v.* Graham, 5 N. H. 440, 183
Saunders *v.* McCarthy, 8 Allen, 42, 484
Sawyer *v.* Lufkin, 58 Maine, 429, 498
——— *v.* Smith, 109 Mass. 220, 447
——— *v.* Smith, 100 N. Y. 471, 475
Seaver *v.* Fitzgerald, 141 Mass. 401, 403, 365, 372
Shattuck *v.* Adams, 136 Mass. 36, 499
——— *v.* Lamb, 65 N. Y. 503, 475
Shea *v.* Mass. Benefit Asso., 160 Mass. 289, 294, 164, 166
Shephard *v.* Thompson, 122 U. S. 231, 495
Shorey *v.* Chandler, 80 Maine, 411, 158
Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515, 504
Slade *v.* Patten, 68 Maine, 380, 371, 373
Smith *v.* Brunswick, 80 Maine, 189, 579
Smith *v.* First National Bank, 99 Mass. 605, 375
Smith *v.* Railroad, 87 Maine, 339, 344
——— *v.* Sullivan, 71 Maine, 150, 152, 153, 452
Snow *v.* Alley, 144 Mass. 546, 182
—— *v.* Snow, 49 Maine, 159, 136
Somes *v.* White, 65 Maine, 542, 92

Southern Ohio R. R. Co. *v.* Morey, 47 Ohio St. 207, 519
Spear *v.* Fogg, 87 Maine, 132, 356
Spofford *v.* True, 33 Maine, 291, 176
Springfield *v.* Sleeper, 115 Mass. 587, 458
Stanwood *v.* Woodward, 38 Maine, 192, 446
Starbird *v.* Brown, 84 Maine, 238, 452
Starrett *v.* Mullen, 148 Mass. 570, 207
State *v.* Beal, 75 Maine, 289, 85
—— *v.* Bucknam, 88 Maine, 385, 85, 211
State *v.* Burke, 38 Maine, 574, 149
—— *v.* Bushey, 84 Maine, 459, 461, 403
State *v.* Cleland, 68 Maine, 258, 452
State *v.* Cram, 84 Maine, 271, 42
—— *v.* Ellis, 33 N. J. L. 102 (97 Am. Dec. 707, and note), 149
State *v.* Godfrey, 24 Maine, 232, 150
—— *v.* Goodenow, 65 Maine, 30, 523
—— *v.* Gould, 52 Maine, 507, 293
—— *v.* Lang, 63 Maine, 215, 219, 220, 150
—— *v.* Mayberry, 48 Maine, 218, 149
—— *v.* Miles, 89 Maine, 142, 403
—— *v.* O'Donnell, 81 Maine, 271, 529
—— *v.* Paul, 69 Maine, 215, 150, 403
—— *v.* Peck, 53 Maine, 284, 397
Steamship Co. *v.* Swift, 86 Maine, 248, 23
Stebbens *v.* Lancashire Ins. Co., 60 N. H. 65, 32, 35, 36
Stephenson *v.* Ewing, 87 Tenn. 46, 448
Stetson *v.* Eastman, 84 Maine, 366, 105
Stevens *v.* Stevens, 70 Maine, 92, 169, 319
Stewart *v.* Campbell, 58 Maine, 439, 481
Stinson *v.* Walker, 21 Maine, 211, 183
Storer *v.* Gowen, 18 Maine, 174, 73
Streeter *v.* McMillan, 74 Mich. 123, 176
Stuart *v.* Walker, 72 Maine, 145, 137
Stubbs *v.* Page, 2 Maine, 378, 474
Sturdivant *v.* Hull, 59 Maine, 172, 57
Sturges *v.* Educational Society, 130 Mass. 414, 520
Swett *v.* Citizens Mut. Relief Society, 78 Maine, 541, 165, 166
Sullivan *v* Maine Central R. R. Co., 82 Maine, 198, 573
Sykes *v.* Keating, 118 Mass. 517, 393
Taft *v.* Taft, 130 Mass. 461, 136
Taggard *v.* Loring, 16 Mass. 336, 92
Taylor *v.* Sayles, 57 N. H. 465, 171
—— *v.* Taylor, 74 Maine, 584, 127
Tedrick *v.* Hiner, 61 Ill. 189, 447
Thompson *v.* Snow, 4 Maine, 264, 92
Thurlough *v.* Chick, 59 Maine, 395, 576, 577
Tibbetts *v.* Railway, 62 Maine, 437, 518
Tillson *v.* Robbins, 68 Maine, 295, 293
Tilton *v.* Tilton, 9 N. H. 390, 25
Torrey *v.* Millbury, 21 Pick. 64, 67, 583
Trainer *v.* Morrison, 78 Maine, 163, 461
Trambly *v.* Ricard, 130 Mass. 259, 272
Treat *v.* Maxwell, 82 Maine, 76, 177
Trippe *v.* Prov. Fund Society, 140 N. Y. 23, 100
True *v.* Emery, 67 Maine, 28, 393
Tufts *v.* Lexington, 72 Maine, 516, 427
Tullett *v.* Colville, 2 L. R. Ch. (1894) 310, 368
Tuxbury's Appeal, 67 Maine, 267, 577
Tyler *v.* Augusta, 88 Maine, 504, 183
Union Bank *v.* Laird, 2 Wheaton, 390, 504
U. S. *v.* Freeman, 3 How. 556, 564
Varney *v.* Bradford, 86 Maine, 510, 514, 498
Varney *v.* Pope, 60 Maine, 192, 309
Vassalboro *v.* Smart, 70 Maine, 305, 156
Vassalborough, Pet'rs for Certiorari, 19 Maine, 338, 252
Veazie *v.* Railroad, 49 Maine, 119, 519, 520
Veazie *v.* Machias, 49 Maine, 105, 533
——— *v.* Mayo, 45 Maine, 564, 568
Verrill *v.* Parker, 65 Maine, 578, 541
Viele *v.* Germania Ins. Co., 26 Iowa, 9, 164
Walker *v.* Chase, 53 Maine, 258, 580
——— *v.* Redington Lum. Co., 86 Maine, 191, 226
Walker *v.* Metropolitan Ins. Co., 56 Maine, 371, 379, 35
Wallis *v.* Thurston, 10 Simons, 225, 369
Wamesit Power Co. *v.* Sterling Mills, 158 Mass. 444, 499
Ware *v.* Gowen, 65 Maine, 534, 384
Warren *v.* Walker, 23 Maine, 453, 495
Water Power Co. *v.* Metcalf, 65 Maine, 41, 549

Webb *v.* Railroad, 49 N. Y. 420, 520
Weeks *v.* Walcott, 15 Gray, 54, 452
Welsh *v.* Woodbury, 144 Mass. 542, 138
Wellington *v.* Small, 89 Maine, 154, 584
Wellman *v.* Dickey, 78 Maine, 31, 261
Wentworth *v.* Sawyer, 76 Maine, 434, 234, 235
Weston *v.* Dorr, 25 Maine, 176, 234
Weston *v.* Hodgkins, 136 Mass. 326, 495
Wetherbee *v.* Bennett, 2 Allen, 428, 476
Wheeler *v.* Hatch, 12 Maine, 389, 474
Whitaker *v.* Sumner, 7 Pick. 551, 393
White *v.* Chadbourne, 41 Maine, 149, 325
White *v.* Foster, 202 Mass. 375, 408
Whiting *v.* Burger, 78 Maine, 287, 296, 581
Willett *v.* Rich, 142 Mass. 356, 375
Williams *v.* Boice, 38 N. J. Eq. 364, 126
Williams *v.* Fowle, 132 Mass. 385, 499
Williams *v.* Morris, 95 U. S. 457, 22, 24, 25
Wilson *v.* Bryant, 134 Mass. 299, 499
——— *v.* Bunker, 78 Maine, 313, 545
——— *v.* New Hampshire Fire Insurance Co., 140 Mass. 210, 212, 34, 35
Williamson *v.* Williamson, 71 Maine, 447, 475
Wing *v.* Harvey, 5 DeG., M. & G. (Eng. Chanc.), 265, 270, 164
Winslow *v.* Kimball, 25 Maine, 495, 564
Winthrop Bank *v.* Jackson, 67 Maine, 570, 375
Witherlee *v.* Ocean Ins. Co., 24 Pick. 67, 458
Woodbridge *v.* Tilton, 84 Maine, 94, 576
Woodbury *v.* Gardner, 77 Maine, 68, 22, 24, 25
Woodbury *v.* Hammond, 54 Maine, 332, 577
Wood *v* Dummer, 3 Mason, 311, 126
Wood *v.* Partridge, 11 Mass. 488, 384
Woodman *v.* Railroad, 149 Mass. 335, 520
Woodman *v.* Segar, 25 Maine, 90, 381
Wormell *v.* Maine Central R. R., 79 Maine, 397, 226
Wyman *v.* Fabens, 111 Mass. 77, 80, 545
Yeaton *v.* Sav. Inst., 95 U. S. 764, 230
York *v.* Goodwin, 67 Maine, 260, 156
—— *v.* Jones, 68 Maine, 343, 153
—— *v.* Railroad, 84 Maine, 117, 344, 536
Young *v.* Pritchard, 75 Maine, 513, 517, 579

CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

ELBRIDGE G. BENNETT, and others,

vs.

HOWARD E. DYER, and others.

Cumberland. Opinion March 12, 1896.

Specific Performance. Equitable Estoppel. Practice. R. S., c. 77, § 25.

It is settled law that if one induces or knowingly permits another to perform in part an oral agreement for the sale of land, on the faith of its full performance by both sides, and it clearly appears that such acts of part performance were done in pursuance of the contract, that damages recoverable in law would not adequately compensate the plaintiff, and that fraud and injustice would result to him if the agreement be held void, then on the principle of equitable estoppel, a court of equity is authorized to compel specific performance by the other party in contradiction to the positive terms of the statute of frauds.

But on all these points the evidence must be full, definite and conclusive. And ordinarily no importance can be attached to acts of part performance done by the defendant or party to be charged. If the defendant chooses to waive the benefit of his own act of part performance which would entitle him to allege a fraud on the part of the plaintiff, it cannot be that the plaintiff may force him to rely upon them, thus in effect himself setting up his own fraud.

Held; that the act of part performance relied upon in this case is not only found to have been done solely by the defendants, but from every point of view it is manifestly insufficient to justify the court in decreeing specific performance. The act of "ploughing a driving park upon the land" did not occasion any injury or damage for which a remedy at law would not afford full and just compensation. The plaintiffs can be restored to their former position without specific performance of the contract. The principle of equitable estoppel does not apply.

ON EXCEPTIONS BY PLAINTIFFS.

The case appears in the opinion.

John C. and F. H. Cobb, *George Libby*, with them, for plaintiffs.

The contract as alleged in the bill is confessed in the defendants' answer, and thus taken out of the statute. Browne, Stat. Frauds, pp. 475, 476; Story, Eq. § 755.

The retention and refusal to give up the agreement, within a reasonable time, was an adoption on the part of these defendants of the agreement itself as solemn and binding, as though they had placed their signatures to it. The agreement was for months out of the possession of the plaintiffs; it was in the possession of these defendants, they knew its contents; they claimed it, it was held by them; and they (the defendants) refused to return it. They held the plaintiffs bound by it; and can it, in justice, be said that the defendants' hands are free at the same time? They should be compelled to take the consequences of their own acts which are equivalent to signing the agreement.

The defendants entered upon the land in question (about thirty acres) plaintiffs assenting, and ploughed a driving park upon it. This fact alone shows, that both plaintiffs and defendants considered that a trade for this land had been fully consummated; and where it is evident that the parties have been pursuing a course of acting as if there were a contract, the court will enforce such contract. Addison on Contracts (Ed. 1888) Vol. 1 *160.

Counsel also cited: *Ash* v. *Hare*, 73 Maine, 403; Story Eq. §§ 759, 768 et seq.

It is well settled that even an oral agreement relating to lands, if wholly or partially performed, is binding upon the parties notwithstanding the statute of frauds and will be enforced in equity. White & Tudor's Leading Cases in Eq. (Am. Ed.) 719 & 746.

Possession alone, without payment or other acts of ownership, is sufficient part performance of a verbal contract for lands to sustain a decree for its specific performance. Browne on Stat. Frauds, p. 460, §§ 467 & 468.

It seems to follow upon equitable principles that the vendor

should have the right to enforce it when he has delivered possession. At any rate, it is held that he may enforce it upon that ground as an act done by himself in part performance of the contract. Browne on Stat. Frauds, §§ 455, 457, 466 & 467, & 473, 483 & 485 et seq. Id. §§ 493 & 507.

Eben Winthrop Freeman, *Robert Treat Whitehouse* with him, for defendants.

The plaintiffs in their argument appear to make it a point that the defendants have admitted in their answer the parol contract alleged in the bill. We submit that no such admission nor anything approaching an admission is anywhere to be found in the defendants' answer; they admit that the plaintiffs prepared and signed a written memorandum of agreement but no more. It is to be noticed, moreover, that the court does not find any such admission or that any agreement was ever entered into. The court finds merely that "the plaintiffs signed an agreement in writing to convey land to the defendants and delivered the same to them to be signed." The defendants did not sign it and it nowhere appears that they had ever agreed to sign it or to take their land.

The findings of the court do not show that any contract of any kind was ever completed between the parties. It does not appear that the defendants intended to be bound until they had signed a written memorandum of agreement. Defendants exercised the "right of deliberating" which is inconsistent with a completed contract.

The plaintiffs claim they would not "meantime have allowed the defendants to go onto the land and plough a driving park" and that the defendants would not have gone to the trouble and expense of so doing had they not then regarded the land as sold. To make this claim successful the plaintiffs must rely on this single assumption of the fact,—that the ploughing was referable only to the precise contract alleged. This single assumption, however, was neither by the plaintiffs alleged nor by the court below found to be true. Brown Stat. Frauds, § 472; Bispham on Equity, p. 447; Wats. on Sp. Per. § 263; *Ex parte Hooper*, 19 Vesey, p. 478; *Rathbun*

v. *Rathbun*, 6 Barb. (N. Y.) 106; *Brown* v. *Brown*, 33 N. J. Eq. 660; *Semmes* v. *Worthington*, 38 Md. p. 300; *Clark* v. *Clark*, 122 Ill. 394; *Williams* v. *Morris*, 95 U. S. 457. It does not clearly appear that the acts of ploughing were necessarily referable only to the contract alleged. *Clark* v. *Clark*, 122 Ill. 394; and cases, supra.

Even if plaintiffs be regarded as having delivered possession in pursuance of the contract, the results of their acts were such as could be readily compensated in damages and therefore would not take the case out of the statute. *Moore* v. *Small*, 19 Pa. St. 467; *Dougan* v. *Bloucher*, (1854,) 24 Pa. St. 34; *McKowen* v. *McDonald*, 43 Pa. St. 441; *Moyer's Appeal*, 105 Pa. St. 432; *Lord's Appeal*, 105 Pa. St. 451; *Kelsey* v. *McDonald*, 42 N. W. Rep. 1105, (1889), (Mich); *Glass* v. *Hulbert*, 102 Mass, 32; *Burns* v. *Daggett*, 141 Mass., 373.

Where the plaintiff nowhere alleges sufficient acts to constitute a part performance by him, a demurrer to the bill should be sustained. *Wood* v. *Midgely*, (1854), 5 D. G. M. & G. 41; *Redding* v. *Wilkes*, 3 Ves. 379; Story Eq. § 503; *Small* v. *Owens*, (1841), 1 Md. Ch. 364.

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

WHITEHOUSE, J. This cause is presented to the law court on exceptions to the ruling of a single justice, as shown by the following statement which constitutes the entire record in the case, to wit:

"This cause came on for hearing on bill, answer and proofs.

"It is a bill in equity to compel the specific performance of an agreement for the purchase of land.

"The plaintiffs signed an agreement in writing to convey land to the defendants and delivered the same to them to be signed. Next day defendants inquired of plaintiffs' attorney about the title and refused to then sign the agreement unless the attorney would say that it was good. He would not say that, but only that he believed it was good. The defendants then took the agreement to see about the title. Meantime, with plaintiffs' assent, they entered upon the

land (about thirty acres) and ploughed a driving park upon it. This was late in the fall. They held the agreement all winter and would neither sign it, nor accept deeds tendered them by plaintiffs according to its terms; therefore this suit was brought the next April. I find that the deeds tendered were sufficient; and would have conveyed the estate described in the agreement.

"I rule as matter of law that the plaintiffs are barred of remedy by the statute of frauds, and therefore,

"It is ordered, adjudged and decreed that plaintiffs' bill be dismissed.

"To which ruling as to the statute of frauds the plaintiffs except."

It is provided in section twenty-five of chapter seventy-seven of the Revised Statutes that "either party aggrieved may take exceptions to any ruling of law made by a single justice, the same to be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby; . . . provided, that no question of fact is open to the law court on such exceptions. And upon request of either party the justice hearing the cause shall give separate findings of law and fact."

In this case there would seem to be possible ground for apprehension that the exceptions are not "accompanied by such parts of the case as are necessary to a clear understanding of the question raised." It is stated to be a "bill in equity to compel the specific performance of an agreement for the purchase of land," and it was ruled "as a matter of law that the plaintiffs are barred of remedy by the statute of frauds." The statute of frauds applicable to such a case declares that no action shall be maintained "upon any contract for the sale of lands" unless "the contract or some memorandum or note thereof, is in writing and signed by the party to be charged, or by some person thereunto lawfully authorized." But it is a familiar and well-established principle of equity that this statute having been enacted for the purpose of preventing frauds should not be used to aid in the accomplishment of a fraud. Hence it has long been settled law in England and nearly all the states of this Union, that if one induces or knowingly permits another to perform in part an oral contract for the sale of land, on the faith of its full perform-

ance by both parties, and it clearly appears that such acts of part performance were done in pursuance of the contract, that damages recoverable in law would not adequately compensate the plaintiff, and that fraud and injustice would result to him if the agreement be held void, then on the principle of equitable estoppel, a court of equity is authorized to compel specific performance by the other party in contradiction to the positive terms of the statute of frauds. *Foxcroft* v. *Lester*, 2 Vern. 456; *Coles* v. *Pilkington*, L. R. 19 Eq. 174; *Williams* v. *Morris*, 95 U. S. 457; *Potter* v. *Jacobs*, 111 Mass. 32; *Woodbury* v. *Gardner*, 77 Maine, 68. See also 3 Pom. Eq. Jur. § 1409.

The argument of the learned counsel for the plaintiff proceeds upon the confident assumption that the sitting justice had substantially found as a matter of fact that, although the written agreement for the sale of the tract of land in question in this case was never signed by the defendants, there was still a subsisting oral contract between the parties by which the defendants agreed to purchase the land; and thereupon invokes the principle of equity above stated, claiming that there were acts of performance on the part of the defendants sufficient to exclude the operation of the statute of frauds.

With reference to this point the authorities all agree that the party making the attempt to take the case out of the statute of frauds must establish the existence of the oral contract by clear and satisfactory evidence. *Williams* v. *Morris*, 95 U. S. 457. The proof must show the terms of the contract clearly, definitely and conclusively, leaving no jus deliberandi or locus penitentiæ. *Purcell* v. *Miner*, 4 Wall. 513. "To be enforceable the agreement must be concluded, unambiguous, and proved to the satisfaction of the court." *Woodbury* v. *Gardner*, 77 Maine, supra.

It is earnestly contended in behalf of the defendants that the findings of the court do not show that any contract of any kind was ever completed between these parties; and it must be conceded that a careful examination of the record strongly supports this contention. It appears from the findings that the plaintiffs signed an agreement to convey the land to the defendants and delivered it to them to be signed, that the defendants refused to sign it without a

positive assurance that the title was good, but "took the agreement to see about the title," and that they held the agreement all winter but would neither sign it, nor accept the deeds tendered to them by the plaintiffs according to the terms of the agreement. There is an entire absence of a definite and explicit finding that an oral contract had been concluded between the parties for the purchase of this land. All of the findings of the sitting justice are perfectly consistent with the theory that, in response to a request from the defendants for the terms of sale, the plaintiffs delivered to them the written agreement in question which they refused to sign, that no other negotiations ever took place, and that no agreement whatever was ever completed between them. When the language employed in the different parts of the decree receives the construction in all respects most favorable to the plaintiffs' contention, it can at most only justify the inference that the parties were "in treaty with a view to an agreement," and that possibly the defendants had agreed to purchase on condition that the title should be found satisfactory, but refused to sign the agreement because the condition was not fulfilled. In view, however, of the fact that this was a subject matter with respect to which contracts are required to be in writing, and of the further fact that pending this investigation of the title, a special arrangement appears to have been made for the defendants to "enter upon the land and plough a driving park upon it," the conclusion is irresistible that it was not then understood by the parties that the defendants were to be bound until they signed the written agreement. *Steamship Co.* v. *Swift*, 86 Maine, 248. The presiding justice, it is true, ruled that the plaintiffs were barred of remedy by the statute of frauds, and, if he found that no agreement of any kind was ever concluded between them, there was no occasion to invoke the statute of frauds as the basis of the decision, since the plaintiffs were barred of a remedy independently of that statute, for want of any agreement at all. The ruling, however, by no means warrants the inference that the sitting justice found as a matter of fact that an oral agreement was concluded between the parties, but rather that the acts of part performance by the defendants were not of such a character as to defeat the operation of the

statute. He may have found that all the terms of the proposed contract for the first time became the subject of negotiation after they had been embodied in the written agreement delivered to the defendants; and in that event there would be no incongruity in ruling that the plaintiffs were barred of remedy by the statute of frauds, because this written agreement was not signed by the party to be charged.

But if the findings of fact disclosed by the case could be deemed susceptible of the construction claimed by the plaintiffs, the defendants contend that there is still an insuperable objection arising from another defect or ambiguity in the record.

When the existence of an oral agreement for the sale of land has been clearly proven to the satisfaction of the court, and acts of part performance are relied upon to defeat the operation of the statute of frauds, it must appear in the first place that such acts of performance had unequivocal reference to the agreement and were done in pursuance and execution of it. *Woodbury* v. *Gardner*, 77 Maine, supra. As stated by Mr. Justice Clifford in *Williams* v. *Morris*, 95 U. S. supra: "The act of part performance must be of the identical contract set up and alleged. It is not enough that the act of part performance is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill or answer." Upon this point the finding of the justice is thus expressed: "The defendants then took the agreement to see about the title. Meanwhile, with plaintiffs' assent they entered upon the land, (about thirty acres) and ploughed a driving park upon it. This was late in the fall." This finding by no means shows that the act of ploughing had "unequivocal reference to the agreement alleged, and was done in pursuance and execution of it." The language is equally consistent with the contention that the defendants sought and obtained permission from the plaintiffs to enter and plough under an arrangement entirely independent of the contract set up by the plaintiffs.

In the view thus taken of the findings of the court, it may be unnecessary to consider further the effect of the alleged act of part performance upon the agreement set up by the plaintiffs; but as

the counsel have exhaustively argued the question, we will briefly examine it.

As already intimated, the court is never authorized to nullify the imperative provisions of this statute and decree specific performance of an oral contract for the sale of land, unless sufficient part performance is made out to show that fraud and injustice would result if the contract should be held inoperative. The doctrine is based on the principle of equitable estoppel, and it must appear that one of the parties has been induced, or allowed, to change his position on the faith of the contract to such an extent and in such a manner that all legal remedies would be inadequate to compensate him for the damages sustained, and nothing but specific performance would restore him to his original position. And the evidence must be full, definite and conclusive. *Burns* v. *Daggett*, 141 Mass. 373; *Glass* v. *Hulbert*, 102 Mass. 32; *Woodbury* v. *Gardner*, supra; *Ash* v. *Hare*, 73 Maine, 403; *Tilton* v. *Tilton*, 9 N. H. 390; *Williams* v. *Morris*, supra; *Moyer's Appeal*, 105 Pa. St. 432; *Lord's Appeal*, Id. 451; *McKowen* v. *McDonald*, 43 Pa. St. 441; *Brown* v. *Brown*, 33 N. J. Eq. 660.

In the first place, it should not be overlooked that in this case the plaintiffs, claiming to be vendors, are relying upon acts of partial performance done by the defendants to compel the latter to accept the deeds and pay for the land according to the alleged contract. But numerous authorities are aptly cited by the defendants' counsel in support of the proposition that the acts of part performance relied upon by the plaintiff must be acts done by himself, and that ordinarily no importance can be attached to acts of performance done by the party sought to be charged. In Browne on Stat. of Frauds § 453 it is said: "If the defendant chooses to waive the benefit of his own acts of part performance which would entitle him to allege a fraud on the part of the plaintiff, it cannot be that the plaintiff may force him to rely upon them, thus in effect, himself setting up his own fraud." See also Bispham on Eq. 4 Ed. 448; *Buckmaster* v. *Harrop*, 7 Vesey, 341; *Caton* v. *Caton*, L. R. 2 H. L. 127; *Glass* v. *Hulbert*, and *Williams* v. *Morris*, supra.

While this may not be accepted as an arbitrary rule and it is

possible that exceptional cases might arise where a plaintiff would be placed in such a position by the act of performance on the part of his opponent that damages at law would fail to compensate him for the injury, it must always be a consideration of great weight in determining whether the court is required to grant the relief of specific performance.

In the case at bar, the act of part performance relied upon is not only found to have been done solely by the defendants, but from every point of view it is manifestly insufficient to justify the court in decreeing specific performance. The finding is that with the plaintiffs' assent the defendants entered upon the land and "ploughed a driving park upon it." It requires no argument to show that this act did not occasion irreparable injury to the plaintiffs. It cannot reasonably be claimed that the plaintiffs suffered any damage in consequence of this act for which a remedy at law would not afford full and just compensation. If, in any material respect, the plaintiffs do not occupy their original position, they can be restored to it without specific performance of the alleged contract for the sale of the land. The principle of equitable estoppel is not applicable to the facts of this case. "The decided inclination of the judicial mind appears to be against extending beyond those limits to which it has been carried by clear authority, the doctrine of enforcing oral contracts in equity on the ground of part performance." Brown on Stat. of Frauds § 492.

Exceptions overruled.

ARTHUR A. CLARK

vs.

INSURANCE COMPANY OF NORTH AMERICA.

Knox. Opinion March 12, 1896.

Insurance. Cancellation. Notice. Assent.

Where a valid contract of insurance has been effected and the assured has accepted the policy in a particular company, the agent of the company has no right to cancel such policy, or place the assured in any other company, without the authority or request of the assured.

Where by the terms of the policy or contract of insurance, an insurance company reserves the right to cancel the policy by giving five days' notice to the assured, such cancellation can be effected only by giving such notice, or by the assent of the assured.

Without some stipulation authorizing it, an insurance company cannot cancel a contract of insurance once entered into, except with the assent of the assured.

Nor will such notice by the company be available after the liability of the company has become absolute by a destruction of the property by fire.

The contract of insurance is to be tested by the principles applicable to the making of contracts in general. The terms of the contract must have been agreed upon.

If the contract is incomplete in any material particular, or the assent of either party is wanting, it is of no binding force.

The property insured must be in existence at the time the contract of insurance is made, in order to render such contract valid.

ON REPORT.

The case appears in the opinion.

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

The insurance effected by the agent, under the circumstances, in this case, in the second company is valid.

In the case of *Schauer* v. *Queen Ins. Co.*, 88 Wis. 561, where the plaintiff employed an insurance agent to keep certain property insured for such an amount, part of the insurance being taken in companies represented by the agent and part through other companies, and to avoid the frequent sending and returning of policies, as some were cancelled by the different companies, all of the policies were left with the agent, it was held that the agent had authority to receive for the insured notice of cancellation of policies, and that the plaintiff could not recover on a policy, notice of the cancellation of which had thus been given to the agent, who was the agent of the insurance company. This case on these facts is precisely parallel with the case at bar with the exception of the circumstance that the policy at bar had been delivered to the plaintiff, while in the case cited they were generally held by the agent of the company merely for the convenience of changing in case of cancellations. In *Buick* v. *Mechanics' Ins. Co.*, *61* N. W. Rep. 337, decided by the Supreme Court of Michigan, it was held that "an agent to whom the owners of property entrust the entire subject of insurance has

authority to cancel an insurance policy and take out a policy in another company without the owners' knowledge, so as to render the latter company liable." In that case the policies when issued were delivered to the principal by the agent. A like proposition was sustained by the court in *Grace* v. *Am. Central Ins. Co.*, 16 Blatch. 433.

It is to be noted in the case cited from the 61 N. W. Rep. the action was upon the policy itself, so that the precise question was distinctly involved, and upon it the case turned.

The only question here is whether the insurance in the defendant company is valid, and that does not necessarily turn upon the continuance of the insurance in the Commercial Union Insurance Company.

It is not necessary to establish the proposition that the agent of the Commercial Union, who was likewise the agent of the defendant company, had authority to receive the notice of cancellation so as to bind the plaintiff. The risk commences when the entry is made on the blotter, or the daily report is written. *Walker* v. *Metrop. Ins. Co.*, 56 Maine, 379.

The fact that the policy was not actually written up and delivered until after the fire can have no effect upon the rights of the parties if the risk commenced, as the agent of the defendant company admits it ordinarily would, upon the writing of the daily report. There is no substantial conflict in the authorities upon this point.

"Destruction of property after risk has commenced and before the policy is issued, if there be no fraud or concealment by the party insured, makes the company liable." *Com. Ins. Co.* v. *Hallock*, 3 Dutch. 645, S. C. 72 Am. Dec. 379.

An application to an insurance agent for a certain amount of insurance, the agent to select the companies, and his agreement to do so and give the insurance, constitutes a valid contract of insurance with each company as soon as it is written, although the policies are not delivered until after the property is destroyed by fire. *Mich. Pipe Co.* v. *Mich. F. & M. Ins. Co.*, 92 Mich. 482, S. C. 20, L. R. A. 277; *Peoria Ins. Co.* v. *Davenport*, 17 Iowa, 276; *Boice* v. *Thames, &c. Ins. Co.*, 38 Hun, 246, *Moore* v. *N. Y. Brewery Ins. Co.*, 55 Hun, 540.

The writing up of this contract of insurance by the daily report on the 18th was afterwards ratified by the plaintiff by his acceptance of the policy and exchanging therefor the policy that had been cancelled in the Commercial Union Ins. Co.

Not only do the provisions of our statute prohibit the defendant's denying that they were affected by the knowledge of their agent when this insurance was written, but the authorities generally sustain the proposition that where an agent under such circumstances has knowledge of the existence of prior insurance, it amounts to a waiver upon the part of the company of that condition in the policy. R. S., c. 49, §§ 19, 90; *Day* v. *Ins. Co.*, 81 Maine, 244; 1 May Ins. § 133; *Horwitz* v. *Eq. Mut. Ins. Co.*, 40 Mo. 557, S. C. 93 Am. Dec. 321; *Hough* v. *City Fire Ins. Co.*, 29 Conn. 10, S. C. 76 Am. Dec. 589, and note; *Kitchen* v. *Hartford Ins. Co.*, 57 Mich. 135, S. C. 58 Am. Rep. 344; *Hayward* v. *Nat. Ins. Co.*, 52 Mo. 181, S. C. 14 Am. Rep. 400.

When the facts of the case at bar are borne in mind, and it is remembered by the court that the policy in the Commercial Union Ins. Company was exchanged by the plaintiff for the one in the defendant company, and the defendant company has received and retains the full premium for the policy of the plaintiff, an examination of the cases cited contra will show a substantial legal distinction between them upon the facts and the case at bar.

Wm. H. Fogler, for defendant.

SITTING: WALTON, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. The plaintiff desired to procure an insurance of $1,200 for six months on his carriages, sleighs and stock, in a building owned by him at Rockport. Accordingly on the 6th day of December, 1893, he left instructions at the office of F. A. Packard, who was agent of the Commercial Union Insurance Company, and five other companies, including the defendant company. The plaintiff gave no instructions as to what company the insurance should be placed in, this matter being left wholly to the agent. The policy was made out in the Commercial Union Insurance Company, and

the plaintiff on the 16th day of December paid the premium and received the policy of that company, which policy he retained in his possession until two days after the property insured was destroyed by fire, which occurred at one o'clock in the morning of December 19th, which was Tuesday. During that time he had no notice that the company intended or desired to cancel his policy. On December 15th, the Commercial Union Insurance Company wrote the agent to cancel the policy. This letter reached Camden, where the agent resided, on the 16th, which was Saturday, in the evening, and was taken from the office by the agent on Monday the 18th. Upon receiving this instruction to cancel the policy, the agent instructed his wife, who was his clerk, to write a new policy in the defendant company. The agent was in the office in the evening, and finding that nothing had been done in reference to the policy, wrote a "daily report" of the insurance in the defendant company, and it remained in his office until the afternoon of the next day, Tuesday, when the policy in suit was written. After the daily report had been written, but before it was mailed and before the policy was made out or entered in the register, the plaintiff notified the agent that the property insured had been destroyed by fire. When the plaintiff notified the agent of the destruction of the property that Tuesday morning, the agent told him he had just received word from the company to cancel the policy in the Commercial Union. That was all the conversation that was had in relation to the cancellation of the policy. The plaintiff testifies that he went over to the agent's office about eight o'clock, on the morning of Tuesday the 19th, and notified him that it had been burned, and he said he was just reading a letter he had received from the company to cancel the policy. At the time the plaintiff left the agent's office he had no knowledge that any attempt had been made to cancel the policy which he then held upon his property which had then been destroyed, and had no knowledge that any act had been done towards placing the insurance in another company. The policy which the agent wrote in the defendant company on the afternoon of the 19th, and after the plaintiff had given notice of the loss, was ante-dated December 6th, and the record of cancel-

lation of the other policy, December 18th, as of the date when notice was received by the agent to cancel the policy in the Commercial Union, and when the "daily report" was written for the defendant company. Two days after the fire, the policy in suit, in the Insurance Company of North America bearing date December 6th, 1893, was sent to the plaintiff by the agent through a Mr. Andrews, who said he had another policy, and he would take the old one and give the plaintiff a new one, and that it would be all right. The plaintiff testifies that he hesitated about doing it, but at last gave him the first policy and took the new one upon his assurance that it would be all right, and that he would be protected. The record of cancellation was not entered on the register of the Commercial Union until Mr. Andrews returned with the policy from the plaintiff, though the record was dated December 18th, the day before the fire. On the afternoon of Tuesday, the 19th day of December, the agent mailed to the defendant company the daily report which had been written the evening before, informing the company of the insurance, and also in separate envelope notice of the loss.

The premium paid by the plaintiff for the policy in the Commercial Union was transferred to the account of the defendant company, and remitted with other money in the due course of business, and this is still retained by them.

On Dec. 25th, a special agent of defendant company, in reply to the notice of loss, notified the agent that he would come down the next week. The defendant company on learning the facts concerning the loss, making of the policy on the 19th of December and ante-dating it as of the 6th, and the alleged cancelling of the policy in the Commercial Union, disaffirmed the acts of the agent, claiming they were wrong and illegal, and that the Commercial Union was the company liable, and not the defendant.

The plaintiff, as the case shows, has another action pending against the Commercial Union, and has made due proof of loss to that company. In his proof of loss against the defendant company, he states that he was insured in the Commercial Union,—that they claim it was cancelled before or at the time the insurance was

effected in the defendant company, but which claim he states he does not admit nor does he waive or surrender any rights that he may have against that company by filing his proof of loss against the defendant company.

Such, in substance, are the facts upon which the plaintiff seeks a recovery in this action against the defendant company.

We do not think he can maintain this action.

There was a valid contract of insurance existing between the plaintiff and the Commercial Union Insurance Company on and after December 16th, when he paid the premium and received his policy. Up to the time of the fire, the plaintiff had received no notice of the intended cancellation of that policy. He had neither authorized nor requested any other insurance of his property, nor had he requested or assented to a cancellation of his policy in the Commercial Union. By the terms of the policy the company could cancel the policy by giving to the assured five days' notice. No such notice was given, and the policy remained uncancelled and in full force in the hands of the assured on the 19th day of December when the loss occurred and when he notified the agent of the loss. Without such a stipulation, or some stipulation strictly authorizing it, an insurance company cannot cancel a contract of insurance once entered into, except with the assent of the assured. 1 May on Ins. § 67. *Alliance Mutual Ins. Co.* v. *Swift*, 10 Cush. 433.

And when the policy contains such a stipulation, the notice must be unequivocal. It is not enough to give notice of a desire to cancel, or to deliver the policy for cancellation. *Lyman* v. *State Mut. Ins. Co.*, 14 Allen, 329; *Griffey* v. *Ins. Co.*, 100 N. Y. 417.

The only notice ever given by the company that had entered into a contract with the plaintiff was that given on the 15th of December in a letter to their agent. He was not the agent of the assured for the purpose of receiving notice of the cancellation of the policy which he himself had written and delivered to the assured as agent of that company.

A case significantly similar to the one at bar was before the court in New Hampshire in *Stebbins* v. *Lancashire Ins. Co.*, 60 N. H. 65,

and there, as here, the attempt was made to change the risk from one company to another after the contract had become fixed and binding, and without any authority from the plaintiff, and in the course of the opinion the court say: "The right to terminate the insurance upon giving notice and refunding the premium for the unexpired term was reserved in the policy; and it appears that the company, upon being informed of the risk, notified their agents that they preferred not to carry it, and advised that it be placed elsewhere, and that the agents attempted to change the risk and place it in the Lancashire Company. But the act of the agents in cancelling the policy upon their books and writing a policy in the Lancashire Company and forwarding it as a proposed substitute was ineffectual to terminate the contract of the North British Company until notice had been given to the plaintiff or his agent; and no such notice was received by the plaintiff, his agent Barber, or Doolittle, until after the liability of the North British Company had become fixed by the destruction of the property by fire. After the liability of the company had become absolute, notice of their previous election to terminate the risk was of no effect. The North British policy was in force at the time of the fire. *Massasoit Steam Mills Co.* v. *W. A. Co.*, 125 Mass. 110. The Lancashire policy never became a binding contract. When insurance on the plaintiff's building to the required amount had been secured in the Commercial Union and North British companies, the plaintiff's application had been filled, and no authority remained for placing other insurance upon the property. The Lancashire policy therefore was unauthorized by the plaintiff; and although written in good faith by the authorized agents of the company, and designed as a substitute for the North British policy, it could have no operative force until it was accepted by the plaintiff. It was not an acceptance of a proposition for a contract of insurance, like the case of a policy issued on a previous application, which, as in the cases cited by the plaintiff, takes effect upon the acceptance of the application. As neither the plaintiff nor his agent had any knowledge of the existence of the policy previous to the fire, it was not an existing contract of insurance when the loss happened, and the

subsequent delivery was ineffectual to give it validity." See also *Wilson* v. *New Hampshire Fire Insurance Co.*, 140 Mass. 210.

At the time of his loss, the plaintiff held the policy of the Commercial Union, uncancelled, and in full force, and had a right of action against that company for the amount of his loss.

He had not applied for or assented to any other insurance, had no knowledge that other insurance was contemplated, and had not at the time of loss any right of action against the defendant company.

It is contended in support of this action that by surrendering his policy in the Commercial Union, and accepting the policy in suit, the plaintiff ratified the acts of Packard, and thus on the 21st of December, in making the exchange of policies with Andrews, under the circumstances which we have stated, completed a contract of insurance with the defendant company upon property which had been destroyed three days before.

But taking the testimony of the plaintiff, it negatives the claim of cancellation of his first policy and the acceptance of the one in suit in lieu thereof. More than a month after the alleged cancellation and transfer of risk, in his proof of loss to the defendant company, he states that he does not admit the claim of the Commercial Union that his policy in that company had been cancelled before the loss, nor does he "waive or surrender any rights" that he may have against the Commercial Union. His testimony in relation to what was done when Andrews came to him shows no consent to such cancellation or change of risk, and the most that can be said in relation to it is, that he hesitatingly exchanged policies upon the assurance that "it would be all right, and he be protected." Nor was the plaintiff at the interview with Packard on the morning after the loss when he conveyed notice to him of his loss, in any way notified that his insurance in the Commercial Union was cancelled, or attempted to be cancelled, or the risk changed, and he went away ignorant of any such fact.

We cannot agree to the plaintiff's position that there was a contract of insurance effected between the plaintiff and this defendant company by the act of the agent in writing the "daily report" on

the evening of December 18th. That would undoubtedly be true had the plaintiff applied for further insurance. *Walker* v. *Metropolitan Ins. Co.*, 56 Maine, 371, 379. But in this case the agent had no authority express or implied to effect any insurance for the plaintiff beyond what had already been completed. His authority was to procure for the plaintiff $1,200 insurance in one of the companies which he represented; and having done that to the acceptance of the plaintiff, his agency, so far as the plaintiff was concerned, was accomplished, and he had no authority to make further insurance in behalf of the plaintiff. Nor was it the intention even on the part of the agent to effect additional insurance. It was at most an attempt to transfer a risk from one company to another at the instance of the company then carrying the risk and without the consent of the assured. The attempted cancellation, and the effort to place the risk in the defendant company were parts of the same transaction, with no consent of the assured. Unless the cancellation was valid, the second risk did not attach. It is not pretended that the plaintiff was aware of any intention or attempt at cancellation till the morning after the loss occurred. Until the five days' notice provided in the policy should be given him, or he should consent to such cancellation, the first policy would remain in force, and the second would not become operative as a legal subsisting contract. *Wilson* v. *New Hampshire Fire Insurance Co.*, 140 Mass. 210, 212; *Stebbins* v. *The Lancashire Insurance Co.*, 60 N. H. 65; *Massasoit Steam Mills Co.* v. *Western Assurance Co.*, 125 Mass. 110.

There was no contract between this plaintiff and the defendant company at the time the loss occurred. There was a subsisting contract between the plaintiff and the Commercial Union. The unauthorized attempt on the part of the agent of the defendant company to make such a contract by entering in his "daily report" the memorandum of such contract, was not enough. The contract of insurance is to be tested by the principles applicable to the making of contracts in general. The terms of the contract must have been agreed upon. This necessarily implies the action of two minds,— of two contracting parties. If it is incomplete in any material particular, or the assent of either party is wanting, it is of no binding force.

Thus, in the case of *Insurance Co.* v. *Young*, 23 Wall. 85, 107, the Supreme Court of the United States, in speaking of the contract of insurance where a question similar to the one under consideration arose, say: "The company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, is wanting. Without it there is none, and there can be none." *Insurance Co.* v. *Ewing*, 92 U. S. 377, 381.

In this case, the action of the agent in the transaction relative to the attempted change of risk to the defendant company, was entirely ex parte. If we assume that he was acting with authority from the company, it was then no more than a proposition which had not been made known to the plaintiff. To give it validity required his knowledge and his consent. At the time of the loss knowledge had not been conveyed to him, and his acceptance had not been given. The rights and liabilities of the parties are to be determined by their legal status at the time of the loss. It is inconceivable that the defendant company can be held liable for indemnity against loss when no contract for indemnity existed at the time the loss occurred.

And if the property had been burned before any contract was entered into with the defendant company, even if we assume such contract to have been afterwards made, that fact was known to the agent, and the defendant company would not be liable; the property must be in existence to render a contract of insurance valid. *Stebbins* v. *The Lancashire Ins. Co.*, 60 N. H. 65; *Mead* v. *Phenix Ins. Co.*, 158 Mass. 124, 126.

Stress is laid upon the fact that the defendant has received and retained the premium paid by the plaintiff. But the plaintiff has never paid any premium to the defendant company. He paid his premium to the Commercial Union when he received his policy under an insurance contract entered into between him and that company. He has paid no other premium. The money so paid became the money of the Commercial Union. If the agent, in order to carry out his plan has included any portion of that amount in a lump sum remitted by him to the defendant company, that matter must be adjusted between the two companies. Such a scheme in

the face of the express disaffirmance of the transaction, both by the defendant company and the plaintiff, cannot place this risk where it does not otherwise belong.

Judgment for defendant.

LIZZIE CUMMINGS

vs.

KENNEBEC MUTUAL LIFE INSURANCE COMPANY.

Hancock. Opinion March 21, 1896.

Life Insurance. Application. Fraud. Verdict.

In a written application for a certificate of membership in a life insurance company, the insured "declared and warranted that his answers and statements are full, complete and true," and agreed that "if there has been any concealment, misrepresentation or false statement or statement not true" made therein, then the certificate shall be null and void." *Held;* in this case, that it is established by clear and convincing evidence that at least eight of the insured's answers to material questions asked by the medical examiner were not true; and, although it is not incumbent on the defense to prove that the insured knew them to be untrue, the conclusion is irresistable that at least five of these answers must have been fraudulent as well as false.

Where one asserts that certain statements are true, and that if not true this fact shall avoid the policy, the question whether they were actually material is not important, as parties have a right to make their truth the basis of the contract; but where the insured obtained from the medical examiner a recommendation to which he was not entitled, by means of wilful false statements, and the intentional concealment of the truth, in relation to matters which were undoubtedly material to the risk, this the law denominates fraud and sternly refuses to allow any person to profit by it.

When a verdict is unmistakably wrong and appears to have been rendered under the influence of sympathy, or prejudice, and in flagrant disregard of the substantial facts submitted in evidence, it will be set aside.

ON MOTION BY DEFENDANT.

The case is stated in the opinion.

E. S. Clark, for plaintiff.

H. M. Heath, and C. L. Andrews, W. T. Haines, with them, for defendant.

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

WHITEHOUSE, J. The verdict for the plaintiff in this case is unmistakably wrong and must be set aside. It appears to have been rendered under the influence of sympathy or prejudice, and in flagrant disregard of the substantial facts submitted in evidence.

The plaintiff is one of the beneficiaries named in a policy of life insurance, or certificate of membership, which was issued by the defendant to the plaintiff's husband Thomas F. Cummings, July 23, 1892. The application is dated July 10 and the medical examnation was made July 18, 1892. The insured died January 2, 1893, from hemorrhage of the bowels caused by tuberculous consumption.

By the terms of the policy, the application including the medical examination, is made a part of the contract, and the certificate is declared to be issued and accepted "on condition that the statements made in the application by and in behalf of the member are in all respects true." In the application the insured over his own signature "declares and warrants that his answers and statements are full, complete and true;" and agrees that "if there has been any concealment, misrepresentation or false statement or statement not true" made therein, "then the certificate shall be null and void." At the close of the medical examination the insured again "declares and warrants" that his answers to the questions put by the medical examiner "are full and true."

Yet it is established by clear and convincing evidence that at least eight of the insured's answers to material questions asked by the medical examiner were not true, and although it is not incumbent on the defense to prove that the insured knew them to be untrue, the conclusion is irresistible that at least five of these answers must have been fraudulent as well as false.

In the medical examination made July 18, 1892, the second question is: "have you now or have you ever had any of the following affections or diseases?" and among other specifications and answers appear the following: "Spitting of blood? No. Chronic cough? No. Inflammation of the lungs? No. Pleurisy? No. Consumption? No."

To the seventh question "Do you now possess a sound constitution and good health?" the answer is "Yes."

To the fifteenth question "How long is it since you were attended by a physician or have professionally consulted one?" the answer is "four months."

To the seventeenth question, "Have any material facts regarding your past health or present condition been omitted?" the answer is "No."

But in order to meet the requirements of the policy for satisfactory proof of the manner and cause of death, the plaintiff herself was compelled to introduce, as a part of her evidence, the "attending physician's certificate." In this certificate made under oath, Dr. Chandler states that he was the "usual medical adviser" of the insured after April, 1892; that the "duration of his last illness" was from April, 1892, to the date of his death January 2, 1893; that the first time he prescribed for him was in April and the last time December 28, 1892; that when he first prescribed for him he had hemorrhages from the lungs and a constant cough, expectorated pus, and was emaciated and weak, and finally that the immediate cause of his death was hemorrhage from the bowels as a result of tuberculous consumption. In his testimony as a witness for the defense, Dr. Chandler gives a detailed history of his treatment of the case and only emphasizes the statements in the certificate. He testifies that he saw him and treated him professionally as often as once a week from the first of April until July; that his cough continued and he had all the characteristic symptoms of consumption; that he prescribed the usual treatment for consumption, and that there was no question that he had consumption, and a well marked case of it from April, 1892, until the date of his death.

This evidence of Dr. Chandler is corroborated by the claimant herself who is compelled to admit that her husband consulted Dr. Chandler professionally several times in "April and May" and that he had a cough at that time.

It is corroborated by Mr. Drew, the agent of the Maine Central Railroad at Bar Harbor, who testifies that he employed Cummings June 1, 1892, to work on the wharf, and noticed that prior to July

18, he was weak and coughed somewhat; that he was unable to do the work required of him without assistance, and looked like a sick man.

It is also corroborated by Dr. Morrison of Bar Harbor, who treated him for influenza, or grip in February and March 1892. He testifies that he also prescribed for him for hemorrhage of the lungs and for pleurisy with effusion, in February or March and before March 20, 1892, and that he saw him in the summer when his appearance was that of a man somewhat emaciated. He further testifies that, in 1892, he was examiner for the defendant company among others, and that about the middle of July, Cummings came to his office and asked him to examine him for life insurance in the defendant company, and that he positively refused to examine him and distinctly stated to him that he was not a fit subject for life insurance; that he couldn't recommend him and that he would only be rejected.

Dr. William Rogers kept a drug store at Bar Harbor, and testifies that the claimant frequently came into his store in the summer of 1892 and bought cough medicines and recognized remedies for consumption, saying that her husband was a sick man and had a bad cough and hemorrhages.

Yet on the 18th day of July, accompanied by this claimant, he presented himself for medical examination at the office of Dr. Hagerthy of Ellsworth, another examiner of the defendant company, to whom he was an entire stranger. It appears to have been a week when his symptoms were more favorable, and his condition more indicative of health. He was bronzed by exposure to the sun on the wharf, and in that respect had the appearance of a laboring man in ordinary health. But conscious that he was not a proper subject for life insurance, and rightly apprehending from his interview with Dr. Morrison that he would not be recommended if he disclosed the truth in regard to his state of health for the four months next preceding, he suppressed all mention of his treatment by Dr. Chandler during that entire period, named Dr. Morrison who had not prescribed for him after March 20 as his "usual medical adviser," and stated that he had not consulted a physician for

four months. He may be excused for not believing that he had consumption, but his denial that he ever had chronic cough, spitting of blood, inflammation of the lungs and pleurisy, against the overwhelming testimony that he had been afflicted with all those troubles, and his statement that he had omitted nothing in regard to his past health or present condition, were manifestly false and fraudulent. He obtained from the medical examiner a recommendation to which he was not entitled, by means of wilfully false statements, and the intentional concealment of the truth, in relation to matters material to the risk. This the law denominates fraud, and sternly refuses to allow any person to profit by it.

It is not incumbent on the defendant, however, to show that the answers were fraudulent. As stated by the court in *Cobb* v. *Covenant Mut. Ben. Ass'n*, 153 Mass. 176, "where one asserts that certain statements are true, and that if not true this fact shall avoid the policy, the question whether they were actually material is not important, as parties have a right to make their truth the basis of the contract." See also *Johnson* v. *Me. & N. B. Ins. Co.*, 83 Maine, 182.

Motion sustained.

STATE

vs.

AUSTIN L. SINNOTT and WILLIAM STONE, Appellants.

York. Opinion March 21, 1896.

Fish and Game. Penalties. Procedure. Jurisdiction. Saco Mun. Court. R. S., c. 40, § 21; 133, § 13; Stat. 1885, c. 275; 1887, c. 144; 1889, c. 292; 1891, c. 126.

Since the Stat. 1891, c. 126, prosecutions for the violation of the fish and game laws, as therein provided, may be begun and finished upon complaint before judges of municipal and police courts and trial justices. This mode of prosecution which had been omitted apparently, by inadvertence, from the statutes of 1887 and 1889, was expressly revived by that act of the Legislature.

The Saco Municipal Court has jurisdiction to render final judgment of conviction and sentence in such prosecutions, subject to the right of appeal. R. S. c. 133, § 13.

ON EXCEPTIONS BY DEFENDANTS.

The case is stated in the opinion.

Willis T. Emmons, County Attorney, for State.

B. F. Hamilton and B. F. Cleaves, for defendants.

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

PETERS, C. J. The two respondents were convicted and sentenced to pay each a fine of $57.50 by the Saco Municipal Court upon a complaint for unlawfully having in possession one hundred and fifteen short lobsters contrary to the statute. R. S., c. 40, § 21, as amended by the Acts 1885, c. 275, 1887, c. 144, and 1889, c. 292. They thereupon appealed to this court, in York County, and there moved for a dismissal of this particular prosecution upon the ground that they could not be convicted of the offense upon a complaint, but only after an indictment.

Must their conviction be preceded by an indictment, or may it be had upon a complaint? In the act of 1885, c. 258, it is expressly declared that judges of municipal and police courts, and trial justices within their counties, have by complaint original and concurrent jurisdiction with the supreme judicial and superior courts in all prosecutions under R. S., c. 40, (the fish and game statute) and under the acts amendatory of said chapter. In the act of 1891, c. 126, it is again expressly declared that all fines and penalties under any law relating to game, fish or shell fish may be recovered by complaint, indictment or action of debt. These two statutes make it sufficiently clear that a conviction under these fish statutes may be had upon a complaint and in a municipal court. The power of the legislature to provide for such a conviction for such an offense is indisputable. *State* v. *Cram*, 84 Maine, 271.

The respondents, however, contend that the act of 1885, c. 258, was repealed upon this point by the act of 1887, c. 144, § 7, which enacted that all fines and penalties under that act should be recovered by indictment or action of debt, and made no mention of a complaint as a mode of recovery. They also contend that it was again completely repealed by act of 1889, c. 292, which re-enacted

in section 6 the above limitation of modes of prosecution to indictment and action of debt, and by section 8, enacted that "all laws, acts and parts of acts inconsistent herewith are hereby repealed."

But the still later act of 1891, c. 126, above cited, expressly restored the mode of prosecution by complaint which had been omitted apparently by inadvertence from the acts of 1887 and 1889. It must be evident, after the act of 1891, that the will of the legislature is that prosecutions under the fish and game laws may be begun and finished upon complaint.

The respondents further contend that, even if a prosecution can be begun and finished upon complaint, it cannot be so finished in the Saco municipal court, which, by the act creating it, is limited in jurisdiction to offenses punishable by fine not exceeding twenty dollars. It was competent, however, for the legislature to afterward enlarge that jurisdiction by special or general statutes. The legislature has once declared that municipal courts should have concurrent (i. e. joint and equal, Web. Dict.) jurisdiction with the upper courts over these proceedings. It has again declared that all the penalties imposed by the fish and game laws may be enforced by complaint, a mode of prosecution cognizable in a superior court only after conviction in and appeal from a municipal or police court or trial justice. R. S., c. 133, § 13. Under these explicit declarations of legislative will, it must be held that the Saco municipal court has jurisdiction to render final judgment of conviction and sentence in prosecutions like this, subject of course to appeal.

Exceptions overruled.

INHABITANTS OF ST. GEORGE

vs.

CITY OF ROCKLAND.

Knox. Opinion March 21, 1896.

Pauper. Minor. Revision of Statutes. R. S. c., 24, § 1, cl. 2 & 3; Stat. 1821, c. 122; Mass. Stat. 1793, c. 34.

A legitimate minor child, whose deceased father had no pauper settlement in this State, instantly acquires the new settlement of the mother gained by her subsequent marriage.

The desire for greater conciseness or simplicity of language will usually account for changes or ommission of words in the revision of general statutes. *Held;* that a change of language in such revisions does not necessarily, nor even presumptively, indicate a change of legislative will.

AGREED STATEMENT.

This was an action to recover for pauper supplies furnished Edith Wardwell, and was reported to the law court upon an agreed statement of facts.

The regularity of the furnishing of the supplies was admitted. Due notices and denials were given and made. The only question in controversy was the settlement of the pauper, depending upon the following facts: —

Edith Wardwell was born January 29, 1890, and is the daughter of George W. Wardwell and Annie (Allen) Wardwell. The parents were married January 3, 1883. George W. Wardwell never had any pauper settlement in the State of Maine. At the time of the birth of Edith Wardwell, the pauper settlement of the mother, Annie Wardwell, was in the town of St. George, and so remained until her subsequent marriage. George W. Wardwell died in the fall of 1893.

Annie Wardwell married Isaac T. Pettee, February 1, 1894. The pauper settlement of Isaac T. Pettee at the time of said marmiage was, and ever since has been, in the city of Rockland.

The parties agreed that if the pauper settlement of Edith Wardwell was in the city of Rockland the case was to stand for the assessment of damages, otherwise the plaintiff to be nonsuit.

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

W. R. Prescott, City Solicitor, for defendant.

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

EMERY, J. The minor pauper in this case, at the time of her birth, had a pauper settlement in St. George because her mother's settlement was there, her father having none in this State. (R. S. c. 24, § 1, cl. 2.) After her father's death, her mother married one Pettee whose pauper settlement was in Rockland. By this second

marriage the pauper settlement of the mother was at once changed from St. George to Rockland, the town of her new husband. (Ibid). Did that marriage also change the pauper settlement of her minor daughter (a legitimate child) from St. George to Rockland?

This question was expressly decided in the affirmative in *Parsonsfield* v. *Kennebunkport*, 4 Maine, 47; and that case is clearly decisive of this, unless there has been since then an effectual change in the statute fixing the pauper settlement of legitimate minor children. The decision in the case cited was based on the Massachusetts statute of 1793, c. 34, (re-enacted in this State in the Act of 1821, c. 122,) which declared that "legitimate children shall follow and have the settlement of their father if he has any in this State; but if he shall have none, they shall in like manner follow and have the settlement of their mother." The words "shall follow and have" were continued in the statute down past the revision of 1841. In the revision of 1857 the clause is condensed so as to read as follows: "Legitimate children have the settlement of their father if he have any in the State; if he has not, they have the settlement of their mother within it." The language is the same in the revision of 1883 now in force. The word "follow" is omitted.

A change of language in the revision of general statutes does not necessarily, nor even presumptively, indicate a change of legislative will. The desire for greater conciseness or simplicity of language, will usually account for the change or omission of words. In this case there was no occasion for a change in the law. It kept poor minor children with their mother. It had remained unamended for a generation. The condensation of the clause into more terse language does not indicate an intent to make such a radical change in the law itself as the defendant contends for.

If the statute had been first enacted in its present form it would have borne the same construction. A comparison of this clause with the next succeeding clause will make this plain. In that clause, (cl. 3, § 1, of the Pauper Act) it is declared that "illegitimate children have the settlement of their mother at the time of their birth." The words "at the time of their birth" were evi-

dently inserted to prevent illegitimate children deriving any new or other settlement from their mother's change of settlement. The omission of these words in the next preceding clause (cl. 2) concerning legitimate children indicates a different legislative will as to them,—a will that they shall have and continue to have the settlement of their mother, wherever that may be.

Defendant defaulted.

EDWARD F. THOMPSON, in equity,

vs.

EDGAR R. ROBINSON, and another.

Cumberland. Opinion March 24, 1896.

Fraudulent Conveyance.

A conveyance made by a debtor for the express purpose of protecting his interest in the property against a pending suit is fraudulent and void as against the plaintiff in that suit, and equally fraudulent and void as against the debtor's assignee in insolvency.

IN EQUITY. ON APPEAL BY DEFENDANTS.

Bill in equity, by the assignee in insolvency of Edgar R. Robinson, asking the court to declare void the conveyance of an equity of redemption in real estate from the insolvent to his mother, who was made a party to the bill. The bill alleged that the conveyance was made by the insolvent during the pendency of a suit arising from a breach of promise to marry and charged that it was made especially to defraud the plaintiff in the breach of promise suit. The material portions of the bill are as follows: —

"First: — That on the twenty-seventh day of November, A. D. 1894, the said Edgar R. Robinson on his own petition of that date was declared an insolvent debtor by our Court of Insolvency for said County of Cumberland, and that the complainant is assignee of said insolvent debtor, lawfully chosen and qualified and having filed a bond for the faithful performance of the duties thereof, which was approved by said court.

"Second: — That prior to the filing his said petition, to wit, on the second day of April, 1894, said Edgar R. Robinson being then the owner of the equity of redemption of the value of sixteen hundred dollars in and to a certain lot of land in said Portland [description of property] did with intent to delay, hinder and defraud his creditors fraudulently convey said equity of redemption to said Olive J. Robinson by deed bearing date the second day of April, 1894, and recorded in the registry of deeds for the County of Cumberland, book 612, page 57, a copy of which deed is filed as exhibit A with this bill.

"Third: — That at the time of said conveyance of said equity of redemption there was pending in the Superior Court for Cumberland County a certain suit begun on the fifth day of November, A. D. 1893, by Arletta Blake, of said Portland, against said Edgar R. Robinson, for breach of contract upon a cause of action which accrued previous to making said conveyance; that judgment was rendered in said suit in favor of said plaintiff against said Edgar R. Robinson on the third day of November, 1894, which said judgment remains in force and wholly unpaid, and still is wholly unsatisfied, and was proven against the insolvent estate of said Edgar R. Robinson and allowed by our Court of Insolvency in and for the County of Cumberland. . . . .

"Fourth: — That your complainant is informed and believes it to be true, that said Edgar R. Robinson, at the time of said conveyance at said Portland, did then and there, with intent to delay, hinder and defraud his prior creditors, and particularly with intent to delay, hinder and defraud said Arletta Blake, then being a prior creditor as aforesaid, convey said equity of redemption to said Olive J. Robinson, and the said Olive J. Robinson was a party to said conveyance with the like intent to delay, hinder and defraud the prior creditors of said Edgar R. Robinson as aforesaid, and particularly to delay, hinder and defraud said Arletta Blake.

"Therefore your complainant prays:

1st. That said respondents may answer the premises.

2d. That said conveyance of said equity of redemption by said

Edgar R. Robinson to Olive J. Robinson may be declared void as against the complainant in his said capacity as assignee.

3rd. That your complainant may have such further and other relief in the premises as the nature of his case shall require, and to your Honor shall seem meet."

"The answer of Edgar R. Robinson who says: first, he admits that on the twenty-seventh day of November, A. D. 1894, he was declared on his own petition an insolvent debtor by the Court of Insolvency for said Cumberland County and that the said complainant is assignee, lawfully chosen and qualified as he alleges and this defendant believes if he had any interest in any real estate or personal property at the time he was adjudged insolvent it became vested in the said assignee by his assignment in insolvency; and that he should not be required in this action to make any further or other transfer than that which is already made.

"In answer to the second complaint this defendant says: that on the twenty-eighth day of August, A. D. 1893, he made a purchase of the real estate in Bramhall Place described in complainant's bill; that this purchase was made for the benefit of Edgar Robinson and Olive J. Robinson, parents of this defendant, and that this defendant took the title to the said property in his own name on said twenty-eighth day of August, A. D. 1893, for the sake of convenience in perfecting the said purchasing and completing the same. The purchase price of said property was five thousand dollars and was paid for in the following manner, to wit: Defendant gave the Portland Savings Bank of Portland a mortgage of three thousand dollars on the same bearing date the second day of April, 1894. At the time of the purchase he assigned and transferred to said Meaher the Rice mortgage amounting to six hundred five dollars and eighty-nine cents and which belonged to his father, Edgar Robinson. He gave a mortgage subject to the Bank mortgage to said Meaher for four hundred dollars; he paid E. G. S. Ricker one hundred dollars in cash to bind the bargain which money was taken from the Bank account of Olive J. Robinson; he also transferred the bank book of Olive J. Robinson to said Meaher on which were eight hundred ninety-two dollars and ninety-eight cents

and the balance amounting to one dollar and thirteen cents said Meaher received from the rent of the house. These several amounts make a total of five thousand dollars. It was agreed at the time of the transfer on the twenty-eighth day of August, A. D. 1893, that this defendant should manage the real estate, collect the rents and occupy the premises just the same as if all the papers had been completed and passed, that he should pay the interest on the mortgages, taxes, water rates and insurance in the same manner as if all the papers had passed. Though the business was done on the twenty-eighth day of August, A. D. 1893, the papers were not executed for the bank until the second day of April, A. D. 1894, but in the meantime the property was managed as if the business had been all completed on the twenty-eighth day of August, A. D. 1893. Much of the delay was caused by the absence of Mr. Noyes in the meantime.

"Edgar Robinson, father of this defendant, a part of whose money went into this property was away in Cuba at the time the trade was made and has been away from this city ever since. Olive J. Robinson, mother of this defendant, a part of whose money went into the purchase of this property has been sick much of the time and most of the business has been transacted by this defendant. The transfer of the property to Olive J. Robinson gives her so much of the property as belongs to her under her own payments and the rest she holds as trustee for her husband, Edgar Robinson, who is now in Cuba.

"This defendant, long about the last part of August, A. D. 1893, had five hundred ninety-three dollars and sixty cents in the Cumberland Loan and Building Association, which money defendant drew out and placed in the Portland Savings Bank. From this sum defendant owed Olive J. Robinson one hundred fifty dollars borrowed money with which he purchased a bicycle and he further owed a three years' board bill from August 4th, 1890, to August 4th, 1893, which would amount to six hundred twenty-four dollars at a low estimate; so what money he had in the Portland Savings Bank in his own name he transferred to Olive J. Robinson on the seventh day of October, 1893, and this defendant had no money of his own

or standing in his own name at the time these payments were made on the purchase price of the Bramhall Place property, so-called.

"After this defendant had completed the arrangements and made the final payments for the purchase of the aforesaid property, to wit, on the second day of April, A. D. 1894, he conveyed all his interest in the said property to his mother who holds the equity either in her own right or as trustee for her husband. Defendant says in doing this business he had no intention to delay, hinder or defraud any of his creditors and it was a simple act of justice when he made the conveyance, as he did, which is recorded in Book 612, Page 57, as complainant alleges. . . . ."

The answer of Olive J. Robinson one of the said defendants who comes and says . . . .

"Second:—She is informed and believes that the said Edgar R. Robinson held in his name and apparently in his own right, as far as the records go, an equity in the Bramhall Place property described in complainant's bill, but she is informed and believes to be true that he held said title simply as trustee for this defendant and for her husband, Edgar Robinson, who is now away in the West Indies and has been away since November, A. D. 1892, and she is informed and believes to be true that the said Edgar R. Robinson has no real interest or ownership in the aforesaid property and there was no transfer made by him to delay, hinder or defraud any of his creditors. . . . .

"Fourth:—This defendant denies that the said Edgar R. Robinson ever conveyed to this defendant the aforesaid property with the intent to delay, hinder or defraud his prior creditors or particularly with intent to delay, hinder or defraud the said Arletta Blake as said prior creditor, and this defendant further denies that she was any party to any conveyance with an intent to delay, hinder or defraud any prior creditor of the said Edgar R. Robinson or particularly to delay, hinder or defraud the said Arletta Blake, and this defendant further says that in receiving the conveyance of the aforesaid property in her name she held the same in part as her own in her own right and in part as trustee for her husband, Edgar Robin-

son, in which said capacity the same being conveyed to her indirectly by her husband, cannot be conveyed by her without his joining.

"This defendant is informed and believes that her title to said property commenced about the twenty-eighth day of August, A. D. 1893, and on the first day of September, A. D. 1893, she went into the possession and occupancy of the said property in Bramhall Place and has resided there making the same her home up to the present time.

"And this defendant further says that the aforesaid property is mortgaged for thirty-four hundred dollars, that her husband Edgar Robinson paid six hundred five dollars and eighty-nine cents towards the purchase price in his transfer of the Rice mortgage, and that she paid over nine hundred ninety-four dollars and eleven cents on the purchase price, a part of which money belonged to her husband, and a part of which belonged to herself, and if the said complainant wishes for a re-conveyance or conveyance of this property to him, she respectfully asks that the Court will order a decree that he repay to her all the money that she has paid out either on her own account, or on her husband's account or their joint account, in procuring the same." . . . .

The case was heard in the court below on bill, answer and proof, where a decree was made sustaining the bill. The defendants appealed.

The proof to sustain the bill consisted of copies of the deeds referred to in the bill, and the insolvent's examination in the proceedings in the court of insolvency. The deed sought to be vacated was a quitclaim, in which the consideration was stated to be one dollar.

The following is a portion of the insolvent debtor's examination:

"Ques. 118. On the 2nd day of April, 1894, you made a transfer of this property to Olive J. Robinson in consideration of one dollar. What did you receive for that property from Olive J. Robinson?

Ans. I didn't receive anything from her.

Ques. 119. Why did you make the transfer?

Ans. To protect her.

Ques. 120. Against what?

Ans. Against anything that would come up against me.

Ques. 121. What were you expecting?

Ans. I was expecting this breach of promise suit. These papers were made over before this case came up.

Ques. 122. How long had you been aware that it had been coming up?

Ans. They told me at the time of the separation that they were going to sue me.

Ques. 123. What was the date of the separation?

Ans. May '92 I think.

Ques. 124. Then there was nothing passed from your mother to you at the time this transfer was made to her?

Ans. No sir."

The defendants offered no proof.

Wilford G. Chapman, for plaintiff.

Counsel cited: *Wheelden* v. *Wilson*, 44 Maine, 1; *Hall* v. *Sands*, 52 Maine, 358; *French* v. *Holmes*, 67 Maine, 190. The burden is upon Mrs. Robinson to show that the deed is not fraudulent. *Laughton* v. *Harden*, 68 Maine, 212; *French* v. *Holmes*, supra; *Jones* v. *Light*, 86 Maine, 437.

D. A. Meaher, for defendants.

Counsel cited: *Society* v. *Woodbury*, 14 Maine, 281; *Buck* v. *Swazey*, 35 Maine, 41; *Baker* v. *Vining*, 30 Maine, 121; *Dwinel* v. *Veazie*, 36 Maine, 509; *Brown* v. *Lunt*, 37 Maine, 423; *Corey* v. *Greene*, 51 Maine, 114; *Brown* v. *Dwelley*, 45 Maine, 52; *Dudley* v. *Bachelder*, 53 Maine, 403; *Kelley* v. *Jenness*, 50 Maine, 455; *Webster* v. *Folsom*, 58 Maine, 230; *Rice* v. *Perry*, 61 Maine, 145; *French* v. *Holmes*, 67 Maine, 186; *Griffin* v. *Nitcher*, 57 Maine, 270; *Gardiner Bank* v. *Hagar*, 65 Maine, 359; *Stevens* v. *Robinson*, 72 Maine, 381; *First National Bank of Lewiston* v. *Dwelley*, 72 Maine, 223; *Gibson* v. *Bennett*, 79 Maine, 302; *Houghton* v. *Davenport*, 74 Maine, 590; *Robinson* v.

Robinson, 73 Maine, 171; *Boynton* v. *Rees*, 8 Pick. 329; *Garner* v. *Providence Second National Bank*, 151 U. S., 420; *Jones* v. *Simpson*, 116 U. S., 609; *Powden* v. *Johnson*, 2 N. J. L. J., 48; *Kimball* v. *Davis*, 19 Wend. 437; *Brown* v. *Kimball*, 25 Wend. 259; *Jenkins* v. *Eldredge*, 3 Story, 181; *United States* v. *Jones*, 3 Wash. 209; *State* v. *Knight*, 43 Maine, 11; *Bell* v. *Woodman*, 60 Maine, 465; *Brown* v. *Bellows*, 4 Pick. 179; *Whitaker* v. *Salisbury*, 15 Pick., 534; *Com.* v. *Starkweather*, 10 Cush. 59; *Com.* v. *Welsh*, 4 Gray, 535; *Brolley* v. *Lapham*, 13 Gray, 294; *Whitney* v. *Eastern Railroad*, 9 Allen, 364.

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

WALTON, J. It appears that Arletta Blake has recovered a judgment against Edgar R. Robinson for the modest sum of $325, as damages for the breach of a promise to marry her. It also appears that in less than a month after the recovery of the judgment, the defendant went into insolvency on his own petition, and that the plaintiff in the present suit was appointed his assignee. The assignee asks the court to declare void the conveyance of an equity of redemption of real estate from the insolvent to his mother, made pending the breach of promise suit, on the ground that it was fraudulent, and made especially to defraud the said Arletta Blake, and thereby prevent her from levying upon the equity of redemption so conveyed to satisfy her judgment, if she should recover one, in her then pending breach of promise suit.

The cause was fully heard in the court below by Mr. Justice FOSTER; and he found as a matter of fact that the conveyance was fraudulent; and ordered the insolvent debtor's mother to execute and deliver to his assignee a deed of her pretended title to the equity of redemption so conveyed to her, free and clear of all incumbrances created by her, or by persons claiming by, through, or under her. From this decree the defendants appealed.

We have examined the evidence with care, and we can not for a moment doubt that the conveyance was made for the express purpose of protecting the grantor's interest in the property against the

breach of promise suit. Such being its purpose, it was, of course, fraudulent and void as against the plaintiff in that suit, and equally fraudulent and void as against the defendant's assignee in insolvency; and our conclusion is that the decree of Mr. Justice FOSTER in the court below was right, and must be affirmed.

Decree affirmed, with additional costs since the appeal.

MAINE RED GRANITE COMPANY

vs.

GEORGE W. YORK.

Cumberland. Opinion March 24, 1896.

Guaranty. Principal and Agent.

A guaranty should receive a fair and reasonable interpretation, so as to attain the object for which it is designed.

The Machiasport Company received an order for some stone which the company was unable to fill, and application was made to the Red Granite Company for assistance; the latter company declined to deliver stone on the credit of the Machiasport Company, but expressed a willingness to do so on the credit of the defendant. Thereupon the defendant wrote a letter addressed to the manager of the Red Granite Company of the following tenor: "Dear Sir: Mr. Pattengall advises me that he is in need of about $200 worth of Red Beach stock. Kindly fill such orders as he may give you, and I will attend to the payment of same as they become due. Geo. W. York, Treas. of the Machiasport Granite Company." *Held;* that the defendant became personally bound by this letter.

The addition, "Treas. of the Machiasport Granite Company," does not relieve the defendant from a personal liability as guarantor.

The use of the words "about $200 worth" in the guaranty *held* to be no more than an estimate; and a verdict of $254.70 was sustained.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit on a guaranty, tried before a jury in the Superior Court, for Cumberland county. The jury returned a verdict of $254.70 for the plaintiff.

The case appears in the opinion.

Augustus F. Moulton, for plaintiff.

Benj. Thompson, for defendant.

The defendant did not intend to bind himself personally to pay the plaintiff's debt, and it is contended that the language used was not such as to make a personal promise on his part. The writing was an assurance on his part to "attend to the payment" as it became due. This assurance is signed by the defendant in his capacity of treasurer of the Machiasport Granite Company. While the defendant would not contend that an absolute promise signed as this letter was would not bind the signer personally, yet a promise of this particular nature merely to attend to the payment, and signed as the treasurer of the corporation, and in the line of his official duties, does not purport to be a personal obligation on his part to pay the debt. Counsel cited: *Russell* v. *Clark*, 7 Cranch, 69, p. 70; *Rice* v. *Gove*, 22 Pick. 158, 161; *Eaton* v. *Mayo*, 118 Mass. 141; *Clerk* v. *Russel*, 3 Dall. 415; *Riter* v. *Sun, &c., Co.*, 37 Pac. Rep. (Utah) 257; *Bank* v. *Young*, 14 Fed. Rep. 889.

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

WALTON, J. The defendant is sued as guarantor of a debt due from the Machiasport Granite Company to the Maine Red Granite Company; and the question is whether a letter written by the defendant to an agent of the Red Granite Company justified that company in delivering stone to the Machiasport Company on the defendant's credit. We think it did.

It appears that the Machiasport Company received an order for some stone which the company was unable to fill, and that application was made to the Red Granite Company for assistance; that the latter company declined to deliver stone on the credit of the Machiasport Company, but expressed a willingness to do so on the credit of the defendant; and that thereupon the defendant wrote a letter addressed to the manager of the Red Granite Company of the following tenor:

"Dear Sir: Mr. Pattengall advises me that he is in need of about $200 worth of Red Beach stock. Kindly fill such orders as he may give you, and I will attend to the payment of same as they

become due. Geo. W. York, Treas. of the Machiasport Granite Company."

It is urged in defense that this letter was not intended to bind the defendant personally, and that the language used will not justify such a construction of it. It is insisted that no one should be compelled to pay another's debt, unless the proof of his obligation to do so is clear; and that a writing, claimed to be a guaranty of another's debt, should be construed as favorably for the writer as the language used will allow.

Some authorities do so hold. Others hold that the words are to be taken as strongly against the party giving the guaranty as the sense or meaning of them will allow. In *Douglass* v. *Reynolds*, 7 Pet. 115, Judge Story said that guaranties are of extensive use in the commercial world, upon the faith of which large advances are made and credits given, and care should be taken to hold the party bound to the full extent of what appears to be his engagement. And again, in *Lawrence* v. *McCalmont*, 2 How. 426, the same learned judge said: "We have no difficulty whatever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation, we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the object for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments, generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and aim; and to construe the words of such instruments with a nice and technical care would not only defeat the intention of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world. . . . If the language used be ambiguous, and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury."

These extracts have been thought to express very happily and accurately the rule that ought to prevail in the construction of letters or other writings claimed to be guaranties, and upon which credits for money or goods have been obtained. *Gates* v. *McKee*, 64 Am. Dec. 545 (13 New York, 232).

And the same rule for the construction of guaranties seems to prevail in England. In *Mason* v. *Pritchard*, 12 East, 227, the court said that the words were to be taken as strongly against the party giving the guaranty as the sense of them would admit; and in *Hargreave* v. *Smee*, 6 Bing., 244, Chief Justice Tisdale said that "there is no reason for putting on a guaranty a construction different from what the court puts on any other instrument;" and that "with regard to other instruments the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself."

In *Hotchkiss* v. *Barnes*, 34 Conn. 27, the defendant wrote the plaintiff a letter saying: "Sir: You can let Mr. Day have what goods he calls for, and I will see that the same are settled for," and the court held that the letter not only constituted a guaranty, but a continuing guaranty.

In the case now before us, the defendant wrote the plaintiff's managing agent a letter saying: "Kindly fill such orders as may be given you, and I will attend to the payment of same as they become due." True, he annexed to his signature a statement of the fact that he was treasurer of the company desiring to obtain the goods; but it is well settled in this state that such an addition to the name of the signer of an obligation will not relieve him from personal responsibility. *Sturdivant* v. *Hull*, 59 Maine, 172; *Mellen* v. *Moore*, 68 Maine, 390; *Rendell* v. *Harriman*, 75 Maine, 497; *McClure* v. *Livermore*, 78 Maine, 390.

It seems to us that in the case now before us, the language of the letter is stronger, and more clearly creates the liability of a guarantor, than the language of the letter in the Connecticut case. In the Connecticut case, the language of the letter was, "and I will see that the same are settled for." Here, the language of the letter was, "and I will attend to the payment of the same as they

become due." It seems to us that the latter is the stronger of the two promises, and more clearly creates the obligation of a guarantor. And if the former was rightly held to create the obligation of an obligor (and we do not doubt that it was) a fortiori, the latter should be held to create such an obligation. And it is the opinion of the court that it did create such an obligation, and that the ruling in the court below upon this point was correct.

Another question raised at the trial in the court below was with respect to the amount. It was claimed that if the defendant was liable at all, he should not be held for more than $200; and the court was requested to so instruct the jury. The court declined. We think the requested instruction was properly withheld. True, the defendant stated in his letter that he had been advised that "about" $200 worth of Red Granite stock would be needed; but this was no more than an estimate; and the use of the word "about" shows that entire accuracy was not intended. If the amount delivered had been very much in excess of the amount named, it might, perhaps, be regarded as evidence of bad faith, and require a limit to be fixed to the defendant's liability. But no such excess is shown; and the amount of the verdict is only $254.70. It is the opinion of the court that this sum can not be regarded as so largely in excess of the estimate as not to come fairly within the terms of the defendant's guaranty.

Exceptions overruled.

HARVEY D. EATON

vs.

GRANITE STATE PROVIDENT ASSOCIATION.

Kennebec. Opinion March 25, 1896.

Agency. Proof.

Evidence that a third person by his declarations and acts assumed to be the agent of a corporation, does not amount to proof of such agency in an action against the corporation.

Agency cannot be established against an alleged principal by showing the words and acts of the alleged agent.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

The case is stated in the opinion.

Wm. T. Haines and Harvey D. Eaton, for plaintiff.

S. S. Brown, for defendant.

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

EMERY, J. The plaintiff at the request of one Hicks performed services, as he supposed, for the Granite State Provident Association, the defendant. Mr. Hick's employment of the plaintiff was with the assent and concurrence of two other men, W. C. Scarboro and H. G. Scarboro. The plaintiff had no conversation nor correspondence with any other person in relation to his employment.

The defendant company did not accept the plaintiff's services nor receive any benefit from them, though this was through no fault of the plaintiff. Therefore, to recover of the defendant company compensation for his services, the plaintiff must establish by competent evidence, that either Hicks, or one of the Scarboros, was the agent of the defendant company with authority to employ the plaintiff to render the services in question.

That all three of these men assumed to be such agents, and talked and acted as though they were such agents, is beyond question; but agency cannot be established against an alleged principal by showing the words and acts of the alleged agent. The defendant company is sued as a corporation; but no corporate vote, no vote of the directors, no word or act of any of its officers is shown tending to prove that either of these three men assuming to act as agent had the least authority to do so.

The plaintiff testified that he once met these three men in the "general office" of the defendant company at No. 88 Exchange St., Portland; but here again no corporate vote, no directors' vote, no word or act of any appropriate corporate officer is shown tending to prove that the company had or recognized any place in Portland as a general office. The plaintiff evidently supposed the place to be the company's general office, and hence called it so in his testi-

mony; but his belief and consequent statement are no evidence of the truth of the proposition as against the company.

The case shows that Hicks and the Scarboros were present at the trial, but this was only their act. It does not appear that any officer of the company requested their attendance or was aware of it. Nor would such request be evidence of their prior agency. They might have been summoned as witnesses to disprove any agency.

There is visible to the careful reader a wide difference between this case and the case *Cloran* v. *Houlihan*, 88 Maine, 221. In that case an attorney at law acting for the plaintiff had discharged the account for a small sum. The question was whether the attorney was the attorney of the plaintiff. The attorney, himself, testified that he had received letters from the plaintiff's house instructing him to return the money to the defendant and bring an action. This was direct evidence of employment as attorney and if true was sufficient. In this case the only evidence is the plaintiff's own testimony as to the acts and declarations of the supposed agent. No act or declaration of any officer of the defendant company is testified to.

The plaintiff too confidently assumed that these men, or some of them, were authorized to act for the defendant company, and neglected to adduce competent evidence of such authority.

Motion sustained.

EDGAR ELLIS *vs.* CITY OF LEWISTON.

Androscoggin. Opinion March 25, 1896.

Way. Town. New Trial. Jury.

Where the jury return a verdict, and it appears that no questions of law were reserved and none of the rulings of the presiding justice were excepted to; that the questions of fact were fairly submitted to the jury; that they exercised an honest judgment; and that there was evidence tending to sustain all the allegations necessary for the plaintiff to prove, *the court considers* that the verdict cannot be set aside.

In this case, the plaintiff recovered a verdict of $500 against the city of Lewiston for a broken leg. He claimed that the injury was caused by a defect, or want of repair, in the street arising from a street railway, from which the

snow having been removed, the street was left with a rut where the rail of the horse-railway ran, and that there were shoulders of ice on each side of the rails by which the runner of the sleigh was caught and tipped over. It was admitted that the street railway was lawfully there. The plaintiff claimed that by reason of the railway some increase of risk for travelers occurred; and that the obligation still remained upon the city to keep the street in safe and sufficient condition. The defendant claimed that the snow was rightfully removed from the track and that the city had done all that could be reasonably required to make the street safe and convenient.

On Motion by Defendant.

This was an action on the case for injuries sustained by the plaintiff, February 22, 1892, by being tipped over and thrown out of his sleigh while driving along Main Street in the city of Lewiston.

The defect complained of was a rut where the rail of the horse-railroad ran, and shoulders of ice on each side, left when the street was plowed out after a storm—by which the runner of the sleigh was caught and tipped over.

The plaintiff described the defect in his declaration as follows:—"that at the point in said highway [Main Street] where the same is intersected by Lincoln Street, one of the streets of said city of Lewiston, and for a considerable distance along said Main Street in both directions from this said point of intersection with Lincoln Street, a depression existed in the traveled part of said Main Street along the line of the rails of the Lewiston & Auburn Horse-Railroad which extended along said street at said point of intersection; that the rails of said horse-railroad projected above the surface of the road bed in such depression, and that shoulders and ridges of snow and ice were on either side of said depression, both between the rails aforesaid and outside of the same; so as to render it difficult, unsafe and inconvenient for the runners of a sleigh passing along the highway at this point, and in said depression, to be turned in either direction upon said highway, or for a team driving along said depression to be so turned to avoid collision with another team passing along the highway at said point. . . ." It was admitted that the street railway was lawfully there.

The jury returned a verdict of $500 for the plaintiff, and the defendant filed a general motion for a new trial.

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

By reason of the existence of the railroad that some increase of risk for travelers lawfully occurred, is conceded. But the obligation still remained upon the city to make this spot reasonably safe and convenient for travelers, in view of all the circumstances.

Among these circumstances, were the location of the spot, being at the intersection of Lincoln and Main Streets—just at the end of the bridge between Lewiston and Auburn and being the main thoroughfare between the cities; and the added fact that it was certain that on this particular day the streets, and this one especially, on account of the location, would be unusually crowded.

It cannot fairly be claimed that the plaintiff had previous knowledge of the defect. He had passed the place but once,—on a crowded street,—on the side of the sleigh farthest from the track, with nothing to call his attention to the defect which was concealed by the melted snow covering the rails. He says he did not notice the place.

The defense say that the plaintiff in going upon the part of the street where the railroad track ran, he was guilty of negligence. We ask the court to consider what that proposition involves.

It involves (1) the concession that the place was dangerous and so esteemed by the defendant; and (2) the claim that there was a place along the middle of a much traveled street of the city of Lewiston, a strip of four feet or more in width, where travelers could pass only at their own risk.

Ellis had a legal right to use the portion of the street where the track ran. If so, it becomes entirely immaterial whether the street was wide enough for him to have driven outside the track.

But this fact is to be noted. At the point where he entered the track there was no defect. The sleigh slewing, as it did, where he entered on the track found no ridge along the track at that point to cause it to tip over. The defective place was sixty feet ahead—the entire width of Lincoln Street. There was nothing careless, then, about his driving upon the track at that point. He did what any prudent driver might have done under the circumstances.

Being upon the track, with teams all about, the street full, what

was he to do? Evidently he should drive along till a fair opportunity came to get out of the track.

Suddenly he becomes aware of an approaching car. He understands he must clear the track. He attempts to turn and is capsized.

Due care a question of fact for the jury, and depends upon all the circumstances. *Garman* v. *Bangor*, 38 Maine, 443; *Coombs* v. *Purrington*, 42 Maine, 332; *Frost* v. *Waltham*, 12 Allen, 85; *Pollard* v. *Woburn*, 104 Mass., 84; *Weed* v. *Ballston*, 76 N. Y., 329.

Plaintiff only required to use ordinary care, and not responsible for mere mistake of judgment. *Farrar* v. *Greene*, 32 Maine, 574; *Haskell* v. *New Gloucester*, 70 Maine, 305.

Notice to Street Commissioner:— *Welsh* v. *Portland*, 77 Maine, 384; *Rogers* v. *Shirley*, 74 Maine, 144; *Bragg* v. *Bangor*, 51 Maine, 532; *Holt* v. *Penobscot*, 56 Maine, 15.

Liability for defect caused by railroad: *Phillips* v. *Veazie*, 40 Maine, 96; *Veazie* v. *Penobscot R. R.*, 49 Maine, 119; *Wellcome* v. *Leeds*, 51 Maine, 313.

R. W. Crockett, City Solicitor, for defendant.

There was no defect. The rule of law is, that notwithstanding there may be a street railway built and notwithstanding it may increase the dangers to travelers who use it, the law requires that the city use only reasonable care to keep the street in a safe condition so far as they reasonably can in view of the existence of the railroad track. And if owing to the existence of the railroad track, the street becomes dangerous for travel, still if the city has neglected no reasonable duty which it ought to perform in view of all the circumstances, then it is not liable for injuries sustained by travelers. *Gillett* v. *Western R. R. Corp.*, 8 Allen, 560, p. 563, and cases; *Tasker* v. *Farmingdale*, 85 Maine, 523, p. 525, and cases; *Knowlton* v. *Augusta*, 84 Maine, 572; *North Manheim* v. *Arnold*, 119 Pa. St. 380, (S. C. 4 Am. St. Rep. 650, p. 652); *Raymond* v. *Lowell*, 6 Cush. 524, pp. 532–4–5.

The testimony shows that the plaintiff on the afternoon in question had driven down Main Street to Auburn; that he remained in

Auburn about twenty minutes; that he drove back over the same way; and had the condition of the street been defective the plaintiff should have seen it, and having seen it should have given notice to one of the municipal officers in accordance with the terms of the statute. *Haines* v. *Lewiston*, 84 Maine, 18; *Knowlton* v. *Augusta*, supra. The plaintiff guilty of contributory negligence: Had he used reasonable care he would have avoided the track by keeping on the level portion of the road outside the rails. He also manifested a lack of due care in driving along the track thirty or forty yards before attempting to turn out.

Again his statement of the occurrence has not in it the element of plausibility. The testimony shows that the slope to the rail was a gradual one, and the weather being warm and the snow melting, the plaintiff's sleigh would not naturally slew down the incline with sufficient force to carry it over the elevation of snow between the rails, causing the horse to be pulled in at the same time. And had the condition of the street been such as to cause the horse and sleigh to slew onto the track in that manner, the plaintiff by using reasonable care could have turned out without injury to himself. *Mosher* v. *Smithfield*, 84 Maine, 334; *Murphy* v. *Deane*, 101 Mass., 455; *Shaw* v. *B. & W. R. R.*, 8 Gray, 45; *Mayo* v. *B. & M. R. R.*, 104 Mass. 141; *Little* v. *Brockton*, 123 Mass. 511; *Gaynor* v. *Old Colony & Newport Ry. Co.*, 100 Mass. 208.

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

WALTON, J. The plaintiff has obtained a verdict against the city of Lewiston for an injury claimed to have been caused by a defect, or want of repair, in one of its public streets. The injury was a broken leg, and the amount recovered, $500. The amount is not excessive, and there is no reason to believe that the jury were influenced by other than honest motives. But the defendant's counsel insists that the verdict is clearly and manifestly against the weight of evidence, and ought to be set aside.

The dangerous condition of the street was caused by a street railway along the center of it. The snow had been removed from

the railway track and left upon the sides of the street, thus leaving the street in a condition too familiar to every one to need a description. The plaintiff says that his sleigh slewed on the track, and that for thirty or forty yards he pursued his way on the track; that he then saw a horse car approaching, and he attempted to turn out; and, as he attempted to turn out, the sleigh tipped over and he fell out and broke his leg; that, at that time, at that place, the track was covered with water to the depth of several inches.

It is insisted in defense that the street railway was rightfully there, and that the snow was rightfully removed from its track, and that the street commissioner of Lewiston had done all that could reasonably be required of him to make the street safe and convenient for travelers.

The case is a close one; and if the action had been tried by the court without a jury, perhaps a different result would have been reached. But no questions of law have been reserved, and none of the rulings of the presiding justice have been excepted to. The questions of fact appear to have been fairly submitted to the jury, and there is no reason to doubt that they exercised an honest judgment. There is some evidence tending to sustain every allegation which it was necessary for the plaintiff to prove. Its sufficiency was a question for the jury. And, upon the whole, it is the opinion of the court that the verdict is one which the court can not rightfully set aside.

Motion overruled.

SOLOMON STEINFIELDT, and another,

vs.

THOMAS JODRIE, and CHARLES P. BARTLETT, Trustee.

Oxford. Opinion March 25, 1896.

Trustee Process. Disclosure. R. S., c. 86, §§ 30, 79.

A trustee will be discharged when he asserts positively and directly that there was nothing due from him to the principal defendant at the time of the service of the trustee writ upon him, although some of his answers are indefinite as to the amounts of his payments to the principal defendant, and also as to the time when a final settlement was had between them, but he asserts posi-

tively that such a settlement was had before the service of the trustee writ upon him, and that a balance was then found to be due from the principal defendant to him, and there is no evidence that contradicts him. In this case the plaintiff called the principal defendant as a witness; but he failed to obtain any contradictory evidence from him. He corroborated the statement of the alleged trustee that a settlement was had between them, and that a balance was found to be due from him to the trustee, and that this settlement was before the service of the trustee writ. *Held;* that upon the evidence there is no ground on which the trustee can rightfully be charged.

On Exceptions by Trustee.

This was an action of assumpsit brought upon an account annexed for the sum of one hundred and two dollars and fifty cents, for merchandise sold to the employees of the defendant who were at work in the woods, cutting birch belonging to the trustee, Charles P. Bartlett, which was being cut under a contract between the defendant and the trustee. For the goods sold, an order was given to the plaintiffs in writing, by the principal defendant upon the trustee, but was never accepted. The case shows that a former disclosure was made by the trustee and that additional allegations were filed, upon which a further examination was had of both the trustee and defendant. The matter was submitted to the presiding justice, who heard the testimony, and upon the whole evidence, charged the trustee with three hundred dollars less his costs. To this finding by the court, the trustee excepted and presented the case to the law court for further consideration.

J. P. and J. C. Swasey, for plaintiffs.

There is no equitable ground upon which the trustee can claim relief, for he had the benefit of the plaintiffs' goods. The merchandise for which this suit is brought was sold to the men who were cutting the birch owned by the trustee. It was his custom, as it was for his interest, to pay the men who were at work under this contract, to prevent the attachment of individual claims, or liens for personal labor upon this timber. He had, from his testimony, evidently divided the money, between the choppers in the woods and the defendant.

The defendant testifies that the price of the goods furnished the men by the plaintiff was deducted from their pay, which if true, went to the direct benefit of the trustee in discharging or cancel-

ling so much indebtedness, which might be otherwise secured by a lien upon his lumber. Counsel cited: *Toothaker* v. *Allen*, 41 Maine, 324; *Sebor* v. *Armstrong*, 4 Mass. 206; *Scott* v. *Ray*, 18 Pick. 361; *Barker* v. *Osborne*, 71 Maine, 69.

R. A. Frye, for trustee.

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

WALTON, J. The trustee is this case asserts positively and directly that there was nothing due from him to the principal defendant at the time of the service of the trustee writ upon him. Some of his answers are indefinite as to the amounts of his payments to the principal defendant. Also as to the time when a final settlement was had between them. But he asserts positively that such a settlement was had before the service of the trustee writ upon him, and that a balance was then found to be due from the principal defendant to him of ninety-eight dollars, or thereabouts. And there is no evidence that contradicts him.

The plaintiff called the principal defendant as a witness; but he failed to obtain any contradictory evidence from him. He corroborates the statement of the alleged trustee that a settlement was had between them, and that a balance was found to be due from him to the trustee, and that this settlement was before the service of the trustee writ.

Upon the evidence before us, we fail to discover any ground on which the trustee can rightfully be charged. We think the entry must be, exceptions sustained, trustee discharged with costs. *Hamilton* v. *Cole*, 86 Maine, 137; R. S., c. 86, § § 30, and 79.

Exceptions sustained.

JAMES A. WINSLOW *vs.* ISAAC B. REED.

Sagadahoc. Opinion March 25, 1896.

Deed. Boundary. Way.

When land is bounded on a highway, it extends to the center of the way; but it is equally well settled in this State, whatever the rule may be elsewhere,

that when land is bounded on a private way, it extends only to the side line of the way.

Bangor House v. *Brown*, 33 Maine, 309; *Ames* v. *Hilton*, 70 Maine, 36, affirmed.

ON EXCEPTIONS BY PLAINTIFF.

This was a real action brought to determine the title to a lot of land on the North side of Court Street, in the city of Bath, or to that part of the lot upon which the defendant had erected a building extending into Winslow Court, a private way. The defendant claimed a fee to the center line of the private way.

Prior to 1874, the plaintiff owned a large tract of land on the North side of Court Street and subsequently sold to various parties parcels of this land, through which he had laid out a private way, bounding the lots thus sold on this private way. The plaintiff claimed that he retained the fee of the private way and that he had by his deeds granted to the purchasers an easement only in such private way. Prior to bringing this action, the plaintiff had conveyed all the land on each side of Winslow Court, or private way, and the only question submitted by the exceptions was whether the defendant's title in fee extended to the Western or side line of Winslow Court, or to the center of the same.

The defendant moved for a nonsuit, after the plaintiff had closed his evidence, upon the ground that the testimony showed that the erection of the building by the defendant, of which complaint was made, was entirely within the center line of the court; that Winslow by his deed had conveyed to the center of the court; that if the plaintiff had any right to the land upon which the building was erected it could amount to no more than an easement, a right to have that portion of the way free from erections of any kind; and that a writ of entry could not be brought to recover an easement.

The presiding justice sustained the motion and ordered a nonsuit; thereupon the plaintiff took exceptions.

The description of the land conveyed to the defendant is as follows:—

"Beginning on the East corner of land of said Isaac B. Reed and Court Street; thence running Northerly on said Reed's line to land of one George Blange; thence on said Blange's East line

to Winslow Court, so-called; thence in a Southwestly direction on said Court to first mentioned bound."

George E. Hughes, for plaintiff.

F. L. Noble and R. W. Crockett, for defendant.

The plaintiff in his deed to the defendant conveyed the fee to the center of the private way known as Winslow Court. It is a well established principle of law that a deed bounded on a highway conveys the fee to the center of the way, unless the language plainly excludes the way, (*Codman* v. *Evans*, 1 Allen, 443); *Palmer* v. *Dougherty*, 33 Maine, 502; *Hunt* v. *Rich*, 38 Maine, 195; *Cottle* v. *Young*, 59 Maine, 105; *Phillips* v. *Bowers*, 7 Gray, 21, 24.

The same principle extends to lands bounded on private ways. *Fisher* v. *Smith*, 9 Gray, 441, p. 444; *Stark* v. *Coffin*, 105 Mass. 328, p. 330; *Boston* v. *Richardson*, 13 Allen, 146, p. 154; *Motley* v. *Sargent*, 119 Mass. 231, p. 235.

In *Ames* v. *Hilton*, 70 Maine, 36, which is seemingly contra, the private way in question was used exclusively by the grantor as a passage way to his buildings and no other person had any right of way in the passage way. Hence it was held that a deed of land on the opposite side of the passage way from the buildings, and bounded on the passage way, conveyed the fee only to the side line.

Here the private way was used in common by all the owners of land lying adjacent thereto, both on Court Street and in the rear of Court Street, and the plaintiff cannot by any construction of law be held to be the owner of the fee to the Court. The language in his deed to the defendant in no manner excludes the passage way; and furthermore he has conveyed the lands on both sides of the way; leaving him no greater rights in it than belong to the public. Consequently the plaintiff having at most only an easement in the private way, if indeed he has that, and it being clearly established that a writ of entry cannot be brought to recover an easement, he cannot maintain his action and a nonsuit was properly ordered. R. S., c. 104, § 1; *Wyman* v. *Brown*, 50 Maine,

139; *Provident Inst'n* v. *Burnham*, 128 Mass., 458; *Ayer* v. *Phillips*, 69 Maine, 50.

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

WALTON, J. Exceptions to a compulsory nonsuit. The presiding justice seems to have assumed that when land is bounded on a private way, the same rule applies as when land is bounded on a highway, and that land so bounded extends to the center of the way. This was erroneous.

It is undoubtedly true that when land is bounded on a highway, it extends to the center of the way; but it is equally well settled in this State, whatever the rule may be elsewhere, that when land is bounded on a private way, it extends only to the side line of the way. *Bangor House* v. *Brown*, 33 Maine, 309; *Ames* v. *Hilton*, 70 Maine, 36.

Exceptions sustained.

THOMAS W. HAMMOND *vs.* PHEBE PHILLIPS.

Franklin. Opinion March 26, 1896.

New Trial.

Where the evidence was conflicting; the case appears to have been fairly and carefully tried; and no reason is apparent why the evidence claimed to be newly-discovered, if true, could not, by the use of due diligence, have been discovered before as easily as after the trial, *the court considers* that the verdict ought not to be disturbed.

ON MOTIONS BY PLAINTIFF.

The case is stated in the opinion.

E. O. Greenleaf and F. W. Butler, for plaintiff.

Jos. C. Holman, for defendant.

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

WALTON, J. The plaintiff worked for the defendant during the season of 1893, and this is an action to recover compensation for his labor.

The defendant does not deny that she once owed the plaintiff for the labor sued for; but she claims that by his order, she paid the amount due him to her daughter, or to her daughter's husband, in part payment for a horse which he had bought of them. The plaintiff denies that he bought a horse of them, or either of them. He says that he contracted to buy a horse of the defendant, and agreed to turn his wages in part payment for the horse, and that her son-in-law afterwards claimed to own the horse, and came with an officer and took him away, and the result is that he has neither the horse nor the pay for his labor; and it was urged at the trial that the evidence disclosed a plan to defraud the plaintiff out of the horse and his summer's work; and it seems as if the jury must have taken that view of it.

The evidence was conflicting; the case appears to have been fairly and carefully tried; no reason is apparent why the evidence claimed to be newly-discovered, if true, could not, by the use of due diligence, have been discovered before as easily as after the trial; and upon the whole, it is the opinion of the court that the verdict is one that ought not to be disturbed.

Motions overruled.

GEORGE H. HUNTER, and others, *vs.* JOHN E. PHERSON.

Somerset. Opinion March 26, 1896.

Practice. Admission. Burden of Proof.

An admission made by a party, to facilitate the trial of an action, must be taken and construed as a whole. It must not be divided, and, by accepting a part, and rejecting a part, give to the admission an effect not intended by the party making it. The whole of the admission must be taken together, as well what is favorable to the party making it as what is unfavorable to him, and be construed according to the true intent and meaning of the party making the admission.

When the defendant admitted that the goods sued for were delivered to him, that he took them and carried them away and used them, and claimed that they were delivered to him upon the order of a third party, to whom they should have been charged, *Held;* that this admission, if taken as a whole, and construed according to the intentions of the party making it, did not confess that the plaintiffs had a cause of action against the defendant. It

confessed a cause of action against a third party, but it did not confess one against the defendant.

Also, that the burden of proof, by such admission, had not shifted from the plaintiffs to the defendant.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit for goods sold and delivered. Plea, the general issue. The verdict was for the plaintiffs.

The defendant admitted that the goods sued for and delivered to him by the plaintiffs, were taken away and used by him; but he claimed that they were delivered to him on the verbal order of a third party, Parks and Connor, and should have been charged to Parks and Connor and not to him.

The plaintiffs denied that the goods were delivered on the verbal order, and contended that the goods were sold and delivered directly to the defendant alone and there was evidence tending to support their contention.

Upon this evidence the court instructed the jury as follows:

"But the defendant says, true, I had the goods and consumed them, but I got them from you on the credit of Parks and Connor. Upon that issue the burden of proof is upon the defendant. The plaintiffs having made out their case, either by proof of the delivery of the items to the defendant or by the admission that you have here, if the defendant says he is not liable to pay, where the law implies a promise to pay, he takes the affirmative there, and it then becomes his duty to satisfy you upon a preponderance of all the evidence that his claim is the right one."

The defendant took exceptions to these instructions.

J. W. Manson, for plaintiffs.

The burden does not shift as long as evidence is offered on one side, or the other, as to the same fact alleged by the plaintiff. But if the defendant, for instance, sets up another and distinct fact in avoidance, he takes the burden of proving it. Stephen's Digest of Evidence, Art. 65. (note).

The instruction was proper because the defendant did not make an issue with plaintiff upon the plaintiff's proposition, did not dispute the facts, or the inference drawn from the facts, which

made up the plaintiffs' prima facie case, but set up a distinct and independent proposition of his own. Here was a new and distinct question raised by the defendant. *Shaw* v. *Waterhouse*, 79 Maine, 180; *Windle* v. *Jordan*, 75 Maine, 149, 154; *Rumrill* v. *Adams*, 57 Maine, 565; *Bennett* v. *Amer. Express Co.*, 83 Maine, 236; *Wilder* v. *Cowles*, 100 Mass. 487.

S. S. Hackett, for defendant.

Counsel cited: *Tarbox* v. *Steamboat Co.*, 50 Maine, 345; *Powers* v. *Russell*, 13 Pick. 76; *Small* v. *Clewly*, 62 Maine, 159; *Wright* v. *Fairbrother*, 81 Maine, 38; *Gilmore* v. *Wilbur*, 18 Pick. 517; *Burnham* v. *Allen*, 1 Gray, 496; *Ross* v. *Gerrish*, 8 Allen, 147.

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

WALTON, J. An admission made by a party, to facilitate the trial of an action, must be taken and construed as a whole. It must not be divided, and, by accepting a part, and rejecting a part, give to the admission an effect not intended by the party making it. The whole of the admission must be taken together, as well what is favorable to the party making it as what is unfavorable to him, and be construed according to the true intent and meaning of the party making the admission. *Storer* v. *Gowen*, 18 Maine, 174; 1 Gr. Ev. § 201.

In the present case, the defendant admitted that the goods sued for were delivered to him, and that he took them and carried them away and used them. But he did not admit that they were sold to him, or that he was ever liable to pay for them. He claimed that they were delivered to him upon the order of a third party, to whom they should have been charged. Clearly, this admission, if taken as a whole, and construed according to the intentions of the party making it, did not confess that the plaintiffs had a cause of action against the defendant. It confessed a cause of action against a third party, but it did not confess one against the defendant. The admission could not be treated as a plea of confession and avoidance; for the cause of action declared on was not con-

fessed. It was traversed. It had been traversed by the plea of the general issue, and again by protestation at the time of making the admission, and as a part of it. This left the plaintiffs in a position requiring them to prove the alleged sale to the defendant,—such a sale as made him their debtor,—or fail in their action. The burden of proof still rested upon them. True, the defendant alleged in effect that the goods sued for had been sold to a third party, to whom they should have been charged. And this was an affirmative proposition; and if issue had been joined on this proposition, the burden of proof would have rested upon the defendant. But issue was not joined on this proposition. The issue was upon the alleged sale to the defendant; and this was a proposition which the plaintiffs must sustain, or fail in their action. The burden of proof had not shifted from the plaintiffs to the defendant.

But the presiding justice instructed the jury otherwise. He instructed them that upon this issue the burden of proof was upon the defendant. That the plaintiffs having made out their case by proof of the delivery of their goods to the defendant, or by the defendant's admission, the law implied a promise to pay for them, and the defendant took the affirmative, and must satisfy them, upon a preponderance of all the evidence, that his claim was the right one.

It is the opinion of the court that these instructions were erroneous; that they gave too great an effect to the defendant's admission, and placed upon him a burden which he was under no obligation to sustain.

Exceptions sustained.

STATE *vs.* JAMES W. CARVER.

Androscoggin. Opinion April 1, 1896.

Assault. Self-Defense.

The intent to do harm is an essential element in all criminal prosecutions for assault.

An instruction that a wanton motion, an angry motion, coupled with the ability

at the time, and under the circumstances to do harm, is an assault, and if carried into effect, is an assault and battery, is erroneous inasmuch as it omits the element of intent. The motion may be wanton, made in an angry manner, coupled with an ability to do harm, and yet no harm be intended, and if harm should result may be from pure accident.

A man when assaulted is not required to cowardly flee from danger, but may assert a manly self-defense, necessary for his protection.

An instruction that it is a man's duty, as a good citizen, to preserve the peace; and when he finds he is in danger of being attacked in any way, it is his duty to try every other means, first by retiring, withdrawing from the scene, or by remonstrance or by calling in assistance, is erroneous.

ON EXCEPTIONS BY DEFENDANT.

The defendant was convicted of an assault and battery in the court below and took the exceptions which will be found in the opinion of the court. At the trial, he claimed that all the force which he used was proper in kind and degree, and under the circumstances, perfectly justifiable and consistent with his rights; that he was on a public street, where he had a right to be; that when he was first pushed or struck and knocked off the sidewalk, he was under no obligation to turn and run from the assailant, but he had a right to return to the walk, and, if the assault continued, to repel force with force.

W. H. Judkins, County Attorney, for the State.

The first instruction is substantially similar to the language of all the text-book writers. II Addison Torts, § 787; Heard's Crim. Law, p. 371; Rapalje and Lawrence Law Dict. Assault. R. S., c. 118, § 27.

The second instruction excepted to, stating the law of self-defense, is a correct statement of the law both abstractly, and as applied to the evidence in the case at bar. *Rogers* v. *Waite*, 44 Maine, 275, (277); *Hanson* v. *E. & N. A. R. R. Co.*, 62 Maine, 84, (89). "The force used must be suitable in kind, and reasonable in degree." The instruction excepted to, means that, and nothing more.

J. P. Swasey and Edgar M. Briggs, for defendant.

Under the instructions the jury were precluded from acquitting the defendant, as he at no time retreated, nor did he remonstrate

nor call in assistance. Counsel cited: *Runyan* v. *State*, 57 Ind. 57—80, S. C. 26 Am. Rep. 52; *Irwin* v. *State*, 29 Ohio St. 186, 193, 199, S. C. 23 Am. Rep. 733; *Babcock* v. *People*, 13 Colo. 515; *Beard* v. *U. S.* 158 U. S. 550; *State* v. *West*, 45 La. Ann. 14.

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

HASKELL, J. Indictment for assault and battery. The defendant was convicted below. He excepts to two several extracts from the judge's charge, viz:

I. "Well, no matter how slight this may be, if it amounts to a wanton motion, an angry motion, coupled with the ability at the time, and under the circumstances to do harm, it is an assault, and if carried into effect, it is a battery, assault and battery; but it is indifferent which one it is, because they are both punishable, and are practically the same thing."

This instruction is erroneous inasmuch as it omits the element of intent. The motion may be wanton, made in an angry manner, coupled with an ability to do harm, and yet no harm be intended, and if harm should result may be from pure accident.

II. "But a man should never resort to violence in self-defense until necessary. It is a man's duty, as a good citizen, to preserve the peace; and when he finds he is in danger of being attacked in any way, it is his duty as a good citizen to try every other means, first by retiring, withdrawing from the scene, or by remonstrance, or by calling in assistance; but still, whenever the emergency is so quick, and the danger is so present that there is no time left for anything of that kind, that you can't withdraw in season, and if you think you are liable to be hit in the back if you do withdraw, or are liable to be hit before an officer comes up, and a remonstrance will do no good, then in self-defense of your person and in self-respect, you are authorized to strike the first blow in order to prevent an assault on you."

That a man when assaulted be required to cowardly flee from

danger, and not assert a manly self-defense, necessary for his protection, does not seem to comport with the laws of a free and enlightened people, and as said by the Supreme Court we cannot give our assent to such doctrine. *Beard* v. *United States*, 158 U. S., 550.

Exceptions sustained.

CHARLES H. CAYFORD *vs.* ASA C. BRICKETT.

Kennebec. Opinion April 3, 1896.

Chattel Mortgage. Identity. Condition.

The following chattel mortgage, duly recorded, *held*, sufficient to apprise a subsequent purchaser of the identity of the property, of the condition in the mortgage, and that it is apparently unfulfilled: "Waterville, Maine, April 27, 1893. I this day make and bill of sale to C. A. Hill one five year old grey colt I had of C. P. Crommet. One top buggy one harness and all the cows in my stable except those recovered from J. P. Hill on a judgment agenst my wife and this bill of sale was made in order to secure the said C. A. Hill against any loss by the signing of a bond for the recovery of four cows from J. P. Hill, that the said property shall be owned by the said C. A. Hill until after a judgment from the June Term of court which sits in Waterville on the second tewsday of June. Frank N. Weeks."

ON EXCEPTIONS BY PLAINTIFF.

This was an action of replevin of five cows tried before a jury in the Superior Court, for Kennebec County, and where a verdict was rendered in favor of the defendant. The mortgage bill of sale under which he claimed title appears in the head-note. The case appears in the opinion.

Geo. W. Field, for plaintiff.

Chas. F. Johnson, for defendant.

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

EMERY, J. The cows replevied in this action were once the property of Frank N. Weeks, under whom both parties claim. While owning the cows Weeks gave to C. A. Hill the paper dated

April 27, 1893, called the bill of sale. This was done to secure Hill against loss as surety on a bond for Weeks in another replevin suit. That suit is still pending, and the liability of Hill on that bond still continues. The identity of the cows here replevied with those in the bill of sale is established by the verdict. The bill of sale was duly recorded as a mortgage of personal property, and the defendant justifies under it as the servant of Hill. The plaintiff, who claims under a subsequent mortgage bill of sale from Weeks, insists that the prior bill of sale to Hill did not give Hill any title or lien against him a subsequent purchaser without actual notice.

The plaintiff argues first, that the description of the cows in the Hill bill of sale is too indefinite to be a notice to subsequent purchasers. Not so. The bill of sale includes *all* the cows in the vendor's stable with four cows excepted. This is sufficiently comprehensive to give information to a subsequent purchaser of cows from Weeks that they were incumbered.

The plaintiff argues again, that the condition is too vaguely expressed to inform an intending purchaser of what was to be done to extinguish the lien. We think not. Mr. Hill's liability as surety upon the replevin bond was definite, and the amount could be ascertained whenever the liability became fixed.

The plaintiff argues lastly, that by the terms of the bill of sale the mortgagee's lien was to expire at the close of the following June term of the Superior Court in Waterville. This construction is much too narrow. It defeats the very purpose of the instrument. The evident meaning of the whole is that Mr. Hill shall have a lien upon the property until his liability is extinguished or made good. It was supposed that this would be done at the following June term, but no judgment was rendered then or since. The liability and the lien continue.

Exceptions overruled.

INHABITANTS OF FRIENDSHIP

vs.

INHABITANTS OF BREMEN.

Knox. Opinion April 3, 1896.

Pauper. New Trial.

On motion to set aside a verdict rendered in favor of the defendant, in a pauper suit, on the ground that it is against law and the weight of evidence, it appeared that the only question between the parties is, in which of the two towns had the pauper acquired a settlement. No questions of law were reserved, and there being no exceptions to the rulings and instructions of the presiding justice, *it is considered by the court*, that the only question is one of fact; and that the motion be overruled.

ON MOTION BY PLAINTIFF.

The case appears in the opinion.

W. H. Fogler, for plaintiff.

There is no presumption of law that a home which is once shown to have been established continues until the contrary is shown, nor is there any such presumption of fact except where a continuance of the indicia of home is proved. *Kirkland* v. *Bradford*, 30 Maine, 453; *Greenfield* v. *Camden*, 74 Maine, 65.

That the pauper had abandoned her home in Bremen does not tend to prove that she established a home in Friendship or in any other place. For a person may abandon one home without establishing another. *North Yarmouth* v. *West Gardiner*, 58 Maine, 207.

While it is true that if a person leaves his home for a temporary purpose he does not thereby abandon his home, yet in order that his home should continue in the town from which he departs he must first have established a home in such town. There must be some link connecting him to the place that he has established as a home—a permanent abode or residence to which it is his intention to return and to which he has a right to return. He must have a "habitation fixed in the place without any present intention of removing therefrom."

In *Warren* v. *Thomaston*, 43 Maine, 406, the court affirming

Turner v. *Buckfield*, 3 Maine, 229, and *Jefferson* v. *Washington*, 19 Maine, 293, says: "Dwelling place and home mean some permanent abode or residence with intention to remain." See *North Yarmouth* v. *West Gardiner*, 58 Maine, 207; *Gilman* v. *Gilman*, 52 Maine, 173.

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

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

WALTON, J. This is an action by the town of Friendship against the town of Bremen to recover for supplies furnished an aged female pauper; and, it not being denied that the pauper once had a settlement in Bremen, the only question appears to have been whether she subsequently acquired a settlement in Friendship by having a home therein for five successive years without receiving supplies as a pauper. The jury returned a verdict in favor of Bremen, thus practically affirming that the pauper had acquired such a settlement in Friendship.

The town of Friendship claims to be aggrieved by this verdict, and asks the court to set it aside on the ground that it is against law and against the weight of evidence.

No questions of law are presented. So far as appears, the rulings of the presiding justice, and his instructions to the jury, were satisfactory. The only question presented is one of fact. There was much evidence tending to prove that the pauper had a home in the town of Friendship for five successive years, and there was much evidence tending to prove the contrary.

The jury must have come to the conclusion that the evidence preponderated in favor of such a home; and it is the unanimous opinion of the court that the parties must abide by the result.

Motion overruled.

STATE *vs.* FRED O. PARKER.

Washington. Opinion April 3, 1896.

Game. Possession. Deer-Park. R. S., c. 30, § 21; Stat. 1891, § § 10, 11.

The respondent was complained of for killing a deer in close time in the enclosed deer-park on Petit Menan Point, in the town of Steuben, the park being the property of the Petit Menan Company, and the respondent being the owner of one-fifth of the deer in said park.

The deer was caught alive, when a fawn, on township No. 29, M. D. by another person in close time and sold the following year after his capture to another person who disposed of it to the respondent, the latter putting it into the park with other deer; and was in his possession continually until killed by him on the nineteenth day of June, 1894.

Held; That, waiving all question of illegality in capturing the animal alive originally, a proper construction of the statute applicable to the facts does not admit of a conclusion that the deer in question was under such dominion and control of the respondent and his associates as to allow them to kill or hunt such animal in close time. Their so-called possession was not actual and complete enough; was more fictitious than real.

The most that the proprietors can claim is that they possess by artificial means some facilities for capturing or recapturing deer within their woods, contained in a territory of seven or eight hundred acres, and perhaps for obtaining actual possession of the same dead or alive; and while that may be denominated an approach towards possession, a step in the direction of possession, to style such a condition of things as an absolutely actual possession, thereby giving the respondent complete property in the animals, would be far-fetched and visionary.

Commonwealth v. *Chase*, 9 Pick. 15, approved.

AGREED STATMENT.

The case appears in the opinion.

T. W. Vose and Fred I. Campbell, County Attorney, for State.

The lands covered by these preserves are substantially wild lands and the ponds and lakes within their limits nearly all great ponds, that is, containing ten acres or more. The important question therefore arises: can the owner of these lands, or his lessee, exclude persons whose only entry is in the pursuit of game, and who are in no way injuring or disturbing his property or rights? For the fish and game are not the property of the land owner.

The underlying principle of our State enactments contravenes

this right of private control of wild lands for hunting and fishing purposes, and, on the contrary, implies the right of the State to govern them. *Cottrill* v. *Myrick*, 12 Maine, 229; *Lunt* v. *Hunter*, 16 Maine, 10. In *Moulton* v. *Libbey*, 37 Maine, 472, SHEPLEY, Chief Justice, says: —"Whatever right the king had by his royal prerogative in the shores of the sea and of navigable rivers he held as a jus publicum in trust for the benefit of the people for the purposes of navigation and fishery." This was said of clam flats, the absolute title of which was in the plaintiff, in fee simple. But the point of the decision is that these great natural privileges were held in trust by the sovereign power for the people, and when the sovereign power transferred its title, this trust still attached.

In *Weston* v. *Sampson*, 8 *Cushing*, p. 347, the court in speaking of the right to fish on flats say: "We think that the mere fact that the jus privatum or right of soil was vested in an individual owner, does not necessarily exclude the existence of a jus publicum or right of fishery in the public."

The object of legislation, both in Massachusetts and Maine, has been to secure these great natural privileges to the public and not to confirm them in the few. It is also clear that our courts are in accord with the aims of such legislation.

It is evident, likewise, that those great natural prerogatives of the people, such as hunting and fishing, depend upon different considerations than those created by personal effort. Such prerogatives are older than constitutions and were in full enjoyment by the people when constitutions were made, and consequently the fundamental law has been made to yield when in conflict with them.

Such has been the course of legislative and judicial opinion, generally, upon questions affecting the common right.

The right to fish and hunt is a natural right; this right has been curtailed by law for the common good; it has been the policy of our legislature and our courts to secure and preserve the great natural advantages of our State for sporting to the people; and game preserves in this State, like similiar preserves in England, are hostile to and utterly destructive of these great public rights.

Possession: The court will take judicial notice that deer are feræ naturæ, and the presumption is that they must be hunted in some manner to be captured. Reducing a thing feræ naturæ into possession to create title in the possessor, the act of taking must have been a lawful act. *Blades* v. *Higgs*, 11 H. L. 621; *James* v. *Wood*, 82 Maine, 177. The deer was shot in close time. Stat. 1891, c. 95, § 10. *Com.* v. *Gilbert*, 160 Mass. 157. There is no proof or presumption that it was domesticated.

Geo. E. Googins, for defendant.

When a deer is taken alive by any person in the open season, or lawfully obtained at any other season of the year, such animal thereby becomes the legally acquired property of said person, and may be killed by its owner at any time. *Allen* v. *Young*, 76 Maine, 80; *James* v. *Wood*, 82 Maine, 178; Stat. 1878, c. 50, § 5.

The property in all the deer by the common law is in the State. A person holding a deer in confinement acquires qualified property in him, but absolute property when he kills such animal. There is no legislative enactment prohibiting private owners of deer from killing their own animals at any season of the year. The right to so kill their deer is one conferred by the common law, and their right cannot be taken away except by legislation.

There is a reasonable doubt as to whether Haycock hunted the deer "in any manner" within the meaning of the statute, 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 law favorable to the party accused. The facts do not warrant the finding that Haycock captured the deer contrary to law.

It must clearly appear that Haycock's conduct in reducing the deer to possession was a violation of the statute before he could be punished even. *James* v. *Wood*, supra.

Haycock, though he may have committed an illegal act in the first place, was lawfully in possession between the first day of October and January following the capture of the deer. A person may be punished for their illegal acts, not their legal ones.

The respondent, Parker, obtained the deer during the open season. In obtaining possession of and acquiring title to the deer he violated no law of his State, neither did his vendor, Willey. The legal title in the deer had passed from the State to Haycock and from Haycock to Willey, before the respondent purchased the animal.

Any person coming into possession of a deer during the open season acquires legal qualified property if alive and confined, absolute property when killed. Before owners of deer can be prevented from killing them at any season of the year there must be some special legislative enactment prohibiting them. *Com.* v. *Gilbert*, 160 Mass. 157.

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

PETERS, C. J. The respondent was complained of for killing a deer in close time, and the question of his liability to be prosecuted therefor is presented to this court upon the following statement of facts agreed to by the parties:

"The respondent had in his possession at Steuben, in Washington County, on June 19th, 1894, parts of a deer, which said respondent killed on June 15th, 1894, being in close season, to wit: between the first day of January and the first day of October, in the enclosed deer-park on Petit Menan Point, in said Steuben; said park being the property of the Petit Menan Company, so-called, and said respondent being the owner of one-fifth of the deer in said park, in common with said company; said deer was caught alive, when a fawn, on Township No. 29, M. D., by Charles Haycock, in the month of June, 1888, being the close season, as aforesaid. That said Haycock sold said deer the following year after his capture to Horace F. Willey of Cherryfield, by whom it was kept until the month of November, 1890, when he, said Willey, sold it to said respondent, who then put it into the park aforesaid in company with other deer therein confined, and was in his possession continually until killed by the respondent as aforesaid.

The respondent was arrested by Game Warden Charles I. Corliss, and, on the fifth day of July, 1894, was arraigned before Jacob T. Campbell, Esq., a Trial Justice in and for said Washington County, at said Cherryfield, on complaint of said Corliss, charging said respondent with having in his possession at Steuben, June 19th, 1894, one deer and parts of a deer killed in close time, as aforesaid, whereupon said respondent waived examination, was found guilty by the magistrate, and sentenced to pay a fine of forty dollars and costs, from which sentence respondent appealed. The Law Court to affirm or disaffirm the decision of said magistrate, as the law and facts in the case warrant."

The respondent contends, upon the strength of the cases of *Allen* v. *Young*, 76 Maine, 80, *James* v. *Wood*, 82 Maine, 173, and *State* v. *Beal*, 75 Maine, 289, that the deer was so far within his dominion and control in open time as to have become his absolute property, with which he could at any time do as he pleased. The doctrine of the above cases has been lately emphasized somewhat by the decision of the court in *State* v. *Bucknam*, 88 Maine, 385, in which it has been distinctly held that, under our statutes, one who lawfully obtains the ownership of game in open time, in that case carcasses of deer, is not criminally liable for having the same in his possession in close time afterwards. Some of the States have decided that laws which do make such acts criminal are not unconstitutional, but that question did not arise in the case referred to.

We think, however, that, giving the respondent the fullest scope of protection which the doctrine of those cases can afford him, he fails to find in them any sufficient justification for his act. We refer to the act of killing the deer within close season, waiving now all question of illegality in capturing the animal alive originally.

Probably it would not be questioned that in particular instances animals feræ naturæ may be so far reclaimed and domesticated, or, if not reclaimed may be so closely subjected to confinement by a person, as to be regarded as under his dominion and control and to become his property. And, if captured or obtained at a proper

season and in a lawful manner, there might be no reason why such person should not control such property at all seasons as he might any other, subject however to any restraint upon the use of the same which may be imposed by our game laws.

But we think that a proper construction of the statute applicable to the facts in the case at bar does not admit of a conclusion that the deer in question was under such dominion and control of the respondent and his associates as to allow them to kill or hunt such animal in close time. Their so-called possession was not actual and complete enough; was more ficticious than real. The deer was roaming wildly over a park covered mostly by woods, as was stated when the case was reported, containing between seven and eight hundred acres of territory and surrounded on all sides by the sea, excepting at a narrow strip or neck connecting this, an almost natural park, with the main land, and artificial structures were placed across this neck to prevent the escape of animals therefrom. Animals kept within these wide boundaries cannot be said to be thereby either reclaimed or held in close confinement. Should they escape from the park either by sea or land into other woods, it would be preposterous for the proprietors of the park to set up an ownership in such animals against other persons who might kill or capture them off of their premises. The most that the proprietors can reasonably claim is that they possess by artificial means some facilities for capturing or recapturing deer within their woods, and perhaps for obtaining actual possession of the same either dead or alive; and, while that may be denominated an approach towards possession, a step in the direction of possession, to style such a condition of things as an absolutely actual possession, thereby giving the respondent complete property in the animals, would be far-fetched and visionary.

The ideas which we entertain on this subject are aptly illustrated by the remarks of the court in *Commonwealth* v. *Chace*, 9 Pick. 15, a case involving the question as to how far and under what conditions doves might be the subject of larceny, and we quote largely therefrom:

"It is held in all the authorities that doves are feræ naturæ

and as such are not subjects of larceny, except when in the care and custody of the owner; as when in a dovecote or pigeon-house, or when in the nest before they are able to fly. If, when thus under the care of the owner, they are taken furtively, it is larceny.

"The reason of this principle is that it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps when feeding on the grounds of the proprietor, or resting on his barn or other buildings, if killed by a stranger, the owner may have trespass, and if the purpose be to consume them as food, and they are killed or caught or carried away from the enclosure of the owner, the act would be larceny. But in this case there is no evidence of the situation they were in when killed, whether on the flight, a mile from the grounds of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence the act of killing them, though for the purpose of using them as food, is not felonious."

Judgment below affirmed.

GEORGE MARSHALL, pro ami, *vs.* HOWARD Q. BOARDMAN.

Washington. Opinion April 4, 1896.

Shipping. Master pro hac vice. Owner.

A part owner of a vessel let to the master on shares is exonerated from a personal liability to pay seamen's wages, although the part owner procured the charters for the two trips made by the vessel during which the wages of the seamen were earned.

The simple statement that a master "sails," or "hires" or "takes the vessel on shares" implies that he fully controls the management of the vessel for the time being.

Conditions and qualifications which would deprive owners from exemption from such liabilities are not to be presumed; they must be proved. It is like the hiring and letting of any other kind of property whether real or personal. The letter yields and the hirer takes possession, and dominion and control presumably follow the rightful possession.

No such conditions and qualifications of the part owner's liability exist when it appears that the seaman's wages were earned after the former procured the charter, and the latter was not connected in any way with the terms of the contract; that the procurement of the charter was not without the master's consent and direction; and the part owner was not pretending to exercise any personal right as owner.

It would seem inconsistent for the master to pay all the running expenses and to be entitled to the greater part of the earnings if he were merely an agent for the owners.

ON REPORT.

This was an action of assumpsit on account annexed, brought before a trial justice, to recover two months' wages due the plaintiff for his services as a seaman on board the Sch. A. B. Crabtree. The defendant was a part owner and the plaintiff held the master's due-bill or memorandum, dated July 10, 1893, which he produced in evidence. Judgment was rendered in favor of the plaintiff by the trial justice and the defendant appealed.

In the court below the parties agreed to submit the action to the law court upon the following statement of facts: The plaintiff rendered the services alleged in the writ, and the wages sued for are correct in amount. The defendant is owner of one-sixteenth of the schooner on which the plaintiff's services as seaman were rendered. The schooner was sailed by the captain on "shares," he taking three-fifths of her earnings and paying running expenses, and the owners taking two-fifths. The defendant procured the charter made by the captain during which trips the plaintiff's wages were earned.

Geo. E. Googins, for plaintiff.

The master in order to be owner pro hac vice must not only have possession of the vessel, but absolute control and direction of her for the time which said vessel is hired, so that the owners could have no right to interfere with her management. See *Holden* v. *French*, 68 Maine, 241; *Reynolds* v. *Toppan*, 15 Mass. 370; and *Taggard* v. *Loring*, 16 Mass. 336.

The vessel was in the employment of the owner during the time when the wages were earned, and the master was appointed by him. The captain acted within the scope of his authority when he

hired the plaintiff. All these things are quite sufficient to render the owner liable. *Reynolds* v. *Toppan*, 15 Mass. 370.

To relieve the owners of a vessel let "on shares" to the master, it must affirmatively appear that the master has the entire control and direction of the vessel with no right of interference on the part of the owners. It is not enough to merely show that the vessel is let on shares. The defendant is liable, unless he can transfer his liability to the master. This he has not done. It does not appear affirmatively that the master had the entire control and direction of the vessel. We do know that the owner, Boardman, procured the charters both trips, thus interfering with the control of the vessel. The silence of the owners as to the point upon which their liability turns is suggestive. *Wickersham* v. *Southard*, 67 Maine, 597.

In the case of *Lyman* v. *Redman*, 23 Maine, 289, Judge TENNEY says: "The cases are numerous which show that the taking the vessel by the master, victualing and manning her, and paying a portion of the port charges, and having a share of the profits do not themselves constitute him the owner pro hac vice. It is the entire control and direction of the vessel which he has the right to assert, and the surrender by the owners of all power over her for the time being, which will exonerate them from the liability of the contracts of the master relating to the usual employment of the vessel in the carriage of goods. The expense of victualing and manning the vessel and receiving compensation for his services, and disbursements in a share of the profits by the master are by no means inconsistent with the right of the employer or owner to have the general direction of the business in which she is engaged." See *Bonzey* v. *Hodgkins*, 55 Maine, 98; *Hall* v. *Barker*, 64 Maine, 339; *Sargent* v. *Wording*, 46 Maine, 464; *Emery* v. *Hersey*, 4 Maine, 412.

Geo. A. Curran and H. H. Gray, for defendant.

The master was owner pro hac vice and the owners are not liable. *Thompson* v. *Snow*, 4 Maine, 264; *Giles* v. *Vigoreux*, 35 Maine, 300, and cases cited.

The due-bill is the personal obligation of the master, and must have been so understood by plaintiff and master, otherwise the bill would have been in ordinary form familiar to seamen, i. e. against vessel and owners and approved by the master.

Taking such an obligation leads to the presumption that plaintiff hired on credit of the master and the lien the law would give him on the vessel, and not on credit of the owners. *Noyes* v. *Staples*, 61 Maine, 422.

He settled with the master taking his personal due-bill for the balance due him. Counsel also cited: *Reynolds* v. *Toppan*, 15 Mass. 370.

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

PETERS, C. J. It appears, from the facts agreed upon by the parties, that the plaintiff was employed as a seaman on a schooner one-sixteenth of which was at the time owned by the defendant, the plaintiff claiming to recover his full wages of the defendant as such owner; that the schooner was sailed by the master "on shares" he taking three-fifths of her earnings and paying the running expenses, and the owners taking two-fifths of the earnings; and that the defendant procured the charters for the two trips made by the vessel during which the wages of the plaintiff were earned.

The question arising on these facts is whether the master can be said to have had such possession and control of the vessel as to exonerate the owners from a personal liability to pay seamen's wages. We think an affirmative answer must be given on this proposition.

It is said the master must have the exclusive control in order to clear the owners of such personal liabilities. But the simple statement that a master "sails," or "hires," or "takes" the vessel on shares implies that he fully controls the management of the vessel for the time being. That must be the presumption. Of course, there may be various conditions or qualifications annexed to

the contract of hiring or letting vessels on shares which would deprive owners of any such exemption from liability. But conditions or qualifications affecting the contract are not to be presumed; they must be proved in some way. It is like the hiring and letting of any other kind of property whether real or personal. The letter yields and the hirer takes possession, and dominion and control presumably follow the rightful possession.

It is contended by the plaintiff that there is evidence that the master had not the exclusive control of the vessel, in the fact that the defendant procured the charters for her employment for the two trips during which the plaintiff's wages were earned. This admission appears to have been made as a part of the case without any explanation whatever. But it should be noticed that these services of the defendant took place after the contract between owners and master was consummated, and nothing appears to connect his acts in any way with the terms of the contract itself. We take it that it was merely a gratuitous assistance rendered for the benefit of the master although operating perhaps beneficially for all concerned. It cannot be an uncommon thing for owners who are out of the possession and control of their vessels to assist masters in such a way. There is no suggestion that the procurement of the charters was without the consent and direction of the master himself, and no indication that the defendant was pretending to exercise any personal right as owner. It would seem to be inconsistent for the master to pay all the running expenses and be entitled to the greater part of the earnings if he were merely an agent for the owners.

The practice of letting vessels on shares, so as to constitute the master an owner pro hac vice, was an ancient one held in great favor in this and our mother country during those commercial periods when the business of transportation was carried on in a much smaller way and by the means of a much smaller class of vessels than at the present day. Among the very many adjudged cases growing out of such business we have not noticed any decision militating against the views expressed by us in this discussion. We need refer to but a few of the cases in effect supporting

our conclusion. In the early case of *Reynolds* v. *Toppan*, 15 Mass. 370, it was held that, "to render an owner of a vessel liable for the contracts of the master it must be proved that the vessel was in the employment of the owner, that the master was appointed by him, and that the master acted in making such contracts within the scope of his authority." In other words, the presumption that the master is in possession for himself and not for the owner must be overcome by some evidence. In *Taggard* v. *Loring*, 16 Mass. 336, the court held that, where a master hired a vessel for six months, rendering to the owners a moiety of the earnings, and sailed in her himself as master, he was so far the owner of the vessel that he could not be charged with barratry. The case of *Manter* v. *Holmes*, 10 Met. 402, decides that when the owners of a vessel have let her on shares for a certain time to the master, who is to victual and man her, they cannot maintain an action for freight earned by the vessel during that time; and that such an action can be maintained by the master only. In *Howard* v. *Odell*, 1 Allen, 85, it was decided that one who received from his debtor a bill of sale of a vessel, absolute in terms, but intended only as collateral security for a debt, but who never took possession nor had the control of the vessel, nor held her out to the world as his property, was not liable for supplies or repairs furnished for her, although registered in his name. In the case of *Thompson* v. *Snow*, 4 Maine, 264, it appears that the master took the vessel "on shares," those words alone expressing the contract, and this was understood by the court as being a letting by which the master became owner of the vessel pro hac vice in the customary manner of such letting, and the case was heard and determined upon that theory. The case of *Somes* v. *White*, 65 Maine, 542, decides that the rule of excepting general owners from liability exists in relation to claims sounding in tort as well as in cases of contract, where the vessel is in the possession of the master sailing her on shares. The claim in that case arose from a collision between two vessels.

Judgment for defendant.

FRANCIS C. BELCHER, and another, PET'RS FOR PARTITION

vs.

HENRY T. KNOWLTON.

Franklin. Opinion April 6, 1896.

Mortgage. Foreclosure. Judgment. Execution.

R. S., c. 82, § 140; c. 104, § 40.

In a real action to foreclose a mortgage under the statutes of this State, it is no valid objection to the foreclosure that, after judgment was granted, one of the demandants having died and the first execution not having been used in his life-time, a second execution was issued, under R. S., c. 104, § 40, in the name of the parties as they previously stood in the record, and under which possession was taken of the mortgaged premises.

Executions may be renewed, from time to time, at common law and under acts governing procedure in probably all the States. This general rule applies in such cases of foreclosure; and the power conferred by R. S., c. 82, § 140, is general enough to authorize an alias execution in such proceeding.

ON EXCEPTIONS BY DEFENDANT.

This was a petition for partition. Plaintiff's title is by virtue of the foreclosure of a mortgage given by Selden Knowlton to Abraham W. F. Belcher and Jason Knowlton. Defendant owns the title of Jason Knowlton by virtue of the mortgage. An action upon the mortgage was commenced by A. W. F. Belcher in his life-time and Jason Knowlton, and judgment as on mortgage was rendered at the March term of the Supreme Judicial Court, 1885. After the judgment and before the writ of possession issued, A. W. F. Belcher died, and a writ of possession issued in the name of A. W. F. Belcher and Jason Knowlton the same as though said Belcher was not dead. On the 31st day of October, 1889, a second writ of possession, issued in the name of said A. W. F. Belcher and Jason Knowlton, without an application to the court for a second writ of possession, as defendant claimed was required by statute. Defendant has the title of Jason Knowlton to the mortgage and also to an undivided half of the farm.

Defendant claimed that no legal foreclosure has ever been made, and that the second writ of possession was irregularly issued, and that petitioners are not entitled to partition.

The court ruled that the foregoing facts, if true, constituted no defense to this petition for partition; and there being no other ground of defense interposed, the court ordered judgment for partition and that commissioners be appointed to make partition as prayed for. To these rulings the defendant excepted.

S. Clifford Belcher, for plaintiffs.

J. C. Holman, for defendant.

The only title of the plaintiffs to the land in question is by virtue of a mortgage. The alias writ of possession was not issued for more than three years from the rendition of the judgment, and should have been by scire facias in accordance with R. S., c. 90, § 9.

One of the original plaintiffs in the suit upon the mortgage being dead at the time of the issuing of the writ of possession,—the one upon which plaintiff claims a foreclosure,—if not by scire facias then it should have been issued in conformity to R. S., c. 87, § 21, which was not done in this case; hence the mortgage has never been foreclosed.

Party having only a mortgage title to real estate is not entitled to partition. *Ewer* v. *Hobbs*, 5 Met. I.

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

PETERS, C. J. Section 40 of chapter 104 of the revised statutes provides as follows: "The writ of possession shall be issued in the name of the original demandant against the original tenant, although either or both are dead; and when executed, it shall inure to the use and benefit of the demandant, or of the person who is then entitled to the premises under him, as if executed in the life-time of the parties."

The case in hand involves the question whether the petitioner is entitled to have partition of certain premises, the title of his por-

tion of which was obtained through a mortgage and the foreclosure of the same. The foreclosure was effected by means of a real action and such subsequent steps as the statute requires to complete the proceeding. After judgment in the real action was granted and before execution was issued thereon one of the demandants died. Notwithstanding such death, however, a writ of possession was taken out in the names of the parties as they previously stood in the record, by virtue of the direction contained in the section of the statute above quoted, and afterwards, the first execution not having been used in its life-time, a second execution was issued, on the application of the petitioner to the clerk, in the same manner as before. The respondent contends that the second or alias execution could not legally be obtained in such way. And this is the only point which the case presents.

We can see no objection to the course pursued by the petitioner in procuring a foreclosure. Executions, in general, are issued upon final judgments as a matter of course. The judgment itself is an order or direction that it be done. By the common law practice and by the acts of procedure in probably all the states, it is permissible to renew such executions from time to time. We do not perceive any difficulty in applying this rule of renewal in such cases as the present any more than in cases generally. If the present case be regarded as special even, still the general rule just as consistently applies, so far as affecting any proceedings of foreclosure. Section 140 of chapter 82, R. S., provides that "an alias or pluries execution may be issued within ten years after the day of the return of the preceding execution, and not afterwards." This is general enough to authorize the alias execution in the proceedings in question here.

There might possibly be exceptions to an adherence to the rule after long delay in taking out a second execution, but no circumstances requiring any such exception appear in the present facts.

Exceptions overruled.

JOHN L. PEABODY

vs.

THE FRATERNAL ACCIDENT ASSOCIATION OF AMERICA.

Androscoggin. Opinion April 6, 1896.

Insurance. Notice. Waiver.

It is a well-settled principle of law, that when an insurance company accepts or assists in preparing second proofs of loss, it thereby waives any defects in the first proofs.

The plaintiff, holding an accident policy in the defendant company, met with an accident, October 19, 1893, which caused him considerable injury. He sent the company a written notification on November 2, but it was not received until after the ten days required by the policy. He contended, however, that the unseasonableness of the notice was afterwards waived by the acts of the company.

The acts thus relied on are of the following character. A preliminary proof was sent to the company by the plaintiff upon a form furnished by it containing conditions and reservations; no objection being taken to this the company forwarded a second form, which was apparently a final proof and with no conditions or reservations. On March 27, 1894, an officer of the company, with a medical expert employed by him, called on the plaintiff at his home where he submitted himself to a personal examination. At the close of this interview this officer demanded of the plaintiff the surrender of the second blank form as the result of what was claimed to be misrepresentation of material facts, and for other reasons; and in a few days afterwards the company rejected the claim. On May 7, 1894, the company received the second form properly filled out by the plaintiff who demanded the compensation claimed by him for his injuries.

The case was submitted on a report, which admitting that the plaintiff received an injury, stipulates that the only question submitted for decision is whether the notice is sufficient; or, if not sufficient, whether its insufficiency was waived by the company or not.

Held; that all these acts taken together, in effect, constitute a waiver by the company of a merely technical forfeiture created by its receiving the notice of the injury a few days later than was stipulated in the contract.

ON REPORT.

The case appears in the opinion.

N. & J. A. Morrill, for plaintiff.

Geo. C. Wing, for defendant.

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

PETERS, C. J. The plaintiff, holding an accident policy in the defendant company, on October 19, 1893, met with an accident which caused him considerable injury. A provision of the policy requires that the company shall receive written notice of the accident within ten days after its occurrence. On November 2, 1893, the plaintiff sent a written notification which was not received by the defendants until after the ten days had expired, being a few days too late. The plaintiff contends, however, that the unseasonableness of the notice was afterwards waived by the acts of the company, and a contention over this point is the only question here.

Upon the receipt of plaintiff's letter to them, the company sent to him a printed blank (called form number 1) containing a long schedule of inquiries to be answered as a first proof of loss, and to be returned within a short time to the company. The blank contained the following notice: "This blank is not intended for final proofs and where the disability is likely to continue for a considerable time a blank (No. 2) will be mailed claimant (on receipt of this blank properly filled up) to enable him to make final proofs; unless settlement shall be made on receipt of this blank."

And the following note was also added to the blank: "Having received notice of your intention to claim benefits under your policy for injuries just received, we herewith send you this blank form, requesting that you fill up the same *at once* (also obtain statement of attending physician) and return same to this office *within seven days from this date at the latest.* The furnishing of this form shall not be held to be a waiver of any of the conditions of the policy as to notification or as an admission of any claim. No claim can be entertained without the certificate of a duly qualified and registered medical practitioner."

There was also attached to the blank form this memorandum for the plaintiff to sign: "I do hereby warrant the truth of the foregoing particulars in every respect, and that I have not abstained

from my usual occupation, either wholly or partially, longer than necessary, and I agree that if I have made, or in any further declaration do make, any false or untrue statement, suppression or concealment, my right to benefits under my policy shall be absolutely forfeited and the policy be void."

The plaintiff filled out the form, answering all inquiries fully, and, obtaining also a certificate from his attending physician, seasonably sent the papers thus completed to the company. Thereupon the company, on some day in November, 1893, without any objection or condition whatever forwarded to the plaintiff another blank form, called form 5, to be filled out by him as a further and apparently a final proof of loss. This form is without condition or reservation.

No other communication took place between the parties after this until March 27, 1894, when a person, who was at the time secretary and treasurer of the company, together with a medical expert employed by him, called on the plaintiff at his home in Lewiston and by his permission subjected him to a personal examination. At the termination of the interview the secretary in a letter to him demanded of the plaintiff a surrender of the blank known as form five, which the company had furnished him, "as a result of what we claim to be a misrepresentation of material facts, and for other reasons." The company also wrote, March 29, 1894, the plaintiff that it had decided to reject any claim he might make upon it for injuries received by him. On May 7, 1894, the form number 5 was received by the company filled out and signed and sworn to by the plaintiff who demanded the compensation claimed by him for his injuries. Alongside these facts it should be noticed that in the report of the case it is admitted that the plaintiff received an injury, and it is stipulated by the parties that the only question shall be whether the notice was sufficient, or, if not sufficient, whether its insufficiency was waived by the company or not; a default to be entered if the plaintiff prevails on this point.

Did all these acts taken together in effect constitute a waiver by the company of a merely technical forfeiture created by its receiv-

ing the notice of injury a few days later than was stipulated in the contract? We think that by deciding this question affirmatively we shall reach a just and equitable conclusion. The requirement of forwarding a notice so that it shall be received within ten days after the accident, is of itself so stringent and unreasonable that a legislative act has been passed, since the date of this policy, allowing notice in all such cases to be given within sixty days instead of ten. · Laws of 1893, ch. 223.

The act of the company in sending the blank form number one to the plaintiff was strong evidence of waiver. It amounted to at least a conditional waiver, the implied condition being that no fraud was, in the opinion of the company perhaps, being practiced upon it. It would have been an inexcusable imposition to invite the plaintiff to make up proofs of loss when the intention of the company was to wholly disregard the same whatever might be the result of their investigation. And still the company has abandoned any defense on the merits of the claim. Their secretary in his letter intimates some wrong on the part of the claimant but no particular act of fraud or wrong ever has been specified.

But we need not rely on this first act of the company as conclusive evidence of waiver. The sending of the second blank (form No. 5) unconditionally, and the fact of the bodily examination made by the agents of the company and submitted to by the plaintiff, taken in connection with the confession that the company finally abandons its charges of fraud as a defense to the action, relying only upon the want of a strict compliance with the contract in the matter of notice, all these facts, aided by the other conduct of the company as before considered, certainly establish a waiver of any technical forfeiture that might have been created by the lateness of the notice. There are many cases which recognize the principle that when an insurance company accepts or assists in preparing second proofs of loss it thereby waives any defects in the first proofs. And that is as logical a conclusion as is the same principle when applied in the matter of pleading, an instance which the books give in illustration of the doctrine of waiver generally. If a defendant pleads the general issue, or any plea in bar

of the action, he cannot afterwards plead in abatement. Every one must take advantage of his rights at the proper time. *Trippe* v. *Prov. Fund Society*, 140 N. Y. 23; *Mer. Ins. Co.* v. *Gibbs*, 56 New Jer. (Law) 679. Our own cases are more or less strongly of the same effect.

Defendant defaulted.

FRANCES E. HURLEY, Appellant,

vs.

JAMES H. H. HEWETT, Administrator.

Knox. Opinion April 6, 1896.

Probate. Distribution. Decree. R. S., c. 65, § 28.

An administrator having made distribution of the money in his hands coming from a conversion of all the personal assets of the estate except one hundred shares of bank stock, appraised at the value of $120 per share, he petitioned the probate court representing that he had in his hands "property to the amount of twelve thousand dollars" according to its appraisal in the inventory, and asked that a distribution of "such balance" be ordered among the heirs.

After due proceedings thereon the court decreed, "that the sum of $12,000 in the stock of the American National Bank, at appraised value, now in the hands of . . . administrator . . . be distributed among the heirs of said deceased, whose names and distributive shares are as follows." After the signature of the judge to this decree, follows the names of the distributees with the amount of the share to each, and all amounting to $12,000.

There was no appeal from this decree and the administrator accordingly tendered the appellant, one of the heirs, an assignment of her share thereof which she refused to receive, but which she could have at any time she might consent to accept.

In the next settlement of the administrator's accounts he was allowed for the twenty-four hundred dollars thus tendered to the appellant, and she appealed from the decree allowing the same, objecting that a distribution in kind cannot be ordered unless the petition prays for a distribution in kind.

Held; that such a distribution in effect, and by the strongest implication, was called for by the petition. It speaks of "property" in the administrator's hands, and not of money. It describes it as a "balance" according to the appraisal. There was no other property in his hands of any kind or amount. The reference to the inventory perfectly identified the property to be divided, and the appellant necessarily knew these facts or is presumed to have known them.

Also; that the judge could order a distribution under the permissive statute, R. S., c. 65, § 28, without the aid of appraisers, which can be executed with mathematical certainty.

There may be some irregularity in a portion of a decree being before, and a portion being after, the name of the judge, but *held;* that this is not enough to render a decree void, there being no contradiction or inconsistency between the several clauses; and such merely formal irregularity can be readily corrected by amendment, if necessary.

ON REPORT.

The case is stated in the opinion.

W. H. Fogler and T. P. Pierce, for plaintiff.

D. N. Mortland and M. A. Johnson, for defendant.

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

PETERS, C. J. The appellant is a distributee of one-fifth of the personal estate of her late father, Samuel Pillsbury, who died in the month of January, 1890. In February of the same year administration was taken out on his estate, an estate containing different kinds of property. Among the parcels were one hundred shares of stock in the American National Bank of Kansas City, of the par value of one hundred dollars each share, but appraised in the inventory of the estate as worth one hundred and twenty dollars a share. The present value of the stock is little or nothing, the bank having failed sometime afterwards.

The administrator having made a distribution of the money in his hands coming from a conversion of all the personal assets of the estate excepting this stock, he petitioned the judge of probate at the August term of court 1894, representing that he had in his hands "property to the amount of twelve thousand dollars" according to its appraisal in the inventory, and asking that a distribution of "such balance" be ordered among the heirs. The proceedings were in due form, and due notice was given of the petition returnable at the next term of the court in September following. At that term the petition was considered and a decree passed, the portion of it which may be essential to the questions arising here being as follows:

"Upon the foregoing petition, due notice having been given thereon pursuant to law and the order of court, it is decreed that the sum of $12,000 in stock of the American National Bank at appraised value now in the hands of J. H. H. Hewett, administrator of the estate of Samuel Pillsbury, late of Rockland, deceased, be distributed among the heirs of said deceased, whose names and distributive shares are as follows:

C. E. Meservey, Judge."

[Here follows the names of the distributees with amount of share to each, and all amounting to $12,000.]

"The above is in stock of the American National Bank of the par value of $10,000 and appraised at $12,000 in the inventory of the estate and is to be distributed in kind."

There being no appeal from this decree, the administrator, in pursuance of its directions, made an equal division of the stock among the distributees, and tendered to the appellant an assignment of her share thereof which she refused to receive, but which she can have at any time she may consent to accept the same. In the administrator's next settlement of accounts he was allowed for the twelve hundred dollars thus tendered to Frances E. Hurley, one of the heirs and distributees, and she appealed from the decree allowing the same.

The appellant now contends that the decree ordering the distribution in kind was void, and therefore not binding on her, because under the terms of the petition the judge had no jurisdiction enabling him to make such a decree. She insists that notice on the petition would not inform any one that a distribution of the bank stock was contemplated. In other words, her position is that a distribution in kind cannot be ordered unless the petition prays for a distribution in kind. The answer to this objection is that such a distribution was in effect, and by the strongest possible implication, called for by the petition. It speaks of "property" in the administrator's hands, and not of money. It describes it as a balance of $12,000.00 according to the appraisal. There was no other property in his hands of any kind or amount. The reference to the inventory perfectly identified the property to be divided,

and she necessarily knew these facts or is presumed to have known them.

But, says the appellant, no appraisers were appointed by the judge to make a division among the heirs. There was not any need of appraisers. The judge may, not must, appoint is the language of the statute touching the subject. R. S., ch. 65, sec. 28. The judge could order a distribution which without the aid of appraisers might be executed with mathematical certainty.

It is said that a portion of the decree is written before the judge's name and a portion after it. There may be, perhaps, some irregularity in this. But it was so written and recorded, and there is no contradiction or inconsistency between the different clauses. This is not enough to render the decree void and such mere formal irregularity could be readily corrected by amendment if necessary.

It is urged that the administrator was guilty of negligence for not disposing of the stock by sale when it was in better demand in the market. The case discloses nothing upon which this objection can avail anything.

After all, how could the appellant be benefited even if the objectionable decree should be declared void? It is not supposable for a moment that either law or equity would allow her any greater proportion of the actual proceeds of the estate than the other heirs receive, and in the end nothing would be gained by her opposition to the proceedings which she now objects to.

Appeal dismissed. Decree below affirmed with costs.

ELMER E. MORRISON *vs.* GEO. E. CLARK.

Knox. Opinion April 7, 1896.

Judgment. Res Judicata. Easement.

The two essential elements of the doctrine of res judicata are the identity of the parties to the suit, and the identity of the issue necessarily involved. It must also appear that the issue which terminated in the former judgment was between the same parties in the same right or capacity. *Held;* in this case, that a former judgment did not operate as a personal estoppel against the defendant acting in a different right.

The defendant and his wife were tenants in common of a right of way across the plaintiff's lot on which the trespasses complained of in this action were committed. In a former suit the plaintiff recovered judgment against the defendant for trespasses committed on the easterly side of the lot, and it appeared from a special finding of the jury that the verdict in that case was based on the defendant's personal agreement to use a way on the westerly side of the lot.

In this action the defendant justifies the alleged acts of trespass on the ground that they were committed by license and authority of his wife in the exercise of her right to have a reasonably suitable and convenient way across the lot, offering at the same time to prove that a way on the easterly side of the lot would be more convenient for himself and wife and not unreasonably injurious to the plaintiff.

Held; that the former judgment against the defendant is not conclusive against him in this case, and that the evidence offered in defense should have been admitted. Tenants in common hold by several and distinct titles, and the wife had an equal right with her co-tenant to the use of a way that was reasonably suitable and convenient for the purpose for which it was granted. She was not bound by the separate agreement of her co-tenant made without her knowledge or consent and in disregard of her individual rights.

She was entitled to have the question of the reasonableness of the location of the way determined by a jury. If in this case the defendant was not acting in the exercise of any right of his own, but solely by authority of his co-tenant, the question of the reasonableness of the location is equally open to him in defense.

ON EXCEPTIONS BY DEFENDANT.

The case is stated in the opinion.

W. H. Fogler, for plaintiff.

The judgment in the first action is conclusive between these parties, and the controversy is res judicata. *Young* v. *Pritchard*, 75 Maine, 513—517; *Sturtevant* v. *Randall*, 53 Maine, 149—151; *Walker* v. *Chase*, Id. 260—262; *Blodgett* v. *Dow*, 81 Maine, 201; *Fuller* v. *Eastman*, Id. 286.

The title to himself and wife jointly of the right of way was available to the defendant in defense of the former suit, and he is estopped from setting up such title in the present suit. As a tenant in common he had then the right to use a right of way held by himself and another, jointly and in common, and had the opportunity to offer such joint title in evidence, and, as the court will undoubtedly assume, did in fact put the deed to himself and wife

in evidence in that suit. The defendant cannot now rely upon evidence of title acquired before the former suit.

The rule is well settled that a former judgment of a court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected with the subject matter of the litigation within the purview of the original action, either as matter of claim or of defense. Freeman on Judgments, § 310; *Griffin* v. *L. I. R. R. Co.* 104 N. Y. 452.

The right of the wife and the right of the husband, being derived from the instrument of conveyance, are identical. Having failed to justify in the former suit under the deed to himself and wife, he now undertakes to justify under the same deed.

C. E. and A. S. Littlefield, C. M. Walker, with them, for defendant.

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

WHITEHOUSE, J. This is an action of trespass quare clausum.

The defendant admits that the acts complained of in the plaintiff's writ were committed by him on the easterly side of the plaintiff's lot, but claims that they were done in the exercise of a right to pass over the lot acquired by grant to himself and wife and by license of his wife.

The deed to the plaintiff of "lot 34" described in his writ contains a reservation of a right of way to George E. Clark the defendant and Lilla B. Clark, his wife, to Rankin Street.

The deed to the defendant and his wife shows title in them to an adjoining lot, and "also a right of way ten feet wide over, upon and across lot 34 . . . . on foot and with horse and carriage to Rankin Street." The defendant and his wife thus became tenants in common not only of the lot of land conveyed to them, but of a right of way ten feet wide across the plaintiff's lot. *Stetson v. Eastman*, 84 Maine, 366; *Robinson, Appl't*, 88 Maine, 1. It does

not appear that, at the date of this deed to the defendant, there was any existing way in actual use across the plaintiff's lot. The deed does not specify upon which side of the plaintiff's lot the way should be located or in what direction it should pass. The defendant and his wife were therefore entitled to have the use and enjoyment of a way as limited and described in the grant, and located upon the plaintiff's lot in such a manner that it would not be unreasonably inconvenient or injurious to the plaintiff and at the same time be reasonably suitable and convenient for the defendant and his wife, having reference to the purposes for which the way was granted, the situation of the lots in relation to each other and to the public street, and all the circumstances connected with the use of the lots and the way in question. *Atkins* v. *Bordman*, 2 Met. 457; *Johnson* v. *Kinnicutt*, 2 Cush. 153; *Brown* v. *Meady*, 10 Maine, 391; Washburn on Eas. 285.

It appears that the plaintiff had recovered judgment against this defendant for a trespass on the same lot, in a prior suit, in which the defendant justified his acts on the ground that they "were done by virtue of a right of way ten feet in width across said lot of the plaintiff, which right of way was at the time of the alleged breaking and entering owned by said defendant." In addition to the general verdict of guilty, found in that case, the jury also returned a special finding that the defendant had made an agreement with the plaintiff to use a right of way on the westerly side of the Morrison lot as claimed by the plaintiff.

The defendant's co-tenant, Lilla B. Clark, was not made a party to that suit. Her name was not mentioned in the pleadings and this special finding was distinctly restricted to this defendant, George E. Clark. Nor did it appear that in making that agreement, to use a way on the westerly side, the defendant acted with the knowledge and consent of his co-tenant or in any respect in her behalf.

In the case at bar, it appears that: "The defendant offered to prove that the acts complained of in the plaintiff's writ were done by him under license and authority from his wife, Lilla B. Clark, and that they were committed by him within a right of way, ten

feet wide, on the easterly side of the lot in question, where the way would be the most convenient for the defendant and wife and not unreasonably inconvenient or injurious to the plaintiff, instead of upon the westerly side thereof as mentioned in the judgment aforesaid, which evidence the court excluded upon the ground that it affords no justification for the defendant by reason of the judgment against him already shown in evidence."

Thereupon the court directed a verdict to be rendered for the plaintiff for nominal damages assessed at one dollar.

To these rulings, excluding the evidence offered in defense and directing a verdict for the plaintiff, the defendant excepted and on his exceptions the case is now before the law court.

It is the opinion of the court that the judgment in the former case is not conclusive against the defendant upon the facts disclosed in this action, and that the evidence offered in defense should have been admitted.

The two leading and essential elements of the doctrine of res judicata are the identity of the parties to the suit and the identity of the issue necessarily involved. Bigelow on Estop. 27—46. Hence to ascertain whether a judgment is a bar in a given case, it is necessary to inquire whether the subject matter in controversy was brought directly in question by the issue in the proceedings which terminated in the former judgment; and whether the former suit was between the same parties in the same right or capacity, or their privies claiming under them. *Lander* v. *Arno*, 65 Maine, 26; *Bigelow* v. *Winsor*, 1 Gray, 299. And one of the most satisfactory and reliable tests of the question, whether a former judgment between the same parties is a bar to the present suit, is to inquire whether the same evidence will sustain both the present and former actions. The issue will be deemed the same whenever, in both actions, it is supported by substantially the same evidence. On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other. Freeman on Judgments, § 259, and cases cited.

With reference to the pending case, it is plain that the former judgment against this defendant would not be a bar if this action

had been against Lilla B. Clark, the defendant's co-tenant. As already noted, she was not a party to the former proceeding, had no right to appear and take part in that trial, exercise any control over the proceedings or take any measures to disturb the verdict rendered. The parties to the litigation would not be the same, nor would they stand in an attitude, or relation, to each other having the same effect as if they were identical. There was no such mutual or successive relationship between them to this right of way as would be required to establish a legal privity between them. I Green. Ev. § 189. As tenants in common they were entitled to the use of one passage way and only one. In no event would each be entitled to the use of a separate way without the consent of the plaintiff. In the absence of a definite location in the grant, it was competent for the parties to fix the location by a joint agreement between the co-tenants of the right of way, on the one part, and the plaintiff, the owner of the servient estate, on the other. In the absence of such an agreement, or in the event of a disagreement between the two owners of the right of way, the location must still be made by the plaintiff with due regard to the rights and convenience of all parties interested; and, if consistent with his own interests, in such a manner as to afford a reasonably suitable and convenient way for the defendant and his co-tenant Lilla B. Clark.

It is sufficiently evident from the special finding of the jury, that the verdict in the former action was based on the individual agreement of George E. Clark to use a way on the westerly side of the plaintiff's lot, and not on the easterly side where the alleged trespass was committed. But it was not shown that Lilla B. Clark in any way participated in that agreement or ever assented to it or acquiesced in it. She had an equal right with her co-tenant to the use of a way that was suitable and convenient for the purposes for which it was granted. She would not be bound by the separate agreement of her co-tenant made without her knowledge or consent and disregard of her individual rights. Tenants in common hold by several and distinct titles. With respect to his share each co-tenant has all the rights except that of sole possession

which a tenant in severalty would have. 1 Wash. Real Prop. 430. It has been uniformly held that one tenant in common cannot as against his co-tenant grant an easement in the common property to a stranger. *Clark* v. *Parker*, 106 Mass. 557; *Crippin* v. *Morss*, 49 N. Y. 67; *Marsh* v. *Trumbull*, 28 Conn. 183; *Merrill* v. *Berkshire*, 11 Pick. 274; Washb. on Eas. p. 46. In *Crippin* v. *Morss*, the court say: "A tenant in common cannot by grant, or by operation of an estoppel, or otherwise, confer any right and privileges which he did not have himself. The most that can be claimed for such a grant, or act of the owner, is that it may operate by way of estoppel against him and his heirs and those claiming under him." In *Merrill* v. *Berkshire*, an attempt was made to set up the agreement of one tenant in common as against his co-tenant, respecting the damages for laying out a highway over the common property, but the court said: "It is very clear that the land of one tenant in common cannot be incumbered, or in any way injuriously affected, by any agreement of his co-tenant."

But if one tenant in common of a right of way is authorized to fix the location of the way in accordance with his own personal preference or caprice by means of a private agreement made with the owner of the servient estate, in entire disregard of the rights and wishes of the co-tenant, it is plain that one tenant in common will always have it in his power by his independent acts to prejudice and "injuriously affect" his co-tenant. Such a doctrine would not only be in clear violation of the well-settled general principles governing the respective rights and obligations of tenants in common, but is manifestly unreasonable and unjust.

The authorities also uniformly support the general proposition, that a judgment for or against one tenant in common of property is not only not conclusive evidence, but ordinarily no evidence at all against his co-tenant. Freeman on Judg. § 171; 12 Am. and Eng. Enc. of Law, 96, and cases cited.

It follows that if Lilla B. Clark had been directly named as defendant in the pending action, neither the separate agreement of George E. Clark invoked in the former suit, nor the judgment there

rendered, could have been invoked as an estoppel against her. Her liability might be determined upon different evidence and be controlled by a different principle. In the case at bar, the defendant offered to prove that a way on the easterly side of the plaintiff's lot was more convenient for the defendant and his wife, and not injurious or unreasonably inconvenient for the plaintiff. It does not appear that this question of the reasonableness of the location has ever been determined. The defendant's co-tenant, Lilla B. Clark, would have had a right to have it passed upon. If the defendant did not act in the exercise of any right of his own, but solely under license and authority of his co-tenant, the question of the reasonableness of the location was equally open to him in this case. The former judgment was rendered against him for acts done in the assertion of his own right. In this case he seeks to defend acts done by him under the direction of his co-tenant in the exercise of her distinct and separate right. The fact that he was defendant in the former action may be immaterial; and his liability in the present suit not essentially different from that of any other agent who might be employed by Lilla B. Clark to drive her carriage over a way which she had a right to use across the plaintiff's lot. "It is a rule of both the civil and common law," says Mr. Freeman "that a party acting in one right can neither be benefited nor injured by a judgment for or against him, when acting in some other right." Freeman on Judg. § § 156 and 164, and cases cited.

The judgment in the former suit, therefore, will not operate in this case as a personal estoppel against the same defendant, acting in a different right.

Exceptions sustained.

GENEVIEVE FEENEY, pro ami, *vs.* JAMES A. SPALDING.

Washington. Opinion April 8, 1896.

Physician. Negligence. Verdict.

In the trial of an action against a physician, who holds himself out as having special knowledge and skill in the treatment of the eye, to recover for an injury claimed to be caused by him in performing an operation upon the eye, his professional services being sought while he was passing through the town in which the patient lived, it is incumbent upon the plaintiff to prove, before he is entitled to recover a verdict, that the injury complained of was caused, either by the defendant's want of that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the treatment of the eye, or by his failure to exercise his best judgment in the application of his skill to the particular case, or by his failure to use ordinary care in the performance of the operation and in giving such instructions as should have been given by a surgeon who was only to perform the operation and who was temporarily in the locality where the patient lived.

At the trial the plaintiff relied almost entirely upon the result, which, it was claimed, followed the operation. As to this the evidence was conflicting; but there was no evidence of any want of the requisite skill, knowledge or care upon the part of the defendant, while the evidence for the defense was positive and uncontradicted that the operation which was for strabismus was a proper one, that it was performed in a skilful and careful manner, and that it was a physical impossibility for the operation, said to be a very simple one, to have caused the injury complained of. *Held;* that a verdict for the plaintiff was unauthorized and should be set aside.

ON MOTION BY DEFENDANT.

The case is stated in the opinion.

J. F. Lynch, for plaintiff.

T. L. Talbot, for defendant.

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

WISWELL, J. The defendant is a physician and oculist practicing in Portland. In the summer of 1891, while on a trip to Machias, to visit patients, he stopped over for a short time at Cherryfield. While he was there, the plaintiff, at that time a girl

seven years old, who had been cross-eyed in one eye since she was a year and a half old, was taken to the defendant by her father for examination and operation if thought desirable.

After an examination by the defendant he performed the usual operation for a difficulty of this kind, bandaged the child's eye, gave certain directions to the father and proceeded upon his journey.

It was claimed by the plaintiff that prior to this operation the sight of this eye was, at least, fairly good, that in fact no defect whatever in the vision had ever been complained of by the plaintiff or observed by her parents or teacher, and that after the operation the sight of the eye operated upon was entirely gone. She alleges in her writ that this result was caused by the ignorance and want of skill of the defendant and by his carelessness in the performance of the operation. The trial resulted in a verdict for the plaintiff.

Before the plaintiff was entitled to recover a verdict it was incumbent upon her to prove that the injury complained of was caused either by the defendant's want of that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the treatment of the eye; or by his failure to exercise his best judgment in the application of his skill to the particular case; or by his failure to use ordinary care in the performance of the operation and in giving such instructions as should have been given by a surgeon who was only to perform the operation and who was temporarily in the locality where the patient lived.

At the trial the plaintiff relied almost entirely upon the result which it is claimed followed the operation. Upon this question the evidence was conflicting. The plaintiff, her parents and others testified that before the operation there was no defect in vision, or that they had never observed any; while the expert testimony upon the part of the defense was to the effect that an examination of the eye showed conclusively that the defective vision had existed from birth, and that it was as good at the time of the trial as it ever had been.

Even if there was sufficient evidence to authorize the jury to find for the plaintiff upon this question, such a finding was not sufficient to warrant a verdict for the plaintiff, when there was no evidence of any want of the requisite skill, knowledge or care upon the part of the defendant, and when the evidence for the defense was positive and uncontradicted that the operation was a proper one; that it was performed in a skilful and careful manner, and that it was a physical impossibility for this operation, said to be a very simple one, performed as it was, to have caused the injury complained of.

We feel certain that a verdict in favor of the plaintiff was not authorized by the evidence, and we believe that sympathy for the plaintiff unduly influenced the jury in rendering such a verdict.

Motion sustained. New trial granted.

JACOB N. LEBROKE and another,

vs.

EMMA DAMON, and another.

Piscataquis. Opinion April 8, 1896.

Probate. Decrees. License. Deed. Forcible Entry and Detainer. R. S. c. 71.

The decrees of the Probate Court, upon matters within its jurisdiction, when not appealed from, are conclusive upon all persons. Such decrees are in the nature of judgments and cannot be impeached collaterally.

The power to grant an administrator license to sell the real estate of his intestate, for the purpose of paying debts, expenses of sale and of administration, is conferred upon the Probate Court by statute. Such a license, when the proceedings are regular and in accordance with the statute, is therefore conclusive and cannot be collaterally attacked.

When an administrator petitions for such license, it is incumbent upon him to show that a sale of the real estate, or at least some portion of it, is necessary for the purpose of paying legally enforceable debts; but a judgment against the goods and estate of an intestate in the hands of the administrator, is not barred by the statute of limitations because it was recovered more than two years prior to the time of filing the petition for license to sell real estate.

In an action of forcible entry and detainer the title to the premises was in dispute. The plaintiffs claimed under the sale and deed of an administrator, whose intestate owned the premises at the time of his death. The defendant

was one of the heirs of the intestate. The administrator's sale was under a license from the Probate Court, in obtaining which and in making the sale under it, all the requirements of law were observed. The deed was in proper form. *Held;* that the plaintiffs obtained a good title under the administrator's sale and deed, and were entitled to judgment for possession.

ON REPORT.

The case appears in the opinion.

J. B. Peaks, for plaintiffs.

P. H. Gillin, for defendants.

Counsel cited: *Woodward* v. *Perry*, 85 Maine, 440; *Chamberlin* v. *Chamberlin*, 4 Allen, 184; *Hanscom* v. *Marston*, 82 Maine, 288; Schoul. Exec. & Admrs. pp. 509, 511. *Allen, Pet'r*, 15 Mass. 58.

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

WISWELL, J. Action of forcible entry and detainer against the defendants as disseizors. From a judgment of the lower court in favor of the plaintiffs, the defendants appealed. The case comes to the law court upon report.

The defendant, Emma Damon, is one of the heirs of Eben Damon, who, it is admitted, had title to the premises at the time of his death. The plaintiffs claim title under a deed of the premises from the administrator of Eben Damon, and the only question presented is whether the administrator's deed to the plaintiffs conveyed the property therein described.

It is a familiar rule of law that upon the death of a person intestate, his real estate descends to his heirs, and can only be taken from them by the adjudication of a court of competent jurisdiction, upon proceedings prescribed by statute, that a sale of some portion, at least, of such real estate is necessary for the purpose of paying debts, expenses of sale and of administration.

No question is raised as to the appointment of the administrator, which was made by the judge of Probate of Piscataquis county at the May term, 1885, nor as to his acceptance of the trust and due

qualification therefor. At the June term, 1886, the administrator's first account was settled, showing a balance in his hands due the estate at that time of $345.45. No other account has ever been rendered by him. Some time prior to the first Tuesday of August, 1888, the case does not show when, but it is said in argument to have been at the June Term, 1886, commissioners were appointed by the Probate Court, under the statute, to pass upon a claim of $1831.88, against the estate presented by Emma Damon. On the first Tuesday of August, 1888, the commissioners made their report to the Probate Court, in which they allowed the claimant the sum of three hundred dollars. From this allowance she appealed and entered her appeal at the September term, 1888, of this court for Piscataquis County. The appeal was continued from term to term until the September term, 1890, when judgment was rendered in her favor for the sum of $563.97, including costs.

At the September term, 1892, of the Probate Court, the administrator presented his petition for license to sell the real estate of the intestate, in which he alleged that the personal property was not sufficient to pay the debts and expenses of administration by about the sum of $799, that it was necessary to sell some portion of the real estate for this purpose, and that by a sale of any portion of the real estate, the residue would be greatly depreciated in value. Upon this petition public notice was ordered, as required by law, returnable at the October term following, and at that term, notice having been given in accordance with the order of court, the court adjudged that the allegations in the petition were true and decreed that the administrator have license as prayed for, upon his giving bond with sufficient sureties in the sum of two thousand dollars. At the same term a bond in the form required by statute and in the sum ordered was given and approved, and thereupon the license issued.

On October 10th, the administrator was sworn as was then required by statute, and on the 25th of September, 1893, after giving notice of the sale in the manner provided by statute and as ordered by the license, the property was sold by the administrator at public auction to the plaintiffs, they being the highest bidders

therefor. On the same day a deed in proper form was made, executed and delivered by the administrator to the plaintiff.

All of these proceedings were in compliance with the statutes, and in obtaining the license and in making the sale under it, the administrator observed all the requirements of law.

The granting of this license was a matter within the jurisdiction of the Probate Court, the proceedings were all regular, its decree therefore is conclusive and the validity of the license cannot be attacked. It has been settled by numerous decisions of this court that the decrees of the Probate Court, upon matters within its jurisdiction, when not appealed from are conclusive upon all persons. Such decrees are in the nature of judgments and cannot be impeached collaterally. *McLean* v. *Weeks*, 65 Maine, 411; *Harlow* v. *Harlow*, 65 Maine, 448; *Decker* v. *Decker*, 74 Maine, 465.

It is urged that this license should be treated as void because of the long lapse of time between the date of the administrator's appointment and that of the granting of the license; and that a license to sell real estate should not be granted to an administrator for the purpose of paying debts that are barred by the statute of limitations. It is certainly true that an administrator should not be licensed to sell real estate for the purpose of paying debts that are not legally enforceable. Whenever an administrator petitions for such a license, it is incumbent upon him to show that a sale of the real estate, or at least of some portion of it, is necessary for the purpose of paying legally enforceable debts; until this is done the heir can successfully resist the granting of such a license.

But in this case when the petition for license to sell was filed, there was a judgment of this court in favor of one of these defendants for $563.97 against the estate. This judgment was not barred by the statute, because it was recovered some two years prior to the filing of the petition for license to sell. The claim upon which the judgment was founded was presented to the administrator, it is said and must be presumed, within the time allowed therefor.

It is said in argument that this judgment has never been

enforced, but it is an existing and valid liability of the estate and should be paid out of the funds in the administrator's hands.

Our conclusion is that the administrator's deed, under which the plaintiffs claim title, conveyed to them the premises in dispute. The entry will therefore be,

Judgment of the lower court affirmed.

STATE *vs.* LAWRENCE MARTIN.

Franklin. Opinion April 8, 1896.

Practice. Presiding Justice. Discretionary Power.

It is entirely within the discretion of the judge presiding at a jury trial to vary the ordinary order of procedure, whenever in his opinion the occasion requires it, and at any stage of the trial to permit evidence to be offered which had been admitted through inadvertence, or which had not before come to the knowledge of counsel. And the exercise of this discretion is not subject to revision on exceptions.

In the trial of an indictment alleging a single sale of intoxicating liquors, after the arguments for the respondent and the State had been concluded, the presiding justice allowed the county attorney against the respondent's objection, to call a witness to testify to the place where the sale had been made, about which there had been no testimony up to that time.

Held; that this was not the subject of exception.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

E. E. Richards, County Attorney, for State.

H. L. Whitcomb, for defendant.

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

WISWELL, J. In the trial of this case, an indictment alleging a single sale of intoxicating liquors, after the arguments for the respondent and the State had been concluded, the justice presiding allowed the county attorney, against the respondent's objection, to call a witness to testify to the place where the sale had been made,

about which there had been no testimony up to that time. To this proceeding the respondent takes exception.

This is a matter entirely within the discretion of the presiding justice. Whenever in his opinion the occasion requires it, he may vary the ordinary order of procedure and at any stage of the trial permit evidence to be offered which had been omitted through inadvertence, or which had not before come to the knowledge of counsel. Nor is the exercise of this discretion subject to revision on exceptions. *McDonald* v. *Smith*, 14 Maine, 99; *Ruggles* v. *Coffin*, 70 Maine, 468.

It is argued in support of the exceptions that, by allowing the evidence to be introduced at that time in the trial, the respondent was left without an opportunity to introduce evidence in rebuttal, and his counsel without an opportunity to comment upon this testimony. If either had been desired, it should have been asked for; and it is safe to assume that such a request would have been readily granted.

Exceptions overruled.

HANNAH HAGGERTY, Admx.,

vs.

HALLOWELL GRANITE COMPANY.

Androscoggin. Opinion April 8, 1896.

Death. Master and Servant. Negligence. Stat. 1891, c. 124.

It is the duty of an employer, implied from the contract of employment, to exercise ordinary care, in view of the circumstances of the situation, to provide and maintain a proper place where his servant may perform his work with safety, subject only to such risks as are necessarily incident to the business, and unexposed to any dangers that may be prevented by the exercise of such care. If the employer fails in this duty, it is negligence for which he is liable to a servant who has been injured in consequence of such failure, without fault on his part and without having voluntarily assumed the risk of the consequence of the employer's negligence, with a full knowledge and appreciation of the dangers to which he is exposed.

The plaintiff's intestate was in the employ of the defendant as a quarryman. While at work as one of a crew of men in removing stone which had been blasted, a detached rock, weighing about eight hundred pounds, suddenly

and without warning, fell from a shelf in the quarry about twelve feet above the place where the crew was at work, struck the deceased and instantly killed him.

About two and a half years before, this rock had fallen from still further above in the quarry, and during that time had remained in the place where it was immediately prior to the accident. There was evidence tending to show that the rock was so near one of the guys of a derrick as to be struck by it when the use of the derrick caused the guy to sway. In regard to this contention, and generally as to the position of the rock prior to its fall, the evidence was conflicting.

Held; that a verdict for the plaintiff, involving a finding that the defendant was negligent in leaving the rock in the position in which it was claimed by the plaintiff to be, and from whence it fell without anything unusual occurring to cause its fall, was authorized.

ON MOTION BY DEFENDANT.

This was an action on the case, brought under Chapter 124 of the Statute of 1891, which provides that 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, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable in an action for damages, brought by and in the names of the personal representatives of such deceased person, for the benefit of his widow, children or heirs.

The verdict was for the plaintiff in the sum of $500.00 and the case was brought before the law court on defendant's motion for a new trial, wherein the only questions raised were that the verdict was against law, evidence and weight of evidence,—no question being raised as to the amount of damages.

The case appears in the opinion.

F. L. Noble and R. W. Crockett, for plaintiff.

O. D. Baker and F. L. Staples, for defendant.

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

WISWELL, J. This is an action brought by the plaintiff, as administratrix of Timothy P. Haggerty, under the act of 1891, c.

124, to recover damages for the death of the deceased, which, it is alleged, was caused by the negligence of the defendant. The trial resulted in a verdict for the plaintiff and the case is here upon a motion to set the verdict aside.

At the time of the accident, on the 6th of September, 1893, the deceased was in the employ of the defendant as a quarryman in its quarry at Hallowell. While he was at work as one of a crew of men in removing stone which had been blasted, a detached rock weighing about eight hundred pounds, suddenly and without warning, fell from a shelf in the quarry about twelve feet above the place where the deceased was at work, struck the deceased and killed him instantly.

About two years and a half before, this rock had fallen from still further above in the quarry and had remained during all of that time in the place where it was just prior to the accident. It was claimed by the plaintiff that the rock was within two or three inches of one of the guys supporting a derrick, and so near that it was struck by the guy when the use of the derrick caused it to sway.

It is the duty of an employer, implied from the contract of employment, to exercise ordinary care, in view of the circumstances of the situation, in providing and maintaining a proper place where his servant may perform his work with safety, subject only to such risks as are necessarily incident to the business, and unexposed to any dangers that may be prevented by the exercise of such care. If the employer fails in this duty, it is negligence for which he is liable to a servant who has been injured in consequence of such failure, without fault on his part and without having voluntarily assumed the risk of the consequence of the employer's negligence, with a full knowledge and appreciation of the dangers to which he is exposed. *Mayhew* v. *Sullivan Mining Co.*, 76 Maine, 100; *Mundle* v. *Hill Manufacturing Co.*, 86 Maine, 400.

The question of negligence, where the facts are in dispute, or even where they are undisputed, but intelligent and fair-minded men may reasonably arrive at different conclusions, is for the jury. *Elwell* v. *Hacker*, 86 Maine, 416.

Here the testimony was conflicting, and the parties differ very materially as to the inferences and conclusions that should properly be drawn from the facts as testified to upon the one side and the other. The plaintiff claims that it was negligence to leave this detached rock in a place from whence it might fall and injure those working below; that it was especially negligent upon the part of the employer in leaving it where it could be struck by the sway of the derrick guy. While the defendant says that, so far as a careful examination would disclose, the rock was in a safe place; so embedded in dirt and small rocks that it could not be moved by hand; and that there was no reason to anticipate that it would ever fall.

But from the fact that it was left in a place from whence it did fall, without anything unusual occurring to cause its fall, the jury were authorized to draw some inference of negligence. A careful examination of all the evidence in the case fails to satisfy us that the verdict was so clearly wrong as to justify its disturbance.

Motion overruled.

IN RE, BROCKWAY MANUFACTURING COMPANY.

EX PARTE, MITCHELL.

Androscoggin. Opinion April 9, 1896.

Insolvency. Debts. Corporations. Treasurer. Stock.

In the allowance of debts and claims in bankruptcy and insolvency, the court proceeds upon principles and considerations that are equitable in their character.

The stock and property of a corporation is to be regarded as a trust fund for the payment of its debts; and its creditors have a lien thereon and the right to priority of payment over any stockholder.

Stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefits of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid.

Creditors may hold the company's agents liable for wasting assets, which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds.

Where the funds of a corporation are used by its treasurer to pay for its stock purchased by him and other stockholders for themselves with the consent of

all the stockholders and directors, *held;* that the treasurer thereby became responsible for the whole amount of the money so converted.

So long as he holds the money in the treasury of the corporation, it is there to answer for its debts if necessary; and it should be devoted to that object so long as it may be required for that purpose. If he withdraws it, except according to law, he does so subject to that trust,—the trust for the payment of debts of the corporation, and needed for that purpose; and it is immaterial whether he got the money by fair agreement with his associates or by a wrongful act.

See *Same Case*, 87 Maine, 477.

ON EXCEPTIONS BY APPELLEE.

The case appears in the opinion.

N. & J. A. Morrill and J. W. Mitchell, for appellant.

There was no indebtedness existing from Haskell, as treasurer, to the company on account of this transaction, and, as assignee, the appellee has no right to call Haskell to account for any alleged shortage, arising in the manner stated.

It will be noticed that Haskell paid out this money by the unanimous consent of all the stockholders and officers of the company. Such is the conceded fact; and it is also conceded that he paid it without any fraudulent purpose either on his part or on the part of the stockholders. Under that state of facts, he as treasurer could not be called upon to account for the same, by the company, although there may be no record of such action on the part of the stockholders or directors. 2 Morawetz Corp. § 794; *Sawyer* v. *Hoag*, 17 Wall. 610.

In this last case it is assumed, that transactions may be undertaken between stockholders and the company which, although injurious to creditors, cannot be questioned by the company.

Haskell as treasurer was the agent of the company. His only duty in relation to the funds of the company was to keep them safely and to pay them out, or otherwise dispose of them, as he might be directed by the corporation. He is accountable to the corporation and to the corporation alone, and to the corporation he has done no wrong. It is not alleged that he did not safely keep the money or that he has made any wrong disposition of it, without the consent or direction of the proper officers; and it is conceded that everything done by him in relation to these payments was

done by the unanimous consent of the officers, and stockholders of the company. So far, then, as Robinson represents the company alone, he is not in a position to call Haskell to an account and therefore not in a position to insist on his claim in set-off to the appellant's proof. *Taylor* v. *Taylor*, 74 Maine, 584; *Ins. Co.* v. *Hill*, 60 Maine, 182.

It is suggested that Haskell's possession of the money was in a double capacity, as director and treasurer. This is an erroneous assumption, because his possession of the money is clearly only that of the agent of the company in his capacity as treasurer. So far as being a director is concerned, it is clear that the appellee cannot in this manner enforce the remedy given in R. S., c. 48, § 8 against Haskell.

Sections 45, 46 and 47, R. S., recognize that the creditors of a corporation, as represented by the assignee appointed to close up its affairs, have a claim upon the capital stock as a trust fund, or as equitable assets, for their protection; but they expressly limit the liability of a stockholder to the amount unpaid, or to the amount withdrawn. *Poor* v. *Willoughby*, 64 Maine, 381.

It is this liability and obligation, which we submit that Robinson the appellee can enforce against this proof of claim, and only this obligation. Allowing in set-off the amount so withdrawn by Haskell from the capital stock, the proof is reduced by the sum of $610.00, as the presiding justice ruled.

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

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

PETERS, C. J. After the previous decision in this case, as see 87 Maine, 477, the appellant, Mitchell, the assignee of Haskell, the insolvent debtor, was allowed to amend his claim agreeably to that decision, by substituting therefor an account for cash paid by said Haskell for the use of the Brockway Manufacturing Company and interest, amounting in all to fifteen hundred and seventy-one dollars and seventy-three cents. At the hearing on the appeal in the

court below, Robinson, the assignee of the corporation, was allowed to amend his objections to the claim as originally filed; and in addition to a general objection alleging that upon a full settlement there was nothing due from the corporation to said Haskell, he specifically stated, as a further ground of objection, that "on the 26th day of December, 1888, said Haskell jointly with five other individuals, signed and delivered to one Samuel G. Damren six notes, each for the sum of four hundred and fifty dollars, with interest, and payable respectively in four, eight, twelve, sixteen, twenty and twenty-four months from date; that said Haskell, without lawful authority, took and appropriated the funds of the Brockway Manufacturing Co. for the payment of said notes with interest thereon, amounting in all to the sum of twenty-eight hundred and eighty-nine dollars, and that said Haskell thereby became bound to account for said sums to the Brockway Manufacturing Co., and to pay the same to the said Brockway Manufacturing Co., for the benefit of its creditors; and said Robinson claims to offset said amount . . . . together with interest thereon . . . . the whole amount being thirty-one hundred and seventy-seven dollars and ninety cents, against the claim of said Mitchell as assignee of said Haskell as aforesaid."

At the hearing in the court below, the following facts were admitted by the parties: That on the 26th of December, 1888, I. N. Haskell and five others bought out all the shares of the Brockway Manufacturing Company which had then been issued, from the original owners, with the exception of four which were retained by said owners; and in payment therefor gave the six notes above referred to in the amended objection filed by the appellee, twenty-seven of said shares, of the par value of one hundred dollars each, being transferred directly to the purchasers of said stock, and a portion, at a later date, viz: January 9, 1889, but as a part of the same transaction, being surrendered to the treasury as treasury stock, by the original holders; that by this transfer the signers of said notes received stock as follows, viz:— I. N. Haskell five shares; the others—various amounts aggregating twenty-two shares; and forty-two shares were surrendered into the

treasury and cancelled; that I. N. Haskell was then made director and treasurer of said corporation, and continued to hold both offices until the filing of the petition in insolvency, August 26, 1892; that from time to time as the above notes matured, they were paid by said Haskell from the funds of the Brockway Manufacturing Company; that this was done without fraudulent purpose on the part of said Haskell or the other stockholders, and with the assent of all the stockholders and directors of the Brockway Manufacturing Company, including the signers of the notes, and was in accordance with the understanding between the parties to said transfer, at the time when the notes were given, December 26, 1888, but without any vote either by the stockholders or directors authorizing such payments, and that no account of such payments appears upon the account books of the corporation.

The appellee admitting that Haskell had paid, for the use of the company, the sums specified in the claims filed against the corporation in this case, claimed that there should be allowed in set-off or recoupment against Haskell's claim, the full amount of money applied, as aforesaid, by him to the payment of the six notes dated December 26, 1888, or so much thereof as would be sufficient to cancel the claim of fifteen hundred and seventy-one dollars and seventy-three cents, while the appellant claimed that, at most, only Haskell's proportionate part of said amount, viz:—five twenty-sevenths, agreed to be the sum of six hundred and ten dollars, should be allowed.

The presiding justice thereupon ruled that the appellee would be entitled to be allowed in set-off against the claim of the appellant said sum of six hundred and ten dollars, and no more, and entered a decree accordingly.

To this ruling the appellee excepts, and prays that his exceptions may be allowed.

We think that, in this proceeding, Haskell must answer for the full amount, or so much of it as is necessary, to balance the claim here preferred by his assignee.

Whatever rule might obtain, if this were a proceeding to enforce the liabilities of a stockholder under our statutes, we think that

the case discloses in its facts a diversion of its property and assets to the detriment of creditors. The case is very like that of a trustee secretly applying the trust property to his own use. To hold otherwise would be a contradiction of the plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and that its creditors have a lien thereon and the right to priority of payment over any stockholder. The payment of the amount claimed by Haskell for the benefit of the corporation amounted in law to an application of that sum in reduction of his indebtedness to the company, and therefore a reduction of its assets to that extent. It is well settled by numerous authorities that the stockholders of a corporation have no rights until all other creditors are satisfied. They have the full benefit of the profits made by the establishment, but cannot take any portion of the funds until all other claims on them are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. *Wood* v. *Dummer*, 3 Mason, 311; *Sanger* v. *Upton*, 91 U. S., 60. Creditors may hold the company's agents liable for wasting assets which are needed to satisfy their claims, on the ground that it constitutes a misapplication of trust funds.

We are of the opinion, therefore, that Haskell from time to time had these funds in his possession, belonging to the corporation, which he was bound to apply only to the legitimate purposes of the corporation; and that if he chose to apply them otherwise while acting as treasurer or director, either for his own benefit or for the benefit of any one else, he thereby became responsible for the whole amount so converted. So long as he held the money in the treasury of the corporation, it was there to answer for its debts if necessary; and it should have been devoted to that object so long as it might be required for that purpose. If he withdrew it, except according to law, he did so subject to that trust—the trust for the payment of debts of the corporation, and needed for that purpose, *Williams* v. *Boice*, 38 N. J. Eq. 364; and it is immaterial whether he got the money by fair agreement with his associates or by a wrongful act. *Bartlett* v. *Drew*, 57 N. Y. 587.

The defendant in his argument admits that the transaction detailed above amounted undoubtedly to a withdrawal of a portion of the principal of the capital stock of the company, within the meaning of the R. S., c. 46, § 37; and that the payment for the twenty-seven shares of stock out of the funds of the company, by which transaction Haskell received the par value of his stock without cost to himself, was illegal as against its creditors. But he argues that the only duty of Haskell as treasurer was as agent of the company; and he urges that his only duty in relation to the funds of the company was to keep them safely and to pay them out, or otherwise dispose of them, as he might be directed by the corporation. And he cites from the opinion in the case of *Taylor* v. *Taylor*, 74 Maine, 584, that: "He is accountable to the corporation and to the corporation alone, and to the corporation he has done no wrong." That case was a bill in equity by an assignee in insolvency to vacate a fraudulent preference, and it was sought to sustain the bill upon the further ground of a breach of trust. But the court held that under the allegations in the bill it could not be supported upon that ground. It was sustained as a fraudulent preference under the insolvent law. It will thus be seen that the two cases are dissimilar. In our view, as already expressed, he is accountable, and because he has done wrong to the corporation by an unwarranted withdrawal of its funds for an illegal purpose whereby creditors have been wronged.

In the allowance of debts and claims in bankruptcy and insolvency, the court proceeds upon principles and considerations that are equitable in their character. It has been accordingly held that an assignee may vacate a preference which was given by the directors of an insolvent corporation to a firm of which a director was a member, although it was given more than four months before the commencement of the proceedings in bankruptcy. *Bradley* v. *Farwell*, 1 Holmes, 433.

According to the agreement of the parties, the entry will be made,

Decision of the judge of insolvency affirmed.
Appeal dismissed.

ELIZA J. WOODMAN

vs.

MOSES G. WOODMAN, and others.

Cumberland. Opinion April 9, 1896.

Will. Vested and Contingent Remainders.

A vested remainder is an estate to take effect after another estate for years, life or in tail, which is so limited that if that particular estate were to expire or end in any way at the present time, some certain person who was in esse and answered the description of the remainder-man during the continuance of the particular estate, would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. A remainder is contingent when it is so limited as to take effect in a person not in esse, or not ascertained, or upon an event which may never happen or may not happen until after the determination of the particular estate.

It is an elementary rule of construction, which has always been uniformly enforced, that no remainder will be construed to be contingent, which may consistently with the intention of the testator, be deemed vested.

A remainder is not made contingent by an uncertainty as to the amount of property that may remain undisposed of at the expiration of the particular estate, the life-tenant having the power of disposal.

A testatrix, by the eighth clause in her will, bequeathed and devised all the residue of her estate, real, personal and mixed, to her sons, and the survivor of them, to have and to hold the same in trust for the benefit and support of her husband and her daughter during the lives of the beneficiaries and that of the survivor. By the same clause, the trustees were authorized, "should it become necessary to perform the object of this trust, to sell and convey by good and sufficient deed the real estate, after first using therefor the personal estate, as the necessity for said purpose may require."

By a codicil to her will she made the following disposition of the property mentioned in the clause above referred to: "After the termination of the trust estate mentioned in the eighth article, by the decease of both my husband and Henrietta, I give, bequeath and devise to my son, Moses G., seven-sixteenths of my lot and store on Exchange Street, Portland, to him and his heirs forever. To my daughter, Susan, five-sixteenths of the same lot and store to her and her heirs forever. To my son, Charles M. G., the remaining fourth part of the same lot and store, to him and his heirs forever. And I make this distinction and difference not from the slightest unequal affection, but only in consideration of the present financial differences in the respective conditions of my children. All the remainder of my estate, of every kind and description, I give, bequeath and devise to my son, Charles M. G., Moses G., and to Susan M. G. Newton, share and share alike, to them and their

heirs forever; and if either of my children die previous to my decease it is my will and desire that my grandchildren shall inherit as the representative or representatives of the parent thus deceased."

The testatrix died in 1870, her husband in 1881 and the daughter, Henrietta, the survivor of the beneficiaries in the trust estate, March 8th, 1891. Charles M. G., died February 27th, 1889, without issue, leaving a widow, the plaintiff. The Exchange Street property was not disposed of by the trustees, under their power of disposal, during the lives of the beneficiaries.

Held; that it was clearly the intention of the testatrix to create by her will, a vested and not a contingent remainder in the Exchange Street property, and that the language used was appropriate for this purpose:

That the trustees took an estate for the lives of the beneficiaries, with a power of disposal if it should become necessary:—That the remainder over, upon the death of the testatrix, vested in her sons, Moses and Charles, and her daughter, Henrietta, of which they might have been divested by an execution by the trustees of their power of disposal during the lives of the beneficiaries, according to the terms of the will.

Charles M. G., who took a vested remainder in one-fourth of the Exchange Street property, and who died Februray 27th, 1889, prior to the termination of the particular estate, left a will by which he devised to his sister, "all the right, title and interests, which I may have at the time of my decease," in and to the homestead of his late mother. The second clause of his will is as follows: "All the rest, residue and remainder of my estate, real, personal and mixed, wherever found or situated, of which I may die seized or possessed, I give, devise and bequeath unto my beloved wife, Eliza Jane Woodman [the plaintiff],—and being in lieu of dower,—to have and to hold the same to her, her heirs and assigns forever."

Held; that this language clearly shows an intention upon the part of the testator to dispose of all of his property, and to give his wife all the residue of his estate, whether in possession or in remainder, and that it was appropriate language to carry out this intention:—That the vested remainder, which the testator took under the will of his mother, was a part of the estate of which he was in possession at the time of his death and was included in the devise in favor of the plaintiff.

Leighton v. *Leighton*, 58 Maine, 67, affirmed.

AGREED STATEMENT.

The case is stated in the opinion.

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

J. W. Symonds, D. W. Snow and C. S. Cook, for Moses G. Woodman.

Wm. P. Hale, for Susan G. Newton.

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

WISWELL, J. This is a real action to recover one undivided-fourth of a lot of land and the store thereon, situated on Exchange Street in the city of Portland.

The plaintiff claims title as the residuary legatee under the will of her husband, Charles M. G. Woodman, who was one of the devisees in the will of his mother, Mary G. Woodman. It is admitted that Mary G. Woodman was the owner of the property in controversy at the time of her death. The questions presented are, what estate if any in the demanded premises, did Charles acquire under the will of his mother; and did that estate pass to the plaintiff by virtue of his will. These questions involve the construction of portions of both wills.

I. By the eighth clause in her will, Mary G. Woodman bequeathed and devised all the residue of her estate, real, personal and mixed, to her sons, Charles and Moses, and the survivor of them, to have and to hold the same in trust for the benefit and support of her husband, Daniel Woodman, and her daughter, Henrietta G., during the lives of the beneficiaries and that of the survivor. By the same clause, the trustees were authorized, "should it become necessary to perform the object of this trust, to sell and convey by good and sufficient deed the real estate, after first using therefor the personal estate, as the necessity for said purpose may require."

By the ninth clause she bequeathed and devised all of her estate mentioned in the eighth article, real, personal and mixed, remaining at the termination of the trust mentioned in the preceding article, to her sons, Charles and Moses, and her daughter, Susan, in equal shares.

By a codicil to this will she made certain changes in other portions of the will, not necessary to be noticed here, revoked the ninth clause and substituted the following provision in lieu thereof:

"After the termination of the trust estate mentioned in the

eighth article, by the decease of both my husband and Henrietta, I give, bequeath and devise to my son, Moses G., seven-sixteenths of my lot and store on Exchange Street, Portland, to him and his heirs forever. To my daughter, Susan, five-sixteenths of the same lot and store, to her and her heirs forever. To my son, Charles M. G., the remaining fourth part of the same lot and store, to him and his heirs forever. And I make this distinction and difference not from the slightest unequal affection, but only in consideration of the present financial differences in the respective conditions of my children. All the remainder of my estate of every kind and description, I give, bequeath and devise to my sons, Charles M. G., Moses, G., and to Susan M. G. Newton, share and share alike, to them and their heirs forever, and if either of my children die previous to my decease, it is my will and desire that my grandchildren shall inherit as the representative or representatives of the parent thus deceased."

Mary G. Woodman died in 1870, Daniel Woodman in 1881 and Henrietta G. Woodman, March 8th, 1891. The Exchange Street property was not disposed of by the trustees, under their power of disposal, during the lives of the beneficiaries. Charles M. G. Woodman died February 27th, 1889, without issue, leaving a widow, the plaintiff.

The first question presented is, whether under this will and codicil, Charles took a vested or contingent remainder in one-fourth of the Exchange Street store and lot.

"A vested remainder is an estate to take effect after another estate for years, life or in tail, which is so limited that if that particular estate were to expire or end in any way at the present time, some certain person who was in esse and answered the description of the remainder-man during the continuance of the particular estate, would thereupon become entitled to the immediate possession irrespective of the concurrence of any collateral contingency. A remainder is contingent when it is so limited as to take effect to a person not in esse, or not ascertained, or upon an event which may never happen or may not happen until after the

determination of the particular estate." Am. & Eng. Encyl. of Law, Vol. 20, page 838.

Chancellor Kent says, that the following definition of a vested remainder, given by the Revised Statutes of New York, appears to be accurately and fully expressed: "When there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate." . . . . "It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder." Kent's Commentaries, Vol. 4, page 303.

And in Washburn on Real Property, Book 2, c. 4, § 1, it is said: "The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have determined, so that the estate in remainder will never take effect."

An application of these definitions to the language of the will, answers the question presented. An estate for the lives of the husband and the daughter, or the survivor of them, was given by the will to the trustees. The remainder after the termination of the freehold estate was given in the proportions named to the sons, Moses and Charles, and the daughter, Susan, in fee. The remainder was so limited that it would take effect at once upon the termination of the prior estate. There were persons in being, definitely ascertained, during the continuance of the particular estate, who, upon the expiration of that estate at any time, were entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. The will contains no language, such as is ordin-

arily used for the purpose of expressing an intention, that the vesting of the remainder was to depend upon a contingency—such as "if they are then living," or, "to such of them as may be living at the termination of the precedent estate." The devise was of a present fixed estate, the possession and enjoyment of which only were postponed until after the termination of the particular estate.

It is an elementary rule of construction, which has always been uniformly enforced, that no remainder will be construed to be contingent, which may consistently with the intention of the testator, be deemed vested.

We think that it was clearly the intention of the testatrix to create by her will a vested and not a contingent remainder in this property; and the language used was appropriate for this purpose, both upon principle and authority.

In *Leighton* v. *Leighton*, 58 Maine, 63, a testator devised all the residue of his property to his wife during her natural life, she not to make unnecessary strip or waste. The will proceeded as follows: "Second. After the death of my beloved wife, Jane, it is my will that my third son, Ruel S. Leighton, have all the property, both real and personal which may then remain." The court held that the clearly manifested intention of the testator was to give his wife a life estate, and to his son, Ruel, a vested remainder in fee simple; and that the son took a vested remainder, which upon his decease, during the lifetime of the widow, descended to his heirs.

In *Kennard* v. *Kennard*, 63 N. H. 303, a testator gave his property, consisting of both real estate and personal property, to his executors to be held by them in trust for the use and benefit of his wife during her life or widowhood, and at her decease or re-marriage to revert to his heirs. One of the heirs died before the termination of the trust estate and it was claimed that his interest in the share of his father's property never vested and did not pass by his will; but the court held that, as to the real estate, the limitation over by way of remainder created vested remainders. The court said: "The prior estate would terminate at all events upon the death of the life tenant, and the time for coming to the enjoyment

of the estate being fixed by an event certain, the right of enjoyment, by a person then in being, immediately upon the occurrence of the event and the termination of the prior estate, was established. It was not necessary to vesting the remainder, that Manning Kennard should survive the first taker. It is the present right of future enjoyment whenever the possession becomes vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when also it may happen before the expiration of the estate limited in remainder, the remainder is vested."

In the case of *Blanchard* v. *Blanchard*, 1 Allen, 223, the limitation over came very much nearer to the dividing line between vested and contingent remainders. There a testator after devising to his wife all the income of his real and personal property during her natural life, devised to five of his children all the property that might be left at the death of his wife, to be divided equally between them; and the will further provided that if any of the five children died before his wife, then the property should be divided equally between the survivors. The court said: "The first clause of the devise to the children is certainly sufficient, if it stood alone, to create a vested remainder in all the children." The difficulty arose because of the proviso that in case any of the children should die before his wife, the property should be equally divided between the survivors, and it was argued with much force that this clause made the remainder contingent because it could not be told who the survivors might be. But the court held that each of the children named took a vested remainder in fee, subject to be divested upon a condition subsequent, with a limitation over on the happening of that condition. In the case under consideration, the devise of the remainder contains no such clause as gave rise to the difficulty in the case last cited.

In *Marsh* v. *Hoyt*, 161 Mass. 459, a testator, after making certain specific bequests, gave the rest of his property to trustees to pay the net income to his wife during her life. After her decease

a portion of the trust fund was still to be retained by the trustees and the net income thereof paid to her niece; "and, to take effect at her decease, I give, bequeath and devise said third part to her children in equal shares, to them, their heirs, executors, administrators and assigns forever." The court held that each of the four children of the niece took a vested interest in one-fourth of the trust estate, in which their mother had an equitable life estate, at the death of the testator.

The provision in the codicil, that "if either of my children die previous to my decease, it is my will and desire that my grandchildren shall inherit as the representative or representatives of the parent thus deceased," if it applies at all to the devise of the remainder in the Exchange Street store, in no way affects this question. None of the children of the testatrix died previous to her decease, consequently during all the continuance of the precedent estate there were persons in being, definitely ascertained, who upon the expiration of that estate became entitled to the immediate possession, irrespective of the concurrence of any collateral contingency. The language of this clause is equivalent to that in *Gibbens* v. *Gibbens*, 140 Mass. 102, in which the devise was, "at the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased child standing in the place of the parent." The court held that the children of the testator took vested interests, and that the provision that the issue of a deceased child should stand in the place of the parent did not affect the question as to whether the remainder was vested or contingent.

But it is argued by the defense that in this case the remainder was contingent because it depended upon the exercise by the trustees of the power of sale given to them in the will; and several Massachusetts cases are cited in which there are expressions to the effect that where a life estate is created, with a power to sell and convey in fee, if necessary for the support of the life tenant, the remainder over is contingent on its not becoming necessary to exercise that power, and that this contingency makes the remainder contingent and not vested. *Johnson* v. *Battelle*, 125 Mass. 453;

Bamforth v. *Bamforth*, 123 Mass. 280; *Taft* v. *Taft*, 130 Mass. 461.

But in neither of these cases was this question necessarily raised. In *Johnson* v. *Battelle*, the question was as to the power of the life tenant to sell and convey in fee the property in which he had a life estate. In *Bamforth* v. *Bamforth*, the devise over was made contingent by the words, "should either of them be living." In *Taft* v. *Taft*, a bill was filed by the remainder-man against the life tenant to enjoin her from selling the real estate, and it was decided that the bill was not maintainable because the defendant was given by the will full control of the property, with a right to sell and dispose of the same during her life, "as she may think best."

Nor was this question necessarily raised in *Snow* v. *Snow*, 49 Maine, 159, in which this language was used by the court in the opinion: "It depended on two contingencies; one, whether anything would remain at the death or the marriage of his mother, and the other, whether he would ever attain the age of twenty-one years." In that case a testator bequeathed to his wife the use of his personal property during her life or widowhood, she to use what might be necessaay for her support, and after her decease or marriage, one-half of what remained to descend to his son, A, and the other half to his son, B, who was not to come into possession until he should arrive at the age of twenty-one years. The court held that B took only a contingent interest which lapsed upon his death before he had arrived at that age and during the life-time of his mother. The case was decided upon the ground that the time when the son B would be entitled to the possession of the property, was annexed to the legacy itself, and that therefore it was contingent upon his arriving at that age.

We think that according to principle and the weight of authority, a remainder is not made contingent by an uncertainty as to the amount of the property that may remain undisposed of at the expiration of the particular estate, the life-tenant having the power of disposal. Where an estate is devised to a person expressly for life, with a power of disposal qualified or unqualified,

the devisee takes an estate for life only. *Stuart* v. *Walker*, 72 Maine, 145.

In this case the qualified power of disposal given to the trustees, should it become necessary in order to perform the purposes of the trust, "after first using therefor the personal estate," did not enlarge the estate given to the trustees expressly limited to the lives of the beneficiaries.

The trustees took an estate for the lives of the beneficiaries, with a power of disposal if it should become necessary. The remainder over, upon the death of the testatrix, vested in her sons, Moses and Charles, and her daughter, Henrietta, of which they might have been divested by an execution by the trustees of their power of disposal, during the lives of the beneficiaries, according to the terms of the will.

In *Burleigh* v. *Clough*, 52 N. H. 267, a frequently cited case, a testator bequeathed to his wife the whole of his estate for life with the power of disposal, and what remained at her decease undisposed of by her he gave to D and his heirs and assigns forever. The court held that the widow took an estate for life with a power to defeat the remainder and that D took a vested remainder.

In *Ducker* v. *Burnham*, 146 Ill., 9, (37 Am. St. Rep. 135) a testator bequeathed and devised to his wife all the residue of his estate, real and personal, with full power "to use and exhaust such part of the principal of my estate real and personal, as she may at any time think necessary for her support and maintainance." By a subsequent clause in the will he directed that all of his property and estate remaining at the death of his wife be equally divided between his five children, share and share alike. The court held, in an exhaustive opinion in which many authorities are collected, that a power of sale added to a life estate does not raise the estate to a fee; that a remainder limited upon a life estate with a power of sale added, is not made contingent by the fact of its being uncertain whether such power will be actually exercised or not, and that the remainder given to the five children, after the termination of the life estate, was vested and not contingent.

The question was raised in *Heilman* v. *Heilman*, 129 Ind. 59, in

which the court said: "The remainder is not made contingent by uncertainty as to the amount of the estate remaining undisposed of at the expiration of the life estate, but by uncertainty as to the persons who are to take."

In *Welsh* v. *Woodbury*, 144 Mass. 542, decided subsequently to the Massachusetts cases above referred to, it is said: "The objection to the uncertainty of what will be the subject of the limitation over, which was once thought to be a further ground for the doctrine of *Kelley* v. *Meins*, as applied to personal property, seems to be discredited by the later English decisions cited in that case, and never has been applied to a life estate coupled with a power." From which it appears not improbable that, when the question arises, the Massachusetts court will hold that a remainder does not become contingent because of the uncertainty as to what will be the subject of the limitation over, notwithstanding the dicta in the former cases.

And finally in *Leighton* v. *Leighton*, supra, it was contended that the remainder was contingent because the life tenant had the power of disposal; but this court, in considering that objection, simply said that in the cases relied upon in support of the contention, the testators expressly directed the sale of their real estate.

II. Did this vested remainder in the Exchange Street property pass to the plaintiff under the will of her husband?

By his will Charles gave to his sister "all the right, title and interests, which I may have at the time of my decease," in and to the homestead of his late mother. The second clause of the will is as follows: "All the rest, residue and remainder of my estate, real, personal and mixed, wherever found or situated, of which I may die seized or possessed, I give, devise and bequeath unto my beloved wife, Eliza Jane Woodman,—and being in lieu of dower,—to have and to hold the same to her, her heirs and assigns forever."

We think that this language clearly shows an intention upon the part of the testator to dispose of all of his property, and to give his wife all the residue of his estate, whether in possession or in remainder, and that appropriate language was used to carry out this

intention. A vested remainder is an estate which may be conveyed or devised. *Loring* v. *Carnes*, 148 Mass. 223. The person entitled to a vested remainder has an immediate fixed right to future enjoyment, which passes by deed. *Pearce* v. *Savage*, 45 Maine, 90.

The language of the will, "all the rest, residue and remainder of my estate, real, personal or mixed, wherever found or situated," could hardly be more comprehensive and expressive of an intention to include all property which the testator could devise. This vested remainder was a part of the residue of his estate. But it is argued that this language is limited by these words which follow, "of which I may die seized or possessed," and that the testator was neither seized nor possessed of any portion of the demanded premises at the time of his death. In support of this contention counsel rely upon the case of *Leach* v. *Jay*, 6 Chan. Div. 496, subsequently affirmed and reported in the 9 Chan. Div. 42.

In that case the devise under consideration was "all real estate (if any) of which I may die seized." The court held that the words "seized" had only a technical meaning, that it had no signification in ordinary language, and that as the testatrix had no seizin, either in law or in fact, of the real estate in controversy, nothing passed under the will to the devisee. The distinction between that case and this is very marked. Here the devise was not of "all the *real estate* of which I may die seized," but of all the residue of "my estate, real, personal and mixed, wherever found or situated, of which I may die seized or possessed." It was not limited to the *real estate* of which he might be seized at his death, but it included all his *estate* of which he might be possessed at that time. He was possessed of a vested remainder in one-fourth of the demanded premises, that was a part of his estate at the time of his death.

Our conclusion is, therefore, that by the will of Mary G. Woodman, her son, Charles took a vested remainder in one-fourth of the Exchange Street property, which he might devise by will before the termination of the precedent estate, and which he did devise to his wife, the plaintiff.

She is also entitled to one-fourth of the net rents and profits from March 8th, 1891, the time of the termination of the precedent estate, by the death of the survivor of the beneficiaries, to the date of the writ. This one-fourth is admitted to be $212.13.

The entry will be,

Judgment for plaintiff for the demanded premises, and for $212.13 rents and profits.

HENRY K. WING *vs.* ABBY FORD.

Hancock. Opinion April 9, 1896.

Bills and Notes. Liquors. Indorsee. Burden of Proof.

Revised Statutes, c. 27, § 56, provides that no action shall be maintained upon any claim, demand or promissory note, contracted or given for intoxicating liquors; but the same statute contains this clause: "This section shall not extend to negotiable paper in the hands of the holder for a valuable consideration and without notice of the illegality of the contract."

Under this section, therefore, the defense that a note was given for intoxicating liquors cannot prevail against any holder for a valuable consideration without notice of the illegality of the contract; and it makes no difference whether such holder acquired the note before or after its maturity. Nor is the fact that a note was purchased after maturity, whether protested or not, any evidence that it was given for intoxicating liquors or for other illegal considerations.

Whenever a defendant sets up and proves as a defense that the note in suit was given for an illegal consideration, it becomes incumbent upon the plaintiff to prove that he is a holder for value without notice of the illegality of the contract. A holder makes out a prima facie case by proving that the note was indorsed to him for value, and can rely upon a presumption arising from his having given value for the note, that he obtained it without notice of the illegality, until this presumption is overcome by rebutting evidence; but where there is evidence upon both sides as to the several propositions necessary to be proved by the plaintiff, then the general burden of proof is upon him to make them out. It is not sufficient to defeat his recovery that the indorsee took the note under circumstances that ought to excite suspicion in the mind of a prudent man. It is simply a question as to whether or not the indorsee had actual knowledge.

Held; in this case, that there was ample evidence to authorize the jury to find that the plaintiff acquired title to the note in suit for a valuable consideration without notice of the illegality of the contract in its inception.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

H. E. Hamlin, for plaintiff.

F. L. Mason, for defendant.

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

WISWELL, J. This is an action upon a negotiable promissory note, brought by an indorsee. The defense was that the note was given for intoxicating liquors sold in violation of the law of this State. The verdict was for the plaintiff and the case comes to the law court both upon exceptions and motion for a new trial.

1. Exception is taken to the refusal of the presiding justice to give the following requested instruction: "That where it has appeared that this note was protested when it was due, that if the jury are satisfied that this man wasn't the holder of the note at that time, that that is notice of some defect or illegality and that he does not stand in the position of an innocent holder for value. When this note was due it was protested. Now if he bought it after protest, there was a notice to the world of some defect in that note."

The refusal to give this instruction was correct. At common law the fact that a note was given for intoxicating liquors would be no defense to a suit upon it either by the payee or indorsee. This is made a defense in certain cases by R. S., c. 27, § 56; but the same section contains this provision: "This section shall not extend to negotiable paper in the hands of a holder for a valuable consideration and without notice of the illegality of the contract."

Under this section therefore, the defense that the note was given for intoxicating liquors can not prevail against any holder for a valuable consideration without notice of the illegality of the contract; and it makes no difference whether such holder acquired the note before or after its maturity. Nor is the fact that a note was purchased after maturity, whether protested or not, any evidence that it was given for intoxicating liquors or for other illegal consid-

eration. *Field* v. *Tibbetts*, 57 Maine, 358; *Hapgood* v. *Needham*, 59 Maine, 442.

II. Motion. Whenever a defendant sets up and proves as a defense that the note was given for an illegal consideration, it becomes incumbent upon the plaintiff to prove that he is a holder for value without notice of the illegality of the contract. The holder makes out a prima facie case by proving that the note was indorsed to him for value, and can rely upon a presumption arising from his having given value for the note, that he obtained it without notice of the illegality, until this presumption is overcome by rebutting evidence; but where there is evidence upon both sides as to the several propositions necessary to be proved by the plaintiff, then the general burden of proof is upon him to make them out. *Cottle* v. *Cleaves*, 70 Maine, 256; *Kellogg* v. *Curtis*, 69 Maine, 212. Nor is it sufficient to defeat his recovery that the indorsee took the note under circumstances that ought to excite suspicion in the mind of a prudent man. *Farrell* v. *Lovett*, 68 Maine, 326. It is simply a question as to whether or not the indorsee had actual knowledge.

Applying these general rules in relation to the burden of proof to the evidence in this case, we are satisfied that there was ample evidence to authorize the jury to find that the plaintiff acquired title to this note for a valuable consideration without notice of the illegality of the contract in its inception.

Motion and exceptions overruled.

STATE *vs.* DANA H. MILES.

Cumberland. Opinion April 13, 1896.

Bribery. Pleading.

A general demurrer to an indictment containing several counts will not be sustained if any one of the counts is sufficient in law.

Bribery at common law is the crime of offering any undue reward or remuneration to any public officer, or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty.

The taking as well as the offering or receiving of such reward constitutes the crime, when done with a corrupt intent.

ON EXCEPTIONS BY DEFENDANT.

This was an indictment for bribery found against a police officer of the City of Portland by the grand jury of the Superior Court, Cumberland County, and to which the defendant filed a general demurrer. The presiding justice overruled the demurrer and the defendant took exceptions.

(Indictment.)

The grand jurors for said State upon their oath present that Dana H. Miles of Portland, in the County of Cumberland, on the fourth day of June, in the year of our Lord one thousand eight hundred and ninety-four, at said Portland, was a police officer of said Portland, duly and legally appointed and authorized to discharge the duties of that office; that as such police officer, it was then and there the duty of said Dana H. Miles to arrest one John Murphy, the younger of that name, who was then and there, on said fourth day of June, unlawfully concerned in a certain lottery, scheme and device of chance not authorized by law in said State, by then and there having in his possession, with intent to sell and dispose of the same, certain certificates, tickets, shares and interests in said lottery, scheme and device of chance, as he, the said Dana H. Miles, then and there well knew; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him, and contriving and intending the citizens of this State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said fourth day of June, in said Portland, under color of his said office as a police officer as aforesaid, a certain sum of money, to wit, the sum of five dollars, for not arresting said John Murphy, the younger of that name, and for not interfering with said John Murphy, the younger of that name, in the prosecution of said business of being unlawfully concerned in a certain lottery, scheme and device of chance not authorized by law in said State as aforesaid, the said Dana H. Miles from the said John Murphy, the younger of that name, unlawfully, unjustly and extorsively did accept, re-

ceive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.

The second count alleged the same offense to have been committed on the eleventh day of the same month.

(Third Count.) . . . that said Dana H. Miles afterwards, to wit, on the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-four, at said Portland, was an officer having power to serve criminal process within said Portland, to wit, a police officer of said Portland, duly and legally appointed and authorized to discharge the duties of that office; that by virtue of his authority as such police officer, he then and there seized in a certain tenement situated on the northerly side of Fore Street, so-called, in said Portland, certain intoxicating liquors, a more particular description of which said intoxicating liquors is to the grand jurors unknown, which said intoxicating liquors were then and there kept and deposited in said tenement and intended for illegal sale in said State, by one Lewis Levi, as he, the said Dana H. Miles, then and there well knew; that it was then and there the duty of said Dana H. Miles as such officer, to institute proceedings against said Lewis Levi for having violated as aforesaid, the laws relative to the illegal sale and the illegal keeping of intoxicating liquors; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him, and contriving and intending the citizens of this State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said tenth day of June, at said Portland, under color of his said office as a police officer as aforesaid, a certain sum of money, to wit, the sum of ten dollars, for not instituting proceedings against him, the said Lewis Levi, for having violated the laws against the illegal sale and the illegal keeping of intoxicating liquors as aforesaid, he, the said Dana H. Miles, from the said Lewis Levi, did then and there unlawfully, unjustly and extorsively accept, receive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.

(Fourth Count) . . . that said Dana H. Miles afterwards, to wit, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-four, at said Portland, was an officer having power to serve criminal process within said Portland, to wit, a police officer of said Portland, duly and legally appointed and authorized to discharge the duties of that office; that he, the said Dana H. Miles, did then and there on said fourteenth day of July, find in a certain tenement situated on the northerly side of Federal Street, so-called, in said Portland, certain intoxicating liquors, a more particular description of which said intoxicating liquors is to the grand jurors unknown, which said intoxicating liquors were then and there kept and deposited in said tenement and intended for illegal sale in said State; that it was then and there the duty of said Dana H. Miles as such police officer, to endeavor to ascertain the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and to further endeavor to ascertain the person or persons intending to unlawfully sell such intoxicating liquors so then and there kept and deposited as aforesaid, and it was then and there the duty of said Dana H. Miles as such police officer to institute proceedings against the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and it was then and there the duty of said Dana H. Miles as such police officer to institute proceedings against the person or persons intending to unlawfully sell such intoxicating liquors so then and there kept and deposited as aforesaid; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him and contriving and intending the citizens of this State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said fourteenth day of July, at said Portland, under color of his said office as a police officer as aforesaid, a certain sum of money, to wit, the sum of twenty-five dollars, for not endeavoring to ascertain the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and for not endeavoring to ascertain the person or persons intending to unlaw-

fully sell said intoxicating liquors so then and there kept and deposited as aforesaid, and for not instituting proceedings against the owner and keeper of said intoxicating liquors so then and there kept and deposited as aforesaid, and for not then and there instituting proceedings against the person or persons intending to unlawfully sell such intoxicating liquors so then and there kept and deposited as aforesaid, the said Dana H. Miles from one William H. Lord did unlawfully, unjustly and extorsively accept, receive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.

(Fifth Count) . . . that said Dana H. Miles afterwards, to wit, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and ninety-four, was an officer having power to serve criminal process within said Portland, to wit, a police officer of said Portland, duly and legally appointed and authorized to discharge the duties of that office; that by virtue of his authority as such police officer, he then and there seized in a certain tenement situated on the easterly side of Monument Square, so-called, in said Portland, certain intoxicating liquors, a more particular description of which said intoxicating liquors is to the grand jurors unknown, which said intoxicating liquors were then and there kept and deposited and intended for unlawful sale within said State by one Henry A. Harding, as he, the said Dana H. Miles, then and there well knew; that it was then and there the duty of said Dana H. Miles as such officer, to institute proceedings against said Henry A. Harding for having violated as aforesaid the laws relative to the illegal sale and the illegal keeping of intoxicating liquors; nevertheless, the said Dana H. Miles, not regarding the duties of his office as aforesaid, but perverting the trust reposed in him and contriving and intending the citizens of this State for the private gain of him, the said Dana H. Miles, to oppress and impoverish and the due execution of justice as much as in him lay to hinder, obstruct and destroy, on said twenty-seventh day of September, at said Portland, under color of his said office as a police officer as aforesaid, a certain sum of money, to wit, the sum of ten dollars, as a consideration for using his influence and endeavoring

in divers other ways to have such proceedings to be so instituted against said Henry A. Harding, dismissed, he, the said Dana H. Miles, from said Henry A. Harding, did unlawfully, unjustly and extorsively accept, receive and have, against the duties of his said office, to the great hindrance of justice and against the peace of said State.

Chas. A. True, County Attorney, for State.

Since the respondent is not a sheriff, deputy sheriff, coroner or constable, the case does not come within the provisions of R. S., c. 122, § 11, and the indictment is founded upon the common law.

Bribery: Am. & Eng. Enc. of Law, Vol. II. p. 530; 3 Greenl. Ev. § 71; 2 Bish. Cr. Law, § 25; *Watson* v. *State*, 39 Ohio St. 123; *State* v. *Ellis*, 33 N. J. L. 102, S. C. 97 Am. Dec. 707, and note; 2 Whar. Cr. Law, § 1572; *Walsh* v. *People*, 65 Ill. 58, S. C. 16 Am. Rep. 569; *People* v. *Markham*, 64 Cal. 157, S. C. 49 Am. Rep. 700; *Com.* v. *Lapham*, 156 Mass. 480.

Allegation of "corruptly" not necessary when the act is charged as done unlawfully, unjustly and extorsively. *State* v. *Jackson*, 73 Maine, 91.

Ardon W. Coombs, for defendant.

As to the receiver of the bribe the offense is not complete by mere acceptance. The money must be corruptly accepted; that is, he must promise the giver to do a corrupt act; must intend to keep that promise and must perform it.

The distinction between the giver and the receiver must be observed in setting out the offense in the indictment, which must allege all the material facts necessary to be proved to secure a conviction. *State* v. *Philbrick*, 31 Maine, 401.

If all the allegations of the indictment may be true, and yet constitute no offense, the indictment is insufficient. *State* v. *Godfrey*, 24 Maine, 232; *State* v. *Chapman*, 68 Maine, 477.

The indictment against the alleged bribe-taker should set out the corrupt action of the respondent, for which the bribe constituted the inducement, by certain and not indefinite averment and allegation.

In no count is it alleged that the money was accepted as a bribe to induce Miles to refrain from doing an official act.

The allegations should have been supplemented by further averments that the money was accepted as a bribe to induce the respondent to refrain from doing some specific act which it was his official duty to perform; or by averment of a promise by the respondent that he "would not arrest," "would not prosecute," "would use his influence," &c., and by further allegations that he "did not arrest," "did not prosecute," "did use his influence by doing specific acts set out and otherwise," etc.

In the first and second counts it does not appear what lottery scheme, or device of chance Murphy was concerned in. "A certain lottery," &c., is too indefinite, in an indictment. While the corrupt acceptance of a bribe, by the respondent, is the gist of the prosecution in the case under discussion, yet the facts must be alleged with all the certainty and formality that would be required in an indictment against Murphy for being concerned in a lottery.

The same argument applies to the third, fourth and fifth counts. The respondent is not informed by the indictment as to the place where liquors were deposited or seized.

In a certain tenement situated "on the northerly side of Fore street" (as in the third count), "on the northerly side of Federal street" (as in the fourth count), and "on the easterly side of Monument Square" (as in the fifth count), are all insufficient descriptions of the place. Such a description would not convey the premises, and would not confine a search to one building or place, and is therefore insufficient. *State* v. *Robinson*, 33 Maine, 564; *State* v. *Bartlett*, 47 Maine, 388.

There is no attempt to identify the place by giving the number of the street, or the name of the occupant of the tenement. There is no allegation that the location of the tenement was "to the grand jurors unknown." Indictment insufficient. *Com.* v. *Hall*, 15 Mass. 239.

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

FOSTER, J. This is an indictment at common law for bribery, and comes before this court on demurrer.

There are five counts in the indictment, and in each the respondent is alleged to have been a public officer of the city of Portland; and, under color of his office, to have unlawfully, unjustly and extorsively received bribes for neglecting and violating his official duties.

The demurrer being general and aimed at the indictment as a whole, if any one of the five counts is sufficient in law the demurrer cannot be sustained. Any one of the counts, if good, would be sufficient upon which to found a verdict, even though there may have been other counts in the same indictment that were defective. *State* v. *Burke*, 38 Maine, 574; *State* v. *Mayberry*, 48 Maine, 218; *Dexter Savings Bank* v. *Copeland*, 72 Maine, 220; *Commonwealth* v. *Hawkins*, 3 Gray, 463.

Bribery at common law is the crime of offering any undue reward or remuneration to any public officer, or other person intrusted with a public duty, with a view to influence his behavior in the discharge of his duty.

The taking as well as the offering or receiving of such reward constitutes the crime, when done with a corrupt intent. *State* v. *Ellis*, 33 N. J. L. 102 (97 Am. Dec. 707, and note).

In the case at bar the corrupt acceptance of the bribe is the gist of the offense. And this is sufficiently alleged. It matters not whether he actually carries out the corrupt agreement.

Thus, in the case of *People* v. *Markham*, 64 Cal. 157, (49 Am. Rep. 700) it was held that a police officer who received money in consideration of his promise not to arrest certain offenders was guilty of bribery; and it was not necessary to allege or prove that the crime was subsequently committed, and that the officer failed to make the arrest.

It is claimed that this indictment does not set out the corrupt action of the respondent, for which the bribe constituted the

inducement, by certain and definite allegations; and that the words "for not arresting," and kindred expressions in the several counts, do not amount to allegation, but leave the corrupt motive of the respondent to inference rather than averment. It is true, that in indictments the want of a direct and positive allegation, in the description of the substance, nature, or manner of the offense, cannot be supplied by any intendment, argument or implication, and that the charge must be laid positively and not by way of recital merely, (*State* v. *Paul*, 69 Maine, 215,) but in this case we think the indictment is not defective in the respect claimed. It is distinctly and affirmatively alleged that the bribes were received, and the alleged inducement or purpose for which these bribes were received is stated in the preposition clauses commencing with the words "for not arresting", etc. We think this is sufficient. The meaning is clear. The substantive part of the offense, accepting the bribes, is affirmatively alleged, and the purpose, object, or inducement is sufficiently set forth to meet the requirements of criminal pleading. It is as strongly asserted as it would be had the indictment stated that the money was accepted as a bribe to induce the respondent to refrain from doing an act which it was his official duty to perform.

It cannot be said that the allegations, as contained in the indictment, may all be true and yet no offense committed, as in *State* v. *Godfrey*, 24 Maine, 232.

The allegation in reference to the lottery, scheme or device of chance mentioned in the first and second counts in which the party to be arrested was concerned, is sufficient. The corrupt acceptance of a bribe by the respondent is the gist of this prosecution, rather than the facts necessary to be alleged for being unlawfully concerned in a lottery. *State* v. *Lang*, 63 Maine, 215, 219, 220.

The same reasoning applies to the remaining counts, and the demurrer was properly overruled.

Exceptions overruled.

ALBERT W. BROOKS *vs.* WILLIAM H. LIBBY.

Kennebec. Opinion April 24, 1896.

Nonsuit. Practice. Replevin. Possession.

Exceptions will lie to an order of nonsuit at the close of the plaintiff's evidence, in a case tried by the presiding justice of a court without a jury, subject to exceptions in matters of law.

Whether there is any evidence to support an action is a question of law; whether the evidence is sufficient is a question of fact.

Testimony by a plaintiff in replevin that he had "sold" the property before bringing suit does not necessarily imply that he had parted with the title and possession. Property is often said in popular language to be "sold," when it is only bargained.

ON EXCEPTIONS BY PLAINTIFF.

This was an action of replevin tried in the Superior Court, in Kennebec County by the presiding justice without the intervention of a jury, at the September term, 1895, subject to exceptions in matters of law. Plea, the general issue, with brief statement denying title in the plaintiff and alleging title or right of possession in the defendant William H. Libby, in his capacity of deputy sheriff. The subject matter of this suit was a lot of granite paving blocks taken in replevin by the plaintiff from the defendant, who had seized them on two executions issued upon judgments to enforce liens of laborers upon said paving blocks, prior to their coming to the possession (as claimed) of the plaintiff. The plaintiff claimed the title in the paving blocks, or the right to their possession under a bill of sale and delivery from one Daniel S. Young and another, who were employees of said lien claimants. After proving a seasonable demand upon the defendant, prior to the beginning of this suit by the plaintiff, and putting in the bill of sale, the plaintiff testified as follows, inter alia:

Q. In pursuance of that contract the blocks were sold and delivered to you? A. They were.

Q. And did you satisfy the lien claims mentioned in the contract? A. I did.

Q. Did you then sell the blocks and reimburse yourself, as provided by the contract? A. I did.

Q. Previous to this sale to reimburse yourself, whether or not the blocks were attached? A. I have no knowledge of it.

Q. When did you sell these blocks? A. I sold them sometime at the beginning of '95 to the city of Augusta, to the mayor.

Q. So that was after the attachment was put on and a taking back by this replevin suit? A. Yes sir. Sometime in January or February I made the arrangement to sell them to the city. I sold them to the city but did not get my pay for them.

Q. At the time of this sale had the liens of these paving cutters been put on, at the time of the sale to you? A. They had.

(Cross Examination.) The first I found out about these liens was when you (Mr. Fisher) came and told me, you or Libby, I forget which one told me first.

Q. And that was long after you had sold the blocks to the city? A. It was this spring after I had made the trade with the city for them.

Q. It was after you sold them? A. After I sold them, yes.

On this evidence a nonsuit being moved for by the defendant on the ground that the plaintiff's evidence failed to show that he had the title and possession or right to possession of the paving blocks at date of the writ, the judge sustained the motion and ordered a nonsuit accordingly. To this ruling of the court in ordering a nonsuit the plaintiff excepted.

J. Williamson, Jr., and L. A. Burleigh, for plaintiff.

E. W. Whitehouse and W. H. Fisher, for defendant.

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

EMERY, J. The first question is, whether exceptions lie to an order of nonsuit at the close of the plaintiff's evidence in a case tried by the presiding justice of a court without a jury subject to exceptions in matter of law. In making such an order the justice does not determine any disputed questions of fact, nor does he pass

upon the credibility of the witnesses, nor upon the weight of the evidence. He rules that there is no evidence to support the action. This is a ruling upon a question of law. Whether the evidence is sufficient is a question of fact. Whether there is any evidence is a question of law. *Emerson* v. *McNamara*, 41 Maine, 565; *York* v. *Jones*, 68 Maine, 343.

The second question is, whether in this case there is any evidence tending to show in the plaintiff title or right of possession in the blocks replevied. The plaintiff introduced a bill of sale of the blocks to himself from the maker of the blocks. This bill of sale was given prior to the action, and purported to transfer to the plaintiff the title to and possession of the blocks. This was certainly prima facia evidence of title or right of possession. The plaintiff, however, further testified that he "sold" the blocks before the date of his writ to the City of Augusta. He also said: "I made the arrangement to sell them to the city. I sold them to the city, but did not get my pay for them."

But it does not necessarily follow from this statement of the plaintiff that he had parted with both title and right of possession before suit. Property is often "sold" conditionally, the title or possession or both to remain with the vendor until the performance of the condition. Property is often said in popular language to be "sold" when it is only bargained. The testimony of the plaintiff taken in the whole is easily susceptible of this construction,—that he had bargained the blocks,—that he had arranged to sell them but had not yet transferred the title and right of possession.

If the justice shall find as matter of fact that the plaintiff had parted with his title and possession before suit, that finding cannot be reversed on exceptions; but by ordering a nonsuit he has ruled, as matter of law, that there is no evidence to sustain the plaintiff's claim. We think there is some evidence, and hence remit the case for the justice to pass upon its sufficiency.

Exceptions sustained.

INHABITANTS OF WELLINGTON *vs.* FORREST A. SMALL.

Piscataquis. Opinion April 24, 1896.

Pleading. Tax-suit. Declaration. R. S., c. 6, § 175.

In an action in the name of a town to recover taxes, it is a necessary averment that the selectmen directed in writing the action to be brought. Good pleading requires it to be alleged with time and place,—but the time and place need not be proved as alleged, and are not traversable facts. Their omission is matter of form, which can be taken advantage of on special, but not on general demurrer.

A declaration, *held*, otherwise sufficient.

York v. *Goodwin*, 67 Maine, 260, affirmed.

ON EXCEPTIONS BY DEFENDANT.

This was an action of debt to recover taxes due from the defendant to the town of Wellington for the years 1889, '90, '91, '92 and 1893. The declaration contained a separate count for the taxes of each year, and mutatis mutandis were the same. The first count is as follows:—". . . for that the said Forrest A. Small on the first day of April, A. D. 1889, at Wellington, was an inhabitant of said town of Wellington and liable to taxation therein, and then and there was the owner of personal property; and then and there Isaac Hutchins, Albert Allen, and John Pease were the duly elected and legally qualified assessors of said town of Wellington, and the said assessors did duly and legally assess upon the poll of the defendant, and upon the personal property of the defendant, as his proportion of the town taxes and the due proportion of the state and county taxes allotted to said town of Wellington for the year then current, the following sums, to wit: upon his poll the sum of one dollar and upon his personal property the sum of seven dollars and ninety-four cents, in all the sum of eight dollars and ninety-four cents. And the said assessors thereafterwards, to wit: on the 12th day of August, A. D. 1889, did make a perfect list thereof under their hands, and commit the same to John M. Small, who was then and there duly elected and qualified collector of the said town of Wellington with a warrant in due form of law,

of that date, under the hands of said assessors. And the plaintiff further avers that the payment of said tax has been duly demanded of said defendant by said collector prior to the commencement of this suit, and the municipal officers gave written directions to bring this action. Whereby, and by reason of the statute in such case made and provided, an action hath accrued to the plaintiffs to have and recover of said defendant the sum of twelve dollars and nineteen cents."

The defendant's general demurrer to the declaration having been overruled, he took exceptions.

H. Hudson, for plaintiff.

D. D. Stewart, for defendant.

Counsel argued: (1,) That the declaration should allege the whole amount of tax raised by the town, each year, as a town tax and that it was raised by vote at a meeting legally called and notified. (2,) It should allege the defendant's proportion of that amount. (3,) It should allege the amount of the state tax, and of the county tax, and the defendant's proportion of them. (4,) It should allege the whole amount of the defendant's proportion of the town, state and county taxes. (5,) That the assessment was made upon all the taxable inhabitants of the town including the defendant, each being assessed according to the just value of his property. (6,) That the assessors, naming them, were citizens of the town, elected at a meeting of the voters of the town, legally called and notified; and that said assessors were sworn previously to assessing the tax. (Dresden v. Goud, 75 Maine, 298, 299). (7,) That the whole of the taxes, thus assessed upon all the taxable inhabitants of the town, including the defendant, were committed to a collector, with the proper tax warrant; with a statement showing how the particular collector having such taxes was chosen and sworn, or otherwise authorized to act. (8,) That the selectmen of the town had in writing directed the collector to commence an action of debt in the name of the inhabitants of the town against the defendant; and that such direction was given prior to the commencement of the suit. *Orono* v. *Emery*, 86

Maine, 362; *Cape Elizabeth* v. *Boyd*, Id. 318, 319; *Gilmore* v. *Mathews*, 67 Maine, 519, 520.

Counsel also cited: *Blanchard* v. *Stearns*, 5 Met. 302; *Ladd* v. *Dickey*, 84 Maine, 194; *Bowler* v. *Brown*, Id. 378; *Lord* v. *Parker*, 83 Maine, 534; *Jordan* v. *Hopkins*, 85 Maine, 160.

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

STROUT, J. This is an action of debt to recover taxes assessed to the defendant, and comes before us on general demurrer to the declaration. It contains all the allegations that were in the writ in *York* v. *Goodwin*, 67 Maine, 260, which were held by this court to be sufficient. That decision was approved in *Vassalboro* v. *Smart*, 70 Maine, 305.

Since those decisions, an amendment of the statute provides that the mayor and treasurer of cities, or the selectmen of any town, or assessors of any plantation, to which a tax is due, "may, in writing, direct an action of debt to be commenced in the name of such city, or of the inhabitants of such town or plantation, against the party liable." Under this statute, it has been held by this court that no action can be commenced or maintained in the name of the town to recover taxes, unless its commencement is directed in writing by some one of the boards named in the statute. *Cape Elizabeth* v. *Boyd*, 86 Maine, 318.

Such written direction being necessary to the maintenance of the action, it must be alleged in the writ. It is a traversable fact, and is put in issue under the plea of the general issue. *Orono* v. *Emery*, 86 Maine, 366. Good pleading requires that it should be alleged with time and place, *Platt* v. *Jones*, 59 Maine, 240; but time and place need not be proved as alleged, and are not traversable facts, in any case, except in those where they are essential elements in the cause of action. *Moore* v. *Lothrop*, 75 Maine, 302. They are not such elements in this case, and need not be proved as alleged, and therefore are not traversable facts, but are matters of form. Advantage can be taken of their omission on *special* but not

on *general* demurrer. Each count in this declaration contains the allegation that "the municipal officers gave written directions to bring this action," but no time or place is alleged. The term municipal officers includes the selectmen. There is enough in the declaration to make it apparent that it was the municipal officers of plaintiff town, by whom the direction was given, and that it was after the assessment of the taxes, and before suit brought.

The statute of 4 Anne, c. 16, which may be regarded as part of our common law, provided "that in all cases where any demurrer shall be joined, etc., the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission or defect in any writ, etc., declaration or other pleading, etc., except those only which the party demurring shall specially and particularly set down and express as cause of demurrer; notwithstanding that such imperfection, omission or defect, might theretofore have been taken for matter of substance. . . , . . So as sufficient matter appear in the said pleadings upon which the court may give judgment according to the very right of the cause." Under this statute it was held in *Bowdell* v. *Parsons*, 10 East, 359, that when a request to the defendant to do an act was necessary to be alleged to give the plaintiff a cause of action, and it was alleged, without time or place (there being a general venue laid in the preceding part of the declaration), the omission of time and place was matter of form, and was available only on special demurrer.

In *Briggs* v. *Nantucket Bank*, 5 Mass. 97, the court say "the venue at common law regulates the process of summoning a jury, who anciently were always returned from the vicinage; but in this commonwealth venues are of no use. In the early days of our law they were not averred. We hold a declaration without a venue or with a wrong one, as bad in form when specially demurred to for this cause." See also *Parlin* v. *Macomber*, 5 Maine, 415; 1 Saunders, 337 b, note 3.

It has been uniformly held in this State, that a definite time and place must be stated in the declaration, as pertaining to the venue, and that their total absence may be taken advantage of on general

demurrer. *Shorey* v. *Chandler*, 80 Maine, 411. In this case, as in *Cole* v. *Babcock*, 78 Maine, 41, no definite time was anywhere alleged. But in the case at bar, each count contains in its commencement an allegation of a definite time and place, and also a definite time of the commitment to the collector, which by relation might be sufficient for the succeeding allegation of the written direction of the selectmen. An additional allegation of the time and place of the selectmen's act is little more than a repetition, and at best is only a matter of form rather than of substance.

The only defect in this declaration is the omission to allege a time and place when and where the selectmen gave written direction to bring the suit (time and place having been properly stated in the beginning of each count). Such omission is matter of form only, and cannot be taken advantage of on general demurrer. The entry must be,

Exceptions overruled.
Demurrer overruled.

FLAVILLA WILLIAMS

vs.

THE MAINE STATE RELIEF ASSOCIATION.

Androscoggin. Opinion April 25, 1896.

Insurance. Benefit Associations. Assessments. Waiver. Agent.

In an action brought by the beneficiary under a benefit certificate issued by a mutual benefit association, the promise to pay was conditioned upon the member being in good standing in the association at the time of his death. The defense set up that he was not in good standing at that time; and it was *held*: That such defense had been waived.

Where assessments have been levied and paid subsequent to those unpaid, and upon which a forfeiture might have been claimed, such subsequent assessments and acceptance of money paid upon them, constitute a waiver of such right to avoid a certificate for delay of payment.

An unconditional acceptance upon assessments is a waiver of all former known grounds of forfeiture.

Although an agent has no authority to bind the company by receiving payment of a premium after it is due, the company may waive it at any time. If the

company receives it from their agent after it has become due, it will be held to have known when it had been paid to such agent, and, by receiving it from him without inquiry, to have waived the right to insist on delay of payment as a ground of forfeiture of the policy.

A waiver may be inferred from circumstances which show that the parties understood the payment of a premium when due would not be required, or a forfeiture claimed.

Agents, in order to bind the company, whether it be a mutual benefit or stock company, must have authority to waive a compliance with the conditions upon a breach of which a forfeiture is claimed, or to waive the forfeiture when once incurred, or their acts in waiving such compliance or forfeiture must be shown to have been subsequently ratified or approved by the company.

Such ratification or approval may be properly inferred when it is shown that the over due premiums paid to them have been turned over to, and received and retained by, the company.

AGREED STATEMENT.

The case is stated in the opinion.

F. L. Noble and R. W. Crockett, for plaintiff.

S. L. Larrabee and E. C. Reynolds, for defendant.

The non-payment by Williams of assessments Nos. 90 and 91 on or before September 15th, 1893, did not simply operate a mere suspension or temporary cessation of his interest, but per se, without any affirmative act or proclamation by the defendant corporation, worked an absolute forfeit of any benefit to be derived from the association. *Richards* v. *Maine Benefit Asso.* 85 Maine, 101.

Under a law of a mutual benefit society, which makes the non-payment of assessments for a given period of time after notice, operate as an expulsion, ipso facto, of the delinquent member, and a forfeiture of his rights in the benefit fund, it is not necessary that the expulsion and forfeiture should be judicially determined by any judicatory of the society. *McDonald* v. *Ross-Lewin*, 29 Hun, (N. Y.) 87.

Where the laws of a society provide that, if a member neglects or refuses to pay an assessment within a specified time, he shall cease to be a member, and the secretary shall strike his name from the roll, such laws are self-executing, and the member so omitting to pay loses his right as a member, although the secretary does not

strike his name from the roll. *Rood* v. *Railway Passenger, etc., Ben. Ass'n*, 31 Fed. Rep. 62.

Having forfeited all his rights of benefits and his membership in the defendant association, Williams could be re-instated and re-admitted to membership in the association only by a compliance on his part with the conditions of Article XII of the By-Laws. Williams never invoked any of the proceedings required for re-instatement. His membership was subject to the operation and effect of the by-laws of the association. Niblack on Mutual Benefit Societies, p. 344, § 325.

No action was taken nor could be taken by the association in respect to Williams' membership, but after waiting a reasonable time for his application for re-instatement and proof of "sound health," the money paid by Williams was returned. But even if the money had been retained by the secretary, that would not have entitled Williams to have claimed to be re-instated to the rights and benefits of a member of the association. The secretary had no power to admit Williams a member thereby making a contract of insurance with him. *Swett* v. *Relief Society*, 78 Maine, 545; *Burbank* v. *Boston Police Relief Ass'n*, 144 Mass. 437; Niblack on Mutual Benefit Societies, p. 364, § 348.

Where, under the laws of a benefit society, the only way in which a member not in good standing can be re-instated is by obtaining a new medical certificate and a majority vote, payment of assessments, after suspension, to the financial secretary or to the supreme treasurer, do not constitute a re-instatement, as those officers have no authority to waive its laws. *Lyon* v. *Supreme Assembly*, etc., 153 Mass. 83.

Waiver: After a policy has been forfeited it cannot be renewed except by express agreement. A waiver never occurs unless intended, or unless the act relied on ought in equity to estop the party from denying it. *Diehl* v. *Mutual Ins. Co.*, 58 Pa. St. 443; see *Leonard* v. *Lebanon Mutual, etc.* 3 Weekly Notes of Cases, 327.

A waiver of a right pre-supposes a knowledge of the right waived, and is not to be inferred from a merely negligent act, or from one

done under a misapprehension of the real condition of the rights of the parties at the time. *Miller* v. *Union Central, etc.*, 110 Ill. 102; *Robertson* v. *Metropolitan, etc., Co.*, 88 N. Y. 54.

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

FOSTER, J. This is an action to recover the amount of $1500 alleged to be due the plaintiff as the beneficiary under a benefit certificate issued by the defendant, a mutual benefit association, to her husband, Eugene Williams, deceased.

The promise to pay the plaintiff is conditioned upon the member being in good standing in the association at the time of his death. The defense is, that he was not in good standing at that time. The reply is, that the defendant has waived that defense.

It appears that on July 15, 1893, two assessments, numbered 90 and 91, were laid on the members of the association, which were due and payable August 15, 1893, and upon the failure of the assured to pay the same on or before September 15, 1893, his membership would be forfeited in accordance with the by-laws of the association; that the insured did not pay the assessments on or before September 15, 1893, although due notice thereof was sent to him by mail; and it is claimed on behalf of the defendant that the assessments not being paid on or before said 15th day of September, a second notice was duly and seasonably mailed to the insured, but the reception of this is denied by the plaintiff. On September 1, 1893, two other assessments, numbered 92 and 93, were laid upon the insured which were due and payable October 1, 1893, of which he had due notice. On October 16th, 1893, assessments numbered 94 and 95 were also laid upon the insured payable November 15, 1893, and a regular notice thereof mailed to him on October 19th, by the secretary of the association.

The secretary would testify, as the agreed statement sets forth, that this last notice was sent to the insured unintentionally and by mistake.

The insured paid assessments numbered 90, 91, 92 and 93, on

October 24, 1893, to the assistant secretary of the association, at Lewiston, and the money thus received was by him sent to the secretary at Portland, on the same day, and, so far as appears from any evidence in the case, went into the hands of the defendant association, and was retained unconditionally till returned to the assistant secretary by the secretary immediately after the death of the insured, which occurred November 10, 1893.

The by-laws show that it was the duty of the secretary to pay to the treasurer of the association on the 1st and 15th of each month all moneys collected, taking his receipt therefor. As the money paid on these assessments was not returned to the assistant secretary till after the death of the insured, it is presumed to have come into the defendant's possession on the first day of November, for the law presumes that every man in his official character does his duty until the contrary is shown.

The matter of re-instatement of the insured was never laid before or considered by the executive board.

Assuming that the payment of the assessments on October 24, 1893, was too late to meet the requirement of the by-laws of the association, the question remains, whether the defendant, by the subsequent assessment of October 16, 1893, the reception and retention of the money paid upon the other assessments with no notice of any objection brought home to the assured, waived the conditions of forfeiture and its right to avoid the certificate of insurance on that ground.

We think it did.

Even where assessments have been levied and paid subsequent to those unpaid, and upon which a forfeiture might have been claimed, it has been held that such subsequent assessments and acceptance of money paid upon them, constituted a waiver of such right to avoid a certificate for delay of payment. *Rice* v. *New England Mutual Aid Society*, 146 Mass. 248.

In that case the court say: "Suppose the payment of the former assessment had never been made at all, and the company, without insisting upon the non-payment as a ground of forfeiture, had levied new assessments upon the assured, which were all duly

paid and accepted without condition; could it be contended that there was no waiver? An unconditional acceptance upon assessment waives all former known grounds of forfeiture, and this effect is not varied or limited because an acceptance of a former assessment had been on condition, and had not amounted to such waiver."

This principle has oftentimes been applied in cases of similar character where a forfeiture has been sought on the part of the insurer against the insured. It was applied in *Hodsdon* v. *Guardian Life Insurance Co.*, 97 Mass. 144, where it was held that, although an agent of the company had no authority to bind it by receiving payment of a premium after it was due, the company might waive it at any time; and if the company received it from their agent after it was due, it was bound to inform itself of the time when it had been paid to him, and that by receiving it from him without inquiry, it waived the right to insist on delay of payment as a ground of forfeiture of the policy.

So in *Insurance Co.* v. *Wolff*, 95 U. S. 326, where forfeiture was set up for non-payment of the premium at the time it became due, but which was subsequently paid to an agent of the company and a receipt delivered for the same. There, the premium was tendered back after the death of the insured and the receipt demanded. But the court held that the company, by the receipt of the premium, waived the forfeiture for non-payment at the stipulated time.

And in *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S. 183, the court held that the acceptance by insurers of payment of a premium, after they know that there has been a breach of a condition of the policy, is a waiver of the right to avoid the policy for that breach. "To hold otherwise," say the court, "would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens."

This principle is too firmly established to be questioned, and the authorities are numerous where this doctrine has been applied, and

such is the current of modern decisions. Among the cases where this rule has been applied, in addition to the foregoing, are the following, as a few of the more important ones. *Bouton* v. *American Ins. Co.*, 25 Conn. 542; *Bevin* v. *Conn. Ins. Co.*, 23 Conn. 244; *Viele* v. *Germania Ins. Co.*, 26 Iowa, 9; *Ins. Co.* v. *Stockbower*, 26 Penn. St. 199; *Frost* v. *Saratoga Ins. Co.*, 5 Denio, 154, (49 Am. Dec. 234); *Wing* v. *Harvey*, 5 DeG., M. & G. (Eng. Chanc.), 265, 270; *Shea* v. *Mass. Benefit Asso.*, 160 Mass. 289, 294; *Rice* v. *New England Mutual Aid Soc.*, 146 Mass. 248; *Ins. Co.* v. *Norton*, 96 U. S. 234; *Appleton* v. *Phœnix Mutual Life Ins. Co.*, 59 N. H. 541.

In *Shea* v. *Mass. Benefit Asso.*, supra, where the defense set up forfeiture for non-payment within the stipulated time, the court held that where the company receives and retains the money but seeks to make its acceptance conditional, it must see to it that notice to that effect is actually brought home to the insured, and that the acceptance of money under an assessment after the expiration of the time of payment constitutes a waiver of all objection growing out of the delay.

The conditions of forfeiture contained in the contract of insurance are for the benefit of the association, and, of course, can be waived by it either before or after they are broken. Being inserted for its benefit, it lies with the association to say whether or not they shall be enforced or waived. Forfeitures are not favored in law, for, as was said in *Ins. Co.* v. *Norton*, 96 U. S. 234, 242, "they are often the means of great oppression and injustice."

It is true that in life insurance, time of payment is, as a general rule, material, and cannot be extended by courts against the assent of the company. But it is equally true that where such assent is given, or where it may be inferred from the acts and conduct of the parties to the contract, courts are liberal in construing the transaction in favor of avoiding a forfeiture. *Leslie* v. *Knickerbocker Life Ins. Co.*, 63 N. Y. 27; *Helme* v. *Phila. Life Ins. Co.*, 61 Pa. St. 107. And while a waiver is the intentional relinquishment of a known right, it may be inferred from any circumstances which show that the parties understood the payment of a premium when

due would not be required, or a forfeiture claimed. *Currier* v. *Continental Life Ins Co.*, 53 N. H. 538, 549, 552; *Pierce* v. *Nashua Fire Ins. Co.*, 50 N. H. 297; *Heaton* v. *Manhattan Fire Ins. Co.*, 7 R. I. 502; *North Berwick Co.* v. *New England F. & M. Ins. Co.*, 52 Maine, 336, 340; *Ins. Co.* v. *Wolff*, 95 U. S. 326, 330.

But it is claimed in defense that the payment of the assessments to the assistant secretary was unauthorized, he having no authority to bind the association by the receipt of money upon assessments unless the same was paid within the time limited for their payment.

This would undoubtedly be true were it not for the fact that the money thus paid to him was immediately forwarded to the secretary of the association whose duty it was to turn the money over to the treasurer at the beginning and middle of each month. It was paid to the man whose duty it was to receive it in the due course of business. No notice was ever brought home to the assured by the association or any of its officers that it was not properly paid. Notwithstanding the case shows that the money was returned to the assistant secretary immediately after the death of the insured, the assistant secretary claims it was not thus returned till three months after his death. From the evidence, and the presumption of law that those acting officially do their duty, till the contrary is proved, it would appear that the money was in the hands of the treasurer at the death of the insured. If in the treasurer's hands it was received by the association. *Swett* v. *Citizens Mut. Relief Society*, 78 Maine, 541. In this particular the case at bar is to be distinguished from the case of *Lyon* v. *Royal Society of Good Fellows*, 153 Mass. 83, cited by counsel for defense. In that case the money never went into the possession of the company, or its treasurer.

The difficulty, where a waiver is alleged, in the absence of written proof of the fact, generally arises from the effect to be given to the acts of agents in their dealings with the assured. Undoubtedly such agents, if they bind the company, whether it be a mutual benefit or stock company, must have authority to waive a

compliance with the conditions upon a breach of which a forfeiture is claimed, or to waive the forfeiture when once incurred, or their acts and dealings in waiving such compliance or forfeiture must be subsequently ratified or approved by the company. *Swett* v. *Citizens Mutual Relief Soc.*, supra. It is upon this latter ground that many of the decisions have turned when the question of waiver of compliance or of forfeiture has come before the courts. The law of agency, to be sure, is the same, whether applied to the act of the agent in undertaking to continue the insurance, or to any other act for which the principal is sought to be held responsible.

The rule that no one shall be permitted to deny that he intended the natural consequences of his acts, which have induced others to act upon them, is as applicable to insurance companies as to individuals.

If applied to the case at bar, this principle will serve to solve the question presented. The association, notwithstanding the assistant secretary was not authorized to waive a compliance with the conditions annexed to the contract of insurance, received from their agents the money paid by the assured upon assessments levied upon him. It was not received upon any conditions accompanying such acceptance, as in the case of *Shea* v. *Mass. Benefit Assoc.*, supra. Nor was it ever returned to the assured, nor was there any notice of objection to its payment, acceptance or retention ever given to the assured. From anything that appears in the case, it still remains in the hands of the association or its agents.

The analogy between the case under consideration and that of *Rice* v. *New England Mutual Aid Soc.*, 146 Mass, 248, is very striking. In that case, as in this, the defendant was a mutual insurance company. There was default of payment of premiums when due, and subsequent assessment by the company, as in this, and payment made and received after such default. There was no determination by the company that the certificate for the time being should be considered or treated as not in force or suspended; and in making the subsequent assessments there was no act of the company manifesting intention to exclude the assured; nor was

there any condition annexed to the assessments subsequently made, or to the acceptance of the payment of them by the assured. And there, as in other cases to which we have referred, the company was held to have waived its right to insist upon a forfeiture of the certificate upon the ground that the subsequent assessments and acceptance of the money paid upon them, constituted such waiver.

The language of the court in the case of *Ins. Co.* v. *Wolff*, 95 U. S. 326, 330, may well be applied to the case at bar. "If, therefore," say the court, "the conduct of the company in its dealings with the assured in this case . . . . has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow."

As the case is before this court on an agreed statement of facts, the exceptions having been waived, the entry should be,

Judgment for plaintiff.

HARRIET WENTWORTH, in equity,

vs.

OSCAR SHIBLES, and another.

Waldo. Opinion April 28, 1896.

Trusts. Deed. Gifts Causa Mortis. R. S., c. 73, § 11.

It is provided by statute that "there can be no trust concerning lands, except trusts arising by implication of law, unless created or declared by some writing signed by the party or his attorney." R. S., c. 73, § 11.

Oral evidence is undoubtedly admissible to establish a fact from which a trust may arise by implication of law, such as the payment of the consideration by

one for land conveyed to another; but in the absence of any allegations of fraud or of facts which would constitute an equitable estoppel, such evidence cannot be received to prove any declarations of a trust, without violating the explicit provisions of the statute.

Declarations of the grantee that he holds the property in trust are not sufficient to show a trust estate.

Neither can a gift of real estate be sustained as a donatio causa mortis, for that only extends to the personalty.

An absolute conveyance of real estate cannot be thus safely employed to accomplish the purpose of a last will and testament. Such a doctrine would be destructive of all certainty and security respecting titles to landed property.

In this case the deed of warranty from the plaintiff to her daughter was absolute on its face, containing no allusion to any trust or defeasance.

It was not alleged or suggested that any trust was subsequently created or declared by any writing signed by the party. It was not claimed that any trust resulted from the transaction by implication of law. *Held;* that the testimony reported tends to prove an oral agreement to reconvey the property, if the grantor recovered, that is void under the statutes of this State.

ON REPORT.

The case appears in the opinion.

R. F. Dunton, for plaintiff.

W. H. McLellan, for defendants.

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

WHITEHOUSE, J. This is a bill in equity asking the court to declare that the defendants hold certain real estate in trust for the plaintiff, and to decree that it be conveyed to her. The cause is reported for the determination of the law court.

The property in question, comprising a dwelling-house and lot, was conveyed to the plaintiff and her daughter, Hortense Shibles, January 21, 1891, in consideration of sixteen hundred dollars, of which the plaintiff paid $1050 and the daughter $550. Subsequently, May 19, 1893, the plaintiff gave to this daughter a deed of warranty of the entire property. At the decease of the daughter and her minor son the following year, these defendants succeeded by heirship to her rights in the property.

Respecting this conveyance to her daughter, the allegation in the plaintiff's bill is as follows: "On the nineteenth day of May, A. D. 1893, the plaintiff being very sick and expecting to live but a very short time, conveyed her interest in said real estate to her daughter, the said Hortense Shibles, without any consideration therefor, with the understanding between her and the said Hortense Shibles that said deed was made in order that said Hortense Shibles might have the whole of said real estate at the decease of the plaintiff; and that if the plaintiff recovered and wanted her interest in said real estate back she, the said Hortense Shibles, would reconvey it to her."

With respect to the original purchase of the property by the plaintiff and her daughter, in 1891, there is no allegation in the bill of a resulting trust in favor of the plaintiff arising from the payment by her of more than one-half of the purchase money; but it is claimed in argument that her "equitable ownership" would be in proportion to the amount paid by her. The plaintiff also prays in the bill "that it may be decreed by this court that the defendants now hold twenty-one undivided thirty-seconds of said real estate in trust for her," and "that defendants may be ordered to convey to plaintiff her said interest in said real estate."

It is a familiar principle in equity that the beneficial estate attaches to the party from whom the consideration comes. Hence when property is purchased and the conveyance of the legal title is taken in the name of one person, and the purchase money is paid by another, generally a resulting trust will be presumed in favor of the party who pays the price; and the holder of the legal title becomes a trustee for him. But this presumption exists "only when the transaction is between strangers where there is neither legal nor moral obligation for the purchaser to pay the consideration for another. The rule is reversed in its application between husband and wife, and also between father and child. As between such parties, the presumption is, that the payment, by husband or father, for property conveyed to wife or child, is an advancement or gift." *Lane* v. *Lane*, 80 Maine, 578; *Stevens* v. *Stevens*, 70 Maine, 92. And the same rule applies to a mother who purchases

property in the name of her child, or in the joint names of herself and child, and pays the price with her own separate funds; there is no presumption of resulting trust. 2 Pom. Eq. § 1039.

But it is immaterial in this case whether the plaintiff, as a result of the original purchase in 1891, became the legal or equitable owner of twenty-one thirty-seconds, or only one-half of the property; for it is not in controversy that she conveyed to her daughter her entire interest in it by her absolute deed of warranty of May 19, 1893; and it is the opinion of the court that the report discloses no evidence which would warrant the conclusion that these defendants now hold any part of it in trust for the plaintiff.

It is provided in section eleven of chapter seventy-three of the Revised Statutes that "there can be no trust concerning lands, except trusts arising by implication of law, unless created or declared by some writing signed by the party or his attorney."

It is conceded that the deed of warranty from the plaintiff to her daughter, in 1893, was in the common form, absolute on its face, and containing no allusion whatever to any trust or defeasance. It is not alleged or suggested that any trust was subsequently created or declared by any writing signed either by Hortense Shibles or these defendants. It is not claimed that any trust resulted from the transaction by implication of law. But it is alleged that there was an "understanding" that if the plaintiff recovered and wanted her interest back, the daughter would reconvey it to her; and it appears from the report that testimony was received tending to prove such an oral agreement between the plaintiff and her daughter.

This is clearly an attempt to establish a "trust concerning real estate" in contravention of the express terms of the statute. The testimony was not admissible for such a purpose.

Oral evidence is undoubtedly admissible to establish a fact from which a trust may arise by implication of law, such as the payment of the consideration by one for land conveyed to another; but in the absence of any allegations of fraud or of facts which would constitute an equitable estoppel, such evidence cannot be received to prove any declarations of a trust, without violating the explicit

provisions of the statute. *Gerry* v. *Stimson*, 60 Maine, 186; *Moore* v. *Moore*, 38 N. H. 382. Declarations of the grantee that he holds the property in trust are not sufficient to show a trust estate. *Graves* v. *Graves*, 29 N. H. 142; *Farrington* v. *Barr*, 36 N. H. 86. As said by the court in *Flint* v. *Sheldon*, 13 Mass. 448: "The evidence would only tend to prove that the conveyance was made in trust, that the grantee should reconvey the land to the grantor on the performance of a certain condition on his part. But such trusts by the express provisions of our statute, must be manifested and proved by some writing signed by the party. . . . . If testimony of this kind were admissible, there would be no security in any conveyance that could be made. Though the conveyance were perfectly fair and legal, and accompanied with all the usual solemnities, still the grantor might always defeat it by procuring evidence of a condition or trust not apparent upon the deed." See also *Taylor* v. *Sayles*, 57 N. H. 465.

But the learned counsel for the plaintiff also suggests that as the conveyance to the daughter was made during the serious illness of the plaintiff, and in expectation of her death, it should be treated as a donatio causa mortis, and in view of the plaintiff's recovery be now declared null and void. It is apparent, however, that he has but little confidence in this suggestion, as the principal part of his argument is in support of the proposition that there was "a valid oral contract to reconvey," and he cites *Meach* v. *Meach*, 24 Vt. 591, in which Redfield C. J. says: "A gift of real estate cannot be sustained as a donatio causa mortis, for that only extends to the personalty."

For reasons too obvious to require further explanation, an absolute conveyance of real estate cannot be thus safely employed to accomplish the purpose of a last will and testament. Such a doctrine would be destructive of all certainty and security respecting titles to landed property.

Bill dismissed.

ANTHONY PLUREDE *vs.* RICHARD LEVASSEUR, and Logs.

Aroostook. Opinion April 28, 1896.

Lien. Logs. Non-Resident Debtor. Jurisdiction. Notice. R. S., c. 81, § 21; c. 91, §§ 34, 38, 39, 42, 45. Stat. 1862, c. 131.

The statute of this State, providing for bringing actions to enforce a lien by attachment on logs in favor of a laborer, is without qualification or limitation.

Such lien may be thus enforced without regard to the ownership of the logs or the residence of the debtor.

The plaintiff performed labor on logs in this State for the defendant, a non-resident, who was under the employment of a contractor but not owner of the logs. Notice by publication under the statute was ordered and duly given to the defendant, to the owners of the logs and all parties interested. The defendant did not appear but made default. The owners of the logs attached appeared and were admitted as parties to the suit, and contended that no valid judgment could be rendered against the property attached, and that the action could not be maintained for want of proper service upon the principal defendant. The court ruled that the action could be maintained upon proof of the plaintiff's lien as required by statute.

Held; that jurisdiction over the debtor, as well as over the owner of the logs attached, is not indispensable to a valid judgment against the property.

To hold that, in such a case, the lien cannot be enforced by an attachment of the logs, with substituted service by publication, unless there was an attachment of some property belonging to the defendant, or jurisdiction of the person of the defendant, would render the statute ineffectual and nugatory in the very cases in which the lien is most required, and to which it must also have been designed to apply.

EXCEPTIONS BY DEFENDANTS.

The case appears in the opinion.

F. A. Powers and D. H. Powers, for plaintiff.

B. L. Smith, for log owners.

In a suit against a foreign defendant in personam and in rem against the lumber attached, in order to maintain the action or get a valid judgment against either, the defendant should appear in court, or be legally and properly summoned to appear in court, and the owners of the lumber attached should be properly and legally notified. In other words, the court should have jurisdiction over both.

This contention is sustained by practice and precedent ever since the earliest statute was enacted, giving the lien. Other methods are provided for enforcing other kinds of liens, but the method always adopted in proceedings to enforce liens on logs and lumber, under the statute, has been by suit against the operator, the employer, and an attachment of the lumber upon which the labor was performed. No case can be found where a log-lien judgment has been rendered, unless the court had jurisdiction over the defendant in the suit.

The authorities throw very little light upon the question here involved, but the judgment of the court in *Parks* v. *Crockett*, 61 Maine, 489, would seem strongly to indicate that the defendant must be in court or summoned into court, as a condition precedent to the entry of final judgment. There the judgment was to be "final unless the sum is reduced, or the action defeated upon an issue between the plaintiff and the defendant." This would seem to indicate the necessity of an adjudication of the rights of plaintiff and defendant either by hearing or default of defendant,—of course after he was duly summoned into court.

The statute seems to indicate throughout that a defendant must be legally in court. R. S., c. 91. Section 38 provides for apportioning costs; § 42 for summoning in the administrator of the employer, or debtor, if deceased; § 45 provides for a judgment against the defendant.

It is true, that judgment may be issued against either, provided both are in court, and justice requires it; but nowhere is there any provision for entering judgment against the lumber unless there is a defendant in court, or one legally summoned into court. The provisions for issuing separate execution against defendant for excess above amount protected by lien, and for the apportionment of costs and discontinuance as to any defendant, are all upon the assumption that there must be a defendant, or defendants, in court.

The defendant was not in court, nor legally summoned into court. There was no personal service on him. R. S., c. 82, § 21.

In order to justify the court in ordering notice by publication,

two things must appear: the necessary failure to get personal service, and an attachment of his goods or estate. The court must be satisfied of these facts.

But whether or not it should appear that the defendant is not within the officer's precinct, it should appear of record, by the notice published or otherwise, that he had no tenant, agent, or attorney within the state. That is, it should appear that the court so found. In this case it does not appear in the notice or elsewhere.

There was no adjudication upon any of the matters upon which the court must be satisfied before issuing the statute order of notice to defendant.

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

WHITEHOUSE, J. This is an action of assumpsit brought under the statute to enforce a lien for the plaintiff's personal services on certain railroad ties and cedar logs attached on the writ. The plaintiff did not perform the labor by virtue of a contract with the owner of the ties and logs, but while in the employment of the defendant, who was in charge of the undertaking as a contractor.

It is provided by section thirty-eight of chapter ninety-one R. S., that: "whoever labors at cutting, hauling, rafting or driving logs or lumber, ... has a lien thereon for the amount due for his personal services, and the services performed by his team, which takes precedence of all other claims, except liens reserved to the state; continues for sixty days after the logs or lumber arrive at the place of destination for sale or manufacture, and may be enforced by attachment;" and by section thirty-nine that "such notice of the suit as the court orders, shall be given to the owner of the logs or lumber, and he may be admitted to defend it." Section forty-four of the same chapter is as follows: "In all lien actions, when the labor or materials were not furnished by a contract with the owner of the property affected, such owner may voluntarily appear and become a party to the suit. If he does not

so appear, such notice of the suit as the court orders, shall be given him, and he shall then become a party to the suit."

It is further provided in section forty-five that, "in any such action, judgment may be rendered against the defendant and the property covered by the lien, *or against either*, for so much as is found due by virtue of the lien."

In this case the defendant is represented in the writ to be "of St. Francis, in the Province of New Brunswick," and it was ordered by the court that notice be given by publication "to said defendant and the owners of said railroad ties, logs and lumber and all parties interested."

In pursuance of this notice, which is conceded to have been duly published, the owners of the logs and lumber attached on the writ, appeared by counsel and were admitted as parties and permitted to defend the suit. The principal defendant did not appear, but made default. In behalf of the owners it was contended that no valid judgment could be rendered against the property attached, and that the action could not be maintained for want of proper service upon the principal defendant; but the court ruled that the action could be maintained upon proof of the plaintiff's lien as required by statute. The jury found that the plaintiff had a lien on the property attached for the sum of $59.50, and the case comes to this court on exceptions to this ruling of the presiding justice.

It is the opinion of the court that the ruling was correct.

The defendant was an alien, and no personal service was ever made upon him within the limits of this state. Process sent to him out of the state, and process published within it were equally unavailing for the purpose of establishing any personal liability on the part of the defendant. *Pennoyer* v. *Neff*, 95 U. S. 715. It is not claimed, therefore, that the plaintiff is entitled to judgment against the person of the debtor, but only to judgment against the property attached.

It is urged in behalf of the owners, however, that the court has no power to render a judgment against either, unless the debtor, who is the original defendant in the suit, appears in court or is legally notified to appear, and the owners of the property attached

are also properly and legally notified. In other words, the argument of the counsel for the general owners is, that jurisdiction over the debtor as well as over the owner of the property is indispensable to a valid judgment against the property.

It is clear that this contention is not sustainable. Such a doctrine would defeat the very purpose of all the legislative enactments on this subject since 1848, and be opposed to the whole tenor of judicial opinion in regard to it, not only in this State, but in other jurisdictions having similar statutes. Prior to the statute of 1848, confiding laborers who had no contract relations with the owners of the logs, were frequently defrauded of their hard-earned wages by unscrupulous operators by whom they were employed, and the legislature felt impelled to extend some protection against the wrongs thus practiced upon a deserving class by irresponsible contractors. This remedial legislation was evidently based on the theory that the labor should be deemed to have been performed on the credit of the logs, regardless of their ownership; and the later enactment, requiring notice to be given to the owners of the logs, was obviously designed to render the practical operation of the principle just to the owner as well as to the laborer. Thus the owners would not only make their contracts with full knowledge that the lumber was charged with a lien in favor of the laborer for services which greatly enhanced its value, and be enabled to protect themselves by requiring security from the operator if they saw fit; but by having an opportunity to contest the validity of the lien claimed and the amount due, they would also be enabled to protect themselves against any injustice which might result from collusion between the contractor and the laborer. *Spofford* v. *True*, 33 Maine, 291; *Redington* v. *Frye*, 43 Maine, 578; *Oliver* v. *Woodman*, 66 Maine, 54; *Reilly* v. *Stephenson*, 62 Mich. 509; *Streeter* v. *McMillan*, 74 Mich. 123; Phillips Mech. Liens, §§ 320–321.

The provisions of the statute respecting the enforcement of the lien are in harmony with the elementary principle that the lex rei sitae attaches to movables as well as to immovables, and that the state has absolute dominion over all property within its borders, no matter where the owner is domiciled. Wharton on Confl. of Laws,

§§ 310–771. "The first jurisdictional inquiry is whether the court has authority over the subject matter; and second, whether it had authority over the parties. A judgment in rem binds the res in the absence of any personal notice to the parties interested. Therefore, in a large number of cases involving the effect of a judgment in rem, no inquiry in regard to jurisdiction over the parties is material." Freeman on Judgts. § 611, and cases cited. So in *Pennoyer* v. *Neff*, 95 U. S. supra, the court say: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of the proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act. Such service may be sufficient for the purpose of enforcing a lien upon it." In such a case, however, the judgment must be substantially a judgment in rem, good only against the particular property attached, and of no effect as to the person of the defendant, or as to other property. *Boswell's Lessee* v. *Otis*, 9 How. 336; *Eastman* v. *Wadleigh*, 65 Maine, 251; R. S., C. 81, §§ 12 and 21.

The case at bar is distinguished from the cases cited, it is true, in the fact that the property attached, on which the lien was claimed, was not the property of the debtor who was named as the original defendant in the suit. It is therefore contended in behalf of the owners that, in case of a non-resident defendant, jurisdiction can only be obtained in the manner prescribed by section 21, chap. 81, R. S., and that notice by publication is only authorized when it appears that the defendant cannot be found within the officer's precinct, that he has no tenant, agent or attorney in the state, and that his goods and estate are attached on the writ.

It should be deemed a sufficient answer to two of these objections, in the first place, that in a court of general jurisdiction, in the absence of anything to the contrary, the presumption is that all the facts requisite to authorize notice by publication were duly made to appear to the satisfaction of the court before the order for such notice was given. *Sanborn* v. *Stickney*, 69 Maine, 344; *Treat* v. *Maxwell*, 82 Maine, 76. It is not claimed here that the defendant was an inhabitant of this state, or that he had any tenant

agent or attorney in the state; but it is still insisted that the court had no power to order notice by publication because no property of the defendant was attached.

It must be remembered, however, that this is not a proceeding under section 21, chap. 81, R. S., to obtain satisfaction for the plaintiff's debt out of the defendant's property. It is a suit based on section 38, chap. 91, R. S., to enforce the plaintiff's lien on certain logs by an attachment of the identical logs, and not by an attachment of any property of the defendant. True, section 42 of chap. 91 provides that, "the declaration must show that the suit is brought to enforce the lien," and that "all other forms and proceedings shall be the same as in ordinary actions of assumpsit." But an examination of the original act (ch. 131, Laws of 1862), from which this provision was condensed, clearly shows that it was simply designed to obviate certain technical difficulties previously experienced in enforcing liens, by specifying one of the averments of the declaration and prescribing in a general way the form of the judgment necessary to effectuate the lien. It was never intended to be construed in connection with section 21, chap. 81, R. S., so that the power of the court to order notice should be restricted to those cases in which the property of the defendant was attached. Furthermore, it was held in *Parks* v. *Crockett*, 61 Maine, 494, that this act, though mandatory in form being remedial in its nature, must be deemed permissive and not exclusive; and that judgment and execution in the common form, as well as a judgment in rem, might be sufficient to make the lien claim available. It may also be observed that the position there taken by the court in the discussion of that question has a relative significance in the case at bar. "When the officer is commanded in such execution to seize and sell the property of the judgment debtor," says Chief Justice PETERS, "he will be justified in taking the property attached on the original precept, although not belonging to such debtor. It will be regarded as his (the debtor's) goods and estate for the purpose of satisfying such execution, and the general owner, whose property is legally encumbered with such lien, will be bound by it. The idea of the legislature undoubtedly was that such

proceedings, if pursued as a remedy, might have substantial correctness enough for practical purposes."

The provision in section forty-five of chap. 91, R. S., that judgment may be rendered against the defendant and the property, *or against either*, affords a plain implication that a valid judgment might be rendered against the property attached on the writ, though not the property of the defendant, and though the court had no jurisdiction to render judgment against the person of the defendant. It is not in controversy that if the logs covered by the lien in this case had been the property of this non-resident defendant, notice by publication as given would have been sufficient to authorize judgment in rem. There is no provision in the statute requiring any other or different notice when the logs are not the property of the non-resident defendant, but are owned by persons residing in this state. It is a satisfaction to remark, also, that in such a case, actual notice by order of court is obviously of far less importance to the non-resident defendant than it would be if he owned the property covered by the lien, especially as the probability is very strong that in the former case the defendant would receive actual notice of the attachment by means of his contract relations with the owner of the logs.

The statute provides that the lien may be enforced by attachment, without limitation or qualification. It declares, in effect, that it may be so enforced without regard to the ownership of the logs, or the residence of the debtor. This statute should be construed with reference to the mischief to be remedied and the object to be accomplished. It has been seen that the great purpose of it evidently was to afford security to the laborer against the irresponsible employer. In the case of non-resident contractors who have no attachable property in the state, this lien on the logs is the laborer's only protection. To hold that in such case the lien cannot be enforced by an attachment of the logs without an attachment of some property belonging to the defendant, or jurisdiction of the person of the defendant, would be to hold the statute ineffectual and nugatory in the very cases in which the lien is most required, and to which it must also have been designed to apply.

Thus construed, the statute would but "keep the word of promise" to the laborer's ear and break it to his hope. It cannot be necessary to give the act such a contradictory and self-destructive interpretation.

In the case at bar the property covered by the lien was duly attached on the writ. The defendant being a non-resident, the court ordered notice by publication to both the defendant and the general owners of the logs. This order was in harmony with all the provisions of our statutes relating to the enforcement of such liens, and was moreover a reasonable exercise of the inherent power of the court involved in its jurisdiction to render judgment to effectuate the lien. The general owners duly appeared and contested the validity of the lien and the amount due thereon. The jury found that the plaintiff had a lien on the logs and lumber attached for the sum of $59.50, and no valid and sufficient reason has been shown why the entry should not now be,

Exceptions overruled.

CLARENCE H. MILLIKEN *vs.* LEONARD P. SKILLINGS.

Cumberland. Opinion April 28, 1896.

Sales. Rescission. Offer to Return.

A sale of personal property with a warranty of quality, and without fraud, may be treated as a sale upon condition subsequent, at the election of the purchaser, and in the event of a breach of the warranty the property may be restored and the sale rescinded.

But the right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract; and this principle makes it the duty of the buyer to return or tender back to the seller whatever of value to himself, or to the other, he has received under the contract.

But if the buyer's offer to restore the goods is met by an absolute refusal of the other party to receive them if tendered, he will be relieved of the duty of actually returning or tendering them to the vendor at the place where the title passed.

The word "offer" is frequently used by courts and text writers as synonymous with "tender" and it may be properly so used with reference to articles capable of manual delivery and actually produced. But with respect to

heavy articles of merchandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase "offer to return" is more commonly and more aptly employed to express a willingness, or to make a proposal to rescind the contract and return the goods.

It is not sufficient, however, for a buyer who has taken delivery of the goods at the vendor's place of business, merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back.

But if he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do he is relieved of the obligation, as stated, by a refusal to receive them if tendered.

ON MOTION AND EXCEPTIONS BY PLAINTIFF.

The case appears in the opinion.

D. A. Meaher, for plaintiff.

A. F. Moulton, for defendant.

SITTING: WALTON, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

WHITEHOUSE, J. The plaintiff brought this action on account annexed to recover a balance of $310.29 for 355 cases of canned corn, being 710 dozen cans, sold and delivered under the following agreement signed by him September 4, 1893:

"I do this day agree to sell to Red Brook Packing Co. my Sweet Corn at $1.00 per doz. warranted to be in good condition with the conditions:

1st. To pay for cans $21.00 per M.
2d. " " " labels, $ 2.40 " "
3d. " " " boxes .09 apiece.

To be taken out of $1.00 per doz."

The defendant filed an account in set off amounting to $405.78 for cans, boxes and labels furnished, and $126.13 in cash paid on account, claiming that the corn received by him was not in good condition as warranted, and had no market value, and furthermore that the contract was rescinded by him on account of this breach of warranty of the quality of the goods.

The jury returned a verdict in favor of the defendant for

$405.78, the exact amount of the account in set off. The case comes to the law court on exceptions to the instructions of the presiding justice and a motion to set aside the verdict as against evidence.

It is undoubtedly settled law in this state that a sale of personal property with a warranty of quality, and without fraud, may be treated as a sale upon condition subsequent, at the election of the purchaser; and in the event of a breach of the warranty, the property may be returned and the sale rescinded, since a breach of the warranty may be equally injurious to the buyer whether the vendor acted in good faith or bad faith. *Marston* v. *Knight*, 29 Maine, 341; *Cutler* v. *Gilbreth*, 53 Maine, 176: *Farrow* v. *Cochran*, 72 Maine, 309.

But the right of rescission is limited to cases where the seller can be put substantially in the position which he occupied before the contract. "Where a contract is to be rescinded at all it must be rescinded in toto," said Lord Ellenborough, "and the parties put in statu quo." *Hunt* v. *Silk*, 5 East, 449. See also *Kimball* v. *Cunningham*, 4 Mass. 502; *Conner* v. *Henderson*, 15 Mass. 319; *Snow* v. *Alley*, 144 Mass. 546; *Morse* v. *Brackett*, 98 Mass. 205; *Marston* v. *Knight*, 29 Maine, 341. And this rule which makes it the duty of a buyer, who would rescind a contract for breach of warranty of quality, to restore the seller substantially to his former position, necessarily requires him to return or tender back to the seller whatever of value to himself, or the other, he has received under the contract. In *Dorr* v. *Fisher*, 1 Cush. 271, Shaw C. J., says that for breach of warranty the vendee may "rescind the contract and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover."

The law, however requires neither impossibilities nor idle and useless ceremonies. So if the buyer's offer to restore the goods is met by an absolute refusal of the other party to receive them if tendered, he will be relieved of the duty of actually returning or tendering them to the vendor at the place where the title passed.

In *Noyes* v. *Patrick*, 58 N. H. 618, the idea is thus expressed: "The party seeking to rescind must ordinarily restore or offer to restore, whatever he has received under the contract; and in case of the refusal of the wrong doer to receive it, an offer to restore, properly made, is equivalent to actual restoration." In the discussion of this question the word "offer" is frequently used by courts and text writers as synonymous with "tender", and it may be properly so used with reference to articles capable of manual delivery and actually produced; as in *Luey* v. *Bundy*, 9 N. H. 298, it was said to be unnecessary to produce the notes and money in court: "He had offered them to the defendant, who refused to receive them." But with respect to heavy articles of merchandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase "offer to return" is more commonly and more aptly employed to express a willingness, or to make a proposal to rescind the contract and return the goods. It is not sufficient, however, for a buyer who has taken delivery of the goods at the vendor's place of business, merely to express a willingness or make a proposal to return the goods, or simply to give notice to the seller that he holds the goods subject to his order, or to request him to come and take them back. If he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery unless upon making the offer so to do he is relieved of the obligation, as stated, by a refusal to receive them if tendered. *Norton* v. *Young*, 3 Maine, 30; *Ayers* v. *Hewett*, 19 Maine, 281; *Cushman* v. *Marshall*, 21 Maine, 122; *Stinson* v. *Walker*, 21 Maine, 211; *Tyler* v. *Augusta*, 88 Maine, 504. The principle controlling the restoration of the status quo in this class of cases is essentially the same as the ordinary rule in regard to the requisites of a valid tender, with respect to which all the authorities agree that there must be an actual production of the money, or its production must be expressly or impliedly waived. Chitty on Cont. 1191; *Sargent* v. *Graham*, 5 N. H. 440.

In this case the only testimony having any tendency to show a rescission is found in the defendant's answers to the following interrogatories:

"Q. What did you say about his taking the corn back?

A. I told him I couldn't use it, and it would be no good to me, and I didn't think I ought to pay for it.

Q. What about sending it back to him?

A. I don't think I said anything about tendering it back; I don't know whether I did or not, I am sure.

Q. What was said about his trying to sell it?

A. He wanted me to get a half a dozen cans for him and he would take it home and see what he could do with it.

Q. How many cans did he take?

A. Half a dozen.

Q. Whether you heard anything further from him?

A. No sir, I didn't.

Q. State whether after examining the corn he presented any bill to you for it?

A. No sir.

Q. Did he make any request or demand of you for the payment of the balance?

A. No.

Q. What is the next you heard from him?

A. The next I heard was when they put the attachment on.

Q. What have you done with the corn?

A. It is in my cellar subject to Mr. Milliken's order.

. . . . . .

Q. When Milliken came over to examine the corn, after receiving notice from you, state what the talk was about his taking the corn back. Just what the words were?

A. As near as I can remember, I told him it would be of no use to me, I couldn't do anything with it and I wanted him to take it back. He said he would take some samples home and try and sell it himself.

Q. He did take the samples?

A. Yes."

The plaintiff, however, denies that the defendant ever requested him to take the goods back, and says he took the sample cans home for the purpose of examination. There is no evidence whatever

that the plaintiff either consented to take the corn back or that he refused to do so, whatever might be the result of his examination of the samples. The corn was delivered to the defendant at the plaintiff's packing house in Scarboro, but the alleged conversation when the defendant says he "wanted the plaintiff to take it back," occurred at the defendant's residence, four miles distant. At that time forty-five cases of the corn appear to have been in the defendant's shop and the balance in the cellar of his house. It was all in the defendant's possession at the time of the trial.

Upon this evidence the presiding justice instructed the jury as follows: "The plaintiff claims that the corn belonged, and does now, to the defendant. The defendant claims that it belongs to the plaintiff, that he has tendered it back and offered to return it and that it belongs to him, the plaintiff. . . . . .

"Now, the plaintiff claims that under all the circumstances there never has been a rescission of the contract. . . . . Now, in the first place, was there an offer here to return these goods? Did the defendant, at the time he states, say to the plaintiff that the goods were not in accordance with the contract, in quality, and did he tender them back to the plaintiff by stating that they were there subject to his order, or words to that effect? There is no set phrase necessary to constitute the rescission of a contract, except that the buyer must offer to return them to the seller on the ground that they were not in accordance with the original arrangement in quality or otherwise. . . . . I believe I have now covered these two grounds. . . . . If there was an offer to rescind the contract on the ground of a defect in the quality, if done within a reasonable time, it makes no difference whether the seller accepted the offer or not, whether he takes the goods into his possession or not."

In the first place, there was not sufficient evidence in the case to warrant these instructions. It has been seen that the defendant did not claim that he ever returned or tendered the goods to the plaintiff at his place of business, or that he was relieved from so doing by any refusal of the plaintiff to accept them if tendered there. When the defendant says he told the plaintiff the corn

would be of no use to him and he wanted him to take it back, the plaintiff only made a counter proposition that he would take some sample cans home and see what he could do with them. This was clearly insufficient to constitute a rescission. As stated by CUTTING, J., in *Hopkins* v. *Fowler*, 39 Maine, 568, "the instructions must have been called forth upon an assumption of some testimony to warrant them; and if the assumption was erroneous, the instructions became a superstructure without a foundation and might have had some tendency to mislead the jury." In the case at bar there is reasonable ground to apprehend that the jury was misled by the instructions given. The frequent reference in the charge to an "offer to return" the corn, as sufficient to constitute a rescission, necessarily gave the jury the erroneous impression that if the defendant made the offer which he claimed to have made, without any refusal on the part of the plaintiff, he had done all the law required of him in order to rescind the contract. As the corn and packing cases were of some value to the plaintiff, the jury must have found that the contract was rescinded. This is apparent from the amount of the verdict.

The general principles of law involved in the rescission of contracts had been accurately stated in the earlier part of the charge; but it is the opinion of the court that, in giving the jury the more specific instructions above set forth, the learned justice inadvertently omitted to point out the distinctions and qualifications required by the facts and circumstances disclosed in the evidence.

Exceptions sustained.

GEORGE M. COOMBS *vs.* CLARENCE E. BEEDE.

Androscoggin. Opinion May 7, 1896.

Architect. Agent. Compensation.

An architect is not a contractor who enters into an agreement to construct a house for its owner, but is his agent to assist him in building one.

The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon any one to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed.

The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.

The plaintiff, a professional architect, was employed by the defendant to prepare plans and specifications for a house. In an action to recover compensation for services so rendered, the defendant, not relying on any charge against the plaintiff of fraud or negligence, set up at the trial that the services were not beneficial to him for the reason that they were performed in a manner contrary to his express direction and wishes. Upon this contention by the defendant the court instructed the jury that if the architect was explicitly told by the defendant, in addition to other things, that the building he was designing must not exceed a certain named cost, the architect should have made plans accordingly or stated that he could not do it and thereupon declined to do it; and that if he undertook to make plans with the restriction as to the cost of the building, he must do it before he could recover any pay. *Held;* that the instruction was erroneous. It punishes the plaintiff for what might be merely an honest mistake, or miscalculation. It leaves out the elements of care and good faith. It does not require that the plaintiff bound himself to the agreement set up by the defendant. The ruling implies a guaranty or warranty, when none was testified to or really pretended.

ON MOTION AND EXCEPTIONS BY PLAINTIFF.

The case is stated in the opinion.

Geo. C. Wing, for plaintiff.

F. L. Noble and R. W. Crockett, for defendant.

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

PETERS, C. J. It is not questioned that the plaintiff, a professional architect, was employed by the defendant to prepare plans and specifications for a house which the defendant intended to have built for himself in the city of Lewiston. On the trial of this action, brought by the plaintiff to recover compensation for services rendered by him in such employment, the defendant sought to establish that, although certain services were rendered by the plaintiff, such services were not beneficial to him for the reason that they were performed in a manner contrary to his express direction and wishes.

In an examination of the merits of the controversy between these parties, we must bear in mind that the plaintiff was not a contractor who had entered into an agreement to construct a house for the defendant, but was merely an agent of the defendant to assist him in building one. The responsibility resting on an architect is essentially the same as that which rests upon the lawyer to his client, or upon the physician to his patient, or which rests upon any one to another where such person pretends to possess some skill and ability in some special employment, and offers his services to the public on account of his fitness to act in the line of business for which he may be employed. The undertaking of an architect implies that he possesses skill and ability, including taste, sufficient to enable him to perform the required services at least ordinarily and reasonably well; and that he will exercise and apply in the given case his skill and ability, his judgment and taste, reasonably and without neglect. But the undertaking does not imply or warrant a satisfactory result. It will be enough that any failure shall not be by the fault of the architect. There is no implied promise that miscalculations may not occur. An error of

judgment is not necessarily evidence of a want of skill or care, for mistakes and miscalculations are incident to all the business of life.

In a case at nisi prius in one of our counties, where a controversy arose very similar to the present, the defendant there contending that the plans called for a too expensive house, and that there had been a departure from the instructions given by the employer, HASKELL, J., gave a ruling, which we adopt as an acceptable statement of the law here, as follows: "The plaintiffs continued in the execution of the plans; they procured the details and perfected the entire set of plans. For some reason those plans were rejected by the defendants. The plaintiffs say that it was because they did not give the house sufficient size and capacity and arrangement to suit them, and that they preferred an entirely different house, a house of different dimensions and different architectural proportions. The defendants say it was because they found the plans impracticable, and that the arrangement of the plans called for so great an outlay that it rendered it too expensive for them to be carried out and adopted, and they say that that was on account of the mistake of the plaintiffs in not properly advising them and in deceiving them as to the practicability of the plans.

"Now, gentlemen, in determining the rights of the parties, it is well to consider what the legal duty of the plaintiffs was to the defendants. The architect is skilled in the art of building houses. Those who employ him have a right to his best judgment, to his skill, to his advice, to consultations with him, and to his absolute fidelity and good faith, and when the architect has contributed these things to the person who employs him, his duty has been fulfilled."

In the case at bar the defendant, not relying on any charge against the plaintiff of fraud or negligence, set up at the trial that there was a special promise that the plans should not call for a house to cost exceeding $2500.00, and contended that, inasmuch as the plans called for a more expensive house than that sum would build, nothing was recoverable for plaintiff's services. And in relation to such contention the presiding justice gave the following

instruction: "Well, if that is true, if Mr. Coombs was explicitly told, in addition to the other things, that the building he was designing must not cost over $2500, that he was to make plans and specifications for a building to cost not over that, why, then, Mr. Coombs, the plaintiff, should have either made plans accordingly, or frankly told Mr. Beede that he could not do it, and declined to do it. If he undertook to make plans with that restriction made to him specifically, why then he must do it before he can recover any pay."

We think this instruction was misleading and without evidence upon which it could be reasonably based. It punishes the plaintiff for what might be merely an honest mistake or miscalculation. It leaves wholly out of consideration the elements of care and good faith. It does not even require that the plaintiff bound himself to the agreement set up by the defendant. The ruling implies a guaranty or warranty, when none was testified to or really pretended.

Of course, it would be too much to say that parties could not make such a shadowy contract as the defense contends for, but it would be so strange and unusual a thing to do, that clear and convincing evidence should be required to prove it. And the testimony exhibits none such to our minds.

Skipping the testimony of the defendant as less adroit and less spirited than that of his wife, who was much the more active of the two in the transaction, we incorporate her statement here, as follows:

"Q. Won't you state to the jury the conversation and what took place?

A. They had some talk about the fifteen-hundred dollar cottage that they had been talking about previously, and conversation was general with regard to the fifteen-hundred dollar cottage; and something was said—I think I spoke myself first—about putting on the other story; spoke about its being better economy. Mr. Coombs said 'Yes, if we studied economy, it certainly was economy to build a double tenement,' and Mr. Beede asked him what it would cost extra to put on the other story and make a double tene-

ment. He said he thought one thousand dollars. Then Mr. Beede said, 'Well, perhaps you can tell Mr. Coombs something about what kind of a house you want.' I said: 'I don't know what we could have for that money so well as he does, he understands that better than I; but one thing Mr. Coombs, I don't want it to exceed the twenty-five hundred dollars, and I would rather you would cut it down to twenty-two; don't you think you could?' He figured a moment and said he hardly thought we could including the plumbing, but for twenty-five hundred dollars we could build a house complete. Mr. Beede said if he could make plans for a house to be built, not exceeding twenty-five hundred dollars, he might go ahead, and Mr. Coombs said he would do so, and he would send me up a sketch of the ground floor to show me what I could have for size.

Q. Did he do so?

A. He did. He told me I might change over whatever I pleased. Something about the sink, I believe, I wanted differently. I told him that the arrangement of the rooms was all right, I guessed.

Q. Now to come to the next conversation you had with him?

A. Then after I carried that sketch down, he sent me up a little sketch of what the elevation would be and I looked that over, and I thought it was rather more elaborate than what I expected for twenty-five hundred dollars and talked with some of my friends about it, and they seemed to think the same; the piazza, I spoke of that, and they said they should judge that piazza would cost two hundred and fifty dollars. I went down and talked with Mr. Coombs, told him that I felt that it was a little extravagant. He said he guessed not; but I thought he felt as though it would perhaps overrun twenty-five hundred dollars, and asked him: 'What do you think such a house ought to cost?' and he said: 'Well, possibly three thousand dollars.' I said: 'We can't do that; we want a twenty-five hundred dollar house and we must cut this down,' and he said: 'You don't want to spoil your house for a few hundred dollars.' I said: 'We are willing to have it a little plainer rather than put in more money.' He said: 'Well, just

as you say, I will cut that piazza down, make less posts, take off the fancy work around the rail, and so forth, and cut it down,' and he did so on the final sketches."

By this statement it does not appear that the plaintiff was to prepare plans for any particular kind of house to cost $2,500, excepting that it was to be a two-tenement house with one tenement over the other. Could not the plaintiff have planned a house answering this description which would not have cost that sum or even half that sum, if allowed to do so? But the difficulty was that the defendant's wife not only wanted the expenditure not to exceed $2,500, but she wanted at the same time a house worth much more than that sum, and the architect was trying in good faith to accomplish the desired result as best he could. After the plaintiff had engaged to make the plans, and not before, the defendant calls on his wife, according to her testimony, to inform the plaintiff what kind of a house she wanted. Was it expected that he had promised to secure to her a house to her liking for $2,500 irrespective of actual cost or worth, and that he was agreeing to expend his services gratuitously if he did not succeed in doing so? We see nothing even in the defendant's side of the case justifying such a position. The plaintiff certainly could have reduced the cost upon the plans, and have earned his compensation, if the wife had permitted him to do so.

The plaintiff gives a different version of the transaction, denying that any particular limit was fixed within which he was required to bring the cost of the house, other than that the wife desired to get as much of a house as she could for as small a price as possible, and he did all he could to assist her in her ideas. We have no doubt ourselves that there were talks about $2,500 as a proximate but not conclusive price, and that there were no rigorous or unalterable instructions or conditions about it. The plaintiff says that after the plans were first completed the wife required expensive alterations to be made in them, and while she does not deny the fact she is not willing to admit that she remembers it.

The bids which came in after the plans were advertised were disappointing, there being but four in all and ranging in amount

from $3,300 to $4,400, showing the moral impossibility of an architect being able to fix precisely the cost of any building if the cost is to be measured in any such capricious way as by the bids of contractors. It was at an unfavorable time of the year when the contractors had on hand all the work they could do, and still the plaintiff by his perseverance virtually obtained afterwards a bid for $3,100 which the defendant refused to accept, nor would he or his wife consent to cut down the plans so as to obtain a bid within the price desired. And so the plaintiff advised the wife to postpone the matter until spring when the conditions would be more favorable and she frankly accepted the advice.

There was, however, no waiting till spring before the defendant had his house built. He says he was informed by several persons that he would not be obliged to pay for the plans unless he used them, and he concluded to buy his materials and hire the labor by the day. His wife had become sufficiently posted, by her experience with the plaintiff, and remembrance of his work, to enable her to make sketches of what she wanted, and so she, with the assistance of the carpenter in her service, acted as architect herself. And the defendant during the same fall and winter erected a house and stable on their lot at a cost of over $3500.00. The wife says that the house built by her "was brought to the same degree of completion that a house would have been by his (plaintiff's) specifications for a little less than $2700.00." So that plaintiff's calculations, tested by actual cost instead of by contractors' bids, were less than two hundred dollars of variance from the standard which the defendant and his wife pretend was prescribed for him by them.

We can perceive no ground upon which, as the testimony stands, the verdict could have been rightfully rendered. Even if the defendant's version of the facts be true, then the undertaking of the plaintiff was to make plans for a house to cost $2500.00, and no more, and if, acting in good faith, he exercised his skill and ability in an endeavor to bring about that result, that is all that could be expected or required of him; and no defense is established against his claim even if he failed in his attempt. But if

the house designed by him could be built for less than $2700.00, it could hardly be called a failure, especially in view of the interferences on the part of the defendant's wife; nor a failure if the plaintiff could have so altered his plans as to reduce the house in price, and it seems to us preposterous to say that he could not, and he was willing to make alterations and the defendant or his wife would not consent thereto.

Motion sustained.

JOHN S. BANGS

vs.

LEWISTON AND AUBURN HORSE RAILROAD COMPANY.

Androscoggin. Opinion May 7, 1896.

Exceptions. Practice. Street Railroad. Track. Repair. Way.

Exceptions do not lie to remarks of the presiding justice in his charge to the jury which embrace an abstract proposition merely that, if possibly in any aspect might become material, is rendered entirely immaterial by subsequent instructions.

In an action against a street railroad to recover damages for an injury sustained by the plaintiff by being thrown from his sleigh when crossing its track, the declaration charged as an act of negligence on the part of the railroad that its inner and outer rail, where it curved around the corner of two intersecting streets, was raised above the level of the streets from two to three inches, rendering that part of the streets dangerous and unsafe for public travel. The defendant contended that if it put its rails upon the grade in the first place that it was not liable; and that any fault in the difference between the elevation of the rails and the street was the fault of the city. Upon this contention the presiding justice instructed the jury that the railroad company, under the evidence in the case, was not bound to keep the street in repair, or between the rails, as that duty was left with the city; and he further instructed the jury that the railroad company was bound to so construct and maintain its track that the travel upon the street could cross the tracks safely with the exercise of reasonable, ordinary care.

Held; that the instruction, that the railroad company was not bound to repair the street between its rails, became immaterial and is not open to exception.

A city, in the absence of municipal regulation or agreement between the parties, does not surrender its supervision and control of its streets; and cannot very well do so while the statutory regulation exists which requires it at its peril to keep its streets safe and convenient for travelers.

Held; that the controversy whether the city or the railroad company is bound to keep that portion of the street lying within the rails of the railroad in repair becomes in any view a practical question only as between the railroad corporation and the city, rather than as between the parties to this suit.

While a street railroad company has the right to keep its track in repair so as to prevent depreciation by wear and tear, the city not opposing; and to keep the earth about its rails firm and secure; and the right of maintaining approaches to its rails at crossings so as to let teams pass over them easily, the propriety of imposing upon the company the duty of keeping the space between the rails in repair is not obvious to the court as necessary to counteract the ordinary wear and tear of the road produced by the feet of horses constantly passing over it. Other horses besides those of the railroad company pass over and upon the railroad tracks, especially where the chances for passing are narrow and the teams engaged in passing are numerous. And at crossings the track is usually much more trodden by horses driven by travelers than by railroad horses.

EXCEPTIONS BY PLAINTIFF.

This was an action to recover damages for injuries sustained by reason of an alleged defective condition of the defendant's horse railroad.

The plaintiff claimed that while he was driving across the track of the railroad, in the street of the city of Lewiston, the runners of his sleigh entered a depression between the rails, and as the runners struck against the further rail, and which he alleged was elevated above the road-bed between the rails, he was thrown from his sleigh and injured.

The verdict was for the defendant.

The case appears in the opinion.

F. L. Noble and R. W. Crockett, for plaintiff.

A street railway company is bound at common law, as well as by statutes, to keep and maintain its entire road including rails and road-bed in a reasonable condition of repair with the rest of the highway, so that the public may use the whole way with as little inconvenience and liability to injury as possible; and is liable for damages.

Counsel cited: *Western Paving & Sup. Co.* v. *Citizen St. R. Co.*, 10 L. R. A. 770; 128 Ind. 525, 540; *McKenna* v. *Met. R. R. Co.*, 112 Mass. 55; *Memphis P. P. & B. R. Co.* v. *State*, 87 Tenn.

746; *Oshkosh* v. *Mil. & L. W. R. Co.*, 74 Wis. 534; Am. & Eng. Ency. of Law, Vol. 23, pp. 978–9, 983 and note; *Osgood* v. *Lynn & Boston R. R. Co.*, 130 Mass. p. 493; *Cent. R. Co.* v. *State*, 52 N. J. L. 220; *Gillett* v. *West. R. Corp.*, 8 Allen, 560; Elliott on Roads & Streets, p. 594; *Rockwell* v. *3d Ave. R. R. Co.*, 64 Barb. 434, aff. in 53 N. Y. 625; *Fash* v. *3d. Ave. R. R. Co.*, 1st Daly, 143; *Worster* v. *42d St. etc. R. R. Co.*, 50 N. Y. 205; *Conroy* v. *23d St. R. R. Co.*, 52 How. Pr. 49; *Cline* v. *Cres. City R. R. Co.*, 43 La. Ann. 327, (26 Am. St. Rep. 187); *Woodman* v. *Metrop. R. R. Co.*, 149 Mass. 335; *Schild* v. *Cent. Park R. R. Co.*, 133 N. Y. 446, (28 Am. St. Rep. 658). *Penn. etc. Canal Co.* v. *Graham*, 63 Pa. St. 296; *Carpenter* v. *Cent. Park etc. R. Co.* 11 Abb. Pr. (N. S.) N. Y. 416; Elliot on Roads and Streets, p. 594; *Schild* v. *Cent. Park etc. R. Co.*, 16 N. Y. Super. Ct. 701; *Ashland St. R. Co.* v. *Ashland*, 78 Wis. 271; *Osgood* v. *L. & B. R. R.*, 130 Mass. 493.

A. R. Savage and H. W. Oakes, F. W. Dana and W. F. Estey, for defendant.

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

PETERS, C. J. The writ and declaration, and the judge's charge are brought up on report, but none of the testimony. An exception was taken to a ruling which may be very well understood from an examination of the charge. The action is to recover damages for an injury sustained by the plaintiff from an accident occurring to him, by being thrown from his sleigh when crossing the track of the street railroad in Lewiston. There are two specifications in the declaration alleging negligence against the railroad. One is for leaving a heap of snow on the side of the track by which the sleigh was upset, thereby causing plaintiff's injury. We need not, however, dwell on this branch of the case, more than to state it as incidental to the second specification, inasmuch as no rulings in this part of the charge are claimed to be in any way objectionable.

The act of negligence secondly charged against the railroad relates to the alleged defective condition of its rails at the place where the accident happened, stated in the declaration as follows: "And further because the inner and outer rail of said railroad, where it curves around the corner of Lisbon and Pine streets as aforesaid, was raised above the level of said streets from two to three inches rendering that part of said streets at the corner of Lisbon and Pine streets dangerous and unsafe for public travel, all of which said dangerous and defective condition of said streets and said rails was then and there well known to said defendant company or could have been ascertained by the exercise of reasonable care."

On this point of the case the presiding judge, in his charge to the jury, made these observations: "That, then, is the second question of fact. The plaintiff says that, at the point of this corner, where the plaintiff crossed over, the rails of the defendant company had been either put or left by them two or three inches above the surface of the street, and that that height was a dangerous height, and made the crossing by a careful man dangerous, and, in fact, did cause a careful man a severe injury as he crossed. And the defendant answers that, first, by saying it is not true, and the rails weren't anywhere near so high, that they were not so high as to make it at all dangerous for a careful man to cross the street; and they say further—and that is a point made to me as Judge—they say further that, no matter whether their rails were above or below the street, that if they put their rails upon the grade in the first place, that they are protected, and that the fault in the difference in the elevation of the rails and the street is the fault of the city of Lewiston. I will only trouble you with the fact, gentlemen. *Now I am going to give you this rule: The railroad company, under the evidence in this case, wasn't bound as a whole to keep that street in repair; they were not bound to keep it in repair as between the rails even. They hadn't assumed the duty of keeping the street, or any part of it, in repair,—that duty was left upon the city of Lewiston, so far as the repairs of the street were concerned.* But I say further to you, that the railroad company,

coming into that street, rightfully putting down tracks to accomodate their cars, was bound to so construct and maintain its tracks that the travel upon that street, with or without a team, could cross those tracks safely with the exercise of reasonable, ordinary care. They were not bound to so construct them or maintain them that a careless man could go across in safety—an unthinking man, a negligent man, could cross in safety—they are not bound, as to the general public, to guard against every man's thoughtlessness; but I repeat that they are so bound, and it was their duty to so construct and maintain their tracks, that a careful man, in the exercise of ordinary care and watchfulness, could go across those rails with safety. Now that may include sinking the rails to the grade of the street, nearly or quite, or it may include the matter of approaches; so that they must so arrange it that a man can get over without hitting against the rails to any serious inconvenience. That is, putting it generally, they were bound to keep their tracks in such condition that a careful man, with the exercise of ordinary care, could safely cross."

Exceptions are taken to what the judge said about there being no responsibility upon the defendant railroad to keep the street in repair so far as the space between its rails is concerned. In the first place, it strikes us very forcibly that the remarks of the judge on this point embrace an abstract proposition merely, which if possibly in any aspect material, became entirely immaterial by the subsequent instruction that, at all events, the railroad company were under obligation to properly lay their rails, and to so maintain them that the passage over them at the crossings shall be safe and convenient for travelers, even if it became necessary to elevate or depress the rails from time to time in order to insure such a situation.

But, should the ruling objected to be considered as prejudicial to the plaintiff's cause, if it be a wrong ruling, then we do not hesitate to go farther and declare the ruling, in its connection with the other parts of the charge, to have been right. The city, in the absence of municipal regulation or any agreement between the parties, does not surrender its supervision and control of its streets,

and cannot very well do so while the statutory provision exists which requires it at its peril to keep its streets safe and convenient for travelers. But those matters as between city and railroad may be regulated by some statutory provision, state or municipal, or by agreement. Of course, the railroad company would be answerable to both the city and to individuals for any injury to the street caused by themselves, and is liable to a traveler who suffers an injury while crossing its rails if a defect exists in the location or situation of such rails in their connection with the street, however or by whomever the defect may have been caused. And this liability arises from the duty imposed on a railroad company to so maintain its tracks, which are necessarily a considerable impediment to travel, that persons having occasion to cross them may do so with at least comparative safety. If the city fail to do its duty the company is not excused from a performance of the duty and obligation resting on it. And such was clearly, in effect, the direction given by the judge to the jury. Really, the controversy whether the city or the company is bound to keep that portion of the street lying within the rails of the railroad in repair becomes in any view a practical question only as between the railroad corporation and the city, rather than as between the parties to this suit.

The plaintiff's counsel urges the propriety of imposing upon the railroad company the duty of keeping the space between rails in repair so as to counteract the ordinary wear and tear of the road produced by the feet of horses constantly passing over it. But other horses besides those of the railroad company pass over and upon the railroad tracks, especially where the chance for passing is narrow and the teams engaged in passing are numerous. And at crossings the track is usually much more trodden by horses driven by travelers than by railroad horses. There is no doubt that a railroad company would have the right to keep its track in repair so as to prevent depreciation by wear and tear, the city not opposing, and to keep the earth about its rails firm and secure, and the right of maintaining approaches to its rails at crossings so as to let teams pass over them easily; and as before inculcated in this

opinion they must do so, if not done by others and if necessary for public safety. See, as having some bearing on the question here, *Conway* v. *Lew. & Aub. R. R. Co.*, 87 Maine, 283.

The plaintiff contends that a city ordinance of Lewiston aids his contention. We think it does not. It reads thus: "The city reserve the right to make changes in the grade of streets and to make all necessary repairs or changes in water, gas or sewer mains or streets, and assume no liabilities for any damage caused by delay or interruption of cars from any cause whatever, but will relay any track disturbed by alteration or repairs of any gas, water or sewer pipes or mains."

Exceptions overruled.

CHARLES A. MILLIKEN, and others,

vs.

IRA H. RANDALL.

Kennebec. Opinion May 7, 1896.

Sales. Contracts. Burden of Proof. Pleadings.

On April 2, 1890, the plaintiffs and the defendant entered into a written contract wherein the plaintiffs agreed to sell and deliver to the defendant, and the defendant agreed to purchase and receive all of the ice in a certain ice house, the quantity of which was agreed by the parties to be three thousand and thirty-six tons. The ice was to be delivered by the plaintiffs, and at their expense, on board vessels to be furnished by the defendant at Hallowell, where the ice was stored, properly dunnaged for a voyage to New York.

One of the provisions of the contract was as follows: "Said ice and house in which it is stored shall be under the care of the party of the first part, [the plaintiffs] until said ice is all shipped, without charge or expense to the party of the second part, or until July 1st, 1890, after which date the expense of the care of said ice and rental of the wharf where it was stored shall be at the expense of the party of the second part." Subsequently the contract was modified by the parties to the extent that the defendant should himself transfer the ice from the house to the vessel and be allowed therefor the actual cost of the same. The defendant commenced taking and shipping ice in the latter part of June and completed the shipments about the 19th of July, 1890.

The plaintiffs sued to recover the contract price for the ice, less the amount of payments made upon account and the cost of taking the ice from the house

to the vessel. The plaintiffs' declaration contained two counts, in one of which the contract was declared upon; the other was the common count upon the account annexed for ice sold and delivered. It was contended by the defendant and set up in his brief statement under the general issue, that by reason of the plaintiffs' failure to take such care of the ice and the house in which it was stored up to July 1st, as the contract called for, a large quantity of the ice was lost by wasting and melting. This was one of the principal issues at the trial,—much evidence being introduced upon both sides as to the manner in which the ice and house were cared for between the date of the contract and the first day of July following.

The presiding justice instructed the jury that the burden of proving that the plaintiffs had not taken reasonable and proper care of the ice was upon the defendant. *Held;* that this instruction was erroneous.

Also; that the obligations assumed by the plaintiffs in the written contract were not only to sell and deliver the specific ice therein referred to, but also to exercise reasonable diligence in taking care of the house and its contents until July 1st, and that the agreement of the defendant was not simply to pay the sum named in the contract for the ice, but that this sum included compensation for the care of the ice during the period named.

Also; that the burden was upon the plaintiffs to satisfy the jury, by a reasonable preponderance of the whole evidence, that they had performed this substantive portion of their contract.

Also; That the allegation in the defendant's brief statement, that the plaintiffs' care of the ice was of such a negligent, careless and unskilful character that a large quantity of the ice wasted and melted away, was unnecessary; and that the defense could have been made under the general issue. The defendant's plea and brief statement set up no new matter in confession and avoidance, but was simply an allegation that the plaintiffs had not performed an important obligation which the contract imposed upon them; it was a denial of the allegation of due care contained in the plaintiffs' writ.

On Motion and Exceptions by Defendant.

This was an action of assumpsit, the writ containing two counts. The first count was on an account annexed to recover a balance due for a stack of ice, sold to and shipped by the defendant; the second, was on a breach of contract covering the same transaction, the damages claimed being $2000. The defendant pleaded the general issue, and also claimed to recoup the sum of $2000, for various reasons set forth in his brief statement.

The jury returned a verdict in favor of the plaintiffs for $2,100.17, and a special verdict as follows:

"Did the defendant, when he took the ice from the stack, weighed it, and loaded it in his vessels, accept it as ice within the meaning of the contract? Answer. Yes."

The contract between the parties, except as modified by them and stated in the opinion, was as follows:—

"This agreement made this 2d day of April, 1890, between E. Milliken's Sons, of Augusta, parties of the first part, and Ira H. Randall, of Augusta, party of the second part, witnesseth.

"Said parties of the first part, for a valuable consideration and the mutual agreements hereinafter contained hereby covenant and agree to sell and deliver to said party of the second part three thousand and thirty.six tons of ice as this day measured and agreed to by said parties, at forty-five cubic feet to the ton, said ice to be delivered by said party of the first part f. o. b. on board vessels to be furnished by the party of the second part at the place of loading in Hallowell, Maine, and properly dunnaged for a voyage to New York, for the sum of two and fifty one-hundredths dollars per ton, to be paid as follows, to wit:

"One dollar per ton according to said measurement upon the execution of this contract and the balance of one and fifty-one hundredths dollars per ton according to said measurement, upon each cargo of ice shipped; Provided that when said ice is shipped any that may be considered worthless, owing to dirt or sediment, shall be weighed and an account of the sum kept by the weigher and deducted from the whole amount to be paid for as above; Provided further that in case of the loss of a part or the whole of said ice by freshet, the party of the second part shall have the remainder not so destroyed by measuring and deducting from the whole amount of ice, as measured aforesaid, the apparent loss, and the party of the second part shall only pay for the quantity of ice remaining after said deduction:

"Said ice and house in which it is stored shall be under the care of the party of the first, until said ice is all shipped, without charge or expense to the party of the second part, or until July 1, 1890, after which date the expense of the care of said ice and rental of the wharf where it is stored shall be at the expense of the party of the second part:

"And it is hereby further mutually agreed that said ice shall be shipped before August 1st, 1890:

"The party of second part, in consideration of said sale hereby covenants and agrees to purchase and receive said quantity of ice aforesaid, to be shipped as aforesaid and to pay therefor as aforesaid.

"Said party of the second part is to insure said ice without expense to the party of the first part and is to pay for said ice as above specified in case of destruction by fire.

"It is further agreed between the parties that said party of the second part shall not be obliged to ship said ice by July 1, 1890, provided he pays for the care of said ice and rental of said wharf as aforesaid after July 1st, 1890.

"It is further mutually agreed that when said ice is all shipped the whole quantity of ice shall be determined and paid for according to the measurements hereinbefore specified.

"In witness whereof have hereunto subscribed their aforesaid names on the day and year as hereinbefore written.

Elias Milliken's Sons.
Ira H. Randall."

The opinion states the case.

O. D. Baker and L. C. Cornish, for plaintiffs.

H. M. Heath and O. A. Tuell, for defendant.

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

WISWELL, J. On April 2, 1890, the parties to this suit entered into a written contract wherein the plaintiffs agreed to sell and deliver to the defendant, and the defendant agreed to purchase and receive, all of the ice in a certain ice-house, the quantity of which was agreed by the parties to be three thousand and thirty-six tons. The ice was to be delivered by the plaintiffs, and at their expense, on board vessels to be furnished by the defendant at Hallowell, where the ice was stored, properly dunnaged for a voyage to New York.

One of the provisions of the contract was as follows: "Said ice and house in which it is stored shall be under the care of the party

of the first part, [the plaintiffs] until said ice is all shipped, without charge or expense to the party of the second part, or until July 1st, 1890, after which date the expense of the care of said ice and rental of the wharf where it is stored shall be at the expense of the party of the second part."

The contract price was $2.50 per ton, of which one dollar was to be paid at the execution of the contract and the balance as each cargo was shipped. Subsequently the contract was modified by the parties to the extent that the defendant should himself transfer the ice from the house to the vessel and be allowed therefor the actual cost of the same. The defendant commenced taking and shipping ice in the latter part of June and completed the shipments about the 19th of July.

In this action the plaintiffs seek to recover the contract price of $2.50 per ton for three thousand and thirty-six tons and for nineteen days' wharfage after July 1st, credit being given for the payments made upon account and for the cost of taking the ice from the house and delivering the same upon vessels at thirty-one cents per ton for twenty-four hundred and ten tons. The plaintiffs' declaration contains two counts, in one of which the contract is declared upon, the other is the common count upon an account annexed for ice sold and delivered.

It was contended by the defendant, and set up in his brief statement under the general issue, that by reason of the plaintiffs' failure to take such care of the ice and the house in which it was stored up to July 1st, as the contract called for, a large quantity of the ice was lost by wasting and melting. This was one of the principal issues in the trial, much evidence being introduced upon both sides as to the manner in which the ice and house were cared for between the date of the contract and the first day of July following.

The presiding justice, throughout his charge, instructed the jury that the burden of proving that the plaintiffs had not taken reasonable and proper care of the ice was upon the defendant. For instance, after stating to the jury that the plaintiffs claimed to recover for the full amount specified in the contract at the price

stipulated of $2.50 per ton for three thousand and thirty-six tons, he said: "There is no controversy between the parties in regard to this item being correct, unless the defendant taking the burden upon himself has satisfied you under the rules of law that I must give you, that he is entitled to a deduction from it." And again, in referring to the contention as to the care exercised by the plaintiffs of the ice-house and its contents, he said: "Now I have said to you that the burden is upon the defendant in making out his defense for a claim of reduction by recoupment, to satisfy you affirmatively by some preponderance of the evidence, of the issues of facts he raises, involving the fact relied upon and also the amount of damage sustained, the amount which he is entitled to have deducted as a loss sustained, by these grounds." In speaking of the material used by the plaintiffs for the protection of the ice while in the house, which the defendant claimed was improper for that purpose, he said: "But he must prove to you in the first place that the plaintiffs were guilty of negligence, of a want of due care in using it at all."

We think that these instructions, all to the effect that the burden of proving that the plaintiffs had not exercised reasonable and ordinary diligence in the care of the ice-house and its contents, were erroneous. The obligations assumed by the plaintiffs in the written contract were not only to sell and deliver the specific ice therein referred to, but also to exercise reasonable diligence in taking such care of the house and its contents until July 1st, unless the ice was sooner shipped, that there should be no unnecessary shrinkage of the ice by melting. The natural waste of the ice at that season of the year was a loss which, under the contract, fell upon the defendant, but he was not responsible for the loss occasioned by any failure of the plaintiffs to perform their part of the contract. We think this was a substantial part of the contract. The agreement of the defendant was not simply to pay $2.50 per ton for the ice, but this sum included compensation for taking care of the ice until July 1st, as well as for the delivery of the same upon vessels to be furnished by the defendant.

Inasmuch as the defendant himself took the ice from the house,

it was perhaps unnecessary for the plaintiffs in the first instance to introduce any evidence in regard to the fulfilment by them of this portion of their contract; but when the claim was made, that by reason of the plaintiffs' failure to perform their contract in this respect, the defendant did not receive as much of the ice as he should have, we think that the burden was upon the plaintiffs to satisfy the jury by a reasonable preponderance of the whole evidence that they had performed this substantive portion of their agreement.

They had contracted to care for the property. They alleged performance in their special count; it was incumbent upon them to prove it. And this is equally true whether they relied upon their special or common count.

If the ice had not been taken from the house by the defendant, it would have been incumbent upon the plaintiffs to prove performance of the obligation assumed by them in the contract, before they would have been entitled to recover, because of this fact the burden of introducing evidence in support of the contention, sometimes called the weight of evidence, rested upon the defendant, but the burden of proof did not shift.

This is in accordance with the general rule as stated in Greenleaf on Evidence, Vol. I, § 74, "the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." In Wharton on Evidence, Vol. I, § 356, it is said: "He who in a court of justice undertakes to establish a claim against another must produce the proof necessary to make good his contention."

It is true that the defendant set up in his brief statement that the plaintiffs' care of the ice from April 2nd to July 1st, 1890, was of such a negligent, careless and unskilful character that a large quantity of the ice wasted and melted away. But this was an entirely unnecessary allegation; the defense could have been made under the general issue, while the exercise of due care by the plaintiffs was a necessary allegation in their declaration. The defendant's plea and brief statement set up no new matter in confession and avoidance, but was simply an allegation that the

plaintiffs had not performed an important obligation which the contract imposed upon them; it was a denial of an allegation contained in the plaintiffs' writ.

The following cases well illustrate the rule in regard to the burden of proof. *Funcheon* v. *Harvey*, 119 Mass. 469, was an action to recover the freight due under a charter party, by the terms of which the plaintiff was to take a cargo on board with all convenient speed, and proceed direct to a port of delivery; the declaration alleged that the plaintiff performed all things in the charter to be performed by him. The answer was a general denial and an allegation that by reason of the failure of the plaintiff to take on board the cargo with all convenient speed and to proceed direct to the port of delivery, the cargo was wholly destroyed. The issue was whether the vessel unnecessarily delayed in her port of departure and deviated upon the voyage. The court held that the burden of proof upon that issue was upon the plaintiff, and that he was bound to prove that he had performed that as well as all other stipulations of the charter party.

In *Phipps* v. *Mahon*, 141 Mass. 471, the plaintiff declared upon an account annexed for work and labor and offered evidence that his work was reasonably worth a certain sum; the defendant answered with a general denial and alleged and offered evidence tending to prove that the work was done under a contract for a definite sum, which had been paid. The court held that the burden of proof did not shift but was on the plaintiff to prove the contract alleged by him upon all the evidence in the case.

In *Starratt* v. *Mullen*, 148 Mass. 570, the action was for goods sold and delivered and for money lent. The defense set up was that the goods were delivered and the money given by the plaintiff to the defendant in payment for the use of money supplied the plaintiff by the defendant. The court held that the burden of proof did not shift but was on the plaintiff throughout to prove that the goods were sold and that the money was lent. The court said, "if he [the plaintiff] declares on a special contract he must prove its terms as alleged, and on the same principle, if he declares on the common count, he must prove that the goods or

services were furnished for a reward to be paid thereafter in money."

We do not think that the cases cited by plaintiffs' counsel, *Freeman* v. *Travelers Ins. Co.*, 144 Mass. 572; *Coburn* v. *Travelers Ins. Co.*, 145 Mass. 226; and *Keene* v. *Accident Association*, 161 Mass. 149, are applicable to the question under consideration. These cases all involve the construction of accident insurance policies, and are decided upon the ground that "stipulations added to a principal contract, which are intended to avoid the defendant's promise by way of defeasance or excuse, must be pleaded in defense and must be sustained by evidence,—they are in the nature of provisos." In the case at bar, the stipulation of the contract in relation to the care of the property, is not a proviso; it was not intended as a matter of defeasance or excuse, but imposed upon the plaintiffs a duty which they must allege and sustain by evidence.

It is urged that these instructions were unimportant; that on account of the preponderance of the evidence in favor of the plaintiffs upon this issue, the jury's finding would have been the same if the instructions had been that the burden of proof was upon the plaintiff; but this was an issue of fact. We cannot assume what the verdict would have been if the instructions had been otherwise in this respect.

The other exceptions need not be considered. The entry must be,

Exceptions sustained.

STATE *vs.* CORNELIUS J. LYNCH, Appellant.

Penobscot. Opinion May 7, 1896.

Game. Possession. Market-Man. R. S., c. 30, § 20; Stat. 1891, c. 95.

Under R. S., c. 30, § 20, as amended by Chap. 95, Stat. of 1891, the possession of but one moose during the whole of one open season is not sufficient evidence of a violation of law by its illegal capture so as to throw the burden upon the respondent of explaining such possession.

A market-man who deals in game, as permitted by this statute, has the same right that every other person has of killing not exceeding one moose in one year. And the possession by him of the carcass of a moose, at a place other than his market, is not evidence that the same was illegally taken or killed, notwithstanding that he has had other moose, during the same open season, at his established place of business for sale to local customers.

ON REPORT.

This was a complaint against the defendant in which he was charged with the illegal possession of game. The case came by appeal into the court below where it was reported to this court upon an agreed statement of facts as follows, under R. S., c. 134, § 26:—

"It is agreed that the respondent is a market-man, having an established place of business on Exchange Street, in Bangor, in this state. On the fourth day of December, 1894, he received a dispatch from a man that he would arrive at Bangor with a dead moose for sale on the noon train. The respondent went to the train, found the man and purchased the moose intending to take him with him to Boston. The moose had been partly but not fully cleaned, and the respondent placed him upon a sled and carried him to a point in front of the sidewalk before his market, and there deposited him on the side of the street outside the sidewalk. He went into his market and got the necessary tools and removed what remained of the insides of the moose, from the moose where it lay. . . . .

"No part of this moose was ever in the respondent's market or on the sidewalk in front of his market. So soon as the moose was

cleaned, the respondent had him removed to the Maine Central depot and took the moose with him on the evening train for Boston, open to view, tagged and plainly labelled with his name thereon and his destination.

"During the open season of 1894, the respondent as market-man had purchased and had in his possession in his said place of business, several moose; but not exceeding one moose at one time for the purpose of selling the same at retail in open season to his local customers; but during the time named in said complaint, to wit: from October first to December eighth, in fact during the whole open season, respondent had never taken, killed, destroyed or had in his possession any moose, except as before stated, in his business of market-man at his said place of business in Bangor. . . . ."

C. A. Bailey, County Attorney for State.

The State claims that an individual must elect in which capacity he will act. If as market-man, he waives his privilege as an individual, or if he does not waive his individual right, that right is used or exhausted with the first moose, two caribou and three deer which he takes into his possession, either as an individual or a market-man, and not such as he may select out of all his purchases during the whole open season.

F. H. Appleton and H. R. Chaplin, for defendant.

The defendant had the general public right common to everybody, and also the special right, in his capacity as a market-man, common only to persons engaged in the same pursuit.

It is not claimed that the respondent was in the exercise of both of these rights at the same time—that he had two moose in his possession at one time, one as an individual and one as a market-man; or that he had previously had prior to December 4th any moose in his possession except in his business as a market-man. The case fails to show anything of this kind and such was not the fact.

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

WISWELL, J. Complaint is made against the defendant, under R. S., c. 30, § 20, as amended by Chapter 95, Public Laws of 1891, for unlawfully having in his possession on December 4, 1894, in the open season, one moose.

In the agreed statement of facts, upon which the case comes to the law court, it is admitted that the defendant at the time named had in his possession the carcass of one moose, which he bought at a railroad station in Bangor, and which after being dressed he took with him by train to Boston, "open to view, tagged and plainly labelled with his name thereon and his destination." It is also admitted that the defendant is a market-man, having an established place of business in Bangor, and that during the open season of 1894, as a market-man he had purchased and had in his possession at his place of business several moose, but not exceeding one at any one time, for the purpose of selling the same at retail in open season to his local customers; and that during the open season of 1894, the defendant had never taken, killed or destroyed any moose and never had in his possession any, except those had by him at his place of business for retail sale, and the one taken by him to Boston, for the possession of which this proceeding was instituted.

This court has recently decided in *State* v. *Bucknam*, 88 Maine, 385, that, under the statute referred to, the possession of any of the game therein mentioned is not a violation of the statute, but is evidence of its illegal capture which is the only offense prescribed; that the provisions in relation to the possession of game "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 capture of the game."

But no such burden rests upon the person who has in his possession not exceeding one moose during the whole of one open season. Every one may take, kill or destroy one moose during

the open season of each year; consequently the possession of but one moose during one open season is not sufficient evidence of the violation of law by its illegal capture, so as to throw the burden upon the respondent of explaining such possession.

Nor is this result affected by the fact that the defendant as a market-man had dealt in game as permitted by this provision of the statute, which provides "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 any one time, and selling the same at retail in open season to his local customers."

A market-man who deals in game has the same right that every other person has of killing not exceeding one moose in one year. And the possession by him of the carcass of one moose, at a place other than his market, is not evidence that the same was illegally taken or killed, notwithstanding that he has had other moose, during the same open season, at his established place of business for sale to local customers.

Under this construction of the statute, the agreed statement of facts discloses no violation of law.

Complaint dismissed.

EUNICE L. WHITCOMB *vs.* DANIEL DUTTON.

Waldo. Opinion May 7, 1896.

Deeds. Evidence. Judgments. Town-Lines. R. S., c. 3, § 67.

The adjudication of commissioners appointed by the court, under R. S., c. 3, § 67, to ascertain the lines in controversy between adjoining towns, can in no way affect the ownership of private property or determine controversies between individuals.

That statute provides a method for ascertaining the location of a line in controversy between adjoining towns and makes the determination of commissioners appointed by the court conclusive upon the towns as to the location of the town line for all purposes; but a proceeding under it was never con-

templated for the purpose of passing upon and determining private controversies.

The constitution of this State guarantees to every one injured in his property, a remedy "by due course of law," and in all controversies concerning property a trial by a jury and a right to be heard by himself or his counsel. *Held;* that a proceeding under R. S., c. 3, § 67, is not a "due course of law" for the settlement of controversies concerning property of private land owners, whose land was upon either side of the town line, who were not parties to the proceedings, and were not heard and could have had no opportunity to be heard upon the question of their respective ownerships, because that question was not involved.

Where a line described in a deed or charter by course does not correspond with that indicated by monuments, either referred to in the deed or charter, or established in the original survey, the latter will control, because monuments are the best evidence of the true line; and the course must yield, whenever the monuments are certain or are capable of being made certain. But if the monuments cannot be found or their locations established, then resort must be had to the course as the only other description given.

Evidence of the recognition of one or the other of two lines respectively claimed by the parties to be the true line, by monuments erected since the line was originally located, and by fences and occupation, is admissible as having some tendency to show where the line was first established; but the value and weight of such evidence, as well as the identity of disputed monuments and their original locations, are questions of fact for the jury.

Where the testimony upon these questions is conflicting, the verdict of the jury will not be disturbed unless the court is satisfied that it was clearly wrong. See *Magoon* v. *Davis*, 84 Maine, 178.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

W. H. McLellan, for plaintiff.

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

The adjudication upon this town line by the commissioners appointed by the court is a judgment in rem, and conclusive upon all parties. Freeman on Judgments, (3rd Ed.), § 606; *Woodruff* v. *Taylor*, 20 Vt. 65; *Pitman* v. *Albany*, 34 N. H. 577.

Notice of the time and place of hearing was given to all parties interested, by the commissioners, by delivering a true copy of the notice to the town clerk of each of the towns of Waldo and Morrill, and by posting the notice in two public and conspicuous places in each of said towns; and in this respect, if in no other, this case is distinguishable from the case of *Magoon* v. *Davis*, 84 Maine, 178,

involving the town line between the towns of Cornville and Skowhegan.

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

WISWELL, J. Real action. The question in dispute is as to the location of the divisional line between the land of the plaintiff and that of the defendant.

The plaintiff's land is described as being in Morrill with the town line between Morrill and Waldo as its easterly boundary, the defendant's is in Waldo with the same town line as its westerly boundary. The verdict was for the plaintiff and the defendant brings the case to the law court upon exceptions and motion.

I. Exceptions. A controversy existing as to the location of this town line between the towns of Morrill and Waldo, the selectmen of the latter town petitioned the Supreme Judicial Court at the October Term, 1887, for Waldo County, setting forth such controversy and praying that such line be run in accordance with the provisions of R. S., c. 3, § 67. Further proceedings were had thereon as required by this section, commissioners were appointed, who after giving notice of the time and place of their meeting to all persons interested, and after hearing all such persons at the time and place appointed, proceeded to ascertain and determine the line in dispute, and placed suitable monuments for the permanent establishment of such line. They subsequently made duplicate returns of their proceedings, as required by statute, and therein described the line in dispute as ascertained and determined by them.

The land claimed by the plaintiff lies easterly of this line established by the commissioners and between that line and where she says the true line is, or was, prior to the proceedings referred to. The defense offered in evidence a record of these proceedings and claimed that the line established by the commissioners as the town line between Morrill and Waldo was necessarily the true line between the lands of these parties, or that it was conclusive

evidence of the location of the true boundary line between them. The presiding justice refused to so rule, but did instruct the jury that the determination by the commissioners of the line between the towns was not conclusive as to the location of the boundary line between the lands of these parties.

We have no question as to the correctness of this ruling. The adjudication and determination of commissioners appointed in proceedings of this nature can in no way affect the ownership of private property, or determine controversies between individuals. Their determination is conclusive, if the proceedings are regular and sufficient, as to the location of the town line for all purposes. It is made so by the section referred to: "And such lines shall be deemed in every court and for every purpose the dividing line between such towns." This provision is undoubtedly a wise one. It is a matter of great public importance that the boundaries of towns should be certain. Upon the location of a town's territorial limits depends its right of taxation, the residence for various purposes of those living upon any territory in dispute, the obligation of the town to maintain and keep in repair its highways and bridges, and many other rights and liabilities. It is equally as important that these limits, when in dispute, should be finally determined by a tribunal constituted, and in a method provided, for that express purpose.

But this proceeding was never contemplated for the purpose of passing upon and determining private controversies. The constitution of this state guarantees to every one injured in his property, a remedy "by due course of law", and in all controversies concerning property a trial by a jury and a right to be heard by himself or his counsel. This proceeding was not by due course of law for the settlement of controversies concerning property; these land owners were not parties to the proceedings; they were not heard and could have had no opportunity to be heard upon the question of their respective ownerships, because that question was not involved.

The case of *Pitman* v. *Albany*, 34 N. H. 577, much relied upon in support of the exception as to the conclusiveness of the determination by the commissioners, is not applicable to this question.

That was an action to recover for injuries caused by a defective highway. The court held that the judgment of a court, which was given by statute the power to make a final determination of the location of town lines, was final and conclusive as to the limits within which a town was under obligation to keep its highways in repair, and consequently as to the liability of the defendant town in that action. We have no question of this, but that case is no authority for the position here taken by counsel for the defendant.

II. Motion. The town line in controversy is the line between Belmont and Morrill on the west and Belfast and Waldo on the east, the easterly line of Belmont and Morrill and the westerly line of Belfast and Waldo.

Belmont, which originally embraced the territory that is now the town of Morrill, was incorporated in 1814, the easterly line being thus described in the act of incorporation: "Beginning at a yellow birch tree, being the southwesterly corner of the town of Belfast; thence north, twenty-two degrees west, by the line of said Belfast, four miles and two hundred and ninety-two rods, to a maple tree, being the northwesterly corner of Belfast aforesaid; thence continuing the same course by unincorporated lands, two miles and one hundred and seven rods to a stake and stone." The next line described, is north eighty-three degrees west by the plantation of Knox, showing that the easterly line of Belmont, the north half of which was subsequently incorporated into the town of Morrill, was coincident with the westerly line of Belfast, so far as the westerly line of Belfast extended northerly, and thence continued in the same course to the plantation of Knox.

Belfast was incorporated by the Legislature of Massachusetts in 1773; its westerly line, commencing at a birch tree at the southwest corner of the town, is thus described in the Act of Incorporation, "from thence north twenty-two degrees west, three hundred and seventy-two chains to a rock maple tree, one rod westerly from a quarry of stones."

The land in dispute is a strip about eighty-seven rods long,

thirteen rods wide at the southerly end and nineteen rods at the northerly end, and lies easterly of the line as located by the commissioners and between that line and what the plaintiff claims is the location of the original line. The line claimed by the plaintiff is obtained by commencing at the southwest corner of Belfast and running from thence north, sixteen and one-half degrees west past the land in controversy. The surveyor called by the plaintiff obtained this course by taking the southwest corner of Belfast, about which there is apparently no controversy, and a monument known as the Hatch monument which is claimed to be on the line between Belfast and Belmont. The surveyor testified that the difference between the course given in the acts of incorporation, north twenty-two degrees west, and the course ran by him, north sixteen and one-half degrees west, would about correspond with the variation in the compass to be expected between the time that the course was first given and the time of his survey. This is not contradicted. The jury found that this line was the true one. The line located by the commissioners, which is claimed by the defendants to be the true one, commences at a point claimed by the defendant to be the northwest corner of Belfast, and extends north twenty-one degrees west.

The defendant urges that the verdict was manifestly wrong, and that the line established by the commissioners is unquestionably the correct one. He invokes the well-recognized rule that where a line described in a deed or charter by course or distance, and that indicated by monuments established in the original survey and location of the tract or township do not correspond, the latter being the best evidence of the true line must govern, however much they may differ. This is undoubtedly true whenever the monuments are certain or are capable of being made certain. In this case the only monuments mentioned in the two acts of incorporation, which were put into the case, are the birch tree at the southwest corner of Belfast, called a yellow birch tree in the charter of Belmont, the maple tree at the northwest corner of Belfast, called a rock maple in the charter of Belfast, and therein further described as being one rod westerly from a quarry of stone,

and the stake and stone at the termination of the easterly line of of what was originally Belmont on the southerly line of Knox plantation. There appears to be no controversy as to the southwest corner of Belfast, but there is dispute as to the northwest corner of Belfast. The maple or rock maple tree is no longer there. The starting point of the commissioners' line is fifty-four feet westerly of the place where the surveyor called by the plaintiff makes the northwest corner of Belfast. Both places claimed to be corners are marked by stone monuments, but neither of them are of great antiquity;—the one claimed by the plaintiff has been placed there more recently than the other. Nor does the stake and stone, mentioned as a monument in the Belmont charter, at the termination of its easterly line, now exist and no evidence is introduced as to its location.

The defense strongly relies upon evidence which, it is claimed, satisfactorily determines the location of a beech tree mentioned as a monument at the northwest corner of a six thousand acre tract of land, which it is said in argument was subsequently incorporated as the town of Waldo. But the act incorporating the town of Waldo was not put in evidence, and this beech tree is not referred to as a monument in any act of incorporation that was put into the case. The Legislature has the exclusive authority to create all municipal corporations and to establish their boundaries.

The legislative acts incorporating the original town of Belmont and the town of Belfast, give the course of this line as north twenty-two degrees west; and both acts further describe the line by reference to certain monuments. If the locations of these monuments could be established and they indicated a line varying from the one described by course, the monuments would control, the course must yield; but if the monuments cannot be found or their locations established, then resort must be had to the course as the only other description of the boundary given in the charters. The identity of these monuments, and the places where they were originally located, being in dispute, were questions of fact for the jury.

Considerable evidence was also introduced upon both sides show-

ing a recognition of one line or the other, monuments erected since the line was first located, fences, occupation, etc. This evidence was admissible as having some tendency to show where the line was first established, but its value and weight were also for the jury.

The question was as to where the town line between these towns was originally established. The plaintiff relied upon the course, given in the acts of incorporation, upon certain monuments and certain acts of recognition. The defendant relied upon other monuments and upon other evidence that the line is where he claims it to be. After a careful examination of all the evidence and the plans, we do not feel satisfied that the verdict was so clearly wrong as to justify disturbance.

Motion and Exceptions overruled.

WILLIAM L. NELSON *vs.* SANFORD MILLS.

York. Opinion May 14, 1896.

Contributory Negligence. Elevator.

An employee is debarred from recovering damages for an injury when he has contributed in causing the injury by his own unjustifiable and foolhardy conduct, although the employer may also have been guilty in some degree of a prior act of negligence that co-operated in producing the result.

The plaintiff was engaged in the management of a freight elevator in the defendant's mill, where he had been in the same employment for some time, and had gained a familiarity with the general working and business of the mill. His duties were, with the assistance of an associate employee, to load in the upper stories of the building the products of the mill upon a truck, wheeling them to the elevator and taking them down to a story below, and thence wheeling them to other places in the mill. Having placed the truck heavily loaded upon the elevator, he undertook to lower it, but found after repeated attempts that it would not move. The floor or platform of the carriage thus loaded was, on one side, four to five inches higher from the floor of the room than on the other side. He perceived, as he thought, that the chain which runs over the drum in the elevator-pit was loosened from its place and supposed that the carriage was suspended by the dogs,—an arrangement attached to all elevators by which they may be caught up in case of the ordinary attachment giving away. It turned out, however, that the

carriage was held by a bolt or nut projecting through the floor of the carriage and impinging against the wall of the elevator where it was held fast. He then went down into the pit, taking his associate employee with him,—the latter, however, being too wary to expose himself to danger,—and finding the chain off the drum he inconsiderately jerked it several times to throw it back in place. In doing so, his hand, with which he was holding onto the frame work of the elevator was exposed to the heavily-loaded descending carriage, as it suddenly fell; and while so placed, was thus caught by it and injured.

Held; that the plaintiff must have known that there was some serious trouble with the elevator somewhere; and that he should have given notice to some of the machinists or carpenters about the mill, who were there as emergency men for the purpose of making any repairs that might be needed, and of which he was aware and knew that he could and should have called upon them to aid him in the dilemma.

It further appears that all the parts of the elevator were so open and exposed to view as to be readily seen by any one having knowledge of such structures, while the plaintiff had not knowledge enough to see what the trouble was, or competency to apply any remedy. While he might voluntarily take such hazardous risks for himself, but not for the defendant company, he could have avoided the responsibility by giving notice of the defect complained of to his superiors. This he failed to do.

Wormell v. *Maine Central R. R.*, 79 Maine, 397, affirmed.

On Exceptions by Plaintiff.

This was an action on the case for personal injuries caused, as the plaintiff alleged, by a defective elevator. At the close of the plaintiff's testimony the presiding justice ordered a nonsuit, and the plaintiff took exceptions to this ruling.

The facts are stated in the opinion.

(Declaration) " . . . for that said defendants, at said Sanford on the twenty-fifth day of June, 1891, were the owner of certain mills and buildings in said Sanford with the machinery therein used by said Sanford Mills in the manufacture of carriage robes, horse clothing and mohair plushes; that an elevator ran from the ground floor of one of said mills or buildings, called old number two up through the building to the floor above and was used by said defendants to get their stock and goods from the floor above down to the ground floor; that said elevator and the machinery running the same were by the negligence and default of the defendants, constructed unsafely, and with defective and improper

materials, and were defective, out of repair and in unsafe condition and thereby dangerous and unfit for the purposes for which they were used as aforesaid, which the defendants well knew, but of which the plaintiff was ignorant; that the plaintiff on the twenty-fifth day of June, A. D. 1891, was employed by defendants as a laborer, that it was a part of the work and labor for which said plaintiff was employed by said defendants as aforesaid to use and operate said elevator in carrying and getting goods and stock from the upper floors of said building to the ground floor, and by reason of said defective and dangerous condition and want of repair of said machinery and elevator as aforesaid, on the twenty-fifth day of June, 1891, and while the plaintiff was employed by said defendants as aforesaid, and while acting in the line of his duty under said employment, using due care, the elevator fell, striking upon the left hand of the plaintiff, breaking, crushing and mangling his said hand in such manner that it was necessary for said hand to be amputated, thereby rendering him unfit and unable to do any manual labor, whereby he suffered great pain and was put to a large expense for surgical and medical attendance and medicines."

Edgerly and Mathews, of the N. H. bar, for plaintiff.

The facts upon which court ordered nonsuit were not so clear that, as matter of law, plaintiff could not recover. Court was not to pass upon weight of evidence, but only to determine whether there was evidence which should be submitted to the jury. *Lawless* v. *Conn. River R. R.*, 136 Mass. 5; *Polley* v. *Lenox Iron Works*, 4 Allen, 333; *Forsyth* v. *Hooper*, 11 Allen, 419; *Hough* v. *Railroad Co.*, 100 U. S. 223; *Gaynor* v. *Old Colony R. R. Co.*, 100 Mass. 208; Wood, Master and Servant, pp. 771 and 777.

There is no controversy about the facts, but only a question whether from certain facts proved, the plaintiff can be charged with competent means of knowledge of the danger, sufficient to charge him with having assumed the risk. Whether the plaintiff had competent means of knowledge of the danger, and knew and appreciated the risk, should have been left to the jury. *Railroad Company* v. *Stout*, 17 Wall. U. S. 657; *Packet Company* v. *McCue*,

17 Wall. U. S. 508; *Scanlon* v. *B. & A. R. R. Co.*, 147 Mass. 487; *Patnode* v. *Warren Cotton Mill*, 157 Mass. 283.

Servant is under no obligation to make close inspection to discover defects. Wood, Master and Servant, pp. 773–4.

Court cannot hold that plaintiff was in fault for not assuming that the defendants had neglected their duty to him when it was more reasonable and likely that the cause of elevator not moving, when shipped, was not through the negligence of any person, but that the speed or power had been shut off for good reasons.

When the plaintiff reached the bottom floor and saw the chain hanging loose, he had a right to assume that the dogs were in repair and had caught and was holding the elevator, and that there was no danger in working under and around the elevator. *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. p. 655; Wood, Master and Servant, p. 763, § 375.

It must appear that plaintiff understood and appreciated the risk and danger of injury before he can be said to have assumed the risk. *Prendible* v. *Conn. River Manuf. Co.* 160 Mass. 131–139; *Fitzgerald* v. *Conn. River Paper Co.* 155 Mass. 155; *Mahoney* v. *Dore*, 155 Mass. 513.

It is only when the servant, with full notice of risk he assumes, chooses to enter the employment, that the master is relieved from liability. No assent can be implied when there is no knowledge of hazard; there must be an intelligent choice to assume the danger. Wood, Master and Servant, pp. 729, 741.

One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger. *Mundle* v. *Hill Mfg. Co.* 86 Maine, p. 405.

Allowing machinery to remain out of repair, when its condition is brought to the master's notice, and not known by the servants operating it, is culpable negligence.

It is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of this service, and another thing to know or appreciate the risk resulting, or which may follow, from such defects. The mere fact that servant

knows the defect may not charge him with contributory negligence or the assumption of the risk growing out of it: the question is did he know, or ought he to have known, in the exercise of ordinary common sense and prudence that the risk, and not merely the defect, existed.

When a servant enters upon service with dangerous machinery, he has a right to rely upon it that the master will discharge his duty fully, both as to the selection of the appliances and his watchfulness in keeping them in repair; and while he is bound to see defects which are obvious, yet he is under no obligations to make a close inspection of the appliances to discover whether it is defective. As he has a right to presume that his employer had done his duty in that respect, therefore, in all cases, the risk assumed by the servant is to be measured by this duty on the master's part. 14 Am. & Eng. Ency. pp. 841, note, 896; Wood, Master and Servant, page 773-4.

The more rude and cheap the machinery, and the more liable on that account to cause injury to servant, the greater the obligation of the master to make up for its defects, by attention necessary to prevent such injury. *Dixon* v. *Rankin*, 14 Court of Sess. 420, cited from *Buzzell* v. *Laconia Manuf. Co.*, 48 Maine, p. 119.

Frank Wilson and Frank M. Higgins, for defendant.

Plaintiff had notice that the elevator was out of repair. Counsel cited: *Walker* v. *Redington Lumber Co.*, 86 Maine, 191; *Connors* v. *Morton*, 160 Mass., 333; *Scanlon* v. *B. & A. R. R.*, 147 Mass. 484, 487; *Myers* v. *Hudson Iron Co.*, 150 Mass. 125. 134; *Lothrop* v. *Fitch. R. R.*, Id. 423; *Anderson* v. *Clark*, 155 Mass. 368; *Coombs* v. *Fitch. R. R.*, 156 Mass. 200; *Ferren* v. *O. C. R. R.*, 155 Mass. 513, 519; *Goldthwait* v. *Haverhill &c., Ry.*, 160 Mass. 556–7; *Wormell* v. *Me. Cent. R. R.*, 79 Maine, 405–6; Wood, Master and Servant, p. 638; 14 Am. & Eng. Ency. p. 859; Buswell, Personal Injuries, 215; *Mellor* v. *Merch'ts Mfg. Co.*, 150 Mass. 362; *Conley* v. *Am. Exp. Co.*, 87 Maine, 352; *Shanny* v. *Andro. Mills*, 66 Maine, 420; *Mundle* v. *Hill Mf'g. Co.*, 86 Maine, 400.

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

PETERS, C. J. This claim surely falls within the class of cases where a plaintiff is debarred from recovering for an injury because he has contributed in causing the injury by his own unjustifiable and foolhardy conduct, although the defendant may also have been guilty in some degree of a prior act of negligence co-operating with his in producing the result. And it is not so clear that defendants were themselves guilty of any negligence which assisted in causing the injury in the present case. The plaintiff's own narrative explains unfavorably to himself the cause of his accident and injury.

He was at work in a manufacturing establishment as an attic boy, so-called, although thirty years old, and a man apparently of a fair intelligence for one in his situation in life, who had had several years of experience in and about the defendant's mills, He was engaged in the management of a freight elevator, and had been in the same employment for some time before, and had gained a familiarity with the general working and business of the mill. His duties were, with the assistance of an associate employee, to load in the upper stories of the building the products of the mill upon a truck, wheeling them to the elevator and taking them down to a story below and thence wheeling them to other sections of the mill to be left in other hands.

On the day he got hurt, after the truck, heavily loaded with freight, was got upon the floor of the elevator-carriage, he undertook by shipping the elevator, that is by putting the machinery in gear which controlled its movement, to start the carriage with the load downwards when after repeated attempts he found that the elevator, or more strictly the carriage of the elevator, would not move. He perceived, he thought, that the chain which runs over the drum in the pit of the elevator was loosened from its place, and supposed that the carriage had dropped from its ordinary holdings and had become suspended by the dogs dropping into the clevis or rack, an arrangement attached to all elevators by which they may

be caught up in case of the ordinary attachments giving away. It turned out, however, that the carriage was held by a bolt or nut projecting through the floor of the carriage and impinging against the wall of the elevator where it was held fast in close quarters.

At this point was the mistake of the plaintiff committed. He must have known that there was some serious trouble with the elevator somewhere. The fact that the floor or platform of the carriage was on one side four or five inches higher from the floor of the room than on the other side should have been evidence to him that he did not know what the trouble was. In any view of the situation he should have given notice to some of the machinists or carpenters about the mills who were there as emergency men for the purpose of making any repairs that might be needed in any of the departments of the mill. And the plaintiff was aware of the fact and knew that he could and should call upon them to help him out of the dilemma. They were skilled persons who would almost at a glance have ascertained the real trouble, for it is testified that all the parts of the elevator were so open and exposed to view as to be readily seen by any one having any knowledge of such structures, while the plaintiff had not knowledge enough to see what the trouble was or competency to apply any remedy. He had never been called upon for any such services as he undertook to perform in this instance, and he should have known that he was violating the unwritten law of the mill in making the attempt which resulted so injuriously to him. He most inconsiderately proceeded to the pit of the elevator, taking his associate employee with him, the latter being too wary however to expose himself to danger, and, finding the chain off the drum, he jerked it several times to throw it back in place, when down came the heavily loaded carriage striking and badly mutilating his hand with which he was holding onto the frame work of the elevator below, the hand being so exposed as to be sure to be caught by the descending carriage if it came down. There was not a prudent step in his conduct from beginning to end. He could voluntarily take such hazardous risks for himself, but not for the defendant company. There are quite a number of cases in this state directly or indirectly supporting our

decision in the present case, one or two of which only need be cited. *Conley* v. *Am. Ex. Co.*, 87 Maine, 352. Very like the case cited is that of *Cunningham* v. *Merrimac Paper Co.*, 163 Mass. 89, where the court lays great stress on the fact that the plaintiff failed to give his superiors notice of the defect complained of when he might have done so, thereby casting all the responsibility on them and avoiding it himself. *Wormell* v. *Maine Central R. R.*, 79 Maine, 397, has become a standard authority in this class of cases. *Walker* v. *Redington Lumb. Co.*, 86 Maine, 191. See, also, *Degnan* v. *Jordan*, 164 Mass. 84, a case that cannot be distinguished from the present, where the plaintiff failed to recover for the same reason that the plaintiff fails here.

Exceptions overruled.

MATTHEW LAUGHLIN, and another, Assignees,

vs.

WILLIAM F. REED.

Penobscot. Opinion May 22, 1896.

Lien. Attachment. Insolvency. Judgment. Officer. R. S., c. 70, §§ 33, 34, 35; c. 81, § 26; c. 91, §§ 34, 35, 42, 44.

The enforcement of a mechanic's lien is not obnoxious to the policy of the insolvent law although the attachment may be within four months of the filing of the petition in insolvency.

An attachment made to enforce the lien created by R. S., c. 91, § 34, in favor of parties who furnish labor and materials, is not dissolved by proceedings in insolvency.

There is an obvious distinction between the special lien which a mechanic acquires under the statute by furnishing labor and materials in the erection of a building, and the general lien created by an ordinary attachment on mesne process. The first will be protected, while the latter may be dissolved, by proceedings in insolvency.

An assignee in insolvency stands in the place of the insolvent and, in absence of fraud, takes his estate subject to all equities, liens and incumbrances, whether created by operation of law, or by the act of the insolvent, which had a valid existence against the property in the hands of the insolvent.

When it satisfactorily appears, in an action to enforce a lien, that the claims designed to be covered by two separate counts in the same declaration are identical, *held;* that there is no merger of a lien claim with a non-lien claim.

The general owner of a building made a contract for labor and materials for its construction, and in answer to an action to enforce a lien claim therefor appeared in court to defend against the suit. There was no suggestion of insolvency of the defendant or that any other person had an interest in property. *Held;* that no other or further notice was required.

Also; that judgment having been rendered, followed by seizure on execution before the appointment of an assignee, a valid judgment was thereby rendered against the debtor; and that no further judgment was authorized or required in order to make the property attached available to satisfy the execution.

The building in this case stood on leased land and therefore deemed personal property for the purpose of attachment. It was situated in an unincorporated place and entirely surrounded by unorganized townships, none of which had an officer to record the attachment. *Held;* that the case did not fall within the precise terms of the statute authorizing a record of an attachment; and that the attaching officer could himself, or by a keeper, take and retain possession and control of the property attached

ON REPORT.

This was an action of trespass brought by the assignees in insolvency of Frank W. Lincoln against the defendant, as sheriff of Penobscot County, for the act of his deputies in attaching, seizing on execution, and selling a certain building situated on leased land in Indian Township, Number 4, known as the Frank W. Lincoln Hotel, and owned at the time of the attachment by Lincoln. The suit in which said hotel was attached, was in an action brought in the Bangor Municipal Court by James M. Davis, against said Lincoln to enforce a lien claim, which said Davis claimed to have on said building for labor performed and materials furnished in its erection. The building was situated in an unorganized township having no clerk or recording officer, and entirely surrounded by unorganized townships, none of which had a recording officer. The building was personal property; hence it was claimed by the defendant that there was no place in which an attachment of it could be recorded. Lincoln was in possession, occupying said building as a hotel, and the officer, in order to retain possession and preserve his attachment, placed a keeper in possession of said building with Lincoln's consent. The case was entered in said

court, tried, and on the third Monday of December, 1894, judgment was rendered for the plaintiff for $90.06, and costs. From this judgment the defendant took an appeal to the Supreme Judicial Court.

The declaration contained averments, as stated in the opinion, that the suit was brought to enforce a lien. On January 1st, 1895, said Lincoln filed his petition in insolvency, and the plaintiffs were duly appointed assignees March 13, 1896. The filing of the petition was before the sitting of the court to which the appeal was taken; it was not controverted that, at the time Lincoln filed his petition in insolvency, the property was held by virtue of an attachment in a suit to enforce a lien claim. The defendant, Lincoln, failed to prosecute his appeal in the Supreme Judicial Court, also failed to suggest and plead his insolvency; and on the 6th day of February, 1896, Davis obtained a judgment, on which, after a hearing on costs, execution was issued. The execution issued and seizure on the execution was made March 20, 1896, and after due notice the building was sold by the officer on March 27, 1896,—all being done within thirty days from the rendition of judgment and issuing of the execution.

The other facts are stated in the opinion.

Matthew Laughlin, for plaintiffs.

F. J. Martin and G. H. Morse, for defendant.

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

WHITEHOUSE, J. The plaintiffs as assignees in insolvency of Frank W. Lincoln brought this action of trespass against the defendant, as sheriff of Penobscot County, for the act of his deputy in attaching, seizing, and selling a certain building situated on leased land in Indian Township No. 4, known as the "Lincoln House" and at the date of the attachment owned by Frank W. Lincoln. The attachment was made November 21, 1894, in a suit brought against Lincoln by James M. Davis to enforce a mechanic's lien, which Davis claimed to have on the building for labor

performed and materials furnished in its erection, the balance claimed being $176.36. The declaration on the account annexed to the writ, specifying the items of labor and materials, contains an averment that the suit was "brought to enforce the plaintiff's lien on said building," previously described in the writ. It is stated in the officer's return that the attachment was made for the purpose of enforcing the plaintiff's lien claim on the building, and that personal service was at the same time made on the defendant Lincoln, who was the debtor and the owner of the building. The writ was duly entered in the Municipal Court of Bangor to which it was made returnable, the defendant appeared and answered, and judgment was rendered for the plaintiff on the third Monday in December for $90.06 and costs of suit. The defendant appealed from this decision, but failing to prosecute his appeal, the judgment of the lower court was affirmed in the Supreme Court on the sixth day of February, and execution duly issued thereon on the fourth day of March, 1895. On this execution is a memorandum describing the building attached and stating that it was "for the purpose of enforcing plaintiff's lien on said hotel." By virtue of this execution the officer seized and sold the hotel, after due notice, stating in his return that it was the same building attached on the original writ to enforce the creditor's lien claimed thereon.

In the meantime, however, Frank W. Lincoln, the defendant in that suit, was duly adjudged an insolvent debtor on the first day of January, 1895, on his own petition, and the plaintiffs as his assignees received the usual assignment, vesting in them all the property and estate of the debtor . . "although the same was then attached on mesne process as the property of the debtor." Thereupon, these plaintiffs invoked the succeeding clause in § 33, c. 70, R. S., declaring that, "such assignment dissolves any such attachment made within four months . . preceding the commencement of such proceedings"; and contend that even if the lien creditor Davis had, in other respects, observed the requirements of the statute for the preservation of his lien, his attachment was dissolved and his lien discharged by force of these proceedings in insolvency.

This position of the assignees is clearly untenable. The bene-

ficent provisions of our statutes in favor of mechanics and material men are not in conflict with the spirit and purpose of the insolvent law, because no injustice will be done to any creditor, or class of creditors, by the enforcement of a mechanic's lien. There is an obvious distinction between the lien which a mechanic acquires under the statute by furnishing labor and materials in the erection of a building and a general lien created by the ordinary attachment on mesne process. "In the latter case, an attaching creditor has no claim for preference over other creditors except by his attachment; whereas, when a mechanic obtains a lien under the statute, and relying thereon, increases the value of the land by erecting buildings thereon, he has a strong equitable claim for re-imbursement to the extent of the value of his labor and materials furnished for building; and in this respect he has a marked preference over other creditors of the owner of the land, who had trusted to the personal credit of their debtor." *Foster* v. *Stone*, 20 Pick. 542. The operation of the lien law is analogous to that of the clause in § 52, c. 70, R. S., declaring valid any loan of actual value made in good faith upon security taken at the time; because such security is only "equivalent to the additional value which the creditor has by this means given to the property of the debtor, and therefore does not diminish the assets of the latter applicable to the payment of his pre-existing debts." *In re, Coulter*, 5 Nat. Bank. Reg. 64; Phil. on Mech. Liens, 299.

Again, it is an uncontroverted and familiar principle that, in the absence of fraud, the assignee in insolvency stands in the place of the insolvent debtor and takes only the property which he had subject to all equities, liens or incumbrances, whether created by operation of law or by the act of the insolvent, which had a valid existence against the property in the hands of the insolvent. *Yeatman* v. *Sav. Inst.* 95 U. S., 764; *Newbert* v. *Fletcher*, 84 Maine, 408; *Hutchinson* v. *Murchie*, 74 Maine, 187.

Reasoning from these two postulates we reach an easy solution of the apparent difficulty arising from the unqualified provision in § 33, c. 70, R. S., that all attachments are dissolved by proceedings in insolvency. The assignees took the property subject to the

strong equities attaching to a mechanic's lien, the security of which, as we have seen, is in no way obnoxious to the policy of the insolvent law; and the insolvent statute should not be construed to destroy those equities by dissolving the lien, unless such a construction is imperatively demanded by its terms when considered in comparison with the statutes under which the mechanic's lien is acquired.

Section 34 of c. 91, R. S., provides that the lien shall be dissolved unless a suit to enforce it is commenced within ninety days after the last labor is performed; but section 35 of the same chapter proceeds to declare that . . . "when a warrant in insolvency issues against his estate within the ninety days and before the commencement of a suit, the action may be commenced within sixty days after notice given of the election or appointment of the assignee, or the revocation of the warrant, and the lien shall be extended accordingly." This amendment to the Revised Statutes of 1871 was enacted in 1881, three years after the passage of the insolvent law; and it is an established rule that acts in pari materia are to be taken together and construed as one law. Thus these several provisions reflect light upon each other, and the whole should be so expounded if practicable, as to avoid any contradiction or inconsistency and give some effect to every part. *Newbert* v. *Fletcher*, 84 Maine, 408; *Gray* v. *Co. Com.* 83 Maine, 429; Endlich on Int. of Statutes, 40–41; Sedgwick on Stat. Const. 238.

But there seems to be no necessary conflict between the statutes above quoted. They may be naturally construed so as to leave a clear and definite field of operation for each. The provision in § 33, c. 70, is restricted to general attachments by which liens are *created*; while § 34 of c. 91 expressly relates to liens *created* by the *act* of furnishing labor and materials and *enforced* by attachment, affording at the same time an obvious implication that all such liens are to be upheld against a warrant in insolvency.

The lien in favor of the plaintiff in the action *Davis* v. *Lincoln*, if otherwise preserved, was protected against the operation of the

insolvent law; and as no suggestion of the defendant's insolvency was made on the record, the action went to judgment in the regular course of procedure; and, if otherwise justified, the officer was authorized to seize and sell the building on the execution.

But the plaintiffs still insist that the lien was dissolved by the failure of the creditor to observe the statute requirements and legal formalities necessary to preserve and enforce it.

In the first place, it is objected that the second count in the writ is for an independent cause of action, and not for the items specified in the first count, and hence that the lien claim is lost because merged in a judgment with a non-lien claim. But this objection cannot be sustained. Section 42 of c. 91, R. S., provides that "the declaration must show that the suit is brought to enforce the lien; but all other forms and proceedings therein shall be the same as in ordinary actions of assumpsit." It has been seen in the case at bar that the first count declaring on the account annexed, specifying the labor and materials furnished, concludes with the following averment: "and this suit is brought to enforce the plaintiff's lien for the same upon said building above described." This general statement that the "suit" is brought to enforce the lien, necessarily applies to the second count for money had and received as well as for the first count; and inasmuch as evidence might be admissible under the second count to support a lien claim, there would seem to be no substantial basis for the assertion that this count is for a non-lien claim. Each count is aided by the general averment that the "suit" is brought to enforce the lien and must be construed with reference to it.

Furthermore, it is a reasonable inference from the whole record that the second count was perfunctorily inserted in obedience to the common practice of providing against possible contingencies in the introduction of the evidence; that it was only intended to cover the identical claim set forth in the first count, and that the judgment was in fact rendered on evidence relating to the items in the first count. The money count is for "another sum of $176.36" being the exact sum named in the first count. The "suit" embracing this count was brought to enforce the plaintiff's lien, and

although there appears to have been a trial in the municipal court, there is no suggestion that the plaintiff in fact had any other claim against Lincoln except that specified in the first count. Finally, it is stated in the record of the court that the action was "upon account annexed to enforce lien as set forth in the writ," no mention being made of the money count and the judgment was for only $90.06. It thus satisfactorily appears that the claims designed to be covered by the two counts are identical, and that there was no mingling of a lien claim with a non-lien claim.

The same objection was made by counsel and overruled by the court in *Parks* v. *Crockett*, 61 Maine, 489.

It is also claimed that the lien was lost because there was no judgment rendered for a lien on the building described. But it has been seen that the defendant, in *Davis* v. *Lincoln*, was the general owner of the building, made the contract for the labor and materials, and in answer to the summons served upon him duly appeared in court in defense of the suit. There was no suggestion that any other person had any interest in the property. No other notice was authorized or required. Under these circumstances a valid judgment was rendered against the defendant Lincoln, and no further judgment was authorized, or required, in order to make the property attached available for the satisfaction of the execution issued on the judgment in that suit. R. S., c. 91, §§ 42 & 44; *Martin* v. *Darling*, 78 Maine, 78; *Farnham* v. *Davis*, 79 Maine, 282; *Byard* v. *Parker*, 65 Maine, 576; *Parks* v. *Crockett*, 61 Maine, 489.

But in the fourth count in their writ, these plaintiffs finally contend that in any event the defendant is liable as a trespasser ab initio, because he unnecessarily placed a keeper in charge of the building to preserve the attachment in *Davis* v. *Lincoln*, and also because the keeper was an unsuitable person for the trust by reason of his intemperate habits.

Section 26 of Chapter 81, R. S., provides that "when personal property is attached, which by reason of its bulk or other special cause cannot be immediately removed" the officer may record the attachment in the office of the clerk of the town in which the

attachment is made; and such attachment is as effectual and valid, as if the property had remained in his possession and custody. But when the attachment is made in an unincorporated place, it shall be filed and recorded in the office of the clerk of the oldest adjoining town in the county.

It is not in controversy that the building in question, standing on leased land, must be deemed personal property for the purpose of attachment; and it was not only situated in an unincorporated place, but was entirely surrounded by unorganized townships none of which had a recording officer. The case, therefore, does not fall within the precise terms of the statute authorizing a record of the attachment.

Prior to the enactment of this statute, in order to perfect and preserve an attachment of such personal property, it was the duty of the officer, either by himself, or by a keeper appointed by him for that purpose, to "take and retain possession and control of the property attached, or have the power to take immediate control." *Weston* v. *Dorr*, 25 Maine, 176; *Gower* v. *Stevens*, 19 Maine, 92; *Wentworth* v. *Sawyer*, 76 Maine, 434; *Brown* v. *Howard*, 86 Maine, 342. But as against the defendant Lincoln or the plaintiff in this case, who took only his interest in the property, it was not indispensible, in order to preserve the attachment in question, that the officer or his agent should remain constantly in the actual possession. *Hemmenway* v. *Wheeler*, 14 Pick. 408; *Ashmun* v. *Williams*, 8 Pick. 402. In general, it may be said that it must be such a custody as to enable the officer to retain and assert his control over the property so that it cannot probably be taken from him by a bona fide purchaser or subsequent attaching creditor. Drake on Attach. § 423; *Hemmenway* v. *Wheeler*, supra.

But on the contrary, even if the operation of this statute could be enlarged by construction, in furtherance of the manifest purpose of it, so as to authorize the record of such an attachment in the oldest neighboring town, in case there was no town actually adjoining, still it would not deprive the officer making the attachment of the right to take actual possession of the property, if reasonably necessary for its preservation, although the probability

of its forcible removal might be very remote. As the "minister of the law" he is charged with a duty on the one hand, to make the property available for the satisfaction of the creditor's claim, and in another event is made accountable for it to the debtor. Thus his relation to the thing attached becomes such as to invest him with a special property in it, which enables him to protect the rights he has acquired independently of both debtor and creditor. Drake on Attach. § 290; *Braley* v. *French*, 28 Vt. 546; *Wentworth* v. *Sawyer*, supra.

In view of the situation of this building in the wilderness, and of the evidence tending to show that disorderly persons frequented the place and might naturally be expected to do so, it does not appear to have been unreasonable, in any event, to have a keeper appointed to retain possession and control of the property, and thus preserve it from destruction and protect it against trespassers and consequent injury and damage.

It also appears that the person appointed by the sheriff to act as keeper, was selected upon the express recommendation and request of Frank W. Lincoln, the owner of the building, and that he was a competent person for that trust. It is not alleged in the writ that he committed any specific act of trespass, and it is not satisfactorily shown that he was responsible for the slight damage occasioned by the injury to a door. But there is a strong preponderance of evidence that he discharged his duty with reasonable efficiency and fidelity.

The plaintiffs fail to establish any liability on the part of the defendant under the law and the evidence applicable to the fourth count in their writ.

Judgment for the defendant.

PROPRIETORS OF MACHIAS BOOM

vs.

WILLIAM C. HOLWAY, and others.

Washington. Opinion May 22, 1896.

Corporation. Tolls. Logs. Special Laws, Mass., Feb'y 13, 1808, c. 55; Special Laws, Maine, 1891, c. 174.

The court adheres to its former decision that the fees and tolls provided in the plaintiff's charter, Special Act, Mass., Feb'y, 1808, c. 55, were changed by the Special Act of Maine, 1891, c. 174; and that by the last act a rule was established by which was fixed the price for "sorting and rafting" logs and timber so rafted and secured at the boom, and also for "boomage" of logs and timber.

Held; that the legislature manifestly intended to fix the boomage at a price that would yield to the plaintiff corporation a reasonable profit, and thereupon adopted the peculiar scheme with respect to rafting for the purpose of giving to the log-owners the privilege of sorting and rafting their own logs at the actual cost to themselves on terms and conditions consistent with the paramount authority of the plaintiff corporation to retain the possession and control of its property.

It must have been anticipated, as a probable result of the practical operation of the scheme, that the defendants' offer would sometimes, if not always, be less than it would cost the plaintiff to perform the service; and yet it was held in the former opinion of the court (85 Me. 343) that the legislature had not exceeded the authority reserved to it in the charter of 1808. The question was directly and necessarily involved in the conclusions there announced, and the defendants may well invoke the maxim, stare decisis.

See *Propr's Machias Boom* v. *Sullivan*, 85 Maine, 343.

ON REPORT.

This was an action of assumpsit to recover $617.98 for rafting and booming the defendants' logs and for wedges and raft rope furnished at Machias, during the season of 1894.

The case is stated in the opinion.

Chas. Sargent, for plaintiff.

H. M. Heath and C. L. Andrews, for defendants.

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

WHITEHOUSE, J. This is an action on account annexed to the writ to recover for booming, sorting and rafting the defendants' logs secured by the plaintiff corporation in its boom at Machias, in the year 1894.

It is stipulated in the report that if the tolls are to be assessed under chapter 174 of the Private and Special laws of 1891, judgment is to be entered for $208.59 and interest; otherwise the case is to stand for trial.

The plaintiff corporation was chartered by virtue of chapter 55 of the special laws of Massachusetts for the year 1808. The third section of that act fixed certain "fees or toll" for logs "rafted and secured" at the company's boom "by any person or persons," but concluded with the following reservation: "Provided, however, that the fees or toll shall at all times hereafter be subject to the revision or alteration of the legislature."

It appears to have been determined by the legislature of Maine for the year 1891 that the exigency had arisen when, in justice to those affected by the operations of the company, this reserved authority for the "revision and alteration" of the tolls should be exercised. Accordingly chapter 174 of the Private and Special laws of that year was enacted, by which the tolls were so "revised and altered" that the corporation should receive "for the boomage of each pine, spruce, or hemlock mill-log or stick, five-eighths of a cent; for the boomage of each cedar stick, one-quarter of a cent;" and "for sorting and rafting logs and lumber so secured at said boom, a price per stick not to exceed such prices as the owners of such logs and lumber shall in writing agree to perform such sorting and rafting for, at their own expense, such agreement by them signed to be filed with said corporation before each rafting season shall open, to be for the season then next ensuing and if accepted to bind such owners to be responsible for the acts, default or negligence of all persons employed thereunder."

In *Prop'rs of Machias Boom* v. *Sullivan*, 85 Maine, 343, the

constitutional limitations, as well as the proper construction of this amendatory act, were brought directly in question and definitely settled in the opinion of the court. In that action, as in this, an attempt was made by the plaintiff corporation to ignore this revision of the fees and toll effected by the amendment of 1891 and to continue the assessment for that season according to the rates established by the original charter which the legislature of Maine deemed excessive and unjust. Then, as now, it was contended by the plaintiff that the power to revise the fees reserved to the legislature in the original charter, could only be exercised by fixing and specifying in terms the exact amount which the plaintiff should be entitled to receive for rafting as well as booming, and that the scheme devised by the legislature of 1891 for the purpose of controlling the maximum price of "sorting and rafting" logs and lumber, which should "be rafted and secured at said boom by any person or persons," would have the effect to deprive the plaintiff corporation of the possession and control of a property and business protected by its charter, and to impair the value of an investment made upon the faith of that charter. Then, as now, the plaintiff contended that under this ingenious device, by specifying a price below the actual cost of sorting and rafting, the log owners would always have it in their power to compel the plaintiff either to surrender to them the possession and control of its boom, or perform the service of sorting and rafting at a loss. In that case the agreement of the log owners to do the "sorting and rafting at their own expense" at a price named, was signed by all those owning logs in the boom to be rafted out that season, with the exception of one. In the case at bar, the offer is also signed by all the log-owners except one, and his logs were included in the offer and the boomage and rafting fees on them ultimately paid by those signing the offer, according to the terms of a contract previously made by them for the purchase of his logs.

After disposing of the minor contentions of the parties, in the former case (85 Me. 343), by holding that under the amendment of 1891 no additional duty was imposed upon the plaintiff by the introduction of the word "sorting" and that by the terms of that

act logs were only required to be rafted out by ownership and not by kinds, the court proceeded to determine the constitutionality of the act, and the further questions of construction involved and stated above, as follows: "The question, therefore, to be determined in this class of cases where legislative interference is claimed, is whether the act in question does in fact impair the obligations of contract. Oftentimes legislation may be such as to injuriously affect the interests of those with whom the contract exists, and yet impair no obligation of contract. . . . . This reserved or delegated power vested in the legislature, permits it to exercise the right of revising or changing the price of compensation to be received by the plaintiff for the acts required to be performed under its charter. Has the legislature done more than that? We think not. . . . . The plaintiff admits that by its charter it was its duty to secure all logs coming into its boom, and subsequently to raft out the same. . . . . The act in question, while adding no new duties, takes away no rights, and destroys no privileges guaranteed by the state. It simply furnishes a rule by which the compensation is to be adjusted. It establishes certain necessary precedent conditions, which if complied with, fix the maximum price of rafting. In the case at bar these conditions have been substantially complied with. The offers were declined by the plaintiff, and this action is brought to recover upon the old rate as specified in the charter of 1808. The provisions of the amendatory act regulating tolls must apply."

It has been seen that there is no material fact to distinguish the case at bar from the case arising in 1891. Even the parties are the same, though the defendants are named in different order, and the only particular in which the cases differ is the amount offered by the log-owners as the price of the sorting and rafting. In 1891 they offered seven-eighths of a cent per stick for the sorting and rafting, claiming however, that under the terms of the act the rafting must be done by kind as well as by ownership. But it was determined by the court that, with respect to that branch of the work, the plaintiff's duty under the act was discharged when the logs were rafted out by ownership only, and not by kinds; and

this service of sorting and rafting by ownership the defendants offered to perform in 1894 for one-eighth of a cent per stick in addition to the fees for the boomage as fixed by the amendatory act, and to furnish the necessary wedges and raft rope.

It is still contended by the plaintiff, however, that this offer on the part of the defendant, though seasonably made, cannot be deemed a compliance with the act of 1891 because it is below the limit of actual cost, either to the plaintiff or to the defendants and so unreasonably low as to indicate bad faith on the part of the defendants.

It should be a sufficient answer to this objection, that in the former opinion of the court (85 Me. 343) it must have been anticipated as a probable result of the practical operation of this scheme that the defendant's offer would sometimes, if not always, be less than it would cost the plaintiff to perform the service; and yet it was held that the legislature had not exceeded the authority reserved to it in the charter of 1808. The question was directly and necessarily involved in the conclusions there announced by the court, and the defendants may well invoke the maxim "stare decisis et non quieta movere."

It may be further observed, however, that when the amendatory act of 1891 is examined in the light of the grievance designed to be remedied, it is manifest that the legislature intended to fix the boomage at a price that would yield the plaintiff corporation a reasonable profit and thereupon adopted this peculiar scheme with respect to rafting for the purpose of giving to the log-owners the privilege of sorting and rafting their own logs at the actual cost to themselves on terms and conditions consistent with the paramount authority of the plaintiff corporation to retain the possession and control of its property. The act declares that the price for rafting shall never exceed the offer of the log-owners, and in effect insures to them the right to raft their logs at their own expense provided their offer is declined. It satisfactorily appears from the testimony relating to the conduct of the defendants' business at their mills, that the work of sorting and rafting can be done to much better advantage and at less expense by the log-owners than by the

plaintiff corporation; and, even if that were a material inquiry, there is no evidence in this case that the defendants' offer was less than the actual expense incurred by them that would have been properly chargeable to the work of rafting by ownership alone, whatever might have been the actual cost to the plaintiff for the same service; for when done by the defendants' employees the work is, of course, done by marks and kinds as well as ownership, and is in all respects adapted to the convenience of manufacturing.

No complaint is made that the agreement or "offer" in writing signed by the defendants was not seasonably filed and in form sufficient to meet the requirements of the amendatory act. The probability that, under the circumstances of this case, any injury or prejudice to the plaintiff would result from the omission of one log-owner to sign the offer, is too remote to be a disturbing factor in the problem. So far as the plaintiff's rights or interests were involved, the contract of one of the defendants to purchase Allen's logs made before the offer was signed, was essentially equivalent to actual ownership. The boomage and rafting fees on those logs were paid by the defendants, and all the logs to be rafted out that season were practically embraced in the offer.

Thus all the conditions precedent named in the act as essential to fix the maximum price for rafting have been substantially complied with. No valid reason has been shown why full effect should not be given to the amendatory act of 1891 according to its clear meaning and manifest purpose. It is the opinion of the court that it must control the assessment of damages in this case. According to the stipulation in the report, judgment must be entered for the plaintiff for $208.59, with interest from the date of the writ.

Judgment accordingly.

DELANA A. WILSON *vs.* FRANZ M. SIMMONS.

Knox. Opinion May 23, 1896.

Way. Trees. Rockland City Charter, R. S., c. 18, §§ 4, 14, 16, 65, 75.

A report of the committee of the city council of Rockland in favor of laying out, altering and widening Main street in Rockland in 1889, having been legally accepted by the concurrent action of both boards of the City Council, *held;* that the approval on the part of the mayor in the acceptance of the report is not required; nor is the acceptance of it effected by the passage of any legislative "act, resolve or order" requiring the express approval of the mayor.

Such acceptance of the report of the committee operates as an adoption of their findings, and makes the adjudication of the committee the adjudication of the city council.

The city charter of Rockland requires the street committee of the city council to "make a written return of their proceedings . . . . containing the bounds and description of the way and the names of the owners of the land taken, when known, and the damages allowed therefor;" but, under the circumstances disclosed by the evidence in this case, *it was held*, that the omission of the committee to state the names of all the land-owners in their return must be held only as an irregularity in the manner of completing their action, and not a radical defect which renders the action itself a nullity as a defense to an action of trespass against the street commissioner for building a sidewalk within the limits of the way by order of the city council, and for cutting down and removing trees standing thereon.

A return, in the report of the committee, of the names of the land-owners and the damages awarded has not been considered by the courts of Maine and Massachusetts to be a matter of such vital importance as to amount to a prerequisite to the validity of the location of a way.

Held; in this case, that it appears that the plaintiff's right of appeal upon the question of damages was as fully preserved as if her name had been stated in the return of the committee.

A street commissioner is justified in removing trees standing within the limits of the street, if such removal is reasonably necessary to the proper construction of a sidewalk which he is directed by the city council to build; and even if it is not reasonably necessary to remove the trees, he would not be liable, if in removing them, he pursues his honest judgment, acting in good faith and without malicious or improper motives.

Nor would he be liable for removing the whole of a tree standing partly within and partly without the location, if reasonable necessity required it, and the removal of that part within the location would destroy the tree.

The principle of law which controls the liability of the owner of a private lot for cutting a tree standing on the line between him and an adjoining proprietor, is not applicable to a street commissioner who is required by reasonable necessity to hew to the line in the construction of a sidewalk, and invested with authority to remove any obstacle which obstructs, or is likely to obstruct, a way or render its passage dangerous.

On Report and Exceptions by Plaintiff.

This was an action of trespass q. c. against the street commissioner of the city of Rockland for removing certain trees, digging up the soil, and other trespasses in front of the plaintiff's house on Main street, while constructing a sidewalk in the month of October, 1894.

The defendant justified his act as road commissioner of Rockland, alleging that the trees were within the located limits of the highway. The plaintiff's deed, dated in 1838, bounds her premises on the street or road; and, although the road is an ancient highway, no record of its laying out could be found prior to a record dated in 1889, and called the road as laid out under Rose's survey. There being no record or monuments to define or indicate the location of the street, other than the buildings or fences along the side thereof, the city in 1889, proceeded to locate and establish a street or way there as required by law. By such location, as appeared, some three or four feet in width of plaintiff's land, inside of the fences, which had existed in front of the plaintiff's premises for more than twenty years, were taken; but nothing had been done by way of actually entering upon the land, from the time of the location, until the defendant entered upon it in 1894.

The case was submitted to the jury upon the assumption that such laying out, in 1889, was sufficient and legal as a proposition of defense against the plaintiff's claim; and, upon that assumption, a verdict was rendered for the defendant. It was admitted that, if such laying out was not valid and sufficient as a defense to this action, that there would be no defense against the action, inasmuch as the trees, etc., removed would in such case be found to have been situated outside of the limits of the road and inside of the plaintiff's close, as held by her through her fences for more than forty years of adverse possession.

It was agreed by the parties, at the suggestion of the court, that the jury should find what the damages of the plaintiff were, assuming that such laying out in 1889 was not sufficient and valid as a defense against the plaintiff's claim; and the jury found, specially, that such damages would be the sum of five hundred seventy-five dollars and eight cents.

And the case was reported to the full court for their opinion whether such laying out, in 1889, was or not a sufficient and legal proceeding, such as would be a defense to the action.

If the court should be of opinion that the proceedings in laying out the way, in 1889, were not sufficient and legal to constitute a new highway, then, by the agreement of parties, the verdict in favor of the defendant was to be set aside and a judgment entered against the defendant in favor of the plaintiff for the sum of five hundred and seventy-five dollars and eight cents ($575.08), as ascertained by the special finding. But if the court, on the contrary, found such proceedings were sufficient and legal, then the verdict in favor of the defendant was to stand, unless set aside and a new trial granted for some erroneous ruling of the justice presiding, stated in the exceptions taken by the plaintiff.

EXCEPTIONS. The plaintiff claimed the right to show, by evidence, that the removal of the trees was not necessary for the good of the public travel, and offered evidence intended to be bearing on that point, and whatever is contained in the following colloquy between counsel and court will exhibit such rulings and requests and refusals as were made on the subject.

Testimony of James Hull. "After leaving Holmes Street, on which side of Main Street is nearly all the residences and population?"

"On the eastern side."

"Is there, in fact, any population of any consequence on the western side?" [Objected to.]

Mr. Johnson: They set up that public necessity requires them to cut down these trees; now, we have a right to show that the public necessity depends upon the travel there.

The Court: I don't believe I shall submit to the jury whether the city is justified in taking land for public purposes. If they have taken it, they are to be the judges of that.

Mr. Mortland, referring to a decision in the 78th Maine in which, he said, the Chief Justice concurred, said: "There is a question at issue as to whether the surveyor had a right to determine, or whether it is a fact for the jury."

The Court: A right to determine whether he is acting with bad motive.

Mr. Fogler: The issue in that case is whether the acts were malicious.

Mr. Mortland: But the Court lays down a rule—

The Court: I think the city and its officers are the judges as to whether the public necessity requires it.

Mr. Mortland: Then the public might be at the mercy of an incompetent man. I will put this: State as to what proportion of the population south of Holmes street travel on the western side? [Objected to.]

The Court: I think if he knows, if he has means of knowledge to give a good judgment, he may state what proportion of the travel goes on the west side of the street.

Mr. Fogler: For what purpose?

The Court: As descriptive of the locus.

Counsel: After you leave Holmes Street there is no sidewalk, and there is no travel down that way to speak of; they have to cross over to go down on the eastern side.

In going from St. George, or South Thomaston or Owl's Head, on which side of the street would that population travel if they went on the sidewalk? [Objected to.]

The Court: That is too remote—the city is just as much bound to give five of its population good travel as it is to give twenty-five of its population.

Mr. Mortland: They say that whatever they did was necessary to be done.

The Court: I shall never submit to this jury the bare, single question as to whether there was any necessity of building the sidewalk or not.

Mr. Mortland: We contend that under the city charter, the city government has entire control over it. The surveyor has no authority except what is conferred by the city government.

The Court: Then he is a trespasser in everything he has done. I shall exclude that last question.

Mr. Johnson: Then as to the other point. The city has the right to build the sidewalk on the line of the street, but when it comes to taking down trees or anything that projects into the sidewalk, there must be a matter of necessity before a man can take them down; now can I show whether these trees should or not come down according to the necessity?

The Court: You will find that it has very little to do with it before we get through, according to my view of it. If a surveyor, every time he removes a tree or rock from the side of the road, has got to prove to a jury that it was necessary to do it, he does not occupy much of an office.

Mr. Johnson: The owner of the fee has a right to plant trees, and the statute is full of authority, and when he does plant them, the court says that the surveyor shall protect them until there is a necessity for taking them down. Now haven't we a right to show the amount of travel that goes up and down that street?

The Court: My idea is that the city is the judge of the necessity, and, in some degree, the officer who has charge of the road.

Mr. Johnson: Yes, and the citizen who goes up and down the street ought to know.

The Court: I have allowed you to put it in, in a general way, but I cannot give it the force as you now claim. It is too remote —to show the unreasonableness of it—to ask whether the travel from St. George or some other place named has to go one way or the other. I have allowed you to show the amount of travel going there, the general fact. Otherwise, you might go far enough to prove the names of the people and how often they go.

Also, in the testimony of Mrs. Emma Karcher, the daughter of the plaintiff, the witness was asked if she knew "any reason for cutting those trees down," which question was objected to and the court said: "She need not answer that question."

Also, in the testimony of Mr. Simmons, the defendant, is the following:

Defendant's Counsel: State whether you had any talk with Mr. Carleton after the trees were cut down, or with Dexter Simmons, relative to hiring some one to grade and sod the lot? [Objected to.]

The Court: Any directions that he gave are admissible.

Mr. Mortland: Directions to a party not in the presence of my client?

The Court: Anything that he did showing good faith and reasonableness is admissible.

Mr. Mortland: I would like an exception to that.

The Court: You may have an exception, and he may state what he did or directed to be done.

Witness: "I told Mr. Dexter Simmons to engage Mr. Carleton to sod up the premises and move the shrubbery and put the bushes anywhere that Mrs. Wilson wanted them put; to consult her, and if she wanted them changed, to change them as she wanted them."

To which rulings and refusals to rule, the plaintiff excepted. Other exceptions relating to the charge are adverted to in the opinion.

The case appears in the opinion.

D. N. Mortland and M. A. Johnson, for plaintiff.

C. E. and A. S. Littlefield, and W. R. Prescott, for defendant.

SITTING: WALTON, FOSTER, HASKELL, WHITEHOUSE, WISWELL, STROUT, JJ.

WHITEHOUSE, J. This case comes to the law court on report and exceptions. It is an action of trespass quare clausum, brought against the road commissioner of Rockland, for damages alleged to have been sustained by the construction of a sidewalk within the

located limits of Main street in that city. The plaintiff contends that the location of the street relied upon by the defendant, was not a legal and valid one; and secondly, that in removing certain large trees in front of her house, the defendant acted wantonly, oppressively and maliciously, and thereby forfeited all claim to the justification which a legal location of the street might have afforded him. But, upon the hypothesis submitted in the instruction of the court, that there had been a valid location of the street in 1889, the jury rendered a general verdict in favor of the defendant. At the same time, by direction of the court, the jury also returned a special finding assessing the damages to which the plaintiff would be entitled, in the event that such location should be found invalid as a ground of defense to the action.

I. The question of the validity of the location of the street, thus raised by the report of the alternative findings of the jury, is now presented by the learned counsel for the plaintiff in an able and exhaustive argument upon two propositions. It is contended that the location is not valid, first, because the report of the committee of the city council of Rockland in favor of such "laying out, altering and widening" of Main Street in 1889, was not approved by the mayor, and not legally accepted by the city council, and because even a legal acceptance of the report would not in itself be sufficient to establish the way; and secondly, because the report does not state the names of the owners of the land taken and the damages allowed therefor.

It is provided in section two of the city charter of Rockland that "the administration of all the fiscal, prudential, and municipal affairs of said city with the government thereof shall be vested in one principal magistrate, to be styled the mayor, and one board of seven, to be denominated the board of aldermen, and one board of twenty-one, to be denominated the board of common council; which boards shall constitute and be called the city council." Section three provides that the mayor "shall from time to time communicate to the city council such information and recommend such measures as the interests of the city may require," and "shall

preside in the board of aldermen and in the joint meeting of the two boards, but shall have only a casting vote." Section four declares that "every law, act, ordinance, resolve or order, requiring the consent of both branches of the city council, ... shall be presented to the mayor for approval." But if not approved by him, it shall be returned with his objections at the next session of the city council, and if then passed by a two-thirds vote, it shall have the same effect as if signed by the mayor; and if not so returned "the same shall be valid without approval."

Section nineteen contains the following provisions in regard to the location of streets and public ways: "The city council shall have exclusive authority to lay out, widen, or otherwise alter or discontinue any and all streets or public ways in the city of Rockland without petition therefor, and to estimate all damages sustained by the owners of land taken for that purpose. A joint standing committee of the two boards shall be appointed whose duty it shall be to lay out, alter, widen or discontinue any street or way in said city, first giving notice of the time and place of their proceedings to all parties interested by publishing the same two weeks successively in two weekly papers printed in Rockland, the last publication to be one week at least previous to the time appointed. The committee shall first hear all parties interested and then determine and adjudge whether the public convenience requires such street or way to be laid out, altered or discontinued, and shall make a written return of their proceedings, signed by a majority of them, containing the bounds and descriptions of the street or way, if laid out or altered and the names of the owners of the land taken, when known, and the damages allowed therefor; the return shall be filed in the city clerk's office at least seven days previous to its acceptance by the city council. The street or way shall not be altered or established until the report is accepted by the city council, and the report shall not be altered or amended before its acceptance." This section also contains an express provision that any person aggrieved by the judgment of the city council may appeal to the supreme court upon the question of damages.

An inspection of these provisions, thus quoted at length from the city charter, in connection with the records of the city council, will render any extended discussion of the plaintiff's first contention unnecessary. July 1, 1889, an order was passed by the city council instructing the joint standing committee on new streets to "lay out, alter and widen" Main Street, if they adjudged that public convenience required it, in accordance with certain definite bounds, courses, distances and width specified in the order. This order was duly approved by the mayor. After due notice and hearing given to all parties interested, this committee adjudged that the street should be altered and widened as specified, and made a written return of their proceedings containing a definite description of the bounds, courses, distances and admeasurements of the street as altered and widened by them; and this description is identical with that contained in the order above mentioned passed by the city council and approved by the mayor. This return appears to have been placed on file in the city clerk's office September 28, 1889, and on the 7th of October following, it was received in the board of aldermen, "accepted and sent down for concurrence." November 4, 1889, the report was "accepted in concurrence" by the common council. Being thus duly accepted by the two branches, which constituted the council, the report was legally accepted by the city council. The acceptance of this report was not accomplished by the passage of any legislative "act, resolve or order" requiring the express approval of the mayor. *Preble* v. *Portland*, 45 Maine, 241.

Nor, is it necessary that there should be concurrent action on the part of the mayor in the acceptance of the report. "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 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." *Brown* v. *Foster*, 88 Maine, 49.

The language of the charter above quoted, that the "street shall not be established until the report is accepted by the city council,"

is a clear implication that after such acceptance of the report by the city council, no further action on their part was contemplated as essential to the final establishment of the way. The charter makes it the duty of this joint standing committee to "lay out, alter, widen or discontinue any street or way." In this instance the city council specified in their order the exact bounds and admeasurements of the alterations desired, and instructed the committee to determine the question of public convenience. The acceptance of the report of the committee clearly operated as an adoption of their findings, and made the adjudication of the committee the adjudication of the council. *Cassidy* v. *Bangor*, 61 Maine, 434; *Dorman* v. *Lewiston*, 81 Maine, 411; *Preble* v. *Portland*, supra. See also Chap. 18, R. S., §§ 14 and 16.

The solution of the question involved in the second objection, that the report of the committee does not contain the names of all the owners of the land taken, though apparently attended with some difficulty, may be safely reached through familiar principles. The charter requires the committee to "make a written return of their proceedings . . . . containing the bounds and description of the way, if laid out or altered, and the names of the owners of the land taken, when known, and the damages allowed therefor."

With respect to the discharge of this duty, the report of the committee is as follows: "By the location and laying out aforesaid, land has been taken owned by Lucy C. Farnsworth of said Rockland, being a strip of land about 16 inches wide on the front of her lot, on the western side of Main Street, and we have estimated and allowed, as the damage sustained by said Lucy C. Farnsworth, by said taking, the sum of four hundred dollars, and we find that no other person or persons have sustained any damages by reason of the location and laying out of said Main Street as aforesaid, and the taking of any land thereby."

No requirement that the return should state the names of the owners of the land taken is found in any other of the fourteen city charters granted by the State between the year 1832, when Portland was incorporated as a city, and the year 1891; nor has any such provision ever been embodied in the general laws of the State

respecting the returns required of the county commissioners or the municipal officers of towns. With respect to the former, the requirement of the statute is that they shall "make a correct return of their doings . . . accompanied by an accurate plan of the way, and state in their return when it is to be done, the names of persons to whom damages are allowed, the amount allowed to each, and when to be paid." R. S., Ch. 18, § 4. With regard to the latter, the language of the statute is that: "A written return of their proceedings containing the bounds and admeasurements of the way and the damages allowed to each person for land taken, shall be made and filed with the town clerk." All the other city charters within the period named, appear to have been modeled substantially after the Portland charter, which in this respect makes the city council subject to "the same rules and regulations as are provided in the laws of the state regulating the laying out and repairing of streets and public ways."

In *Vassalborough, Pet'rs for Certiorari*, 19 Maine, 338, the requisites of a proper return under the statute then in force were brought under discussion, and it was held that while it might be desirable that the names of all persons over whose land the road located passes, should appear in the return of the commissioners, it was not indispensably necessary; that it was "not every irregularity, or even illegality, which may have arisen in such a matter, that imperatively urges the discretion of a court to grant a certiorari;" and that the weight of authority was against any interference in that case.

In *Howland* v. *County Commissioners*, 49 Maine, 143, the construction of the statute was again brought in question, and the court said in an opinion by Mr. Justice CUTTING: "This statute does not require the commissioners to ascertain and determine the legal title, description, location or boundaries of each proprietor's lot over which the highway passes when no one appears to claim damages between the times of the notice first given and the close of the original petition,—notices sufficiently given both by publications and a public record, and a time sufficiently long to enable any person injured to present his claim for damages and to estab-

lish his title. The commissioners, when none such appears, may well conclude that none such exists, and that no adjudication is necessary. . . . . The argument of counsel that, under such circumstances, the constitutional rights of the citizen have been invaded, is untenable."

In *North Reading* v. *Co. Com'rs*, 7 Gray, 109, the same conclusion was reached. "Some of the earlier cases," said the court "seem to require that the persons, over whose land the proposed way passes, should be named. It is, however, rather directory. . . . Practically, it seems of little consequence whether the names, and the rejection of the claim for damages, appear by the direct language of the return of the assessment of damages, or are inferred from the fact that no damages were awarded. If the location of the way is distinctly defined in the report of the location, and thus notice given to the landholder that his land is taken, and by the further report of damages he finds none awarded him, it is virtually a refusal to allow him damages, and would authorize an application for a jury to assess damages, as much as if his name had appeared in the report as one to whom no damages were allowed. It is certainly the more regular mode to name, in the assessment of damages, all the persons over whose land the way passes, and to state those, if any, to whom no damages are awarded. If the omission to do so would bar the landholder from asking for a jury to assess his damages, we might be holden to grant a writ of certiorari, however fatal the consequences might be—as they certainly would if the proceedings were illegal—in rendering nugatory the whole location and establishment of the way." But holding that the rights of the land-owner might be equally secured without a statement of all the names, the petition was denied. These views were adopted by our court in *Howland* v. *Com'rs*, supra. See also *Monagle* v. *Co. Com'rs*, 8 Cush. 360.

It is contended by the defendant, in limine, that in the light of the rule of procedure thus established by legislative and judicial action in this state and Massachusetts, and of the excellent reasons given in support of it, the provisions of the charter in question ought not to receive such a literal construction as to require a

statement of the names of the land-owners when no damages are allowed. But, assuming that it was designed to inaugurate a departure from the practice which had uniformly prevailed under other charters, as well as under the general laws of the state, the defendant still insists that a literal observance of the requirement is not indispensable to the protection of the rights of the land-owner, and that failure to comply with it ought not to be attended by the fatal consequences claimed by the plaintiff.

It is undoubtedly true that, in the exercise of the power of eminent domain delegated to them by the legislature, municipal corporations should be held not only to a strict compliance with all prerequisite conditions and limitations for its exercise, but also to an observance of all substantial provisions respecting the mode of procedure which were prescribed and intended for the protection of the citizens and to prevent a sacrifice of his property. If there be an omission of any of the essential jurisdictional requisites, the proceedings will be void. If, however, the defect is not so radical as to deprive the council of jurisdiction, but is only a deviation from certain minor provisions, designed to secure method and convenience in the procedure, it may properly be termed an irregularity only; and if the rights of the land-owner would not be injuriously affected thereby, it will not vitiate the proceedings. Dillon Mun. Corp. §§ 604, 605; Black on Int. of Law, 340, and cases cited. The distinction is expressively stated by Chief Justice PETERS in *Bank* v. *Rich*, 81 Maine, 164: "Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. Error or nullity goes to the foundations, and discovers that the proceedings have nothing to stand upon, while irregularity denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law, the other to matters which are contrary to the practice authorized by the law. One relates more to the act, the other to the manner of it. It may be stated as a general rule, that in doubtful cases the courts incline to treat defects in legal proceedings as irregularities rather than as

nullities." It may be added that, in the class of cases to which the one at bar belongs, if the defect is not plainly jurisdictional but relates to form rather than substance, the question whether it shall be deemed an irregularity or render action a nullity, must be determined mainly by considerations of justice towards the parties to be affected. If it is apparent that no injustice would be occasioned to land-owners by sustaining the proceedings, on the one hand; and, on the other, that great injustice and consequences mischievous and far-reaching would inevitably result from a nullification of the action, the defect may well be treated as an irregularity only.

It is not in controversy in the case at bar that all other requirements of the charter, except that relating to the names of the land-owners (and the formality of accepting the report already considered) were strictly and fully observed by the committee and the council in "laying out, altering and widening" the way in question. Indeed, extraordinary measures, not required by the charter, appear to have been taken to give the abutting owners full information of the precise nature and extent of the alterations contemplated. For while the charter only requires the committee to give "notice of the time and place" of their proceedings to all parties interested, by publishing the same two weeks successively in two weekly papers, etc., it has been seen that the notice actually published by the committee embraced a complete and accurate description of the alteration proposed, with a definite statement of the bounds, courses, distances and width, "all according to a survey of E. Rose & Son as shown in city atlas;" being the identical description, bounds and admeasurements contained in the original order passed by the city council July 1. This notice thus comprising an exact survey of the new lines proposed, was published, not only in two, but in three weekly papers printed in Rockland. A full hearing was given to all parties interested, appearing at the time and place fixed therefor, on the 16th day of August. The return of the committee, adjudging that the alteration proposed was required by public convenience, was signed and filed in the office of the city clerk more than seven days prior to its acceptance by

the city council. This return contains the identical description and survey comprised in the original order and in the notice published in the three weekly papers. It states that the committee award damages to Mrs. Farnsworth in the sum of $400 and "find that no other person or persons have sustained any damages by reason of the location and laying out of said Main Street and the taking of any land thereby." It does not specify the name of any other abutting owner whose land was taken. The new location extended a distance of nearly three-fourths of a mile. It was obviously impracticable for the committee to make a correct determination of the question of adverse possession and of the legal and equitable title in respect to every proprietor's lot; and, to state that the owners were unknown would serve no useful purpose. But a substantial equivalent for such information as they could be expected to give, concerning the ownership of the lots, is afforded by the accurate description and survey, with a reference to the city atlas, published in the weekly papers. Thus every abutting owner was put upon inquiry, and enabled to ascertain if any of his land would be taken, without even visiting the office of the city clerk; while if there had been a literal compliance with the several provisions of the charter and the names of all owners had been stated in the return filed in the clerk's office, but the "notice of the time and place of the proceedings" published by the committee had not embraced a description of the new location with bounds and admeasurements, every land-owner would have been compelled to repair to the clerk's office in order to examine the return and ascertain if it disclosed his name as one whose land had been encroached upon by the new line. Nor would the mere discovery of his name there conclusively show that his land had been taken, for the true boundary line of his lot would not be settled by the report of the committee.

More than four months elapsed after the passage of the original order, and nearly three months after the last publication of the notice, before the proceedings were closed and the new location established. The plaintiff's right to an appeal upon the question of damages was as fully preserved as if her name had been men-

tioned in the return; but for five years she acquiesced in the action of the city council and only "awoke from a long sleep" when measures were taken to make the new location practically available in the construction of the sidewalk in question.

Under these circumstances, the omission to state the plaintiff's name in the return cannot be held a defect respecting any jurisdictional requisite. It was a direction relating to the manner of consummating the work, but not a matter which can be deemed of the essence of the thing to be done. In all the general legislation upon the subject in this state and Massachusetts, from their early history to the present time, it has never been deemed essential to the protection of the rights of the citizen to make such a requirement. For more than half a century it has been uniformly considered by the courts in both jurisdictions, that it was not a matter of such vital importance to the land-owner as to be held a prerequisite to the validity of a location. The rule which appeared to be laid down in the early cases of *Com.* v. *Coombs*, 2 Mass. 489, and *Com.* v. *Great Barrington*, 6 Mass. 492, was declared to be directory merely, as already noted, in the later cases *Monagle* v. *Co. Com.*, 8 Cush. 360, and *North Reading* v. *Co. Com.*, 7 Gray, 109. The rule may be none the less directory when provided by the legislature than when enunciated by the court.

In view of the abundant opportunity afforded the plaintiff to learn if any part of her lot would fall within the line of the new location, it could not reasonably be anticipated that her rights would be injuriously affected in any respect by the failure of the committee to make express mention of her name in their return. On the other hand, the consequences of declaring the entire location void after the lapse of seven years, and after the grades and bounds of numerous abutting lots have been modified to conform to the new line of the street, would involve great inconvenience to the public, and damage and injustice to innocent persons. It is, therefore, the opinion of the court that, under the peculiar facts of this case, the omission of the committee to state the names of all the land-owners in their return should be held only an irregularity in the manner of completing their action, and not a radical defect

which renders the action itself a nullity as a defense to this proceeding.

II. Numerous exceptions were also filed by the plaintiff to rulings, instructions and refusals to instruct, on the part of the presiding justice.

It appears from the record that the plaintiff's counsel took exceptions generally to instructions given to the jury, comprising nearly eight closely printed pages and fully one-half of the entire volume of the charge, and containing, at least, six distinct legal propositions, without even distinguishing by brackets, or italics, the paragraph to which the exceptions were designed to apply, or in any manner designating the proposition to which objections were specifically to be made.

This method of taking exceptions to the charge in gross is such a palpable disregard of the eighteenth rule of court as expounded in *McKown* v. *Powers*, 86 Maine, 291, and has been so often declared to be ineffectual for the purpose of reserving legal questions for the court, that the counsel for the defendant insists that it is now the plain duty of the court to refuse to give these exceptions any consideration whatever. True, the exceptions were allowed by the presiding justice; and the contentions of the plaintiff are so clearly and vigorously stated in the argument of her counsel that the court is not left in doubt as to the particular instruction claimed to be erroneous; but the objection is not thereby obviated, as the counsel for the defendant was not thus aided in the preparation of his argument. An imperative rule has been established and repeatedly reaffirmed in order to secure greater regularity and certainty in the administration of justice, and no material relaxation of the rule will be countenanced, unless for special and peculiar reasons in the furtherance of justice. The instructions to which these exceptions appear to relate will, therefore, only be examined for the purpose of giving more intelligent consideration to other exceptions which appear to have been regularly taken and properly presented.

It is provided by section one of chap. XIII of the city ordinance

that it shall be the duty of the road commissioner "under the direction and subject to the approval of the city council, or such committee as they may appoint, to superintend the state of the streets, sidewalks . . . . and attend to the building, widening, altering or repairing of the same. It is also provided by section three that it shall be the duty of the road commissioner to see that no encroachments are made upon any street, etc., by fences, buildings or otherwise. Section four declares that: "All powers vested in, and the duties required of, highway surveyors by the laws of this state are hereby vested in and required of said commissioners." See also Rev. Stat., Chap. 18, § 75.

It appears in this case that, after the report of the committee establishing the new location, in 1889, had been filed in the city clerk's office, the street commissioner was instructed by the city council "to build a four and one-half foot cross-plank sidewalk" between specified limits on this street passing the plaintiff's premises, and that in the execution of the authority thus conferred upon him, the alleged trespasses were committed by him. Upon the hypothesis that this location of 1889 was a valid one, the presiding justice instructed the jury as follows:

"In obeying that direction, he was not a trespasser in going upon any part of the limits of the street which were conferred upon the city by the laying out of 1889. He had a right to be there. He had a right to construct the walk, he had a right to be anywhere within the limits of the highway as then laid out; and it is not doubted in this case that the limit, the western limit of the road, opposite these premises, pushed the line of the road as traveled and occupied up, upon the former premises of the plaintiff several feet—I think it was stated here, perhaps two and one-half feet. He was not a trespasser in my judgment of the law, although the committee under whose supervision he was to construct the way did not participate in the construction, and were not present aiding and assisting him, either in their judgment or otherwise, because there is nothing in evidence indicating that he was building this road in opposition to any instruction, or regulation, or direction on their part. There, then, we find him, rightfully on these premises

to build a sidewalk. He had a right, so far as this plaintiff is concerned, to build it up to the very limits of the road although it was beyond some of these trees, although it was beyond all the trees, any or all. It was testified to that the policy of the city had been, in making new constructions of sidewalks, to build on the line for the public welfare; for the public good; for the improvement of the city; for the benefit of its citizens; and, in this aspect of the case, he had a right, under that direction, not being interfered with, not being directed to the contrary, to build a sidewalk at this spot upon the very line between the plaintiff and the city as indicated by the survey or laying out of 1889. But the precise question here is whether in laying out a sidewalk, which he was legally justified in making, he was or not also justified in removing the trees. Should he have built a sidewalk in such a manner, in such a mode of construction, with such variations in it, as to allow the trees to stand or not? As he was not directed by the city council to remove the trees, he removed them, somewhat, at least, upon his own responsibility. . . . . And hence arises the first question in the case, whether it was reasonably necessary to remove these trees, or any of them, in order to effect the construction proposed by the city and by the defendant, or not. . . . . The plaintiff contends that it was utterly unnecessary, unreasonable; the defense contends that it was necessary, that it was reasonable, because, says the defense, he could not build up to where he had a right to build without making the removal. The idea is, as elaborated by counsel in commenting on the evidence, that he could not have moved in the sidewalk two and one-half feet without digging down for the purpose of doing it, and thus undermining the roots of the trees and leaving them in such condition as would obstruct the sidewalk and the passage there, and prevent improvement, prevent the widening of the street, prevent a smooth grade of the sidewalk and prevent the general purpose designed by the city in making its improvements. The plaintiff contends that it could have been avoided, it could have been reasonably avoided, and the defense contends that it could not. If you find, looking fairly without any feeling of prejudice, just at the true facts and

the law,—if you find that the removal of the trees, or even a partial removal of them, so far as that goes, was reasonably necessary to make the necessary improvements intended,—if you find it to have been reasonably necessary,—that is a perfect defense for the defendant; but if you do not find—or if you do find, on the contrary, that it was unnecessary and unreasonable to remove the trees, then the defendant is not liable, unless you further find that he was actuated in doing so by some improper or dishonest motive. If he acted honestly, without being actuated by any improper or dishonest motive, in good faith, and removed the trees because in his judgment it was reasonable and necessary to remove them in order to make and complete the improvements he was making, then he is not liable in this action for his act; but if, in pursuing his own judgment, he was actuated by improper and dishonest motives, and you further find that it was an unnecessary and an unreasonable act, then he would be liable for all he has done and its consequences. But, the law will protect him as a public officer in this emergency, if he pursued his own judgment acting honestly, although he may have acted fearlessly and although he may have committed a mistake. Such in my judgment is the law."

These instructions are in harmony with the decision, as well as the language of the opinion, in *Wellman* v. *Dickey*, 78 Maine, 31, and with the implication in *Hovey* v. *Mayo*, 43 Maine, 322. They are consonant with reason and justice and afford the plaintiff no ground for exceptions. They are much more favorable to her contention than the doctrine uniformly laid down on this subject by the court in Massachusetts. See *Denniston* v. *Clark*, 125 Mass. 219; *Morrison* v. *Howe*, 120 Mass. 565; *Brick Co.* v. *Foster*, 115 Mass. 431; *Benjamin* v. *Wheeler*, 15 Gray, 486; *Same* v. *Same*, 8 Gray, 409.

With respect to the liability of the defendant for cutting a tree that stood upon the line, partly within and partly without the limits of the location, the instruction was as follows: "Now if the defendant is not guilty of wrong, under the rules which I have given you, in removing the trees, he would not be guilty in removing so much as was within the limits of the road even if he

removed the whole tree, if necessary to do it. In other words, if removing just so much as was in the city limits would destroy the tree, you will judge whether there was any injury in taking the remainder of the tree. Apply your common knowledge and common sense to that condition of things."

It is obvious that the principle of law, which would control the liability of the owner of a private lot for cutting a tree standing on the line between him and an adjoining proprietor, would not be applicable to a street commissioner who is required by a reasonable necessity to hew to the line in the construction of a sidewalk and invested with authority "to remove any obstacle, which obstructs or is likely to obstruct a way, or render its passage dangerous." R. S., Ch. 18, § 65. If three inches of a large tree extended outside of the limits of the street, and all of it within the location were removed, it is plain that the liability that the tree would fall across the street would be a constant menace to public travel; and it would be wholly impracticable to distinguish such a case from the situation where one-half, or a different proportion of the tree, might be outside of the location. If the jury were justified in finding that the defendant acted from a reasonable necessity and from proper motives in removing the trees, it would seem from the general verdict returned for the defendant that they also obeyed the instruction given to them to "apply their common knowledge and common sense" to the condition of things when a tree was partly outside of the limits of the street. It is the opinion of the court that the defendant was not necessarily liable in trespass for cutting the whole of a tree under such circumstances, if reasonable necessity required it; and that the instructions upon this point were appropriate and adequate.

It is provided in the charter that the "city shall not be compelled to construct or open any street or way thus hereafter established until, in the opinion of the city council, the public good requires it to be done, nor shall the city interfere with the possession of the land so taken by removing therefrom materials or otherwise, until they decide to open and construct said street;" and the plaintiff's counsel requested an instruction in this case that the

street commissioner was not authorized to interfere with land taken in widening this street until they had decided to open and construct it. The presiding judge refused to give this instruction and ruled against it, and the plaintiff has exceptions to this ruling. The instruction upon this point was undoubtedly correct. The provision in the charter above quoted clearly relates to the opening of a new street, and not the widening of a street already opened and occupied.

The decision of this court in the analagous case of *Heald* v. *Moore*, 79 Maine, 271, is a practical determination of this question against the plaintiff.

The propositions embraced in the other requested instructions were fully covered by the charge.

In the early part of the trial a colloquy occurred, between the counsel for the plaintiff and the court, respecting the admissibility of certain evidence claimed to be material upon the question of the reasonable necessity for the removal of the trees; but it is not shown that any exceptions were taken to the exclusion of evidence upon this point, or that any material evidence was in fact excluded. An exception was seasonably taken and allowed to the admission of testimony from the defendant in regard to the directions given by him to have the plaintiff's premises sodded and the shrubbery removed as she might prefer. This fact was manifestly relevant to the issue respecting the reasonableness and good faith of the defendant's conduct.

The entire charge is made a part of the case, and after a careful examination and study of all the legal propositions there considered by the presiding justice, we find no reason to question the fullness or correctness of the instructions with which the vital issues involved in the case were submitted to the jury. The conclusion, therefore, is that the entry should be,

Exceptions overruled.

Judgment on the verdict for the defendant.

CHAS. H. NELSON *vs.* JAMES W. BECK.

Kennebec. Opinion May 29, 1896.

Illegal Contracts. Bills and Notes. Stallion. R. S., c. 38, § 61.

No action can be maintained upon a contract that is in contravention of the statute; and this rule applies to an action upon a negotiable note by the payee against the maker.

Thus, no action can be maintained to recover compensation for the service of a stallion whose owner has not complied with the provision of R. S., c. 38, § 61, which requires the owner or keeper of the stallion kept for breeding purposes, before advertising the service of the same by written or printed notice, to file a certificate with the register of deeds in the county where the stallion is owned or kept, stating, among other things, the name of the stallion.

A certificate thus filed in which the name of the horse is stated as "Oliver" will not support an action for the service of the same horse rendered under the name of "Dictator Chief" a year subsequent, there being no registered certificate of the horse under the latter name.

ON EXCEPTIONS BY PLAINTIFF.

This was an action on a promissory note given by the defendant to the plaintiff for the service of a stallion. The case was tried to a jury in the Superior Court for Kennebec county. The presiding justice ordered a verdict to be returned for the defendant, and the plaintiff took exceptions.

The case appears in the opinion.

G. W. Heselton, for plaintiff.

F. E. Southard, for defendant.

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

WISWELL, J. This is an action upon a negotiable promissory note, given by the defendant to the plaintiff for the service of the stallion, "Dictator Chief."

Revised Statutes, c. 38, § 61, requires the owner or keeper of any stallion kept for breeding purposes, before advertising the service of the same by written or printed notices, to file a certificate

with the register of deeds in the county where the stallion is owned or kept, stating, among other things, the name of the stallion. The same section also provides that whoever neglects to make and file such certificate shall recover no compensation for such service.

The stallion, "Dictator Chief," was kept by the plaintiff for breeding purposes, and had been advertised by printed notices prior to the time of the service for which the note in suit was given. No certificate had been made and filed with the register of deeds as required by statute. The plaintiff's counsel offered to show that a certificate of this horse, in which his name was stated as "Oliver," had been filed with the register of deeds as required by law.

But, at the time when the defendant's mare was bred to him, the name of the horse was "Dictator Chief," he was so known and advertised, and this had been his only name for at least a year prior to that time. If such a certificate, in all other respects sufficient, had been made and filed, it was not in compliance with the statute which requires the name of the stallion to be stated.

No action, therefore, could be maintained to recover compensation for the service of this stallion. Does it make any difference that this suit is upon a promissory note given for such service? We think not. The action is between the original parties to the note. The statute prohibits the recovery of compensation in such a case. It can make no difference whether the promise is express or implied, oral or written, so long as, in the case of a note, the suit is brought by the promisee.

The ruling of the presiding judge in ordering a verdict for the defendant was therefore correct.

Exceptions overruled.

ELLEN E. MARSTON, Executrix,

vs.

KENNEBEC MUTUAL LIFE INSURANCE COMPANY.

Kennebec. Opinion June 4, 1896.

Insurance. Application. Agent. Estoppel. Fraud. Evidence. R. S., c. 49, § 90.

In the case of life insurance policies, where the application is drawn by the authorized agent of the insurer, and the answers to the interrogatories contained therein are written by such agent in filling the application, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such statements in an action upon the policy between the parties thereto.

Nor is the introduction of evidence showing the actual statements made by the applicant to the agent at the time of the filling of the application, inadmissible as tending to vary or contradict a written contract by parol, although it may contradict the answers as written by such agent.

The introduction of such evidence is admissible to show the acts and declarations of the agent, for without such evidence there would be nothing upon which to found such estoppel.

A written instrument may be shown to be void by parol evidence.

It may be attacked and overthrown for fraud, illegality, want of consideration or other vice going to the existence of the contract.

So where the fraud and false representations are made with the knowledge and upon the advice or instruction of the party seeking to take advantage thereof, he would be estopped from setting up his own fraud as contrary to good faith; and parol evidence of such fraud would be admissible to establish the estoppel.

This rule is as applicable to insurance contracts as to any other.

The ground upon which such evidence is admitted is not that it does not tend to vary the terms of a written contract by parol, but that the recitals in the application are not the representations of the applicant, but the statements of the insurer himself.

Although by the terms of the written application it is agreed that "statements made to an agent not herein written shall form no part of the contract to be issued hereon," such provision is in contravention of R. S., c. 49, § 90, which provides that "such agents, and the agents of all domestic companies, shall be regarded in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk, and of all matters connected therewith. Omissions and misdescrip-

tions, known to the agents shall be regarded as known by the company, and waived by it as if noted in the policy."

The statute is paramount to any agreement or stipulation which is in conflict with its terms.

Mailhoit v. *Ins. Co.*, 87 Maine, 374, affirmed.

ON REPORT.

The case appears in the opinion.

J. H. Drummond and J. H. Drummond Jr., for plaintiff.

H. M. Heath and C. L. Andrews, for defendant.

Prior rejection: The clauses of R. S., c. 49, § 90, relied on by defendant, relate to fire and not life insurance, as shown by the context of the entire section. The words "risks," "omission" and "misdescription" are applicable only to fire insurance. It is not possible to include within the word "misdescription" a false statement. It would be an ingenious perversion of language that would permit a negative, which is the full response to its correlative affirmative, to be euphoniously called a "misdescription."

Nor is the preceding sentence: "The Company is bound by their knowledge of the risk and of all matters connected therewith" applicable. The word "risk" means property insured, and the sentence was intended to charge companies with an agent's knowledge of the condition of the property, the title, etc.

Farrow v. *Cochran*, 72 Maine, 310, referring to this section as applicable to life insurance, is a dictum only. In *Coombs* v. *Charter Oak Co.*, 65 Maine, 383, the policy provided that the premium should be paid on a given day. It was not paid. Plaintiff offered to prove that the agent, when the insurance was effected, agreed that he could pay at other times. The evidence was excluded. The case follows the Massachusetts cases, citing them with approval, *Odiorne* v. *Ins. Co.*, 101 Mass. 553.

Equitable Estoppel: Never invoked in Maine. In no case cited by plaintiff was the company precluded from showing the falsity of the statement, as a full defense, in spite of the knowledge of its agent, where the application contained a provision that statements made to an agent not written in the application should form no part of the contract. No case has yet gone to that extent.

Some courts, while applying the rule of equitable estoppel to certain facts, hold the rule inapplicable if the application expressly limits the contract to the wording of the policy and of the application and the parties by express agreement limit the agent's authority to receiving and writing down the truth, the application stipulating that the answers written shall all be considered material and true.

To the common law rule excluding such statements, we add the express agreements of the parties that the validity of the contract should stand exclusively upon the truth of the written answers.

A precisely similar contract was upheld in all its strictness in *Johnson* v. *Me. & N. B. Ins. Co.*, 83 Maine, 183, where this court said: "Until a statute shall intervene, a court of law must recognize the contract the parties make and not venture to change it in any way."

McCoy v. *Ins. Co.*, 133 Mass, 82, declines to follow *Ins. Co.* v. *Wilkinson*, 13 Wall. 222; and *Ins. Co.* v. *Mahone*, 21 Wall. 222. See *Ryan* v. *World Ins. Co.*, 41 Conn. 168, (19 Am. Rep. 490); *McCollum* v. *Mut. L. Ins. Co.*, 55 Hun, 103; *Kenyon* v. *K. T. & Masonic Assoc.*, 122 N. Y. 247; *Franklin Ins. Co.* v. *Martin*, 40 N. J. L. 568, (29 Am. Rep. 271), reviewing N. Y. and U. S. Sup. Court decisions. For the full limit of the doctrine in Penna. see *Conn. Ins. Co.* v. *Huntzinger*, 98 Pa. St. 41. Counsel also cited: *Teutonic Life Ins. Co.* v. *Beck*, 74 Ill. 165; *Manuel* v. *Ins. Co.*, 67 Cal. 621; *Kausal* v. *Ass. Co.*, 31 Minn. 17, (47 Am. Rep. 776); *Cleaver* v. *Ins. Co.*, 65 Mich. 527, (8 Am. St. Rep. 908); *Piedmont* v. *Ins. Co.*, 5 Ala. 476; *Fitzmaurice* v. *Ins. Co.*, 84 Tex. 61; *Moore* v. *Conn. Mut. L. Ins. Co.*, 41 U. C. Q. B. 497; May on Insurance, § 140; *Porter* v. *U. S. Life Ins. Co.*, 160 Mass. 183; *Kyte* v. *Com. Union Ass. Co.*, 144 Mass. 43; *Packard* v. *Fire Ins. Co.*, 77 Maine, 150; *Richardson* v. *Me. Ins. Co.*, 46 Maine, 394.

If given its broadest meaning, § 90 can mean no more than this: that the doctrine of equitable estoppel is law in this state by statute, upon proof of the necessary facts. This we deny, but it states the case as strongly as plaintiff can possibly contend.

But it is entirely competent for the parties to agree that the

agent shall not have authority to receive statements other than as written. Where so limited, this court must put upon the rule of estoppel the same limitation imposed by the U. S. Supreme Court, the Courts of New York, Pennsylvania, and all others where the question has arisen.

The statute contains no clause declaring provisions in any policy in conflict therewith to be void. It contains no prohibitions express or implied; and creates no penal offense. The stipulation was a legal one before the statute was passsd. Contracts waiving the statute are neither mala in se nor mala prohibita. A statute like this, with no prohibitions, can be applied only in cases where the contract contains no stipulation to the contrary. It is no more than a statutory rule of construction intended solely for the benefit of individuals. It may be waived by either party. It was waived in this case.

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

FOSTER, J. This case comes up on report. It is a suit upon a policy of life insurance to recover $5000, brought by the executrix of the last will of Daniel E. Marston, who entered into a contract of insurance with the defendant company. The contract is evidenced by two written instruments—the application, signed by the deceased, and the policy signed by the officers of the company. The application contained various questions to be answered by the applicant, and certain statements, all of which were therein declared to from the basis of the contract, and at the close were the following certificates signed by the applicant:

1. "I have verified the foregoing answers and statements and find them to be full, complete and true; I do also adopt as my own, whether written by me or not, each foregoing statement, representation and answer, and I agree that they are all material and that statements made to an agent not herein written shall form no part of the contract to be issued hereon."

2. "I do hereby declare and warrant, that the foregoing

answers and statements are full, complete and true; and I agree that this declaration and warranty, together with the preceding agreements shall form the basis of the contract between the undersigned and the Kennebec Mutual Life Insurance Company, and are offered to said company by me as a consideration of the contract applied for, and are hereby made a part of the certificate to be issued on this application; and if there has been any concealment, misrepresentation or false statement, or statement not true, made herein, and if I or my representatives shall omit or neglect to make any payment, as required in respect of amount, place and time of payment, by the condition of such certificates, then the certificates to be issued hereon shall be null and void, and all money paid thereon shall be forfeited to said company," etc.

The policy issued upon this application contained, among other provisions, a stipulation that it was issued upon the condition that the statements and declaration made in the application were in all respects true, and that the application was the basis and a part of the contract of insurance.

Among the several questions propounded in the application, were the following: "6. Has any company, society or order declined to grant you a policy of membership? If so, name them and when."

"7. Have you ever been examined for life insurance or membership by any physician with an unfavorable result?"

To each of these questions the answer was "No."

The defendant claims that these answers were not true, and introduces in evidence the application of the deceased to the Provident Aid Society, made five years previous, wherein the following question and answer appeared: "Has any proposal or application for life insurance, or admission to any order, assessment association, or relief society, ever been made and declined or withdrawn, or upon which a policy or certificate has not been issued? If so, state full particulars." Answer: "Rejected by Ancient Order. Did not give family history."

It also introduces the records of the local lodge of the Ancient Order, wherein is a duplicate record of the report of the recorder,

and upon which appears the following: "Names of rejected applicants: D. E. Marston. Cause; Family history." It also introduces a copy of the original application, upon which is the indorsement of the medical examiner rejecting the applicant.

To meet this position of the defense, the plaintiff introduces the testimony of Mrs. Marston, wife of deceased, and Dr. Edward P. Marston, his son. The substance of their testimony is, that they were present at the time the agent of the defendant wrote out the application, and that the applicant, in answer to questions six and seven, stated to him that he had been rejected by the Ancient Order of United Workmen and gave the circumstances attending the rejection and the cause of it; that after being informed of the circumstances the agent said: "I shouldn't call that a rejection," and advised him to answer the questions "No."

The defendant objects to the introduction of this testimony upon two grounds. (1) That it tends to vary or contradict a written contract by parol. (2) That the clause in the application—"I do also adopt as my own, whether written by me or not, each foregoing statement, representation and answer, and I agree that . . . . statements made to an agent not herein written shall form no part of the contract to be issued hereon"—informed the applicant of the limitations upon the authority of the agent to waive any of the provisions of the contract or to bind it by his knowledge, and that the knowledge of these limitations is binding on the plaintiff, and for this reason also the evidence is not admissible.

To these positions the plaintiff claims that the knowledge and instructions of the agent, based upon the information imparted to him by the applicant, estops the defendant from setting up the alleged falsity of the above answers, and that the evidence of what took place between the applicant and the agent at the time is admissible for the purpose of showing the facts which constitute the estoppel; also, that the provision in the application in relation to the limitation of the authority of the agent to waive any of the provisions of the contract, is in conflict with and controlled by R. S., c. 49, § 90.

The questions arising upon these contentions are the principal matters in issue in this case.

I. It is undoubtedly the general and well-settled rule that a written contract which is signed by a party, and which contains the terms and conditions of the agreement, is conclusive upon him, and he will not be permitted to show, for the purpose of avoiding such contract, that other stipulations were made at the time of, or before, its execution, which would vary, alter or contradict the terms of the written agreement. This is a cardinal rule in the construction of contracts admitted to be valid, and where the true intent and meaning is to be ascertained. It has no application, however, where the existence or validity of the contract itself is in question. *Prentiss* v. *Russ*, 16 Maine, 30; *Trambly* v. *Ricard*, 130 Mass. 259.

But in the case of life insurance policies, it is the doctrine of many modern decisions, that where the application is drawn by the authorized agent of the insurer, and the answers to the interrogations contained therein, are written by him in filling the application, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such statements in an action upon the instrument between the parties thereto. This doctrine has received the sanction of many of the highest courts in this country, in numerous decided cases, among which may be mentioned those by the Supreme Court of the United States, *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, which was afterwards followed by *Insurance Co.* v. *Mahone*, 21 Wall. 152; *New Jersey Mutual Life Ins. Co.* v. *Baker*, 94 U. S. 610; and *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304.

It is established by the great weight of authority in a large majority of the courts of the several states. It is unnecessary to call attention to the decisions in every state where this question has been decided. The following are some of those which adopt the rule as laid down in the Supreme Court of the United States. *Plumb* v. *Ins. Co.*, 18 N. Y. 392; *Rowley* v. *Empire Ins. Co.*, 36 N. Y. 550; *Baker* v. *Home Life Ins. Co.*, 64 N. Y. 648; *Maher* v.

Hibernia Ins. Co., 67 N. Y. 283; *Grattan* v. *Met. Life Ins. Co.*, 92 N. Y. 274; *Miller* v. *Ins. Co.*, 107 N. Y. 292; *Patten* v. *Ins. Co.*, 40 N. H. 375; *McGurk* v. *Ins. Co.*, 56 Conn. 528; *Ins. Co.* v. *Cusick*, 109 Pa. St. 157.

Massachusetts and New Jersey hold a contrary doctrine, on the ground that the evidence, if introduced, would tend to vary or contradict a written contract. *McCoy* v. *Ins. Co.*, 133 Mass. 82; *Batchelder* v. *Ins. Co.*, 135 Mass. 449; *Ins. Co.* v. *Martin*, 40 N. J. L. 568.

This precise question has not arisen before in this state.

In the case before us, is the insurance company estopped to dispute its liability upon the policy? It cannot be unless the evidence of the acts and declarations of the agent are admissible, for without that evidence there would be nothing upon which to found such estoppel.

The answer to this question depends upon whether this court is to adopt the doctrine laid down by the Supreme Court of the United States, in the decisions to which we have referred, and also what we believe to be the great weight of authority in other courts of the several states, or the doctrine adhered to in Massachusetts and New Jersey. It is true that by the terms of the application and certificate the questions and answers of the applicant are made the basis of the contract. They are nevertheless the proposals upon which the contract is to be issued, and furnish the information upon which the company acts in determining whether it will enter into any contract or not. There can be no doubt that fraud or false representations made as an inducement to a contract may be shown for the purpose of avoiding the contract by the party upon whom such fraud has been practiced. A written instrument may be shown to be void by parol evidence. It may be attacked and overthrown for fraud, illegality, want of consideration or other vice going to the existence of the contract. And where the fraud and false representations are made with the knowledge and upon the advice or instruction of the party seeking to take advantage thereof, he would be estopped from setting up his own fraud as

contrary to good faith, and parol evidence of such fraud would be admissible to establish the estoppel.

This rule is equally applicable to insurance contracts as to any other, and it has been so held in many adjudicated cases. The ground upon which such evidence is admitted is not that it does not tend to vary the terms of the written contract by parol, but that the recitals in the application are not, when viewed in the light of the evidence offered, the representations of the applicant, but the statements of the insurer himself. Wherever the courts have held facts to constitute an estoppel which precluded an insurance company from taking advantage of the alleged false answers, it has been assumed or expressly held that evidence was admissible showing what these facts were. As was said by the court in *New Jersey Mut. Life Ins. Co.* v. *Baker*, supra: "The evidence objected to was admissible to show that the statement was not that of the applicant, although signed by her. The statement was one prepared by the company, for which it was responsible, and it cannot be set up to defeat its policy."

And again in *Insurance Co.* v. *Throop*, 22 Mich. 146, Judge Cooley, in speaking of this question, says: "Its purpose was not to vary or contradict the contract of the parties, but to preclude the party who had framed it from relying upon incorrect recitals to defeat it, when he himself had drafted these recitals, and was morally responsible for their truthfulness. . . . . And we think the estoppel is precisely the same when the agent of the insurer drafts the papers as it would be in the case of an individual insurer who was himself personally present and acting."

In New Hampshire the same principle was applied in *Patten* v. *Ins. Co.*, 40 N. H. 375, 380, where the court say: "Nor was it to contradict the fact that the plaintiffs had thus falsely answered the question, nor was it to explain that answer in any way, but merely to show that whatever the answer may have been, however incorrect in its statement of facts, yet, that the agent of the company who drew the application and wrote down this answer of the plaintiffs upon that application, at the same time that he did so, knew perfectly well that the answer was incorrect, and had full

knowledge of the existence of the incumbrances whose existence that answer denied. It is the introduction of a new and independent fact, not for the purpose of contradicting or explaining the answer, but to show that whatever the answer may have been, the defendants had not been, and could not have been, misled or injured by it."

In the case at bar, had the agent who wrote out the answers in the application been the insurer and acting for himself in thus taking and filling the application, certainly the court would refuse to allow him to repudiate the advice and instructions given by him to the applicant in reference to the answers given, and to set up their alleged falsity in defense to an action against him on the policy. He would be estopped from so doing upon the doctrine before stated. He had the facts and circumstances fully made known to him by the applicant himself, and if bound by his own acts and instructions when acting personally, the company which he represents would be equally bound by his acts, instructions, and knowledge when acting as its agent. *Insurance Co.* v. *Mahone*, 21 Wall. 152, 156. Moreover, the statute (R. S., c. 49, § 90) provides that "such agents, and the agents of all domestic companies, shall be regarded in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk, and of all matters connected therewith. Omissions and misdescriptions, known to the agents, shall be regarded as known by the company, and waived by it as if noted in the policy."

This statute applies to domestic life insurance companies as well as to fire insurance. The legislature so intended. The remark of the judge who drew the opinion in *Johnson* v. *Maine and N. B. Ins. Co.*, 83 Maine, 182, upon page 188, that "there is no such statute affecting life insurance contracts," evidently had reference to another section of the statute (§ 20) in regard to fire insurance, which provides that certain representations or statements in the application must be shown to be in fact material before they shall be held to avoid the contract. It was not intended to go to the extent of saying that this section under consideration had no appli-

cation to life insurance contracts. We have held that it does, in *Mailhoit* v. *Ins. Co.*, 87 Maine, 374, 382.

Of what avail would this statute be if the agent's knowledge could not be shown? And how can it be except by just such evidence as was introduced in this case? If this evidence were to be excluded, the agent's knowledge could never be shown. When it is shown, however, it binds the company, rendering the contract valid, and estopping the company from setting up the alleged false answers to defeat a suit upon it. *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304, 311; *Mailhoit* v. *Ins. Co.*, 87 Maine, 374, 382.

In the case last cited, the false answer set up in defense was in reference to whether the applicant had other insurance on his life. He was insured in co-operative societies and so informed the agent, who advised him that such insurance was not within the meaning of the question, and to answer it "No other." The court held that the attempted interpretation of the question by the agent was binding upon the company, and that the evidence was admissible to show the facts.

The defense cites the case of *Coombs* v. *Charter Oak Ins. Co.*, 65 Maine, 382, claiming that that is an authority directly against the position which the plaintiff is contending for in this case. In that case, the policy provided that in case the premiums were not paid on or before the days mentioned for the payment thereof, it should be void. The second premium was not paid when due, and the plaintiff offered to prove that at the time the policy was negotiated the agent assured him that he might pay down what money he had, and "that he would wait for the balance any time within a year." This evidence was held inadmissible upon the ground that it tended to vary the terms of the written contract. But we think that case is to be distinguished from the case at bar. In that case the provision in relation to the time of payment of the premiums was one of the express terms of the contract, as much as was the amount of the insurance, the party insured, or to whom it was payable. They constituted the essential elements of a completed contract, and of course could not be varied by parol.

But the questions and answers in the application in this case, while they form the "basis of the contract," are really propositions for a contract, or proposals upon which it is to be issued, if satisfactory to the company. The evidence which was held inadmissible in the one case and that which is received in the other, bears upon entirely distinct propositions. In the former, it was excluded because it tended to vary a written contract by parol; in the latter, it becomes admissible to show that the recitals in the application are not, under the circumstances, the representations of the applicant, although signed by him, but the statements of the company which had full knowledge of all the facts and which is estopped from controverting the truth of these statements.

II. The defendant also contends that the knowledge of its agent of the facts in reference to the declination of the Ancient Order of United Workmen to admit him to membership did not create an estoppel because of the applicant's agreement in his application that "statements made to an agent not herein written shall form no part of the contract to be issued hereon."

It is claimed that by virtue of this stipulation the case comes within the principle of *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519, in which it was held that the company was not estopped by the knowledge of an agent whose authority was limited by a provision in the application that no statements made, or information given to the person soliciting the application, should be binding on the company or in any way affect its rights.

Whatever might have been the effect of such an agreement, aside from any statutory provision governing the same, it is enough to say that we deem it in conflict with that provision of statute to which we have alluded. While the statute does not in express terms prohibit the insertion of such provisions, thereby declaring the same null and void, it expressly declares that the agents of insurance companies shall be regarded in the place of the company in all respects regarding any insurance effected by them, and that the company is bound by their knowledge of the risk and all matters connected therewith, and that omissions and misde-

scriptions known to them shall be regarded as known by the company and waived by it as if noted in the policy.

In this respect the present case differs essentially from that of *New York Life Ins. Co.* v. *Fletcher*, supra, for no such statute was referred to there; and it is more like the case of *Continental Life Ins. Co.* v. *Chamberlain*, supra, where a somewhat similar statute in Iowa was considered, and which was held to govern the rights of the parties.

Nor is the case of *Johnson* v. *Maine and N. B. Ins. Co.*, 83 Maine, 182, in conflict with the principles herein stated. In that case the court held that where, in a contract of insurance, the parties stipulate that certain statements are material, the court could not, in the absence of any controlling statute, decide that they are immaterial. In the present case the parties attempt to agree to that which is controlled by statute, and thereby nullify its plain spirit and meaning.

If the effect of the provision in the application is to limit the authority of the agent to such an extent that his acts and knowledge in respect to the risk is not binding on the company, then certainly it is in direct conflict with the statute which expressly provides that the agent "shall be regarded in the place of the company in all respects" and that it shall be bound by his "knowledge of the risk and of all matters connected therewith," and that "omissions and misdescriptions known" to him "shall be regarded as known by the company, and waived by it as if noted in the policy."

The statute must be held to be paramount to any agreement or stipulation which is in conflict with its terms. It is imperative and must control. It does not render void the contract of insurance which contains provisions at variance with its requirements. Its effect is to render null and void such provisions and stipulations, leaving the contract in all other respects in full force. Parties must be held to have contracted with a knowledge of it and subject to it. The legislature have deemed it wise to enact the law, and parties will be held to its observance, notwithstanding it may nullify stipulations which they see fit to insert in their

contracts contrary to its mandates. *Emery* v. *Piscataqua F. & M. Ins. Co.*, 52 Maine, 322; *DeLancy* v. *Insurance Co.*, 52 N. H. 581, 589, 590; *Continental Ins. Co.* v. *Chamberlain*, 132 U. S. 304; *Mailhoit* v. *Metropolitan Life Ins. Co.*, 87 Maine, 374, 382.

III. The remaining objections relate wholly to questions of fact, and will be considered briefly.

Among the questions in the application asked of the applicant, concerning his family history, and answers thereto, are the following:

"Father, age at death." Answer: "52."

"Cause of death. Duration of illness." Answer: "Not actually known. No physician. Had complaint of stomach for two years or more."

"Mother, age at death." Answer: "52."

"Cause of death. Duration of illness." Answer: "Chronic bronchitis; sick four or five years."

"Own brother, age at death?" Answer: "62 or 63."

"Cause of death. Duration of illness?" Answer: "Died in Illinois. Short sickness, with great pain in stomach."

The defendant insists that the answers given in relation to the cause of death of the father and brother are false, and were known to the applicant to be so at the time they were given.

(1). The evidence bearing upon the answer, given in reference to the father's death, consists of the copy of applicant's previous applications to two other societies, and the testimony of a brother of the applicant. In these applications it appears that the answers given as the cause of the father's death was "heart disease," and as to its duration—"don't know; died suddenly, at last."

In the application to the defendant, claimed to be inconsistent with the former statements, the answer was: "Not actually known. No physician. Had complaint of stomach for two years or more." The testimony of the brother was that his father died forty-four years ago, suddenly in the night, that there was no physician called before or after his death, and that he never knew whether his father died of apoplexy, paralysis or heart disease. The

applicant was but fourteen years old at the time of his father's death. The statements in the former application were made five and seven years respectively prior to his application to the defendant, and are only inconsistent with his answer therein so far as it may be inferred from them that the applicant actually knew the cause of his father's death. At most they are only conflicting statements. The presumption is that he answered truthfully, and fraud cannot be reasonably inferred from such evidence.

(2.) Again, as to the cause of his brother's death, his answer was, that he "died in Illinois. Short sickness with great pain in his stomach."

As contradictory to this statement, the defense introduced the application to the Ancient Order of United Workmen, in which his answer as to the cause of his brother's death is given as "anginia pectoris;" and as to the duration of his illness as "short, only a few hours."

The fact is, that in the application to defendant the question calling for an answer as to the cause of death is not answered at all. If the defendant had desired a fuller statement it could have called for it. It did not, but accepted the application with questions partially answered, and issued the policy upon it, thereby waiving the imperfection in the answer, and rendering the omission to answer more fully, immaterial. *Phœnix Life Ins. Co. v. Raddin*, 120 U. S. 183; *Conn. Ins. Co.* v. *Luchs*, 108 U. S. 498; *Hall* v. *People's Ins. Co.*, 6 Gray, 185.

The alleged falsity of these answers was an affirmative proposition set up by the defendant to defeat a recovery upon the policy. The burden was on the defense to sustain this proposition, and this it has failed to do.

Judgment for plaintiff.

JAMES R. ATKINS *vs.* EDWIN L. FIELD.

Cumberland. Opinion June 8, 1896.

Negligence. Fellow-Servant. New-Trial.

An employee is responsible to a co-employee for injuries caused by his negligence in the line of his duty to the common employer.

When the common employer approves the conduct of an employee without directing it, that does not free the latter from his responsibility to a co-employee, if he was in fact negligent.

When an employee personally selects the means and directs the mode of setting up apparatus furnished by the common employer, he becomes personally responsible to co-employees for injuries caused by his negligence in so doing;—and the fact that the work was satisfactory to the common employer, does not excuse the employee from the consequences of his negligence to others.

The foregoing rule does not apply where the common employer or his agent directs and controls the means and modes of setting up the apparatus. There is responsibility only where there is freedom of action.

That a party was unable to procure the testimony of a particular witness in season for the trial, is no ground for a motion for a new trial. The proper course for the party in such case is to move the presiding justice for the postponement of the trial.

His action will not be revised in any ordinary case.

ON MOTIONS AND EXCEPTIONS BY DEFENDANT.

This was an action on the case for personal injuries received by the plaintiff on the thirteenth day of July, 1894, by the fall of a derrick while in the United States government employ in the construction of fortification work at Cape Elizabeth.

The case was tried to a jury in the Superior Court, Cumberland County, where a verdict was rendered for the plaintiff for $3,100.

The facts are stated in the opinion.

Besides the general motion for a new-trial and a special motion founded upon newly-discovered evidence, the defendant took exceptions to the ruling of the presiding justice upon the admission of evidence and a refusal to give certain instructions to the jury.

From the bill of exceptions it appears that the counsel for the

defendant seasonably objected to the testimony of a witness, Freeman Willard, introduced by the plaintiff relative to the construction of the derrick and the iron eye-bolt connected therewith, and to the testimony of all the witnesses introduced by the plaintiff relating to the same subject matter, as appeared in a report of the testimony accompanying the motion for a new-trial, because he alleged that their construction concerned only the master or employer, the United States, or Col. Peter C. Hains who had the general charge and supervision of the work, but not the defendant who was the fellow-servant of the plaintiff; but over these objections, which were noted, and under the rulings of the court, these witnesses were permitted to state in regard to the same.

The court was requested to instruct the jury as follows:

1. That upon the master or employer (in this case the United States or Col. Peter C. Hains who had the general charge and supervision of this work) the law imposes the duty to furnish his servants for their work not the best machinery and appliances, nor those of the latest invention, but such as are suitable and may be used with safety; and the law imposes upon him the additional duty of taking care that this machinery and these appliances are kept in a safe and proper condition.

2. The defendant in this action is not liable to the plaintiff for defects in the construction of this derrick and the iron eye-bolts which were used to fasten the guys to. The construction of this derrick concerns the United States or Col. Peter C. Hains who had the general charge and supervision of this work; so that, so far as there was negligence in the construction of this derrick and these iron eye-bolts, as already stated (if that was the cause of the injury to the plaintiff) you may dismiss that from your minds.

3. That the defendant, if liable at all, is liable in his capacity as servant in the operation, and not in the construction of the machinery.

All these requested instructions were refused by the court except so far as given in the charge. The defendant further excepted to so much of the judge's charge as relates to the liability of the

defendant for the equipment and construction of the said derrick and the iron eye-bolt connected therewith.

The evidence in connection with the motion for a new-trial was made a part of the exceptions.

Benj. Thompson, for plaintiff.

A. W. Bradbury and G. F. McQuillan, for defendant.

Plaintiff and defendant were fellow-servants. A foreman, superintendent or overseer of a job of work is not on that account to be regarded as other than a fellow laborer with those who are at work under him. *Conley* v. *Portland*, 78 Maine, 217; *Osborne* v. *Morgan*, 130 Mass. 102. A servant is never liable to a third person merely for not doing that which it was the duty of the master to do. *Hill* v. *Caverly*, 7 N. H. 215, S. C. 26 Am. Dec. 735. The servant, as such, is liable to his fellow-servant for the personal neglect of his own duties, and not for the neglect of duties which the law imposes upon others. *Osborne* v. *Morgan*, 137 Mass. 1; *Rogers* v. *Overton*, 87 Ind. 410; *Griffiths* v. *Wolfram*, 22 Minn. 185; *Steinhauser* v. *Spraul*, 127 Mo. 541, Book 27, L. R. A., p. 441; *Greenbery* v. *Whitcomb Lumber Co.*, 90 Wis. 225, Book 28, L. R. A; *Hare* v. *McIntire*, 82 Maine, 240.

"The plaintiff must show in regard to the defendant he would hold, that that defendant had a duty in regard to the use of the apparatus, keeping it in repair and in condition to use, put upon him by the corporation, and that that duty, with the relation of the plaintiff himself to the defendants, was such as to involve some duty to the plaintiff; that the defendant violated that duty, and that the plaintiff did not." Per W. Allen, J., in *Osborne* v. *Morgan*, supra, and where he adds, "the plaintiff was not a fellow-servant with those who were engaged in constructing this machinery and appliance."

"Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them, because he did not undertake the performance of some duty which he owed to his principal, and

imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing, as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances, — does not take that precaution, does not exercise that care, which a due regard for the rights of others requires." Mechem, Agency, § 572.

In *Lasky* v. *C. P. R. Co.*, 83 Maine, 461, PETERS, C. J., said: "An act done for the superintendent by his authority, either general or special, is his act. The employee is not required nor permitted to investigate the question of authority." See, also, *Griffiths* v. *Wolfram*, supra.

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

EMERY, J. From the plaintiff's evidence, the admissions in the defendant's evidence, and from the rulings of the presiding justice, it may be safely inferred that the jury, in finding for the plaintiff, found a state of facts as favorable for the plaintiff, as the following:—

In the summer of 1894 the United States government was constructing a two gun battery at Portland Head through Lt. Col. Hains of the Engineer Corps of the U. S. Army, supervising officer in charge. The plaintiff Atkins, the defendant Field and numerous other civilians were employed by the government on this work,—the plaintiff as a laborer, the defendant as immediate and general overseer. In the prosecution of the work, it was necessary to set up and operate a large derrick, and to change its location from time to time. Such a derrick was purchased by the government and delivered on the ground at the battery. The defendant Field, in the line of his employment as overseer, personally assumed charge of the work of rigging and setting it up. He personally selected from the government stores the wire rope for the guys and gave directions to put only four guys on the derrick, though there were places for five guys. He also personally selected second-hand

inch and a quarter or inch and a half iron rods, and handed them to the blacksmiths with directions to make them into a certain form of bolts or pieces with which to fasten the guys to the rock or ledge. He personally selected the places for thus anchoring the guys, and personally directed the mode of the drilling the holes, the insertion of the bolts, and the connection with the guys. It did not appear that there was among the government stores on hand at that place wire rope sufficient for more than four guys, or iron rods of greater size or strength than those used;—nor did it appear that the defendant made any application for more wire rope or larger and better iron. The usual course of business was for the defendant as overseer to apply to the engineer officer in charge for any material needed, and for the latter to furnish it through purchase or requisition.

In doing this work about the derrick the defendant acted upon his own judgment in the first instance, though he called the attention of the engineer officer in charge to what he was doing, and what material he was using, and obtained his ratification. It did not appear, however, that this supervising officer ever gave the defendant Field any specific directions about this particular work or material other than to express his content with what had been or was being done.

In June, 1894, after the derrick has thus been set up and used for some time, the defendant as overseer undertook to change the location of the mast. This involved the slackening and retightening of the guys, their anchorage not being changed. After the mast had been shifted, three of the guys had been retightened, and while a crew of men were retightening the fourth or southern guy by means of a tackle and fall at its anchorage, the iron rod or bolt at the foot of the northern guy, nearly but not quite opposite, suddenly broke either from direct tension, or oblique break, and the derrick as suddenly fell. The plaintiff was at work at the time near the foot of the mast under the direction of the defendant, and without fault on his part was injured by the falling mast.

Neither the plaintiff nor any of the workmen were in the employ of the defendant, nor in any way his servants. They were all,

including the defendant, in the common employment of the government, through the government officer in charge.

The plaintiff alleged in his declaration that the defendant in setting up and moving the derrick was guilty of negligence in two respects: (1.) That he did not use a sufficient number of guys; (2.) That he did not use suitable pins or bolts suitably arranged to hold the guys and support the derrick. No other fault was alleged. The complaint was wholly of insufficient material and arrangement. The jury were plainly instructed that before they could determine the question of negligence in either respect, they must be satisfied that the defendant directly and personally, and not through other employees of the government, fixed the number of the guys and the quality, size and arrangement of the pins or bolts. The jury, therefore, in finding for the plaintiff must be assumed to have found that there was negligence, in one or the other of these respects, and that it was the negligence of the defendant.

The defendant contended at the trial that he was not responsible for any result of the negligence or misconduct of any of the workmen in setting up or moving the derrick, nor for the fall of the derrick, if it resulted in any way from such negligence or misconduct of the other workmen, they not being his servants. This contention was practically sustained by the presiding justice, and the case submitted to the jury upon the question of insufficiency in guys, and bolts, and fastenings, and of the defendant's direct personal control over them. This circumstance eliminates all other questions from our consideration of the exceptions.

The defendant now upon his exceptions contends that even upon the foregoing finding of facts he is not responsible for the insufficiency in the number of guys, nor for the insufficiency in the quality, size and arrangement of the bolts in fastening the guys to the ledge. The question of his responsibility for either of these deficiencies is the only question legitimately raised by his several exceptions.

His argument is, that he was only a co-servant with the plaintiff under a common master, the United States government, and

both taking orders from a common superior, Lt. Col. Hains; that the duty of furnishing safe machinery and appliances was upon the government, the common employer acting through its alter ego, the officer in charge; that all that he, the defendant, did in setting up and staying the derrick was done as an employee under the supervision of and with the approval of that officer; and that this approval by his superior relieves him from any responsibility therefor to his fellow-servants. He concedes that in operating the derrick, and even in changing its location, he was bound to be careful and diligent in his own conduct even toward fellow-servants. His claim for exception from liability is confined to the rigging and setting up the derrick, this being where he was held liable by the jury under the ruling of the court below. This work he contends was the duty of the common master, and hence was not his act, but the act of that master for which he is not responsible.

For the purposes of this opinion it may be conceded that, if in rigging and setting up the derrick, the defendant did not exercise his own judgment or discretion but simply followed the directions of a higher authority, he would not be responsible for any deficiency in material or arrangement. Responsibility arises only where there is freedom of action. It appears, however, that the defendant was practically untrammelled in this work. He selected the material. He omitted to ask for more or better materials. He personally determined the number of guys, and the quality, size and arrangement of the moorings of the guys. Colonel Hains, the officer in charge, did little if any more than acquiesce in the defendant's opinion and action. Representing the government, he was content so far as the government was concerned. He appears to have denied nothing, to have required nothing. Such subsequent or even cotemporaneus approval by superior authority may free the actor from all liability to that authority, but cannot free him from liability to other persons. The driver of a carriage may drive hurriedly through a crowded street with the full approval of his employer, but will nevertheless be responsible to all persons injured by his recklessness.

The plaintiff as directed by the defendant was at work near the derrick within range of injury from its possible fall. In the absence of notice to the contrary he could rightfully assume that whoever had rigged and set up the derrick had done so with proper material and in a careful manner. He was injured without fault of his, by the fall of the derrick, directly resulting from some lack of due care either in the material used, or in its arrangement. His injury, therefore, is directly attributable to whoever selected and arranged that material. The jury have found that the defendant was that person. His responsibility to the plaintiff follows logically and legally.

The defendant calls our attention to a distinction made in some cases between the misfeasance and mere nonfeasance of a person in the situation of the defendant. Such a distinction cannot avail here. If the defendant had not undertaken to rig and set up the derrick, or in so doing had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance.

The legal result thus arrived at has seemed to us so easily deducible from familiar general principles, that authorities need not be cited. We cite one case only for illustration. In *Cameron* v. *Nystrom*, (1893) app. ca. 308, the defendant was a stevedore employed in discharging a vessel;—the ship furnished the gear, but the stevedore set it up;—this was done so negligently that a part of the gear broke, letting fall a coil of wire upon the plaintiff, a seaman of the same ship, to his injury. It was argued that the plaintiff and defendant were co-servants under a common master, the owner or master of the ship; and that as the defendant did not furnish the gear he was not responsible for its breaking. The court held this to be no defense, and held that the defendant was responsible to the plaintiff for the negligence in setting up the gear.

Assuming our conclusions above stated to be correct, it is evident that all the requested instructions were properly refused.

The bill of exceptions further states that the defendant excepted "to so much of the judge's charge as related to the liability of the defendant for the equipment and construction of the said derrick, and the iron eye-bolt connected therewith;" neither the words nor the substance of the ruling complained of is stated. We are not bound to consider such an exception. It is too comprehensive and indefinite. Each exception in a bill of exceptions should be specific, pointed, and explicit, showing specifically and precisely what ruling is claimed to be error. *McKown* v. *Powers*, 86 Maine, 291; *Hamlin* v. *Treat*, 87 Maine, 310. It may be said, however, that the presiding justice upon that part of the case ruled in accordance with this opinion.

As to the motion to set aside the verdict as against evidence, we find the testimony conflicting as usual in such cases, but we do not find such a preponderance in favor of the defendant as constrains us to believe the jury were clearly wrong. The evidence for the plaintiff, if true, amply sustains all the propositions he was bound to prove, and we are not satisfied that it is untrue.

The damages seem to us large, but some of the evidence tends to show that the plaintiff, a young man, was badly and perhaps permanently injured. We hesitatingly conclude that the jury may not have erred.

As to the motion to set aside the verdict to let in the evidence of Lt. Col. Hains, it is clear that the evidence is not newly-discovered. It was well known to the defendant when the action was first brought. He later endeavored to procure it, but did not obtain it in season for the day set for the trial. He then properly asked the presiding justice for a continuance or postponement until he could obtain the evidence. This question of further delay was for the presiding justice to decide in the exercise of a sound judicial discretion. The law court will not revise his action unless it appears that he has clearly abused his discretionary power. The action was entered at the February term, 1895, of the Superior Court, and the writ was served at least fourteen days before that time. The location of Lt. Col. Hains, he being then stationed on Staten Island, New York Harbor, was well known to

the defendant, or at least easily ascertainable. The defendant, however, did not file his interrogatories until the fourth day of the following May, although he was bound to assume that the plaintiff would press for trial at the May term.

The plaintiff did not impede or delay the defendant in any way but filed his cross-interrogatories on the next secular day and agreed upon a commissioner nominated by the defendant. The presiding justice granted one postponement of the trial for nearly a week, but refused to delay the plaintiff further. We cannot say that, under these circumstances, he abused his discretionary power in the premises. We think he exercised it properly. Litigants with trials in prospect must look early after their witnesses and documents. Vigilantibus non dormientibus jura subveniunt.

Motions and exceptions overruled.

STATE *vs.* GEORGE W. NORTON.

Cumberland. Opinion June 8, 1896.

Libel. Pleading. Demurrer. Const. Art. 1, § 4; R. S., c. 129, §§ 1, 5.

Whether language published is libellous is regularly a question for the jury.

When a respondent demurs to an indictment for libel, he thereby refers the question of libel or no libel to the court.

Words not actionable, if merely spoken, may be indictable as libellous, if published.

Words in an interrogative form may be as libellous as if in a declarative form.

In determining whether published language is libellous, its natural ordinary meaning is to be regarded, rather than its possible different meaning.

Held; that the language published by this respondent though in the interrogative form is clearly defamatory in meaning and effect and is therefore libellous.

When a respondent refers his case to the court by a demurrer, and the opinion of the court is against him, judgment and sentence regularly follow.

EXCEPTIONS BY DEFENDANT.

This was an indictment for libel found in the Superior Court, for Cumberland County, and to which the defendant filed a demurrer. The presiding justice overruled the demurrer and the defendant excepted.

The material allegations in the first count of the indictment are as follows:—"Against what man is Deputy Sheriff Charles A. Plummer (meaning the said Charles A. Plummer) now plotting by the employment of a needy man who shall act as 'spotter' that some one who has incurred the liquor deputy's displeasure (meaning the said Charles A. Plummer) may be punished? (meaning that the said Charles A. Plummer was engaged in a scheme to obtain some needy man to act as a 'spotter' to obtain evidence against some person who had incurred the displeasure of the said Charles A. Plummer.) Who will be the next young man to lay himself liable to State prison for a term of years by taking a false oath by direction of this guardian of our laws?" (meaning that the said Charles A. Plummer had procured and caused one young man to lay himself liable to State prison for a term of years by committing the criminal offense of perjury by direction of the said Charles A. Plummer, and that the said Charles A. Plummer had thereby been guilty of the criminal offense of subornation of perjury); to the great damage, scandal and disgrace of the said Charles A. Plummer, to the evil example of all others in like cases offending, against the peace of said State and contrary to the form of the statute in such case made and provided."

C. A. True, County Attorney, for State.

A. W. Coombs, for defendant.

There is no averment that Plummer had employed any man as a spotter in the past, and that the words were published of and concerning such employment. Nor is there averment that Plummer had sought to punish any man who had incurred his displeasure, and that the words were published of and concerning such action. The want of necessary averments in this respect cannot be supplied by inference.

At most, these words of interrogation can only be held to imply that Plummer had been plotting by the use of a spotter to obtain evidence to secure conviction of some criminal offender. It is not intimated that Plummer was plotting against any innocent man. All guilty men should be "plotted" against by all legitimate

means, and the employment of detectives is a common, and sometimes, the only method available for the detection of the criminal.

The publication in question is a harmless interrogation which is not of itself libellous; the indictment contains no proper averments to render it so; the innuendo is not supported by what precedes; and so much of the indictment is therefore bad.

All false swearing is not perjury; in order to constitute that offense, the false swearing must be committed under oath, before a court of competent jurisdiction, in a pending trial and the false swearing must be as to matter material to the issue. False swearing not confined within these limits is not a crime.

There is no allegation in the publication, that any "young man" had taken a false oath even. The interrogation, at most, merely implies it, by the use of the words "next young man;" but implication and inference are not proper substitutes for necessary averment in prosecutions for criminal libel. The words used do not expressly charge a crime upon any young man.

A natural and entirely reasonable construction of the entire article would be that it sets out the danger to the community from spotter evidence and to a "young," inexperienced, "green" spotter himself, though misunderstanding the nature of the work committed to him by the general direction given him by one who was really acting as a "guardian of our laws."

The liberty of the press permits of fair criticism of the acts of all public officers. That is what the publication in question was and the respondent is guilty of no criminal offense unless he has exceeded the limits of fair criticism.

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

EMERY, J. The indictment charges that the respondent maliciously published by printing in a daily newspaper, in Portland, the following language concerning Charles A. Plummer then a deputy sheriff, specially charged with the enforcement of the

liquor law in Portland, to wit:—"Against what man is Deputy Sheriff Charles A. Plummer now plotting by the employment of a needy man who shall act as spotter, that some one who has incurred the liquor deputy's displeasure may be punished? Who will be the next young man to lay himself liable to State prison for a term of years by taking a false oath by direction of this guardian of our laws?"

The respondent, admitting all the allegations by his demurrer, contends in his argument that this language so published does not constitute a criminal libel.

This question was wholly one for the jury, since under our constitution and statute, in all indictments for libels, the jury determines the law as well as the facts. Const. Art. 1, § 4; R. S., c. 129, § 5. But since this provision is for the benefit of the accused, he may waive it by admitting the allegations of fact, and asking the court to determine the law. *State* v. *Gould*, 62 Maine, 507. Hence the case is properly before us.

The respondent urges that the language published does not accuse Mr. Plummer of any criminal offense. Such a charge is not essential to a criminal libel. There is a wide difference in this respect between words spoken, and words printed in a newspaper. Many words which merely spoken are not actionable become punishable as libellous when embedded in type and circulated in a newspaper. *Tillson* v. *Robbins*, 68 Maine, 295. This point in argument, therefore, must be overruled.

The various common law definitions of criminal libel need not be cited, since the statute, R. S., c. 129, § 1, sufficiently describes what written words, maliciously published, will constitute a punishable libel. They are any such words, "tending to provoke him [the victim] to wrath, expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse." Reading now in the light of this statute the written or printed words published by the respondent, it must be evident that they tend directly to bring about one if not more of the results named in the statute. They are defamatory in that they tend to injure Mr. Plummer's reputation. His integrity as

an individual and as a public officer is distinctly assailed. If he were guilty of such conduct as the words clearly imply, he would deserve public hatred, contempt and ridicule; and would forfeit the benefits of public confidence and social intercourse. If innocent, such words would be provocative of wrath, and would endanger his standing with the public until at least their falsity was made equally well known. In either event, his reputation as a public officer would for a time at least be seriously injured.

The respondent further urges that he asserted nothing against Mr. Plummer but only asked some questions. It is immaterial whether he asserted, or only suggested, whether he used the declarative or interrogative form. *Adams* v. *Lawson*, 17 Gratt. 250 (94 Am. Dec. 455). Insinuations may be as defamatory as direct assertion, and sometimes even more mischievous. The effect, the tendency of the language used, not its form, is the criterion. The libeller cannot defame and escape the consequences by any dexterity in style.

The respondent urges still again that the language may, perhaps, be so construed and explained as not to be defamatory, and that if this can possibly be done such construction is to be taken as the true one—the one intended by the writer. He endeavors with much ingenuity to show how this can be done in this case. Here, however, the want of sufficient skill in style may subject the writer to a punishment he hoped to avoid. He should avoid defamatory style as well as defamatory matter. It is not the ingeniously possible construction, but the plainly normal construction which determines the question of libel, or no libel, in written words which are maliciously published. In this case the natural inference from the published language is clearly defamatory.

The indictment is for a misdemeanor only. The respondent has admitted all the facts alleged against him, and rested his defense upon the opinion of the court whether those facts constitute the offense charged. That opinion is that upon his own confession he is guilty of publishing a libel as charged. Both the law and the

fact being determined against him, nothing remains but judgment and sentence.

Exceptions overruled. Judgment for the State.

CHARLES H. WATERMAN *vs.* EDGAR M. CUNNINGHAM.

Waldo. Announced June 26, 1896. Opinion December 28, 1896.

Elections. Ballots. Stickers. Stat. 1891, c. 102, § 10.

The statute of this State regulating voting requires the name of the person desired to be voted for, and not printed on the ballot, to be inserted in the blank space left for that purpose.

A sticker placed over one of the printed names is not a compliance with the statute.

ON REPORT.

This was a friendly procedure to ascertain which of two persons is entitled to an office of common councilman in the city of Belfast, and was instituted for the purpose of ascertaining the legality of using stickers upon ballots under the Australian system of this State. Thirteen ballots with stickers on them bearing the name of the complainant were cast for the complainant, the stickers having been placed over the name of the respondent. It was agreed that one or more of the original thirteen ballots should be produced at the argument as a specimen, or specimens, of the kind used, all of them being alike. They were all thrown out by the counting officers, as being an illegal kind of ballot, no question being made over them at the time. Had they been counted, the complainant would have been elected by four majority. Throwing them out because stickers were used would defeat the complainant's election.

Upon these facts the full court was to determine which party should have received the certificate of election, and adjudge the case accordingly.

R. F. Dunton, for plaintiff.

There can be no question as to the intention of each of the voters who cast the thirteen ballots. Their choice is clearly

expressed, and their votes should be counted unless repugnant to the spirit of the law.

The Australian system adopted in this State is commonly called a "secret ballot." In *Curran* v. *Clayton*, 86 Maine, 52, our court say: "Its distinguishing feature is its careful provision for a secret ballot," and the ballots were rejected in that case on the ground that the marks employed, and their location, might be used as distinguishing marks to identify the ballot cast by the voter.

The statute does not require the name to be written, but uses the terms "insert" and "fill in." Even if the statute required the name to be written this would include printing and other modes of making legible words. Rule XVIII, § 6, Chap. 1, R. S.

The use of "stickers," as in this case, instead of violating the secrecy of the ballot, tends to promote its secrecy, for the handwriting of the voter might be identified, his "sticker" could not.

In the recent Pennsylvania cases of *De Walt* v. *Bartley; Ripley* v. *Lackawanna County*; and *Meredith* v. *Lebanon County*, reported together, (146 Penn. St. 529, 28 Am. State Reports 814) under a statute which reads as follows: "On receipt of his ballot the voter shall forthwith and without leaving the space enclosed by the guard rail, retire to one of the voting shelves or compartments and shall prepare his ballot by marking in the appropriate margin or space a cross (x) opposite the party name or political designation of a group of candidates or opposite the name of the candidate of his choice, for each office to be filled, or by inserting in the blank space provided therefor, any name not already on the ballot;" the court say: "It would be a strained construction to hold that the word 'inserting' as used in the act means inserting by writing. It certainly does not say so, and we see no reason why we should place this construction upon it." To the same effect is *Quinn* v. *Markoe*, (Minn.) 35 N. W. Rep. 263.

The blank space under the names of candidates on the official ballot is left for the convenience of the voter in inserting other names and for no other purpose, and the statute providing that names may be inserted in these spaces should be regarded as directory and not mandatory.

The legislature never intended that the voter should be deprived of his ballot when his choice is clearly expressed, for no other reason than that the name is not inserted in the space left for his convenience, and within the strict letter of the law. It has been repeatedly asserted in both ancient and modern cases that judges may in some cases decide upon the 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. *Holmes* v. *Paris*, 75 Maine, 561.

W. P. Thompson and N. Wardwell, for defendant.

The statute is mandatory and not merely directory.

We are not to infer from the use of the word "may" that the voter may insert the name of the candidate for whom he wishes to vote in any other space, or place, than the statute directs, for such a construction would give rise to such loose methods of voting that the objects of the law would be defeated. And, to use the language of the court in *Parvin* v. *Wimberg*, 130 Ind. 561: "We would be left entirely without any fixed rule by which the officers of elections could be guided in counting the ballots."

Counsel also cited: *Curran* v. *Clayton*, 86 Maine, 42.

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

STROUT, J. Bill in equity to determine whether plaintiff or defendant was elected councilman of Belfast. The printed ballots contained the names of a candidate for mayor, for aldermen and two councilmen, and other officers. The candidates for two councilmen as printed on the ballot, were Edgar M. Cunningham, and under that name was that of William W. Cates. A blank space, as required by law, was left under the last name. Certain ballots were cast, with a sticker, so-called, on which was printed the name of the plaintiff. This sticker was placed on the ballot over the name of the defendant. The question is whether such ballot was legal, (being regular in all other respects,) and entitled to be counted for the plaintiff.

The statute of 1891, c. 102, § 10, provides that in the ballots

printed by authority of the State, "a blank space shall be left *after* the names of the candidates for each different office, in *which* the voter may insert the name of any person, not printed on the ballot, for whom he desires to vote, as candidate for such office." This provision is retained in chap. 267 of laws of 1893. By section 24 of the same chapter, as amended by chap. 267 of the laws of 1893, specific directions as to the preparation of his ballot by the voter, are provided. Among other things a cross (x) is to be made on the ballot "within the square above the name of the party group," if he wishes to vote the entire ticket as printed. But "if the voter shall desire to vote for any person or persons, whose name or names are not printed as candidates on the party group or ticket, *he may erase any name or names which are printed on the group or party ticket, and under the name or names so erased he may fill in the name or names of the candidates of his choice.*"

Nothing is left to intendment. To entitle the vote to be counted, the cross (x) must be made at the place designated by the statute. *Curran* v. *Clayton*, 86 Maine, 42. To vote for a person not printed on the ballot, the person must erase the printed name to which he objects, and *under* the name so erased fill in the name he desires. No other mode is allowed by the statute. Its provisions are plain and specific, and if not followed the vote cannot be counted. In this case, the upper printed name of candidate for councilman was covered by a slip on which was printed the name of the plaintiff. If this could be considered an erasure of the printed name, it cannot be regarded as a filling in of plaintiff's name *under* the name so erased. We are not at liberty to seek for the intention of the voters who cast these ballots. They did not conform to the plain and specific directions of the statute, and were therefore defective and could not be counted. Rejecting these votes, the defendant was duly elected, and he should receive a certificate of election.

Bill dismissed without costs.

RAYMOND GRANT *vs.* CHARLES B. ALBEE, and others.

Washington. Opinion June 26, 1896.

Attachment. Record. R. S., c. 81, § 26.

When an attachment of personal property is made in an unincorporated place, it may be recorded in the office of the clerk of the oldest adjoining town in the county. R. S., c. 81, § 26.

Held; that an attachment made in Township 36, Washington County, will not be preserved by recording it in the clerk's office of the town of Wesley, which being the oldest and nearest town to Township 36 nowhere adjoins it.

See *Laughlin* v. *Reed*, ante, p. 226.

ON EXCEPTIONS BY PLAINTIFF.

The case appears in the opinion.

J. F. Lynch, for plaintiff.

C. B. Donworth, for defendant.

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

STROUT, J. Plaintiff performed labor in cutting and peeling bark on township Number 36, Washington County, an unincorporated place. He claimed a lien thereon, and brought suit to enforce it. The officer attached the bark, but did not retain possession. He recorded his attachment in the clerk's office of the town of Wesley, that being the oldest and nearest town to township 36.

Revised Statutes, c. 81, § 26, provides that "when the attachment is made in an unincorporated place" the copy of the officer's return of attachment "shall be filed and recorded in the office of the clerk of the oldest adjoining town in the county." Between Wesley and township 36 lies another township. Township 36 nowhere adjoins Wesley. The record of attachment in that town, was not authorized by the statute.

The ruling that the attachment was not preserved by the record in Wesley, and that the plaintiff has lost his lien upon the property attached, was correct.

Exceptions overruled.

JOHN K. AMES *vs.* JOSEPH A. COFFIN.

Washington. Opinion July 30, 1896.

Tenants In Common. Assumpsit.

At the time the services sued for were performed, the parties to this suit, with numerous others, were owners, as tenants in common of a township of land in Washington County. The plaintiff as the agent of the owners had the general control and management of the township. For a long time there had been a custom acquiesced in by all, and an arrangement more or less definite, that any of the tenants in common who owned saw-mills should exclusively operate upon such portion of the territory as was most convenient for the hauling of timber therefrom to their respective mills; but each owner so operating accounted to the others for stumpage on all lumber hauled. In the southeast corner of the township there is a tract known as the "Harris Reserve," the timber upon which can be most conveniently hauled and driven to mills owned for some years by the defendant; and in accordance with this custom and understanding the defendant had been allowed to exclusively operate upon this tract for soft wood timber.

Prior to the time that the services sued for were rendered, the owners had given a written license, running for a number of years to one Church, to enter upon the township, fell hemlock trees and peel and remove the bark therefrom, the peeled hemlock logs to remain the property of the land-owners. In the spring of 1886, the defendant notified the plaintiff that he did not propose to haul any more logs from this tract where he had been accustomed to operate, and that he did not want Church to peel any hemlock upon the tract during that summer. Church, however, did peel bark upon this tract in the summer of 1886, leaving the logs where they fell, and the plaintiff in consequence of his previous conversation with the defendant, supposing that he did not want the logs so left and that there was nobody to care for them, and for the purpose of saving them for the benefit of the owners, had these logs "yarded" and placed on skids, so that they could be hauled during the ensuing winter to a lake and from thence driven to the plaintiff's mill at Machias to be sawed.

After this expense had been incurred, the defendant gave a written permit to one Allen to enter upon this tract and to haul therefrom these peeled hemlock logs together with spruce and pine logs. Allen entered under this permit and removed all of the hemlock logs. The expense incurred upon these logs never having been paid, the plaintiff seeks in this action of assumpsit to recover the same of the defendant. The defendant never expressly promised to pay.

Held; that the law will not imply from these circumstances a promise, upon the part of the defendant, to pay for the services thus rendered.

The fact that services were rendered to a person at his request need not be proved by direct evidence, it may be by circumstantial evidence; but it is the opinion of the court that the circumstances in this case clearly show that the services were not rendered for the defendant nor at his request. They were performed by the plaintiff as one of the owners and agent of the township for the benefit of all the owners, to save these logs which, as he thought, would otherwise have been left in the woods and become worthless.

ON REPORT.

The case appears in the opinion.

C. B. Donworth, for plaintiff.

The fact that the parties were tenants in common of the logs does not affect the plaintiff's rights here. This was a contract respecting labor bestowed upon the common property and "the law imposes no disability upon part owners of personal property to make such a contract with each other." *Chapman* v. *Eames*, 67 Maine, 452.

But, should plaintiff be without remedy at law, he should be permitted to invoke the equitable side of the court by virtue of the Law and Equity Act of 1893.

The defendant filed no brief.

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

WISWELL, J. At the time the services sued for were performed, the parties to this suit, with numerous others, were owners, as tenants in common, of a township of land in Washington County. The plaintiff as the agent of the owners had the general control and management of the township.

For a long time there had been a custom acquiesced in by all, and an arrangement more or less definite, that any of the tenants in common who owned saw-mills should exclusively operate upon such portion of the territory as was most convenient for the hauling of timber therefrom to their respective mills; but each owner so operating accounted to the others for stumpage on all lumber hauled. In the southeast corner of the township there is a tract known as the "Harris Reserve," the timber upon which can be

most conveniently hauled and driven to mills on Pleasant River owned for some years by the defendant; and in accordance with this custom and understanding the defendant had been allowed to exclusively operate upon this tract, for soft wood timber.

Prior to the time that the services sued for were rendered, all of the owners had given a written license, running for a number of years, to one Church, to enter upon the township, fell hemlock trees and peel and remove the bark therefrom; the peeled hemlock logs to remain the property of the land owners.

In the spring of 1886, the defendant notified the plaintiff that he did not propose to haul any more logs from this tract, where he had been accustomed to operate, and that he did not want Church to peel any hemlock upon the tract during that summer. Church, however, did peel bark under his permit upon this tract in the summer of 1886, leaving the logs where they fell, and the plaintiff in consequence of his previous conversation with the defendant, supposing that he did not want the logs so left and that there was nobody to care for them, and for the purpose of saving them for the benefit of the owners, had these logs to the amount of 146,210 feet "yarded" and placed on skids, at an expense of one dollar twenty-five cents per thousand feet, so that they could be hauled during the ensuing winter to a lake and from thence driven to his mill at Machias to be sawed.

After this expense, amounting to $182.76 had been incurred, the defendant gave a written permit to one Allen to enter upon this tract known as the "Harris Reserve" and to haul therefrom these peeled hemlock logs, together with spruce and pine logs, into Pleasant River Lake, from whence they would be driven down Pleasant River. Stumpage for these logs was fixed at $1.50 per thousand feet. The logs were sold by Allen to the Columbia Falls Lumber Company, who had a portion of them sawed at a mill owned by the defendant but operated by one Turner under lease from the defendant.

After the plaintiff learned that the logs were being hauled by Allen he notified the defendant by letter, wherein he said: "All can be arranged satisfactory now by paying for the yarding.

Please let me hear from you." In his reply to this letter the defendant said: "Mr. Allen will be disposed to pay a fair price for skidding logs." Allen denies that he ever promised to pay for this labor, and he and other witnesses testify that the defendant told Allen that he would protect him and save him harmless from this claim.

This expense has never been paid, and in this action of assumpsit the plaintiff seeks to recover the same of the defendant. The defendant never expressly promised to pay for the labor expended upon these logs, and the question presented is whether the law will imply a promise from the circumstances. We think not. The work was not done for the defendant, nor at his request, either express or implied. It was done by the plaintiff as agent of the township for the benefit of the owners, to save these logs which would otherwise have been left in the woods and become worthless. When the service was performed the plaintiff expected to have the logs driven to his own mill, there to be sawed, and that the defendant would have nothing whatever to do with them, except that as one of the owners he would be entitled to his proportional part of the stumpage.

He was prevented from carrying out his purpose of having the logs sawed at his own mill by their being hauled by Allen under the permit from the defendant. It is unnecessary to inquire as to what right the defendant had, if any, to give this permit with express oral instructions, as testified by some of the plaintiff's witnesses, to take the logs upon which labor had been expended in preparing them to be hauled, because, if this was done entirely without authority, it would not render him liable to the plaintiff in this action. Nor can we decide in this case what the defendant's liability is, if any, to the landowners. The question simply is whether the defendant is legally liable to the plaintiff to pay the account sued.

The fact that services were rendered to a person at his request need not be proved by direct evidence, it may be by circumstantial evidence; but we think that the circumstances in this case not only fail to show such a request, but that they very clearly show

that the services were not rendered for the defendant, nor at his request. They were performed by the plaintiff as one of the owners and the agent of the township, upon the property of all the owners for the benefit of all. Consequently the law will not imply a promise to pay upon the part of the defendant.

The entry must therefore be,

Judgment for defendant.

JAMES TRACY, in equity, *vs.* JOSEPH LE BLANC.

Androscoggin. Opinion July 30, 1896.

Nuisance. Equity. Law.

When a nuisance is prospective and threatened, a court of equity may interfere to prevent its being brought into existence; but when what is claimed to be a nuisance already exists, the general rule is that the fact that it is a nuisance must be established by a suit at common law before a court of equity will interfere to abate.

This general rule is subject to exceptions, as in cases of pressing or imperious necessity, or where the right is in danger of being injured or destroyed, or where there is no adequate remedy at law.

The parties were owners of adjoining lots of land on the southerly side of Main Street in the City of Lewiston. On each lot there was a three-story frame building occupying nearly the entire width of the lot, the fronts of the first story of the two buildings being substantially on a line and within two or three inches of the street limit. The plaintiff occupied the whole of his building as a furniture store; the first story of the defendant's building was used as a shop,—the upper two stories as tenements. The defendant's building, above the first story, had a circular front nearly the entire width of the building, which projected in the centre, about two and one-half feet over the street line,—the lowest part of the projection being from twelve to thirteen feet above the sidewalk.

The plaintiff alleged in his bill that this projection was a nuisance and that he was specially injured thereby, in that the view from the upper stories of his building was to some extent shut off; and that the front of his upper stories where he had previously been accustomed to display his wares and merchandise, could not be seen by persons passing along certain portions of the street, and that thereby he was injured in his business. He, therefore, prayed for a mandatory injunction to compel the defendant to remove the alleged nuisance and to perpetually enjoin him from maintaining the same in the future.

Held; that the case is not one which calls for the interference of the chancery court to grant the relief prayed for.

ON REPORT.

The case is stated in the opinion.

F. L. Noble and R. W. Crockett, for plaintiff.

In cities and towns where stores and warehouses are built to the street line and where shop-houses are accustomed to display their wares from their windows, no obstruction to the view either from the stores themselves or from the street, in the way of bay windows or swell fronts extending over the street line on adjoining buildings should be allowed to be erected and remain to the damage of their business. And when such obstructions exist and the damage caused thereby is proved, as in this case, a court of equity will lend its aid to enjoin the nuisance thus occasioned.

This is a private nuisance which entitles the complainant to relief in equity unless he has a plain, adequate and complete remedy at law. *Lockwood* v. *Lawrence*, 77 Maine, 297; *Creely* v. *Bay State Brick Co.*, 103 Mass. 514.

The injury to the complainant is permanent and continuous, and a judgment for damages would not furnish him adequate relief. In order to deprive him of the aid of equity by injunction, it must appear that the remedy at law is as practical and efficient to serve the ends of justice and its proper and prompt administration as the remedy in equity. And unless this is shown, a court of equity may lend its extraordinary aid by injunction notwithstanding the existence of a remedy at law. I High on Injunctions, § 30; *Lockwood* v. *Lawrence*, supra; *Cadigan* v. *Brown*, 120 Mass. 493.

Especially is this the case when the injury is of such a nature that from its continuance or permanent mischief, it must cause a constantly recurring grievance which cannot otherwise be prevented. Adams, Eq. 211. *Webber* v. *Gage*, 39 N. H. 186; *Cadigan* v. *Brown*, and *Lockwood v. Lawrence*, supra.

The grounds upon which equity takes jurisdiction is that the injury complained of is irreparable, or of such a nature that there is no adequate remedy at law. *Varney* v. *Pope*, 60 Maine, 195; *Coe* v. *Winnipiseogee Mfg. Co.*, 37 N. H. 263; Gould on Waters, § 506 and cases.

Revised Statutes c. 17 has reference to obstructions or incumbrances placed upon highways. The nuisance claimed, in this case, is a swell-front projection extending the entire width of the building on the upper stories of said building shutting out the complainant's view up Main Street and obstruction to his display of wares and merchandise. *Lyons* v. *Woodward*, 49 Maine, 29 p. 30.

In *Reimer's Appeal*, 100 Pa. St. 182, (45 Am. Rep. 373,) it was held that a bay window in the second story of a city house sixteen feet above the sidewalk and projecting three feet six inches beyond the building line was a public nuisance, which could not be justified by ordinance, and its construction might be enjoined by the public, the court declaring that the law upon the point was so plain and well settled as to require no discussion.

In *Codman* v. *Evans*, 5 Allen, 308, in which damages were sought to be recovered for the erection of a bay window extending over into the plaintiff's land, the court say on page 311: "For in the present case the plaintiff not only has a right to have the whole space occupied by the street open, from the soil upwards, for the free admission of light and air, and the prospect unobstructed from every point, but it is a right of appreciable value in reference to himself and his grantees, who are proprietors of the land adjoining the way. If the defendant may obstruct the light and air by means of a bay window, he may by a much larger structure, and thereby greatly injure the property bounding on the street."

The special damage which the complainant must prove need only be slight. It is sufficient if he prove that he has lost trade by the obstruction. *Callahan* v. *Gilman*, 52 N. Y. 112.

The rule seems to be, that the law gives an abutting owner no right to build a swell front or bay window projecting over the building or street line, and an adjoining owner who suffers damage thereby may apply to a court of equity for relief as the complainant in this suit has done. It would be a dangerous precedent to allow the former to project his bay window only a small distance over the line, for as the court say in *Codman* v. *Evans*, supra, he might project it a greater distance, making it impossible to deter-

mine how far he might go without overstepping the bounds of the law.

W. H. Newell and W. B. Skelton, for defendant.

The testimony does not show that the structure or its maintenance constitutes a common nuisance.

The plaintiff has not shown any damage special and peculiar to himself.

If the plaintiff has any remedy he must first establish it at law.

If damaged at all, the plaintiff has a plain, adequate and complete remedy at law.

The plaintiff, if entitled to relief, has mistaken his remedy.

It is undoubtedly true that the public has the right to the use of the entire width of the street, if necessary, to reasonably accommodate public travel. But the right of the public therein is that of passing and repassing, and the title to the soil, subject to the easement of passage in the public, is in the abutting owner. *Stackpole* v. *Healy*, 16 Mass. 33.

The lower surface of the structure is more than twelve feet above the sidewalk, and at the widest point, which forms the cord of the arc of curvature, it projects only twenty-eight inches over the street line. It does not obstruct public travel, and has not deflected the same from its usual course. It is not claimed and the evidence does not show, that one individual of the general public has, by its maintenance, lost a second of time, traveled an inch farther, been hindered from visiting plaintiff's store, or directly or indirectly suffered a moment's annoyance.

The only complaint is that the view from a few feet of sidewalk to and from the second and third story-windows is partially obscured. He can show no damage to his business, and no annoyance from the occupancy of defendant's building. He, in fact, makes such a complaint as every owner of a building on a business street in Lewiston, or any other city, might make of his next door neighbor. But such a condition of things must necessarily exist, is incident to the conduct of business on a crowded street and is, if it exist at all, damnum absque injuria.

It is apparent that the plaintiff has suffered no legal damage to

person, feelings, business or property by the maintenance of defendant's structure—and in order to maintain an action in any form he must prove damage special and particular to himself.

In *Hay* v. *Weber*, 79 Wis. 587, 24 Am. Rep. 737, the court held, "that the abutter owned the fee to the center of the street, that to maintain a private action for a public nuisance, the injury sustained must be such as not merely differs in degree but in kind, from that which is sustained by the public." The remedy sought was denied and the court said, "that it is difficult to perceive how such obstruction could result in such damage, but assuming that it would, yet such damage would be too remote and speculative to constitute the basis of a private action at law or in equity."

If the plaintiff is entitled to a remedy, it must be by an action on the case under R. S., c. 17, § 12.

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

WISWELL, J. This bill in equity is brought to the law court upon report of bill, answer and proofs.

The parties are owners of adjoining lots of land on the southerly side of Main Street in the city of Lewiston. On each lot there is a three-story frame building occupying nearly the entire width of the lot; the fronts of the first story of the two buildings are substantially on a line and within two or three inches of the street limit. The complainant occupies the whole of his building as a furniture store; the first story of the defendant's building is used as a plumber's shop,—the upper two stories as tenements. The defendant's building, above the first story, has a circular front, nearly the entire width of the building, which projects, in the centre, about two and one-half feet over the street line; the lowest part of the projection is from twelve to thirteen feet above the sidewalk.

It is alleged in the bill that this projection is a nuisance, that the complainant is specially injured thereby, in that the view from the upper stories of his building has been to some extent shut off, and that the front of his upper stories, where he had previously

been accustomed to display his wares and merchandise, cannot be seen by persons passing along certain portions of the street, and that thereby he has been injured in his business. He, therefore, asks this court to grant a mandatory injunction, to compel the defendant to remove the alleged nuisance and to perpetually enjoin him from maintaining the same in the future.

We do not think that the complainant's case is one which calls for the interference of the chancery court by granting the relief prayed for. The injunction asked for is not to prevent the creation of a nuisance, but to compel its removal and to enjoin its continuance. The defendant's building had been erected and completed in the manner described before the commencement of these proceedings.

"When the alleged nuisance is prospective and threatened, a court of equity may interfere to prevent its being brought into existence. When what is claimed to be a nuisance already exists, the general rule is, that the fact that it is a nuisance must be established by a suit at common law before a court of equity will interfere to abate." *Varney* v. *Pope*, 60 Maine, 192. This has always been the doctrine in this State. *Porter* v. *Witham*, 17 Maine, 294; *Jordan* v. *Woodward*, 38 Maine, 423; *Morse* v. *Machias Water Power Co.*, 42 Maine, 119.

It is true that this general rule is subject to exceptions. In cases of pressing or imperious necessity, or where the right is in danger of being injured or destroyed, or there is no adequate remedy at law, equity will interfere. *Lockwood Co.* v. *Lawrence*, 77 Maine, 297. But, we do not think that the complainant has shown a case which comes within the exceptions to the rule. There can be no pressing nor imperious necessity for relief by injunction. There is no danger of irreparable injury, nor of his right being destroyed. If the condition and position of the defendant's building has created a private nuisance or a public nuisance, from which the complainant has suffered a special and particular injury, he has a plain and adequate remedy at law. Although the condition complained of is a continuing one, that need not cause a multiplicity of suits nor vexatious litigation, because if he should establish at law that the nuisance exists, that

is that the condition above described is a nuisance which causes him special and particular injury, he would then be entitled to the relief that he now asks for.

As was said in *Haskell* v. *Thurston*, 80 Maine, 129, this court has always, "considered the remedy by injunction an extraordinary remedy, and only to be used when it is evident that the ordinary remedy at law will not afford adequate relief."

The entry will therefore be,

Bill dismissed with costs for the defendant.

JOHN J. O'ROURKE

vs.

LEWISTON DAILY SUN PUBLISHING COMPANY.

Androscoggin Opinion August 5, 1896.

Libel. Privileged Communications. New Trial.

In an action against a newspaper for a libel upon the plaintiff, who was a public officer and falsely charged with cruelty to an insane pauper, the following instructions *were held correct:*

"That the people of our towns and cities have a right to know how their municipal affairs are being conducted, and how the duties of their officers are being performed, and that it is one of the privileges of newspapers to give the people this information; and that, if the information so given is true, or, if the publishers believe it to be true, and have reasonable and probable cause for so believing, the law protects them; that the press must not be muzzled; that the public good requires that it be allowed to speak; and that all which the law requires of its editors and publishers is good faith, and an honest belief that their articles are true, and that such belief be founded on reasonable and probable grounds."

Also; that the right of trial by jury is guaranteed by the constitution. It is a right belonging to plaintiffs as well as defendants. And when the court is asked to set aside a verdict and grant a new trial, the rights of both parties must be considered. And in libel suits, the fact must not be overlooked that while our constitution guarantees the freedom of the press, and the right of every citizen to freely speak, write and publish his sentiments on any subject, it also guarantees redress to those who are injured by the abuse of this liberty.

A new trial will not be granted when a careful examination of the evidence, although voluminous and conflicting, fails to satisfy the court that the verdict can rightfully be set aside.

ON MOTION BY DEFENDANT.

This was an action in which the plaintiff sought to recover damages resulting from the publication of certain libellous newspaper articles by the defendant. The articles in question, four in number, and published under dates of February 11th and 12th, 1895, charged the plaintiff, who was then superintendent of the city farm in Lewiston, with cruel and inhuman treatment toward an insane girl, an inmate of the farm, while she was being removed from the farm to the insane asylum at Augusta.

The defendant pleaded the general issue with a brief statement setting up justification in that it published the articles believing them to be true, as a fair and privileged criticism of the plaintiff's official acts towards said girl, while he was acting as a public servant of the city of Lewiston, and that the articles were in fact and in substance true. The verdict was for the plaintiff in the sum of $866.70 and the defendant filed a motion to have the verdict set aside.

The case appears in the opinion.

F. L. Noble and R. W. Crockett, for plaintiff.

W. H. Newell and W. B. Skelton, for defendant.

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

WALTON, J. The Lewiston Daily Sun accused Mr. John J. O'Rourke (then superintendent of the poor farm of the city of Lewiston) with cruelty to an insane pauper. Mr. O'Rourke brought a suit against the Sun Publishing Company for libel. The suit was defended by able and eloquent counsel, and the charge of the presiding justice was as favorable to the defense as the rules of law would allow.

The jury were instructed that the people of our towns and cities have a right to know how their municipal affairs are being con-

ducted, and how the duties of their officers are being performed, and that it is one of the privileges of newspapers to give the people this information; and that, if the information so given is true, or, if the publishers believe it to be true, and have reasonable and probable cause for so believing, the law protects them; that the press must not be muzzled; that the public good requires that it be allowed to speak; and that all which the law requires of its editors and publishers is good faith, and an honest belief that their articles are true and that such belief be founded on reasonable and probable grounds. And the jury were admonished that if they came to the question of damages, to exercise a cool, careful and unimpassioned judgment. And still, with these instructions for their guide, the jury returned a verdict for the plaintiff, and assessed his damages at $866.50.

Can the court rightfully set this verdict aside? The court feels compelled to answer this question in the negative. The right of trial by jury is guaranteed by the constitution. It is a right belonging to plaintiffs as well as defendants. And when the court is asked to set aside a verdict and grant a new trial, the rights of both parties must be considered. And in libel suits, the fact must not be overlooked that while our constitution guarantees the freedom of the press, and the right of every citizen to freely speak, write, and publish his sentiments on any subject, it also guarantees redress to those who are injured by the abuse of this liberty.

In the present case, the evidence is voluminous and conflicting, and we shall not attempt to analyze or review it. It is sufficient to say that a careful examination of it fails to satisfy the court that the verdict is one which can rightfully be set aside.

Motion overruled.

ALBERT M. PENLEY, COMPLT., for increase of damages.

Androscoggin. Opinion August 6, 1896.

Way. Damages. Committee. Exceptions. R. S., c. 18, § 8.

Exceptions to the acceptance of the report of a committee, appointed under R. S., c. 18, § 8, on laying out ways, because the committee awarded damages for land not described in the complaint will not be sustained, when the bill of exceptions fails to disclose the facts.

When a case is submitted to the law court on exceptions, it is no part of the duty of that court to weigh evidence and pass upon disputed questions of fact.

Exceptions, in the same proceeding, because the committee allowed damages for the taking of land not owned by the complainant at the time of the action of the county commissioners, will not be sustained when the objection is not supported by any direct proof, but rests on inference.

The value of land taken is not in all cases the measure of the damages.

Injuries and benefits to the remainder of the estate are to be considered; and the damages may be more or less than the value of the land taken.

ON EXCEPTIONS BY DEFENDANTS.

The case appears in the opinion.

J. A. Morrill and Geo. E. McCann, for plaintiff.

W. H. Judkins, County Attorney, for Androscoggin County, and *Tascus Atwood*, for A. M. Ryerson.

We rely upon two propositions in support of the exceptions; one of law and one of fact.

The proposition of law is this: a party cannot recover damages for the taking of land in the laying out or alteration of a highway, to which he had no title at the time of the adjudication by the county commissioners. That is, he cannot recover damages for the taking of land which he purchased after their adjudication. *Thurston* v. *Portland*, 63 Maine, 149; *Minot* v. *Co. Com.*, 28 Maine, 125; *Sargent* v. *Machias*, 65 Maine, 591. Applicable by analogy, we cite: *Boynton* v. *Frye*, 33 Maine, 216; *Sawyer* v. *Freeman*, 35 Maine, 542.

Second. Our proposition of fact is,—The committee appointed in this case allowed damages to the complainant for the taking of

land to which he had no title at the time of the action and award of the commissioners.

The first report of the committee having been offered and admitted as evidence in support of the objections, the recitals therein stand as facts proved.

These facts being proved and the first report awarding the complainant fifty dollars, the same sum awarded by the county commissioners, we claim the second report shows conclusively that the committee in their second report awarded damages for the taking of the other strip of land, land not described in the complaint and to which complainant acquired title since the action and award of the county commissioners.

It was error to accept the report with such conclusive evidence before the court that the committee had passed upon something over which they had no jurisdiction.

When one inference only can be drawn from existing facts it is a matter of law. *Morey* v. *Milliken*, 86 Maine, 481; *Bryant* v. *Co. Com.*, 79 Maine, 128, 132.

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

WALTON, J. This case is before the law court on exceptions to the acceptance of the report of a committee agreed upon to assess the damages, sustained by the complainant, on account of a change in the location of Main street, in the city of Auburn.

The committee has made two reports. The first was not satisfactory to the court, and it was recommitted. A second report has been made, and its acceptance is objected to upon the ground that the committee has awarded damages for land not described in the complaint. We have no means of knowing whether this objection is well founded or not. The complaint is not made a part of the case, and we have not been furnished with a copy of it.

Another objection to the report, and apparently the one most relied upon, is that the committee has allowed damages for the

taking of land not owned by the complainant at the time of the action of the county commissioners.

This objection is not supported by any direct proof. It rests on an inference. In their first report, the committee allowed the complainant fifty dollars as the value of the land owned by the complainant at the time of the action of the county commissioners, and one hundred dollars for land which came to him afterward, provided he could legally claim the same. In their second report, the committee has awarded the complainant one hundred and fifty dollars, as the whole amount of damage sustained by him by reason of the change in the location of the street. This latter amount being exactly equal to the two sums mentioned in the first report, one of which was confessedly for land not owned by the complainant at the time of the action of the county commissioners, we are asked to infer that the second award has the same vice in it as the first.

Certum est quod reddi potest—that is certain which can be made certain—is generally a safe maxim to act upon. But the inference which we are asked to make in this case is by no means certain. The value of the land taken is not in all cases the measure of the damages. Injuries and benefits to the remainder of the estate are to be considered, and the damages may be more or less than the value of the land taken. In the present case, the damages awarded, in excess of the value of the land taken, may have been for injuries to the remainder of the estate. The inference that it was for land not owned by the complainant at the time of the action of the county commissioners is by no means a safe one. It may or it may not be correct. The case has been heard by a learned and capable committee agreed upon by the parties, and the facts stated in the bill of exceptions are not, in the opinion of the court, sufficient to overcome the presumption that they have acted honestly and intelligently. And the fact must not be overlooked that the case is before the law court on exceptions only; and that, in such a case, it is no part of the duty of the court to weigh evidence and pass upon disputed questions of fact.

We do not overlook the position of the county attorney upon this

point. His contention is that the evidence of error is so conclusive that the question presented should be regarded as one of law and not of fact. We differ from him with regard to the conclusiveness of the evidence. We do not think it necessarily proves error on the part of the committee. We do not think it is sufficient to overcome the presumption of accuracy on their part. And, consequently, we can not say, as a matter of law, that the court below erred in accepting their report. And, really, this is the only question properly before the law court.

Exceptions overruled.

GEORGE O. DANFORTH *vs.* SAMUEL BRIGGS, and another.

Waldo. Opinion August 6, 1896.

Trespass. Mortgage. Husband and Wife. Trusts.

In an action of trespass for breaking and entering the plaintiff's close and carrying away the crops, the question was whether, at the time of the alleged trespass, the plaintiff or his wife, under whom the defendants justified, had the better title to the close. It appeared that the land in question consisted of two parcels. The first, previously owned by the husband, had been conveyed by him to his wife. The second was then purchased and the deed taken in the wife's name; and to secure the purchase money both husband and wife gave their notes—the wife giving a mortgage of both parcels to secure these notes. The notes were paid, but whether wholly by the husband, or partly by the husband and partly by the wife, was a disputed question between them. The husband made the last payment and the notes were given up to him; but instead of having the mortgage discharged, he took an assignment of it to himself and had it recorded. The wife afterwards procured a discharge by the mortgagee and had it entered of record. The husband claimed title and possession under his assignment, and his equitable title to the land; the wife, denying any equitable title in her husband, claimed title and possession upon the ground that the assignment of the mortgage to her husband, after the notes to secure which it had been given were paid, was inoperative and void; and that the discharge of the mortgage obtained by her was valid.

Held; that the wife had the better title and the right of possession; and that as the defendants acted under her authority, their justification was complete.

Also, that when the debt was contracted, the husband was not a mere surety for his wife but expected to pay the debt himself, and thus extinguish the mortgage and leave his wife's title to the land unincumbered;—*hence*, the assignment of the mortgage to him was inoperative and void.

The presumption of the law is against an implied trust in favor of a husband who has paid for lands conveyed to his wife. To overcome this presumption the proof must be strong and clear.

ON REPORT.

The case appears in the opinion.

W. T. Haines, for plaintiff.

E. P. Coffin, for defendants.

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

WALTON, J. This is an action for breaking and entering the plaintiff's close and carrying away hay and apples. The question is whether, at the time of the alleged trespass, the plaintiff or his wife had the better title to the close. The wife is not a party to the suit, but the defendants justify under her authority, and the real controversy is between husband and wife. They had been living apart for several years, and in 1894, there was a struggle between them for the possession of the land in question, and the crops growing upon it, attended with some violence. The defendants assisted the wife; and for their acts in so doing, the plaintiff has commenced this action against them.

The land in question consists of two parcels. One is known as the Danforth place and the other as the Clifford place. The Danforth place was formerly owned by the plaintiff. In 1878, he conveyed it to his wife. The Clifford place was then bought and a deed of it taken in the name of the wife. She then had the title to both parcels. To pay for the Clifford place, a thousand dollars was hired, and notes given signed by the plaintiff and his wife, and the wife gave a mortgage of both parcels of the land to secure the payment of the notes. The notes have been paid, but whether wholly by the husband, or partly by the husband and partly by the wife, is one of the questions in dispute between them. The husband made the last payment, and the notes were given up to him; but instead of having the mortgage given by his wife discharged, he took an assignment of it to himself, and had the

assignment recorded. The wife afterwards procured from the mortgagee a discharge of the mortgage and had the discharge entered of record. The husband claims title and the right of possession under his assignment, and his equitable title to the land; and the wife claims title and the right of possession upon the ground that the assignment of the mortgage to her husband, after the debt to secure which it had been given was paid, was inoperative and void, and that the discharge of the mortgage obtained by her is valid; and she denies that her husband has even an equitable title to the land.

In support of his title under the assignment of his wife's mortgage to himself, the plaintiff invokes the doctrine of subrogation. He claims that he was only a surety on the notes signed by himself and his wife; and, having paid them, he is entitled to a subrogation of the security held by the creditor; and that, upon this ground, the assignment of the mortgage to him can and ought to be sustained.

Undoubtedly a mere surety, who is compelled to pay the debt of his principal, is entitled to a subrogation of the securities held by the creditor. But we find it impossible to believe that the plaintiff was a mere surety on the notes signed by himself and his wife.

These notes were given in 1878. So far as appears, he and his wife were then living together in harmony; and the notes were given for money with which to buy a home for himself and his wife and his little children. He was then receiving a pension from the United States government of twenty-four dollars a month—since increased to thirty dollars a month—and the evidence shows that he was able to work in a shoe shop and to earn good wages. With the exercise of prudence and economy, he might reasonably expect to be able to pay the notes in a few years. But how could he expect that his wife would be able to pay them? She was drawing no pension; and, so far as appears, she was then engaged in no business yielding an income. She was then performing the duties of a wife and a mother. And it was his duty, not hers, to provide a home for the family. And if he chose, as many other husbands have done, for prudential reasons, to have the title to

that home vested in his wife, it by no means follows that he expected her to pay for it. Their relations have since changed. He now accuses her of willful desertion, and she accuses him with getting drunk and breaking her furniture and kicking her with his cowhide boots on; and he may now regret having placed the title to his home under her control; and, as a means of getting it back, he may now be willing to assume the position of a mere surety on the notes given for the money with which to purchase it; but we can not believe that, at the time when the notes were given, he regarded his wife as the principal debtor and himself as a mere surety. On the contrary, our conviction is that when the debt was contracted, the husband expected to pay it, and to thereby extinguish the mortgage given by his wife, and leave her title to the land unincumbered; and we think that such must be the effect of the payment, and that the assignment of the mortgage to him must be regarded as inoperative and void. *Moody* v. *Moody*, 68 Maine, 155; *Burnham* v. *Dorr*, 72 Maine, 198.

Nor do we think the wife can be regarded as holding the land as a mere trustee of her husband. Our law allows husbands to convey their real estate directly to their wives; and it allows husbands to pay for real estate indirectly conveyed to their wives. As against existing creditors of the husband, such conveyances may be inoperative. But, as against the husband, they are valid. The wife may not be able to convey the real estate without the joinder of her husband; but she will be entitled to the exclusive possession of it. And while it is no doubt possible for an implied trust to arise in favor of a husband who has paid for real estate conveyed to his wife, the presumption of the law is against such a trust, and, to overcome this presumption, the proof must be strong and clear. *Stevens* v. *Stevens*, 70 Maine, 92; *Lane* v. *Lane*, 80 Maine, 570.

No such proof exists in this case. And our conclusion is that, at the time of the alleged trespasses, the wife had the better title and the right of possession; and that, as the defendants acted under her authority, their justification is complete.

Judgment for defendants.

INHABITANTS OF BUCKSPORT *vs.* JOSEPH L. BUCK.

Hancock. Opinion August 10, 1896.

Award. Objections to Report. Practice. Rule of Court, XXI. Town Records. Amendment. R. S., c. 3, § 10.

Rule XXI of the court requires that objections to any report offered for acceptance shall set forth specifically the grounds of the objections; and that these only shall be considered by the court.

Where the award of a referee is absolute in form, contains no conditions and submits no questions either of law or fact to the determination of the court, and no exceptions to his rulings at the time of the trial before him appear to have been taken or reserved, *held;* that objections to the acceptance of the award which are general only should be overruled.

Objections to the admission of evidence must be made when the evidence is offered, or they will be regarded as having been waived. The reasons for this rule restated.

In a suit to recover a tax and in which the defendant denied its validity because of errors and defects in the records of the town where it was assessed, the court remarks that the granting a new trial to the defendant would be of no advantage to him when it appears that such errors and defects are in matters of form only, and are amendable under the statute. R. S., c. 3, §10.

ON EXCEPTIONS BY DEFENDANT.

This was an action of debt brought in the name of the Inhabitants of Bucksport against the defendant, Joseph L. Buck, to recover the sum of $259.57 for taxes assessed against the defendant upon his poll, personal property and real estate in the town of Bucksport for the year 1888. At the April term, 1894, the case was referred to Hon. William P. Whitehouse, with right to except regarding matters of law.

At the April term, 1895, the final award of the referee was filed, and at the same term the defendant filed objections to the acceptance of said award and reasons therefor in writing; but the presiding justice overruled the objections, and, on motion of the plaintiff's counsel, ordered the award accepted; to which ruling the defendant seasonably excepted.

The writ and declaration, account in offset, report of referee made at April term, 1895, with copies of all records made part

thereof, the objections to acceptance of said report and reasons therefor, were all made a part of the bill of exceptions.

(Report of referee.) "By virtue of the foregoing rule of reference, I, the undersigned referee, gave due notice to the parties named therein to meet at Bucksport on the fourth day of September, A. D. 1894, at which time and place I met the parties, and having heard their several pleas, proofs and allegations, and duly considered the same, do hereby make this my final award and determination in the premises, to wit:

"That the said Inhabitants of Bucksport recover of the said Joseph L. Buck the sum of one hundred and twenty-seven dollars and seventy cents, debt or damage, and costs of reference taxed at three dollars and seventy-two cents, together with costs of court to be taxed by the court.

"And I further find that all of the items in the account in set-off, filed by the defendant, were barred by the statute of limitations prior to the commencement of the plaintiff's action, and prior to the assessment of the tax therein described.

"At the hearing, the plaintiffs offered as evidence in support of their action the warrant for the annual meeting of the town of Bucksport for the year 1888 with the officer's return thereon; records of said meeting; record of the qualification of selectmen and assessors for said year; record and appointment and qualification of collector of taxes for said year, with assessors' lists of taxes assessed for said year and warrant and commitment to the collector of taxes; also said collector's written authority to bring suit for collection of said taxes.

"I find that said tax had been duly demanded of said defendant, and I rule that these records are legally sufficient, and accordingly find that upon them the plaintiffs are entitled to recover of defendant the unpaid portion of the tax sued for in this action, to wit, the sum of one hundred and twenty-seven dollars and seventy cents.

"Copies of so much of said record as may pertain to the cause are to be filed herewith and made a part of this report.

"Dated at Augusta, this eighteenth day of October, A.D. 1894.

WILLIAM P. WHITEHOUSE, Referee."

(Objections to acceptance of referee's report.) And now the said defendant comes and objects to the acceptance of the award of the referee in the above-entitled case filed at the present term, and states the following as his objections thereto:

1. Because said referee found that the account in set-off, seasonably filed in the case by defendant, was barred by the statute of limitations and refused to allow the same.

2. Because said referee found that the records introduced by plaintiffs to sustain their said action, and made part of said referee's report, were legally sufficient, and that upon them the plaintiffs were entitled to recover of defendant the unpaid portion of the tax sued for in said action, to wit, the sum of one hundred and twenty-seven dollars and seventy cents.

O. F. Fellows and O. P. Cunningham, for plaintiffs.

H. E. Hamlin, for defendant.

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

WALTON, J. This action is before the law court on exceptions to the acceptance of the award of a referee. It is an action commenced by the Inhabitants of the town of Bucksport against Joseph L. Buck to recover a town tax assessed against him in 1888. The action was referred to Mr. Justice WHITEHOUSE with the right to except regarding matters of law. Mr. Justice WHITEHOUSE has made an award in favor of the town, therein stating that he found an account filed by the defendant in set-off barred by the statute of limitations. He also states that, at the hearing before him, the plaintiffs offered in evidence in support of their action certain records of the town of Bucksport, which he ruled were legally sufficient. But his award is in form absolute. It contains no conditions and submits no questions either of law or fact to the determination or revision of the court. So far as appears, no objections to his rulings were made at the time of the trial before him, and no exceptions were then taken or reserved. But when his award was presented for acceptance

in the court below, the defendant filed objections to its acceptance. He objected in general terms to the finding of the referee that his account filed in set-off was barred by the statute of limitations, and to the ruling of the referee that the town records were legally sufficient. But he did not set forth the grounds of his objections, as required by rule XXI of this court. Rule XXI declares that objections to any report offered to the court for acceptance, shall be made in writing and filed with the clerk, and shall set forth "specifically" the grounds of the objections, and that these only shall be considered by the court.

In the present case, the objections were in writing, and they were filed with the clerk; but they did not set forth specifically the grounds of the objections. It would be difficult to conceive of objections more unspecific. Everything stated in the report of the referee, and everything stated in the defendant's objections, and everything stated in his bill of exceptions, may be true, and yet the defendant have no grounds of complaint. There is nothing in the case to indicate that the finding of the referee, that the account filed in set-off was barred by the statute of limitations, was not correct. Apparently it was correct.

Our attention has been called to certain supposed defects in the records of the town of Bucksport, and particularly to a defective return on the warrant for the annual town meeting for the year 1888. The return on the warrant is undoubtedly defective, as the authorities cited by the learned counsel for the defendant will show. But there is neither averment nor proof before us that these defects were called to the attention of the referee, or that any objections whatever were made to the sufficiency of the town records, at the time of the trial before him. This we regard as a very serious omission; for, if no such objections were then made, they could not be successfully made afterwards. It is a well-settled rule of law that objections to evidence must be made when the evidence is offered, or they must be regarded as waived.

In *Patten* v. *Hunnewell*, 8 Maine, 19, the action had been referred by a rule of court; and, on the coming in of the award, which was in favor of the plaintiff, the defendant objected to its

acceptance, "because the referee admitted the verbal statement of the plaintiff, not under oath, in proof of a material part of the claim or cause of action sued; and upon said statement, without any other evidence in support of it, allowed that part of said cause of action, and awarded that the plaintiff recover the same." The objection was overruled in the court below, and the defendant excepted. The full court held that the objection was properly overruled, because it did not appear that the evidence was objected to at the time it was offered. "Surely," said Chief Justice MELLEN, "if in the trial of an action at law, an improper witness is admitted without any objection, such admission can be no legal ground for an exception; and why should it be here? We see no reason for sustaining the exception, and it is accordingly overruled."

So, in *Kimball* v. *Irish*, 26 Maine, 444, where, in an action on a poor debtor's bond, the records of two justices of the peace and of the quorum, introduced in defense to show that the debtor had disclosed and been discharged, were defective, and the court ruled that the records were sufficient to show a performance of one of the conditions in the bond, and the plaintiff excepted, the full court held that all objections to the records not specifically made during the trial must be regarded as waived, and that a bill of exceptions to the reception of illegal evidence, or to a ruling that it is sufficient, must show that the objections were so made, and were specific, or the exceptions will not be sustained. "Regularly," said Chief Justice WHITMAN, "exceptions, in order to be available, should be specifically taken during the trial, and, if not so taken, they should be considered as waived." And he stated the reason of the rule as follows: "This certificate was introduced as evidence that the oath had been taken as required, and went to the jury without objection, as affording evidence that it had been so taken. If it had been objected to on its being introduced, the defect might have been cured by an amendment, and perhaps by parol proof. The objection, therefore, if valid when seasonably made, comes too late, and can not be allowed to prevail without manifest injustice." The defect in the certificate

of discharge was that, it had no date, and would as well apply to any other bond as the one in suit.

In *White* v. *Chadbourne*, 41 Maine, 149, it was urged that when the evidence is documentary, a bill of exceptions stating that the evidence was objected to ought to be held sufficient, because the court can, upon examination of the evidence, determine whether or not the objection is well taken; but the court held that it is no part of the duty of a judge at nisi prius to examine documentary evidence in search of matter that may render it incompetent; that all objections to evidence, to be available, must be specific; and that a bill of exceptions which fails to show that the objections were specific, can not be sustained. Objections, when not made at the trial, come too late. *Longfellow* v. *Longfellow*, 54 Maine, 240. And the objections must be specific. *Bonney* v. *Morrill*, 57 Maine, 368.

The reasons are obvious and substantial. Parties are entitled to an opportunity to avoid exceptions to the competency or the sufficiency of their evidence, if they can. This they can do by withdrawing the evidence objected to; or, if the evidence is documentary, and the objections are to mere matters of form, by withholding it till the defects can be removed by amendments. These are rights of which parties can not be rightfully deprived. They have a right to insist that all objections to their evidence shall be made when the evidence is offered, and be specific, so that they can intelligently determine whether they will take the risk of an exception, or avoid it in one of the ways mentioned; or, if not so made, that the objections shall be regarded as waived.

We are not holding that the records of the town of Bucksport were all in proper form. But it may not be out of place to say that all of the defects to which our attention has been called are in matters of form only, and that such defects are now amendable; and that, if a new trial should be granted, it is not only possible, but probable, that every one of them would be cured by legitimate and truthful amendments before the records would be again offered in evidence. And then, of what advantage would the new trial be to the defendant? See R. S., c. 3, § 10.

But, for reasons already stated, we do not think a new trial can be granted. The objections to the award of the referee filed in the court below were not sufficiently specific to satisfy the requirements of Rule XXI of this court; nor is the bill of exceptions sufficiently full in its statements to show that the defendant is an aggrieved party. As we have already said, everything stated in the award of the referee, and everything stated in the defendant's objections to the acceptance of the award, and everything stated in the defendant's bill of exceptions, may be true, and yet the defendant may have no just cause to complain.

Exceptions overruled.

STATE *vs.* CLARA EMMA GETCHELL.

Kennebec. Opinion September 12, 1896.

Murder. Evidence.

Evidence held sufficient by the law court to sustain a verdict of guilty of murder in the first degree, the case being heard on appeal from the decision of the justice sitting at nisi prius, who denied a motion for a new trial after verdict.

ON APPEAL BY DEFENDANT.

F. A. Powers, Attorney General, for State.

H. M. Heath, *C. L. Andrews*, *F. E. Southard*, with them, for defendant.

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

HASKELL, J. This is an appeal from the decision of the court below in refusing the prisoner a new trial on motion to set aside a verdict of guilty of murder in the first degree, for three reasons.

I. Because it was against law and the charge of the justice presiding.

II. Because it was against evidence.

III. Because it was against the weight of evidence in the case, contained in thirteen hundred octavo printed pages.

The first reason assigned for a new trial has not been pressed at the bar, nor should it be. The charge was full and complete, and no error of law has been discovered in it, after a careful consideration of it and its application to the evidence of the case.

The remaining two reasons, as one, have been pressed with great vigor and earnestness. The prisoner was convicted of poisoning her husband by administering to him strychnine, mixed with some gin and sulphur that he was accustomed to drink before meals. Getchell, the prisoner's husband, took the bottle of gin and sulphur from the buttery and swallowed some of the contents. He sat down to dinner and immediately became sick. He called for medicine and at the suggestion of the prisoner was given more gin and sulphur mixed with hot water and sugar, and became sicker still. The doctor was sent for who came and administered remedies, not suspecting poison. After he went away the prisoner gave her husband more gin and sulphur and gruel, and he died between six and seven o'clock that afternoon.

Strychnine was found in the stomach, kidney and lung, pure alkaloid, equal to about one-half a grain of the sulphate of strychnine. The prisoner produced the gin bottle that evening for the doctor to mix a solution of carbolic acid, and its contents were thrown out. Intimate relations existed between her and a man other than her husband. Her statements have been contradictory and her conduct inculpatory. The evidence is wholly circumstantial but it shows opportunity, motive and guilty conduct. It is unnecessary to review it in detail, but sufficient to say that a careful consideration of it, and of its force and effect, satisfies the court of her guilt beyond reasonable doubt. She had a fair and impartial trial. The sitting judge, who did not sit in this appeal, refused a new trial. No error, either of law or fact, appears, and it is our duty, therefore, to order judgment on the verdict.

Appeal dismissed.
Motion for new trial denied.
Judgment for the State.

MAINE CENTRAL RAILROAD COMPANY

vs.

WATERVILLE AND FAIRFIELD RAILWAY AND LIGHT COMPANY.

Somerset. Opinion November 7, 1896.

Railroads. Crossings. Expense. Stat. 1895, c. 72.

Where it is the evident intent of the legislature to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the Railroad Commissioners, *held*; that their decisions will not be altered or reversed unless manifestly illegal or unjust.

Held; that whenever an alteration is made in an existing railroad track for the sole convenience and accommodation of another railroad, the expense should be borne by the latter.

After an examination, the court applies this rule to the present case.

ON EXCEPTIONS BY DEFENDANT.

This was a proceeding begun by petition of the Maine Central Railroad Company, January 21, 1896, to the Railroad Commissioners in which they represent that it possesses and operates a line of railroad from Portland to Skowhegan, passing through the town of Fairfield in the county of Somerset; that its railroad is crossed in the town of Fairfield by the electric railway of the defendant company; that the location of the crossing in question is at grade by means of crossing-frogs; that the crossing-frogs have heretofore been furnished and put in place at the sole expense of defendant company; that the existing condition of said frogs is such as to make the construction and manner of such crossing dangerous to public safety, including travelers upon the petitioner's railroad and on the defendant company.

The petitioner thereupon prayed the board of railroad commissioners for a change in the existing condition, construction and manner of such crossing; and that the board would decide what changes are necessary, and how such crossings shall be constructed and maintained, and how the expense thereof should be borne, according to the provisions of the statute of 1895, c. 72, § 1.

A hearing was had upon the petition by the board of commissioners January 31, 1896, who rendered the following decision:

DECISION OF RAILROAD COMMISSIONERS.

"It was alleged upon the part of the Maine Central Railroad Company, and admitted on the part of the Waterville and Fairfield Railway and Light Company, that the crossing-frogs at the place named in the petition were in a condition dangerous to public travel, and should either be repaired, or replaced, by new ones. It was contended on the part of the Maine Central Railway Co., that there is a well-recognized custom in relation to this matter, and that where electric railways have crossed steam railroads, the crossing-frogs have been invariably paid for by the electric railway company, and some evidence was introduced tending to show such a custom. It may be, and probably is, true, that electric railways have paid for crossing-frogs in the first instance, when electric railways have been constructed across steam railroads, and when the electric railway was the last one located. We think such has been the custom.

"But the electric railway claims that however that may be, this is a new and different question; that in this case the electric railway company paid for the crossing-frogs several years ago. The present claim is presented under section 1, chapter 72, of the Public Laws of 1895, which provides that 'any corporation or party operating such railroad may apply to the board of railroad commissioners for a change in the then existing condition, construction or manner of any such crossing, and said board shall determine what changes, if any, are necessary and how such crossing shall be constructed and maintained. The expense thereof to be borne as the railroad commissioners may order.'

"It appeared in evidence that this electric railroad company, in the first instance, did pay for the crossing-frogs which are now used at this place. But said frogs having become worn and, (we are satisfied) dangerous to public travel, we are asked, under the statute to determine what changes, if any, are necessary, and how such crossing shall be constructed and maintained, and how the expense thereof shall be borne.

"There seems to have been no statute in relation to the expense of crossings, where one railroad crosses another, until 1885, chapter 336; but that statute evidently had relation to the crossing of steam railroads only, and the statute of 1895, chapter 72 now gives the railroad commissioners jurisdiction where one railroad of any kind crosses another; so the question presented here is under this last statute.

"But the counsel for the Electric Railway Company goes further, and in argument claims that by its charter, his company has the right for its electric cars to pass and repass across the rails of the Maine Central Railroad Company, and over the highway, the same as any other vehicle on said highway, and that the Maine Central Railroad Company is obliged, under the law, to make proper provisions for the passage of electric cars across its railroad tracks. He argues that the car of the electric railway is nothing more than the team or vehicle of any other person, or corporation, which has a right to pass and repass within the highway. He argues that the building of an electric railway along the highway in this state is not a new servitude upon the street, and is not a new use of the way, but is only a new and later mode of using the way. And he cites *Briggs* v. *Horse Railroad Company*, 79 Maine, 363.

"The court in that case was called upon to decide simply whether the owner of the fee, over which the street was built, was entitled to additional compensation for the building of a street railway; and the court held that the building of such a street railway through the public street was not a new servitude upon the land, because it was only a new and later mode of using the way, for which the owner had once received compensation. We perceive no reason why we should attempt to extend the decision of the court in that case. The court could not have intended to hold that the street car had the same rights in the street that a vehicle of any other kind would have, for if so, what becomes of the law of the road, chapter 19, § 2, of the revised statutes, which provides that persons traveling with teams, when meeting another traveling in an opposite direction, shall turn to the right of the middle of the

traveled part of the way; because the word 'team,' by section one means all kinds of conveyances on such ways for persons and property.

"If, in the later case, the court intended to lay down any such rule, as is here contended for, why does it become necessary to obtain a charter from the legislature, or under the general law, for persons or corporations to run electric cars in the streets and ways of cities and towns?

"We assume that the legislature, by P. L. of 1895, chap. 72 intended to give the board of railroad commissioners full jurisdiction in relation to the matter of crossings of railroads of any kind, subject to the appeal provided in that statute, and we have heretofore acted upon that assumption.

"Under this statute the matter of apportioning the expense of constructing and maintaining such crossings of electric railways with steam railroads has been before this board at eight different locations since this statute of 1895 was in force, and in every instance the board has put the whole expense, not only of constructing but of maintaining such crossings, upon the electric railway company, when such electric railway company was the one last located; and in no instance has there been any objection upon the part of the electric railway company to paying the expense of constructing and maintaining such crossing-frogs.

"At three of these crossings, which were considered unusually dangerous, the board has ordered signal officers to be stationed, at the joint expense of the two companies; but the expense of constructing and maintaining the crossing-frogs has been in each case put upon the railway last located.

"The legislature of this State, by chap. 336 of the P. L. of 1885, deemed it equitable when steam railroads cross each other at grade, to put the expense of constructing and maintaining a suitable signal station at such crossing upon the parties operating the railroad last located, but that the signal officer should be kept at the joint expense of the parties operating the railroads.

"While the statute does not control the question here presented, we think our decisions in relation to this matter have been in line

with the equitable rule laid down by the legislature; and no reason has been presented to us in this case why we should change it.

"We are, therefore, of the opinion, and so decide, that the expense of constructing and maintaining this crossing shall be borne by the Waterville and Fairfield Railway and Light Company. That the said company shall provide new, good and substantial crossing-frogs, the angle of which shall conform to the angle of the several tracks at point of crossing as now established. The rails in said crossing-frogs shall be of like metal, pattern and weight as the rails now in use by the Maine Central Railroad, and the Waterville and Fairfield Railway and Light Company respectively.

"Said crossing shall be laid in a first-class manner, on good ties, correctly aligned and surfaced.

"The work of laying and maintaining shall be done by the Maine Central Railroad Company, but the whole expense thereof shall be borne by the Waterville and Fairfield Railway and Light Company.

"Dated at Augusta, this fifth day of February, A. D. 1896.

JOSEPH B. PEAKS,
BENJ. F. CHADBOURNE,
FREDERIC DANFORTH,
} Railroad Commissioners of Maine."

The defendant company took an appeal from this decision to the March term of the court below, sitting at Skowhegan; and the presiding justice upon hearing the case ordered that the report and decision of the Railroad Commissioners be accepted and recorded. Thereupon the defendant company took exceptions.

Edmund F. and Appleton Webb, for plaintiff.

This court will treat this appeal as a review of the decision of a subordinate tribunal. *In re, New Hamburg, etc., R. R. Co.*, 83 N. Y. 76; *In re, Amsterdam, etc., R. R. Co.*, 93 N. Y. 578. The burden is on the defendant to show any error in the decision below.

The electric road has no greater rights in the highway than the steam road. The street road can have no greater right in crossing

a steam road than a steam road can have in crossing another steam road not in a highway. Where one steam road crosses another steam road, the law is settled by legislative act. Why should there be any distinction between roads of any kind in crossing another road? In other words, there should be no difference as between steam or electric roads. The railroad commissioners have made no difference. The locus, so to speak, is a part of the highway, and lying between the steam rails.

When the plaintiff company built its road, it was required to pay damages for its right of way, and in that way obtain its possession. Stat. 1848, c. 186.

The defendant, like all other street railways, belongs to the more privileged class. It is wholly in the street from Waterville to Fairfield. It paid nothing for this privilege. When the defendant, in constructing its line, crossed a street in its way, it adapted itself to crossing such street or way; it adapted itself to the various grades of the highway. The defendant is a new-comer. It is the "railroad last located," and has no greater rights in a highway than the steam railroad.

W. T. Haines, for defendant.

Prior to the act of 1895 street railways under their charters had the same right in highways as any other traveler, modified by the mode or means of travel. *Briggs* v. *Horse Ry. Co.*, 79 Maine, 363. Act made no change in parties' right. Highway-crossings by railroads: *P. & R. R. Co.*, v. *Deering*, 78 Maine, 61; *R. R. Co.* v. *Co. Com.* 79 Maine, 386; *Mayo* v. *Veazie*, 45 Maine, 560; *Roxbury* v. *Boston R. R. Co.*, 6 Cush. 424; *Little Miami R. R. Co.* v. *Green*, 31 Ohio St. 383; *Com.* v. *Hartford R. R.*, 14 Gray 379; *Welcome* v. *Leeds*, 51 Maine, 313; *North Cent. R. R. Co.* v. *Baltimore*, 46 Md. 425; *State* v. *St. Paul R. R. Co.*, 35 Minn. 131, S. C. 59, Am. Rep. 313; 1 Rorer on Railroad, 541; R. S., c. 51, §§ 28, 31; Stats. 1885, c. 310; 1889, c. 282; 1895, c. 312.

Statutes have increased the obligations of railroads to the public, and enlarged none of their rights.

Prior rights: *Cin. etc., Ry. Co.* v. *City etc., Tel. Asso.* 27 N. W.

Rep. 890 and cases; *Hud. etc., Tel. Co.*, v. *Watervliet, etc., R. R. Co.*, 135 N. Y. 393; *Railway* v. *Railway*, 30 Ohio, 604; *C. & A. R. R.* v. *J. L. & A. Ry. Co.*, 105 Ill. 388, and cases; *Cooke* v. *B. & L. R. R.*, 133 Mass. 188; *Norwood* v. *N. Y. & N. E. R. R. Co.*, 161 Mass. 266; *Davis* v. *Co. Com.* 153 Mass. 218; *In re, R. R. Com.* 87 Maine, 247; 2 Wood on Railroads, p. 1171; *Mass. Cent. R. R. Co.* v. *Boston, etc., R. R. Co.*, 121 Mass. 124.

Before the act of 1895, the expense of crossings must have been borne by the steam railroad and according to the principles in above cases. Statute of 1895, at most, contemplates that the expense should be apportioned between the two roads using the highway. It nowhere indicates that the total expense of making and maintaining crossings shall be put on street railways; to do so would be unconstitutional, because it would be taking private property without compensation. It being in derogation of common law, the statute should be construed strictly.

The decision seems more like taking private property for private use than for public use. If the crossing-frog was not required then the steam railroad would require fifty feet of rail. Thus the steam railroad is relieved of maintaining fifty feet of track that it was compelled to maintain before the crossing-frog became necessary.

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

WALTON, J. The track of the Waterville and Fairfield Railway and Light Company crosses the track of the Maine Central Railroad, and the Railroad Commissioners have decided that the Waterville and Fairfield Company shall bear the whole expense of constructing and maintaining the crossing. On appeal, the court below accepted the report of the commissioners and ordered it to be recorded, and the case is before the law court on exceptions.

In support of the exceptions it is urged that it was unreasonable and unjust to place the whole burden of constructing and maintaining the crossing upon the Waterville and Fairfield Company, and that the Act of 1895, c. 72, under which the Commissioners acted,

not only authorizes but contemplates that the expense shall be apportioned between the two companies.

The Act of 1895, c. 72, undoubtedly authorizes the Railroad Commissioners to apportion the expense, but it does not require them to do so. It leaves the question to their sound judgment and discretion. And, on appeal, the only rule prescribed for the presiding justice is that he shall make such order or decree as law and justice shall require. The statute declares that "exception may be taken to such order or decree," but it prescribes no rules by which the law court shall be governed in passing upon the exceptions. It seems to us that the evident intention of the legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the Railroad Commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust.

Taking this interpretation of the statute for our guide, the question is whether the decision of the Railroad Commissioners is manifestly illegal or unjust. We do not think it is. At the time when this crossing became necessary, the track of the Maine Central Railroad had been completed, and the crossing was needed for the accommodation of the Waterville and Fairfield road alone, and it does not seem to us that it was either illegal or unjust to require the latter road to bear the expense of its construction and maintenance. It seems to us that whenever an alteration is made in an existing railroad track for the sole convenience and accommodation of another railroad, the expense should be borne by the latter. Possibly exceptions may exist to such a rule; but we fail to discover any reason for holding that the present case furnishes such an exception.

Exceptions overruled.

BETSEY F. MADDOCKS *vs.* ANDREW J. STEVENS.

Waldo. Opinion November 28, 1896.

Deed. Incumbrance. Evidence. Tax. R. S., c. 6, § 205; Stats. 1893, c. 314; 1895, c. 70.

In an action of covenant broken, for breach of the covenant against incumbrances in a deed, the plaintiff alleged unpaid taxes as the incumbrance, and produced in evidence the collector's tax deed of the premises.

Held; that the recital in his deed, by the collector, that the land was sold for an unpaid tax "assessed agreeably to law" does not amount to proof that the tax was lawfully assessed, or was an incumbrance on the land.

AGREED STATEMENT.

The case is stated in the opinion.

Wayland Knowlton, for plaintiff.

W. P. Thompson and Norman Wardwell, for defendant.

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

EMERY, J. The covenant counted on in this action of covenant broken is the usual covenant against incumbrances in deeds of conveyance of land. The language of the covenant in this case is: "They [the granted premises] are free of all incumbrances." The breach alleged is the existence of unpaid taxes assessed upon the land prior to the conveyance. An unpaid tax lawfully assessed upon a parcel of land is a lien upon the land from the date of the assessment, and constitutes an incumbrance and a breach of a covenant against incumbrances. *Cochran* v. *Guild*, 106 Mass. 29.

It is incumbent on the plaintiff to show the existence of a lawful assessment of a tax in order to show that a tax lien existed such as would constitute the breach alleged. The only evidence she has adduced are tax deeds of the land from the collector of taxes of Belfast, (in which city the land lies) to the city, and a subsequent deed from the treasurer of Belfast to the plaintiff.

The tax collector recites in his deeds that the taxes were assessed "agreeably to law;" but this is merely his opinion. The court upon seeing copies of the records of the city and of the assessors, might be of a different opinion. A collector of taxes is not the authorized tribunal to determine the validity of an assessment, or whether a tax has been so assessed as to constitute a lien upon the land. His recitals in his deed as collector are not evidence of the existence of a tax lawfully assessed so as to constitute a breach of covenant against incumbrances. *Phillips* v. *Sherman*, 61 Maine, 551; *Libby* v. *Mayberry*, 80 Maine, 138; *Bank* v. *Parsons*, 86 Maine, 514.

The statutes creating a presumption in favor of the validity of tax sales upon the production of the collector's deed (R. S., c. 6, § 205; Stat. 1893, c. 314; Stat. 1895, c. 70) do not apply to actions like this. This action is not to recover the land. It does not assert or deny a tax title. It does not involve the validity of a tax sale. The only question is, was a tax lawfully assessed which the defendant did not pay. There is not as yet sufficient legal evidence of such assessment.

Plaintiff nonsuit.

ELIZABETH R. GIBERSON, Admx., of JAMES GIBERSON,

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion November 28, 1896.

Negligence. Railroad.

A person about to pass over a railroad crossing at grade must be himself apprehensive of the danger of collision with passing trains, and be intent and alert to avoid the danger. He must not wait to be apprised of the danger by warnings from the railroad employees, but must look and listen for himself. If it does not affirmatively appear that he was thus apprehensive and alert, he cannot recover for injuries received from the collision.

In this case, *held;* that it does not appear that the plaintiff's intestate, the person injured, made any effort to ascertain whether a train was approaching, or took any thought or care about the matter;—had he done so, he could have avoided the collision.

ON MOTION BY DEFENDANT.

This was an action brought by the plaintiff, as administratrix of the estate of James Giberson, of Mars Hill, County of Aroostook, deceased, to recover damages sustained by the said Giberson in his lifetime, by reason of injuries received by him on account of being struck and run over by a train belonging to the defendant company at Mars Hill.

The material acts of negligence alleged by the plaintiff in her declaration are as follows: " . . . said James Giberson then and there after said train had passed, and while said crossing was clear and unobstructed as aforesaid, and having no reason to apprehend the passing of another train, or section of a train, immediately after one had just passed, attempted to pass over said crossing, and did, then and there, slowly and carefully drive upon the same. But the said defendant corporation by its servants and agents, and with its locomotive engine aforesaid, carelessly and negligently and without warning or safeguard of any kind, 'kicked back' said train of nine cars along said track and over said crossing with great force and violence, the said locomotive engine being then and there disconnected from said cars, and the said James Giberson being then and there lawfully upon said highway, and going over said railroad track at the crossing aforesaid; and the said train of nine cars then and there under the direction, management and control of said defendant corporation, was then and there, by said locomotive engine, which was then and there under the management, direction and control of the defendant corporation by its servants and agents as aforesaid, carelessly and negligently propelled, hurled, projected and driven over said railroad and across said highway at the crossing aforesaid with great velocity and violence, directly against and upon the sled upon which the said James Giberson was then and there lawfully riding and against and upon the said James Giberson, ...

"And the plaintiff avers that after said locomotive engine and train of nine cars had passed over said crossing as aforesaid, and while the said James Giberson was attempting to pass along said highway, and over said track as aforesaid, there were none of the

servants or agents of said corporation at said crossing; that there was no flagman, signal or safeguard of any kind to show that said crossing was not then and there safe; and that before and when said cars were as aforesaid driven, forced or 'kicked back' along said track, and over and upon the said James Giberson, as aforesaid, there was no warning by whistle or bell, and there was only one brakeman on all of said nine cars."

The jury returned a verdict in favor of the plaintiff for one thousand dollars, and the defendant filed a motion for a new trial.

The case appears in the opinion.

V. B. Wilson and G. A. Gorham, Jr., and R. W. Shaw, for plaintiff.

It is the duty of those in charge of trains to keep a sharp lookout in order to avoid collisions with teams at crossings; it does not rest upon the traveler alone. *Purinton* v. *Me. Cent. R. R. Co.*, 78 Maine, 569; *Garland* v. *Me. Cent. R. R. Co.*, 85 Maine, 521.

It is a matter of common knowledge that a practice to back and switch cars over a highway-crossing is peculiarly dangerous and therefore creates a duty of unusual care on the part of the company. There should be abundant warning not only by the usual signals of bell and whistle, but there should be a flagman near the track, or a watchman on the nearest approaching car, to warn travelers who are near. *Smith* v. *Me. Cent. R. R. Co.*, 87 Maine, p. 349, and cases therein cited.

When the evidence is conflicting on the point upon which the case turned, the verdict will not be set aside unless it is clearly against the weight of evidence. *Purinton* v. *Me. Cent. R. R. Co.*, supra.

And we claim that at a crossing, where the view of the track from the highway and the highway from the track is obstructed, that a watchman on the approaching car, even if one were there, does not supply the place of a flagman at the crossing when cars are to be backed or switched over the highway. See *Linfield* v. *Old Colony R. R. Co.*, 10 Cush. 562.

Direct proof that the deceased both looked and listened before going upon the crossing is not necessary, but the jury are warranted in finding from the circumstances, if the circumstances are sufficient, that the deceased both looked and listened. *Chisholm* v. *State of N. Y.*, 141 N. Y. p. 249, (Sickels, Vol. 96); *Romeo* v. *Boston & Maine R. R. Co.*, 87 Maine, p. 549; *State* v. *Boston & Maine R. R. Co.*, 80 Maine, 430; *Hooper* v. *Boston & Maine R. R. Co.*, 81 Maine, 260; *Kellogg* v. *N. Y. C. & H. River R. R. Co.*, 79 N. Y. Court of Appeals, 72, (Sickels, Vol. 34); *Galvin* v. *Mayor etc., of the City of New York*, 112 N. Y. Rep. Court of Appeals, 223, (Sickels, Vol. 67.)

The law does not require the traveler to stop for the purpose of listening; if with a team, it does not require that he should get out of the vehicle in which he is riding, leave his team and go to the track for the purpose of looking, or to rise up in his vehicle and go upon the track in a standing position to enable him to obtain a better view of the track. This would be requiring extraordinary care such as is rarely, if ever, exercised by the most prudent. *Davis* v. *N. Y. C. & H. River R. R. Co.*, 47 N. Y. Court of Appeals, p. 402, (Sickels, Vol. 2).

In *Kellogg* v. *New York Central & Hudson River R. R. Co.*, before cited, the court say: "There were buildings, trees, shrubbery, the embankment on the south side of the road, and upon that a board fence. To what extent he could have seen this rapidly approaching train if he had looked at various points in the highway, is uncertain." . . . "Under all the circumstances surrounding the accident we think it was for the jury to determine whether he exercised that care which the law required of him. He could have probably avoided the accident by stopping before he passed upon the track, but that is a degree of care not usual even with very prudent persons."

And in the same case the court also say: "It is a well-known fact that sounds are frequently shut off by obstructions; the same obstacles that obstruct the eye-sight will prevent sounds from being heard, and that the condition of the atmosphere will frequently prevent sounds from being carried in one direction which may be

clearly heard in another is well-known. Whether under such circumstances by the exercise of ordinary prudence he did or could have heard, was a question for the jury."

While negligence on the part of the defendant company is no excuse for negligence on the part of the traveler, yet at a crossing, where it is necessary for them to use more than ordinary care in kicking a train back over the highway, and no warning of any kind was given and the train had passed over the track within five minutes of the time of its returning, it would be some evidence that no train was approaching.

While a neglect of the company to perform its duties does not excuse the traveler in a neglect of the duties and degree of care which the law imposes on him, still, in making his calculation for crossing a railroad track safely, he is often justified in placing some reliance on a supposition that the company will perform the obligation resting on it, where there is no indication that it will do the contrary. Cases supra.

A remote fault in one party does not, of course, dispense with care in the other; it may make it even more necessary and important if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated.

Common justice and common humanity, to say nothing of law, demand this, and it is no answer for the neglect of it to say that the complainant was first in the wrong. *Isbell* v. *N. Y. & New Haven R. R. Co.*, 27 Conn. 404, and cases cited; *State* v. *Railroad*, 52 N. H. 554, and cases cited.

F. H. Appleton and H. R. Chaplin, F. A. and D. A. Powers, and L. C. Stearns, for defendant.

The omission of a flagman is not a legal act of negligence, for the law does not require a flagman to be maintained at a highway-crossing in the compact part of a town, unless the train is run across said crossing at a speed greater than six miles an hour,—R. S., c. 51, § 75, and amendments thereto,—or unless upon the request of the municipal officers of the town, the railroad commissioners should order a flagman to be stationed at the crossing and

the company should fail to comply with such order. In this case no request was ever made or order ever given to maintain a flagman—and the speed of the train did not exceed the statutory limit of six miles an hour. The company was guilty of no statutory negligence, then, in providing no flagman at the crossing, nor can they be said to be guilty of any negligence at common law. They carefully guarded the front of the backing train, by stationing lookouts on the platform and in the monitor, and the case shows that these men, from their very positions, were able to discover and seasonably warn travelers upon the highway of the approach of the train, had any heed been given to their warnings.

Ordinarily, the question of due care and negligence is for the jury. This is necessarily so when the facts bearing upon these questions are in dispute or even when the facts are undisputed and intelligent and fair-minded men may reasonably differ in their conclusions; but it is not true where the facts are undisputed and there is no evidence, or the evidence is too slight and trifling to be considered by the jury. *Romeo* v. *B. & M. R. R.*, 87 Maine, 540; *Lasky* v. *C. P. Ry. Co.*, 83 Maine, 461.

This case certainly falls within the latter category. There is no evidence that he listened and thus fulfilled one of the duties required of him by law. He has not discharged the burden resting upon him in this regard and hence cannot recover.

Counsel cited: *Wheelwright* v. *B. & A. R. R.*, 135 Mass. 229; *Lesan* v. *M. C. R. R. Co.*, 77 Maine, 87; *Hooper* v. *B. & M. R. R.*, 81 Maine, 260; *State* v. *M. C. R. R.*, 76 Maine, 366; *Smith* v. *M. C. R. R.*, 82 Maine, 342; *Chase* v. *M. C. R. R.*, 78 Maine, 353; *Allen* v. *M. C. R. R.*, 82 Maine, 117; *Baxter* v. *Troy & Boston R. R. Co.*, 41 N. Y., 506.

In *Burke* v. *New York C. & H. R. R. Co.*, 25 New York Supp. 1009, 73 Hun, 32, it was held, "where a person is killed at a crossing and the evidence shows that an approaching train could have been seen three hundred feet away, when he was thirty-three feet from the track, he will be presumed to be guilty of contributory negligence in failing to look."

In *Gardiner* v. *Detroit L. & N. R. Co.*, 97 Mich. 240, (56 N.

W. Rep. 603) it was held, "where, if the plaintiff had looked, when within five feet of the crossing, his view of the railroad track would have been unobstructed for two hundred and fifty feet and he must have seen the train approaching, it is evident that he either did not look or that he saw the train and carelessly attempted to cross in front of it; and in either case was guilty of such contributory negligence as would authorize the court to direct a verdict for the defendant.

Mr. L. C. Stearns, argued orally for the defendant.

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

EMERY, J. Grade crossings of railroads with common roads are places of obvious peril to the traveler upon the common road. The exigencies of modern railroad traffic require the running of frequent trains of heavy cars at considerable speed. If every railroad train or locomotive was to stop or even materially reduce its speed at every country road-crossing, the great benefit of railroads to the public, viz., quickness and economy of transportation, would be greatly lessened if not destroyed.

The traveler upon the common road is not seriously inconvenienced by the railroad crossings. Whether on foot or driving horses he can easily stop or slacken his pace at any point, and easily renew his progress without appreciable loss of time or power. If he be alert and watchful for the passing train, he can usually check his own speed quickly enough to avoid a collision.

The obvious peril of collision at such crossings requires that the traveler upon the common road, when approaching a railroad crossing, should exercise a degree of care commensurate with the peril. He should bear in mind that he is approaching a railroad crossing and that a train or locomotive may also at the same time be approaching the same crossing at great speed. He should never assume that the railroad track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near. He should,

when near or at the crossing, look and listen,—not simply with physical eyes and ears but with alert and intent mind,—that he may actually see or hear if a train or locomotive be approaching. He should not venture upon the track or crossing until it is made reasonably plain that he can go over without risk of collision.

Persons operating the railroad upon their part are required to give suitable signals or warnings as their trains approach crossings over common roads, and their omission to do so may subject them to penalties and damages;—but the traveler upon the common road must not trust his safety entirely to the care and thoughtfulness of the railroad men. He must still exercise due care upon his own part,—must still use his own faculties to apprehend and avoid the danger. If he fail to do so and thereby plunge into a danger that he could have avoided by such care and precaution, he has no legal redress against others who were only negligent with himself. In all actions for negligence like this, the plaintiff must affirmatively prove his own freedom from contributory negligence. The mere collision is prima facie evidence of the plaintiff's want of due care.

The foregoing is only an iteration of what has been repeatedly stated in varying language, in several well considered opinions of this court, to be the law of this State both upon reason and authority. *Chase* v. *Railroad*, 78 Maine, 346; *Allen* v. *Railroad*, 82 Maine, 111; *Smith* v. *Railroad*, 87 Maine, 339; *Romeo* v. *Railroad*, 87 Maine, 540. The opinions of the court in *Hooper* v. *Railroad*, 81 Maine, 260, and in *York* v. *Railroad*, 84 Maine, 117, do not modify the above statement of the traveler's duty. In those cases the railroad men were guilty of something more than a mere omission to give warnings. They were not merely silent, thus inciting the traveler to more exertion to see or hear. By their conduct they broke silence and affirmatively assured the traveler that no train was then approaching. They caused him to take no further care.

It remains to apply these principles to the undisputed facts in the case now before us:—On February 27, 1895, the defendant company was operating its newly constructed and unballasted railroad through the town of Mars Hill in Aroostook County. In

that town, at that time, was a grade crossing where the railroad crossed a common road at a somewhat acute angle, the railroad running northwest and southeast and the common road running northeast and southwest. From the crossing southeasterly to the Mars Hill railroad station the distance was nearly 1200 feet with a slightly descending grade. The common road to the northeast of the crossing for some distance was nearly level, but at about twenty-five feet distant from the crossing there was a rise of a few feet in grade to the crossing itself.

On the morning of the day named, a train of ten loaded freight cars with a saloon car in the rear passed southeasterly down the track past this crossing to the Mars Hill station nearly 1200 feet below. After a very brief stop there this train was backed up toward and past this crossing again in order to get out some other freight cars from a siding. There was the usual conflict of evidence as to the speed of the train in backing up, and as to whether the locomotive whistle or bell was sounded as a warning.

About the same time, the plaintiff's intestate, Mr. Giberson, who knew this crossing, was driving a pair of horses in a sled down the common road from the northeast toward the crossing. Riding on the sled with him were two other men sitting opposite each other on the side boards just behind Mr. Giberson, who was sitting on the cross-seat. He trotted his horses to about the foot of the rise near the crossing where he slowed down to a walk, and kept on at that pace without stopping until the horses came upon the crossing. At this moment the saloon car, now the forward car of the backing train, also reached the crossing. The horses then sprang ahead and to the right, away from the car, but too late; and the car struck the sled, inflicting severe injuries upon Mr. Giberson from which he died on the same day.

According to the legal principles, now so often stated that they must be familiar, it was incumbent on the plaintiff to affirmatively prove that her intestate, Mr. Giberson, when approaching this crossing, was in the exercise of a due degree of care commensurate with the well-known dangers likely to exist at a railroad crossing. It is urged that he was excused from not seeing the approaching train

by reason of buildings and high banks of snow obstructing the vision. It does not appear that he made any effort to surmount those obstacles even by rising from his seat and standing up to look over or between them. It is urged, again, that he was excused from not hearing the train for the reason that no whistle, or bell, or other alarm was sounded. It does not appear that he listened for any sounds of a train. The mere rumbling of the eleven cars, ten of them loaded, on the unballasted track on that still winter morning made sufficient concussion and noise to shake the windows in a building some two hundred feet above the crossing, and to arouse the attention of the occupant of the building and bring him out to see the train. The plaintiff's intestate, some two hundred feet nearer the train, undoubtedly could have heard this rumble had he been listening with his mind alert and intent upon the danger. There is no suggestion that any wind carried away the sound.

Only one of the men on the sled with Mr. Giberson was a witness at the trial. He testified that none of them saw or heard the train, but he does not testify that any, even the simplest, effort was made to get a view of the track over or around the obstacles, or that either of them listened for any whistle, bell, rumble or any other sound of a train. From his testimony it appears that Mr. Giberson and his two companions kept steadily on without stopping and seemingly, at least, without any consideration or thought upon the chance of a train passing. None of the evidence shows that he was mindful of the danger to be apprehended by the traveler at a railroad crossing, or mindful of the precautions which ought to be taken by the traveler to avoid that danger.

Much as we regret the great misfortune of the plaintiff and her intestate, it is our plain duty to declare that upon the evidence adduced she has no legal right of action.

Motion sustained.

GERTRUDE E. HOPKINS, pro ami, in equity,

vs.

JAMES KEAZER, and others.

Cumberland. Opinion November 30, 1896.

Will. Fee. Life-Estate. Vested and Contingent Remainders. Trusts. Insurance. R. S., c. 74, § 16.

A testatrix appointed her son James the executor of her will, to act without giving bond, and made the following disposition of her estate:

"Second. During the lives of my son James Keazer, and his wife Mary Elizabeth Keazer, I give and bequeath to them one-half of the income of my store and the land connected therewith, situated on the North Westerly side of Middle Street, in said Portland, and now numbered 203. Said James and his wife, so long as they, or the survivor, shall have and enjoy the income of said one-half of the above described premises, shall be charged with and pay one-half part of the repairs, insurance, taxes, and other legal expenses. Upon the decease of the said James and the said Mary Elizabeth Keazer, I give and bequeath the income of said one-half of said premises to my children, or child then alive, charged with the payment of said taxes, insurance, repairs and expenses: Said balance of said income of said one-half of said premises is to be divided equally among my children, and upon the death of all my children, I give and devise said one-half of said premises to my grandchildren then alive, said grandchildren receiving the share the parent would have received if distribution thereof had been made under the laws of Maine."

"Third. I give and bequeath to my daughter Mary Helen Yeomans, the other half of the income of said premises on said Middle street during her life, charged with said half of the repairs, taxes, insurance and other legal expenses; and upon the death of my said daughter Mary Helen, I give and devise said one-half of said premises on Middle street to the child, or children of my daughter Mary Helen Yeomans."

"Fourth. Inasmuch as my late daughter Mrs. Caroline Hopkins, received from her father, property on Gray street, in Portland, I therefore give and bequeath to my granddaughter, Gertrude Emma Hopkins, the sum of three hundred dollars. This amount is to be invested by my executor, for the said Gertrude, but shall not be paid to her until she shall become twenty-one (21) years of age; when of that age this sum with its accumulations shall be paid to her. Should my grandchild Gertrude die before that period, I give and bequeath said sum with its accumulations to my children then alive."

"Fifth. I give and devise to my daughter Frances Eva Webb, now of said Portland, during her life, the use and income of the brick dwelling-house with the land connected therewith and being now numbered 81 on the Northeast

side of State street, and in which she now resides. My daughter is to pay all taxes, insurance, repairs, and other legal charges thereon. Upon the decease of my said daughter, Frances Eva Webb, I give and devise said premises to the children of said Frances Eva Webb, and to their survivors or the survivor. If either of said children should die leaving issue then alive, such issue shall have the parents' share, and if there is no such issue, said share or shares shall descend to the survivors or the survivor."

"Sixth. I give and bequeath to my daughter, Mrs. Emma S. McDuffie, now of Chicago, during her life, the use and income of the brick dwelling-house with the land belonging thereto, situated at the corner of Gray and State streets in said Portland, together with the use of all the household furniture of every description in said dwelling-house. My daughter, Emma S. McDuffie, is to pay all taxes, repairs, insurance, and other legal charges thereon. Upon the death of my daughter Emma, I give and devise said premises above mentioned with the said household furniture, to the children, or child of said Emma S. McDuffie."

"Seventh. It is my wish, and I therefore make this request of my grandchildren, that none of them who become seized and possessed of any of my estate, shall sell and convey such interest until he or she shall have owned and controlled said interest at least for ten years, unless from sickness, accident, or some unforseen circumstance he or she is obliged to dispose of the same."

"Eighth. After payment of taxes, repairs, insurance, and other legal charges from the income of the rest, residue, and remainder of my estate, I give and bequeath the balance of said income to my children, and to the survivors, and survivor of them, and when all my children are deceased, I give, devise and bequeath said rest, residue and remainder to my grandchildren, the same to be distributed in accordance with the laws of Maine."

Upon the question whether, under items two and eight, the children of the testatrix are entitled to an absolute fee in the estates described in those items,—in item two upon the termination of the prior estate, and in item eight, residuary clause, at the death of the testatrix,—disregarding in both instances the devise over to their children, her grandchildren:—

Held; that the testatrix intended to give the enjoyment of her estate to her children so long as they might live, and to give the estate itself, subject to this first charge, absolutely to her grandchildren; that instead of there being a clear intention, by these bequests, that her children are to take an absolute property, it is on the contrary clearly evident that she intended they should not have any such property; her scheme being that the fee in all her estate should vest in her grandchildren; *Also;* that the real intention and the judicial intention are not inconsistent with each other.

Held; that the children of the testatrix, not taking an estate in fee simple, are entitled to a life estate, the income of which is bequeathed to them.

Held; that the grandchildren, under items two and eight, take a contingent and not a vested estate;

Also; that they take their interests in their vested remainders, per stirpe, the child or children of each parent taking by representation what would have been such parent's share had the estate been inherited by the children instead of being given to the grandchildren.

Held; that the executor is appointed by the will trustee of the fund provided for Gertrude Emma Hopkins, and he may properly be regarded as an implied or quasi trustee of the estates vesting in the children of the testatrix until they see fit to go into possession of such estate themselves.

The life-tenant shall, at the risk of committing waste if neglected, insure for the benefit of the whole estate,—its principal or corpus,—so that in case of loss, the proceeds may be either expended in the way of repairs, or be preserved as a substitute for the property lost.

Spear v. *Fogg*, 87 Maine, 132, affirmed.

ON REPORT.

This was a bill of interpleader to determine the construction of the will of Caroline Keazer, of Portland, deceased, and was heard on bill and answers.

The bill sets forth the will, the material parts of which are stated in full in the opinion; and further alleges that the estate of the testatrix is sufficient to meet all the calls of the will, and that the property embraced in the residuary clause consists of real estate and rights and credits.

The following questions were submitted for decision:—

1. Do the several specific devises of the income of real estate therein described convey a life estate in the property itself to the several devisees for life?

2. Does the devise, in item 2, of the income of one-half the store, to the children of testatrix, upon the decease of James and Elizabeth Keazer, convey to the children of testatrix who may then be alive, an absolute title to the property? If not, what title does it convey?

3. Does the devise of the income of the property embraced in the residuary clause (item 8) vest in the children of testatrix an absolute title to the property itself as joint tenants? If not, what title does it vest in them?

4. Are the devises to the grandchildren of the store, in item 2, and the residuary property, in item 8, or either of them, invalid, for lack of any words limiting the estates immediately preceding?

5. Does any grandchild now hold any estate or title in the residuary property which may be subject to inheritance or disposal by will or deed, and which will not be divested in case such grandchild does not survive all of the children of testatrix?

6. If the devise to the grandchildren in item 2, is valid, will the children or heirs of a grandchild now living, but who does not survive all the children of testatrix, take any interest in the store?

7. Is the distribution of the residuary property among the grandchildren to be per stirpe or per capite?

8. Is there any construction of the will which will prevent the children of the testatrix from making a valid present division of the residuary property between themselves and your orator? And also of the remainder in the store?

9. Are any trusts created by said will? If so, what? When do they terminate? What is the subsequent disposition of the estate?

H. W. Gage and C. A. Strout, Geo. C. Hopkins, with them, for plaintiff.

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

SITTING: PETERS, C. J., WALTON, FOSTER, HASKELL, WISWELL, JJ. STROUT, J., having been of counsel did not sit.

PETERS, C. J. Caroline Keazer left at her decease a will, some of the provisions of which are deemed to be of such doubtful meaning and effect as to render it expedient to obtain a construction of them by the court. Omitting such parts of the will as can have no bearing on the questions presented for our consideration, the instrument reads as follows:

"*Second.* During the lives of my son James Keazer, and his wife Mary Elizabeth Keazer, I give and bequeath to them one-half of the income of my store and the land connected therewith, situated on the North Westerly side of Middle Street, in said Portland, and now numbered 203. Said James and his wife, so long as they, or the survivor shall have and enjoy the income of said one-half of the above described premises, shall be charged

with and pay one-half part of the repairs, insurance, taxes, and other legal expenses. Upon the decease of the said James and the said Mary Elizabeth Keazer, I give and bequeath the income of said one-half of said premises to my children, or child then alive, charged with the payment of said taxes, insurance, repairs and expenses: Said balance of said income of said one-half of said premises is to be divided equally among my children, and upon the death of all my children, I give and devise said one-half of said premises to my grandchildren then alive, said grandchildren receiving the share the parent would have received if distribution thereof had been made under the laws of Maine.

"*Third.* I give and bequeath to my daughter Mary Helen Yeomans, the other half of the income of said premises on said Middle street during her life, charged with said half of the repairs, taxes, insurance and other legal expenses; and upon the death of my said daughter Mary Helen, I give and devise said one-half of said premises on Middle street to the child, or children of my daughter Mary Helen Yeomans.

"*Fourth.* Inasmuch as my late daughter, Mrs. Caroline Hopkins, received from her father property on Gray street, in Portland, I therefore give and bequeath to my granddaughter, Gertrude Emma Hopkins, the sum of three hundred dollars. This amount is to be invested by my executor, for the said Gertrude, but shall not be paid to her until she shall become twenty-one (21) years of age; when of that age this sum with its accumulations shall be paid to her. Should my grandchild Gertrude die before that period, I give and bequeath said sum with its accumulations to my children then alive.

"*Fifth.* I give and devise to my daughter Frances Eva Webb, now of said Portland, during her life, the use and income of the brick dwelling-house with the land connected therewith and being now numbered 81 on the Northeast side of State street, and in which she now resides. My daughter is to pay all taxes, insurance, repairs, and other legal charges thereon. Upon the decease of my said daughter, Frances Eva Webb, I give and devise said premises to the children of said Frances Eva Webb, and to their

survivors or the survivor. If either of said children should die leaving issue then alive, such issue shall have the parents' share, and if there is no such issue, said share or shares shall descend to the survivors or the survivor.

"*Sixth.* I give and bequeath to my daughter, Mrs. Emma S. McDuffie, now of Chicago, during her life, the use and income of the brick dwelling-house with the land belonging thereto, situated at the corner of Gray and State streets in said Portland, together with the use of all the household furniture of every description in said dwelling-house. My daughter, Emma S. McDuffie, is to pay all taxes, repairs, insurance, and other legal charges thereon. Upon the death of my daughter Emma, I give and devise said premises above mentioned with the said household furniture, to the children, or child of said Emma S. McDuffie.

"*Seventh.* It is my wish, and I therefore make this request of my grandchildren, that none of them who become seized and possessed of any of my estate, shall sell and convey such interest until he or she shall have owned and controlled said interest at least for ten years, unless from sickness, accident, or some unforeseen circumstance he or she is obliged to dispose of the same.

"*Eighth.* After payment of taxes, repairs, insurance, and other legal charges from the income of the rest, residue, and remainder of my estate, I give and bequeath the balance of said income to my children, and to the survivors, and survivor of them; and when all my children are deceased, I give, devise and bequeath said rest, residue and remainder to my grandchildren, the same to be distributed in accordance with the laws of Maine.

"*Ninth.* I appoint my son, James Keazer, executor of this my last will and testament, and I request the Judge of Probate to grant unto him letters testamentary without requiring of him bonds, or sureties."

Perhaps the most important question presented by the will is, whether, under items two and eight, the children of the testatrix are entitled to an absolute fee in the estates described in such items,—in item two upon the termination of the prior estate, and in item eight, residuary clause, at the death of the testatrix,—dis-

regarding in both instances the devise over to their children, her grandchildren. In this case it cannot be so much an inquiry as to what the testatrix desired and expected to be done as it is whether she has been able to effectuate her intention consistently with the rules of law; for surely it cannot be denied that her purpose may be visibly seen by either lawyer or layman throughout all the lines of her will, a purpose to give the enjoyment of her estate to her children so long as they might live, and to give the estate itself, subject to this first charge, absolutely to her grandchildren.

Of course, we must fully recognize the familiar principle, well established in this state, that if a testator first bequeaths property by absolute and unconditional terms, he cannot afterwards by a different provision in the same will, unless it be a full or partial revocation of the first provision, carve a remainder out of what he has already disposed of. But that doctrine should be applied carefully where it manifestly conflicts with the real intention of the testator, and some judges and jurists think that the doctrine has already gone too far in some cases.

But we are of opinion that such doctrine cannot be reasonably applied to the bequests in question here. None of our own cases go far enough in that direction to embrace this case. Take for example the devise construed in *Mitchell* v. *Morse*, 77 Maine, 423, as illustrative a case as any on the subject. There a husband, after devising the rest and residue of his estate to his wife, afterwards says: "But the remainder thereof at my wife's decease I give and devise to my children and their heirs." There a positive repugnancy existed, and also an implication that there might or might not be any property remaining at the death of the wife. So in *Jones* v. *Bacon*, 68 Maine, 34, a leading case often cited, where a testator devises his estate to his wife and then undertakes to direct what shall be done with any portion of it which she may leave at her decease. These were inconsistent and repugnant devises. The same may be said of *Ide* v. *Ide*, 5 Mass. 500, an early and leading case in Massachusetts, where Parsons, C. J., said: "Wherever it is the clear intention of the testator that the devisee shall have an absolute property in the real estate devised

[the principle had not then been extended to personal property], a limitation over must be void." Let it be noticed that it is a "clear" intention that is to be manifested and not a doubtful one.

Now the present case differs from the above cases which we have presented as illustrations of the principle invoked by some of the parties interested in the controversy here. So far from there being in the bequests under consideration any "clear intention" that the children of the testatrix are to take an absolute property in her estate, it is on the contrary clearly evident that she intended they should not have any such property, her scheme being that the fee in all her estate should finally vest to her grandchildren. The two provisions for children and grandchildren are contained in a single sentence, done in one breath, while the pen is not lifted from the paper in expressing them. The meaning and effect of the words, "and when all my children are dead I give said residue to my grandchildren," are the same as if reading, "until all my children are dead, and then I give said residue to my grandchildren." So sure was she in her own mind that her real estate would go eventually to her children's children that in the seventh item of her will she advises them about its management.

It is noticeable that no power of disposal is at any rate expressly granted in the bequests, and that the words bequest and devise are appropriately used according to her intention, making bequests to the first generation and devises to the second. Nor are words of inheritance annexed to her bequests. The fact that she bequeaths only income instead of estate, whatever construction we may feel constrained to give to the word income in another connection, goes a good way towards indicating intention, and also in establishing the legal effect of the language used, construing all the clauses of the will together. And of still greater consequence for the same purposes is the fact that she carefully bequeaths only a balance of income, such balance as may be created after deducting, from the entire income, the items of taxes, insurance and all legal expenses. Why should she interest herself in those details of the future management of a property which she had previously given

absolutely to her children; and, a fortiori, if she was aware that she had already disposed of the property in such way?

This interpretation is consistent with all the ordinary rules of construction applicable in such cases; such as that the intention of the testator shall prevail, to be ascertained from a consideration of all the provisions of the will taken together; that the predominating or controlling purpose of the testator shall have great weight in interpreting his will; that all the provisions of a will without exception shall be rendered effectual if possible to be done consistently with the rules of law; and that courts will change or mould the language of a will in order to give to it its intended effect. See Schouler, Wills, § 477, and cases in notes. We have already seen what slight modification of the phraseology of this devise, while at the same time preserving all its substance, would indisputably establish its meaning. And why does not the rule of construction laid down in R. S. ch. 74, § 16, lead to the same result, the rule being that a devise of land conveys all the interest of the devisor therein, unless it appears by the will that he intended to convey a less estate therein? We think on this point in the controversy that the real intention and the judicial intention are not inconsistent with each other.

The next important question arising upon the will is whether the children of the testatrix, not taking an estate in fee simple, are entitled to a life estate in the properties, the income of which is bequeathed to them. Those who are opposing the proposition of a life-tenancy rely very much on the circumstance that only a "balance" of income is bequeathed after certain deductions are made from the earnings; the argument being that such a bequest has an effect totally different from one that might give the whole income of the estates. We incline, however, to the belief that it would be a reasonable construction of the clause to say that, in effect, it is nothing more or less than a bequest of the net income of the property described, and our own cases have fully established the doctrine that a devise of the income or net income of an estate for one's life-time is a devise of the estate itself for such period. *Andrews* v. *Boyd*, 5 Maine, 199. In *Butterfield* v.

Haskins, 33 Maine, 392, essentially the same principle is enunciated. In *Earl* v. *Rowe*, 35 Maine, 414, it was held that a direction by a husband in his will that his wife "shall receive for her support the net profits" of his land was a devise of the land itself. In *Diament* v. *Lore*, 31 N. J. L. 220, a bequest of income for life was decided to be a devise for life of the land from which the income was to be derived and paid over to the beneficiary annually for his support and maintenance. There are a few opposing cases however, and in the cases of *Bowen* v. *Payton*, 14 R. I., 257, and *Craig* v. *Craig*, 3 Barb. Chan. R. 76, will be found a collection of many cases on the subject. In late cases the Supreme Court of the United States has decided that the taxation of net income derived from land is a taxation of the land. See *Sampson* v. *Randall*, 72 Maine, 109, on the general proposition that a bequest of income of land is a devise of the land, when there are not overruling words in the will establishing the contrary.

Another point to be settled is whether the grandchildren take under items two and eight a vested interest in those estates at the death of the testatrix, or whether the vesting of the title in them is to be postponed until the termination of the prior estates subsisting in the testator's children during their lives.

We are of opinion that the estates to go to the grandchildren must be considered as contingent and not vested. The provision in their behalf in item two must be held to be contingent by force of the late case of *Spear* v. *Fogg*, 87 Maine, 132. See, also, the citations in that case. The words of this bequest plainly indicate contingency. The testatrix provides for an equal division of income among her children, and upon the death of all her children she devises the same estate to such of her grandchildren as may then be alive. There cannot be a plainer proposition than that it is uncertain who, if any, among the grandchildren shall be survivors after all the children of the testatrix are deceased.

The language of the residuary clause differs from that of item two and might admit of more doubt in its construction were it not for the influence of the construction which is inevitably to be placed on item two, and furthermore but for the general intention

of the testatrix as manifested by the whole will. It can hardly be possible that the testatrix intended different kinds of disposition by the two clauses of her will. The whole scheme of her will opposes such an idea. And, still, in item two, she gives to such of her grandchildren as may be alive at the decease of all her children, and in the residuary clause she devises to her grandchildren generally. But we think she meant in the second case what she directly said in the first, that grandchildren then alive should be the takers. Living grandchildren were intended. "When all my children are deceased, I give, devise and bequeath to my grandchildren," are her words. She had in mind such grandchildren as there would be at the decease of her children, and not at her own decease. The idea of survivorship was entertained by her in the whole residuary clause, the estate going first to her children and the survivors and survivor of them, and then to the surviving grandchildren.

Still another inquiry is to be responded to, and that is whether the grandchildren take their interests in their vested remainders per stirpe or not. We do not doubt that by the terms of the will they take per stirpe, the child or children of each parent taking by representation what would have been such parent's share had the estate been inherited by the children instead of being given to the grandchildren.

Finally, we are asked if any trusts are created by the will. Evidently the executor is appointed by the will a trustee of the fund provided for Gertrude Emma Hopkins, and he may properly be regarded as an implied or quasi trustee of the estates vesting in the children of the testatrix until they see fit to go into possession of such estates themselves. It would perhaps have been a wise provision had a trustee been expressly appointed, inasmuch as among the numerous devisees questions may arise as to what repairs better be made, or how much insurance should be carried, or as to which of them should have possession of the moneyed assets, the residuary estate consisting, as the bill informs us, of real estate and rights and credits, and one responsible person

can undoubtedly manage such concerns more satisfactorily than many can.

There is a good deal of reason to believe that the testatrix supposed she had intrusted these affairs in the hands of her trusted executor, and for that reason it may be proper to require security from any of the devisees who may have the keeping of the personal assets; but that is not a question here at this time, and it can be determined at a later date upon an application to the court if controversy arises in relation to it.

It should be noticed by those interested that the carrying of insurance is made a charge upon the incomes of the several portions of the estate or upon the estate itself. This does not mean merely that a life-tenant shall or may procure an insurance on his own interest, leaving the remainder-man to insure his separate interest if he sees fit to do so. But it means that the life-tenant shall, at the risk of the consequences of committing waste if neglected, insure for the benefit of the whole property,—its principal or corpus,—so that in case of loss the proceeds may be either expended in the way of repairs or be preserved as a substitute for the property lost. See 2 Perry, Trusts, 4th ed. §§ 487, 553, and cases cited.

We have no doubt that these views as expressed by us substantially answer the interrogatories submitted for our opinion, and we think that there is such serious doubt as to the true construction of some of the provisions of the will as to entitle the complainant to payment of her disbursements in this proceeding, and also to entitle each side to reasonable counsel fees out of the personal assets of the estate.

Bill sustained.

JOSEPH PULITZER *vs.* LOUISA BOWLER LIVINGSTON.

Hancock. Opinion December 2, 1896.

Perpetuities. Trust.

The rule against perpetuities was established to prevent the creation of estates which are to vest, or come into being, upon a remote contingency, and where the vesting of an estate or interest is thereby unlawfully postponed beyond the period of a life or lives in being and twenty-one years and nine months thereafter.

Nothing is denounced as a perpetuity that does not transgress this rule.

It is equally applicable to equitable as to legal estates or interests,—to instruments executing powers, as well as to other instruments.

The rule against perpetuities is independent and distinct from that of a restraint upon alienation, although their object is the same,—the prevention of property being taken out of commerce, and locked up, or so held that it cannot be conveyed.

It concerns itself only with the vesting, the commencing of estates, and not at all with their termination.

A perpetuity, therefore, is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.

An estate or interest that is vested, is not subject to, and cannot offend against the rule.

The same is true of future estates or interests that are destructible at the will and pleasure of the owners of the property.

In this case all interests, legal and equitable, were vested.

Moreover, the powers contained in the trust deeds clearly provide for a complete revocation of the trusts at any time, and thereby remove the case from the rule against perpetuities.

If an unlimited indestructible power exists, suspended indefinitely over the fee, it does restrain free alienation by the one who, subject to that power, is the owner of the fee; but the present case is not obnoxious to such a power. It is subject to be barred or destroyed at the will of the cestuis que trustent, or any one of them.

Slade v. *Patten*, 68 Maine, 380, overruled.

AGREED STATEMENT.

This was an action of covenant broken, submitted to the law court on an agreed statement of facts which are found in the opinion.

A. W. King, for plaintiff.

H. E. Hamlin and L. B. Deasy, for defendant.

R. C. Dale, of the Philadelphia bar, also filed a brief for defendant.

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

FOSTER, J. More than forty years ago certain persons residing in England and France were the owners in fee of large tracts of real estate in America, particularly in the states of Maine, New York, Pennsylvania, and the District of Columbia. These estates had formerly been the property of their ancestors, William Bingham, of Philadelphia, and from whom the title descended, the "Bingham Estate," so-called, embracing two million two hundred thousand acres in the state of Maine alone. These large landed estates were principally wild and unimproved, and required the management in this country of representatives of the owners.

Considering the large and increasing number of persons who jointly owned these estates and the distance of their residence from the same, provisions for the sales and conveyances by letter of attorney were inadequate, because of deaths frequently occurring among those who were the owners, and of the necessity of purchasers inquiring and taking the risk of the correctness of the information as to the continuance of the lives of the parties executing a letter of attorney.

On July 18, 1853, three-fifths undivided of this property were vested in the following named persons: William Bingham Baring, (Lord Ashburton), Henry Bingham Baring, Frances Emily (Baring) Simpson, William Frederick Baring, and Anna Maria Helena (Countess de Noailles), and on that day these persons executed a deed of trust of their undivided three-fifths of the property to Joseph Reed Ingersoll and John Craig Miller, as trustees.

The other two-fifths of the property were vested in William Baring de Lotbiniere Bingham, who on the 12th day of August, 1862, executed a like deed of trust of his undivided two-fifths of the property to the same persons, as trustees.

These owners, for the more convenient management of their property in this country, conveyed it to these trustees by the foregoing deeds, and upon substantially the following trusts, as therein expressed: —

(1) To let and demise the real estate: (2) To invest and keep invested the moneys and personal estate, with power of sale and reinvestment: (3) To collect and receive the rents and income of the real estate, and the interest and income of the personal estate: (4) To remit the net income to the parties or their legal representatives, according to their respective rights and interests therein, or otherwise to apply and dispose of the same as the parties or their legal representatives should from time to time direct.

The following powers were therein expressly conferred upon the trustees, viz: —To grant, bargain, sell, exchange, and absolutely dispose of in fee simple, or for life, or lives, or for years, or for any other estate, all or any part of the real estate, and to make in due form of law all such deeds and conveyances as might be necessary to carry the sale into effect: To remit the proceeds of such sales after deducting expenses, to the parties or their legal representatives, according to their respective interests therein, or to otherwise apply and dispose of the same as the parties or their legal representatives should from time to time direct: To raise by mortgage of the premises or any part thereof, such sum or sums of money as should be requested by the parties, or such of them as might be entitled to any beneficial interest in the premises: To appoint by deed successors with all the powers of the trustees originally named: and finally it was expressly provided that it should be lawful for the parties respectively, "and their respective legal representatives, at any time or times hereafter, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to alter, change, revoke, annul,

and destroy all and every the trusts hereby created as respects their respective shares and interests in the premises, and to declare, direct, and appoint such other uses and trusts, if any, concerning their respective shares and interests in the said trust estate, or any part thereof, as they shall respectively choose or think proper, anything herein contained to the contrary notwithstanding."

New trustees were from time to time nominated in accordance with the provisions of the deeds in relation to successors to the original trustees, and on September 14, 1882, the then trustees, Charles Willing and Phineas Pemberton Morris, conveyed the particular property involved in this action to May W. Bowler, of Cincinnati, Ohio. On October 4, 1886, May W. Bowler conveyed the same to the defendant, and on May 30, 1894, the defendant conveyed the same by warranty deed, with full covenants, to the plaintiff.

The plaintiff has brought this action for a breach of the defendant's covenant contained in her deed to him that the property is "free of all incumbrances," alleging an outstanding title in fee in those persons who executed the trust deeds, or their heirs or assigns, as a breach of that covenant. And as a part of the same transaction with the deed from defendant to the plaintiff, the defendant executed and delivered to the plaintiff a special covenant that those grantors in the trust deeds, had no right, title or interest in the property that could be maintained in any proceeding in the courts of this state as against the title conveyed by her to the plaintiff, and a breach of this special covenant is also alleged in this action.

The land involved in this action is situated at Bar Harbor, and comprises about fifteen acres with the buildings thereon. The purchase price between the plaintiff and the defendant was $90,000, and since the conveyance over $100,000 more have been expended in improvements.

The rights of the parties depend upon the legal effect to be given to the trust deeds of July 18, 1853 and August 12, 1862, the plaintiff claiming that these deeds are not legally sufficient to divest the grantors of their title in the property; that there were

future estates and interests so limited therein that they offend against those rules of law which prescribe and limit the period within which future estates and interests must necessarily vest; and that these deeds being void no title ever passed to the trustees but still remains in the grantors, or their heirs or assigns.

The ground upon which the trust is attacked, and the court asked to declare it void, is that the terms of the trust violate that rule of law known as the Rule against Perpetuities.

It is necessary in order to determine whether the trust is objectionable, to consider just what the rule is, and what is its object and purpose.

The rule against perpetuities was established to prevent post mortem control of property. It forbids the creation of estates which are to vest, or come into being, upon a remote contingency, and where the vesting of an estate or interest is thereby unlawfully postponed.

It is contrary to the policy of the law that there should be any outstanding titles, estates, or powers by the existence, operation, or exercise of which at a period of time beyond lives in being, and twenty-one years and a fraction thereafter, the complete and unfettered enjoyment of an estate with all the rights, privileges, and powers incident to ownership should be qualified or impeded. When this is the case, as the court say in *Philadelphia* v. *Girard's Heirs*, 44 Pa. St. 26, they are called perpetuities, not because the grant or devise as written would actually make them perpetual, but because they transgress the limits which the law has set in restraint of grants or devises that tend to a perpetual suspension of the title or of its vesting, or, as is sometimes with less accuracy expressed, to a perpetual prevention or restraint upon alienation.

This rule of restraint upon alienation has frequently been confounded with the rule against perpetuities. They are, however, separate and distinct rules, although their object is one and the same,—the prevention of property being taken out of commerce, locked up, or so held that it cannot be conveyed. It is important therefore in the consideration of cases to bear in mind that the two rules are independent and distinct. Gray on Perpetuities, § 236,

thus speaks of the two rules: — "There are two distinct rules of law by the joint action of which the tying up of estates is prevented: (1) Estates cannot be made inalienable: (2) Future estates cannot be created beyond the limits fixed by the rule against perpetuities."

The rule against perpetuities concerns only remote future and contingent estates and interests. It applies equally to legal and equitable estates, to instruments executing powers, as well as to other instruments. *Duke of Norfolk's Case*, I Vern. 164, (3 Ch. Cas. 48); Gray on Rule against Perpetuities, § 411. A limitation that is valid in the case of a legal estate is valid in the case of an equitable estate. If an equitable estate, as for instance a trust, is so limited that it creates a perpetuity, a similar limitation of a legal estate equally creates a perpetuity. *Goddard* v. *Whitney*, 140 Mass. 100; *Kimball* v. *Crocker*, 53 Maine, 266; *Ould* v. *Wash. Hosp.*, 95 U. S. 303, 312.

What then is a perpetuity?

It is a grant of property wherein the vesting of an estate or interest is unlawfully postponed. The law allows the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints and void, and estates or interests which are dependent on them are void. Nothing is denounced as a perpetuity that does not transgress this rule, and equity follows this rule by way of analogy in dealing with executory trusts; and those trusts which transgress the rule are called transgressive trusts, being in equity the substantial equivalent of what in law are called perpetuities. Fearne on Rem. 538 n. "But the limitation, in order to be valid, must be so made that the estate or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void." *Fosdick* v. *Fosdick*, 6 Allen, 41; *Brattle Square Church* v. *Grant*, 3 Gray, 142. Lewis in his work on Perpetuities gives the follow-

ing as an accurate definition of a perpetuity: —"A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."

The rule against perpetuities has no application to vested estates or interests. Gray on Perpetuities, § 205. It concerns itself only with the vesting, the commencing of estates, and not at all with their termination. It makes no difference when such a vested estate or interest limited terminates. *Routledge* v. *Dorril*, 2 Ves. jr. 366; *Evans* v. *Walker*, 3 Ch. Div. 211; *Hampton* v. *Holman*, 5 Ch. Div. 183; see 14 Am. Law Review, 237. When an estate or interest vests in a person he is the owner and can alienate it. *Fosdick* v. *Fosdick*, 6 Allen, 41; *Kimball* v. *Crocker*, 53 Maine, 266; *Merritt* v. *Bucknam*, 77 Maine, 258; *Seaver* v. *Fitzgerald*, 141 Mass. 401.

Examined in the light of the foregoing rules and principles, we are unable to discover wherein the deeds in question offend the rule against perpetuities. The trustees took the legal estate. The beneficial or equitable estate was reserved to the grantors and their representatives. All interests legal and equitable were vested. Nothing was postponed. The beneficial enjoyment of the estate absolutely and unqualifiedly vested in the persons who, prior to the delivery of the deeds, held the legal title. Each of these persons as the owners of the equitable estate, after the deeds were delivered, possessed over his own equitable interest the same power of sale, conveyance, devise, and disposition, as prior to the deeds he had over his undivided interest in the legal estate. Upon the exercise of any of these powers, the person in whose favor it might be exercised would become fully possessed of such equitable and beneficial interest. The trustees as the holders of the legal title, during the continuance of the trust, have the fullest powers of sale

and conveyance, so that the alienation of the property is absolutely unfettered. The owners of an equitable estate, like the owners of a legal estate, can alienate or assign their interest. There is nothing in these deeds that prohibits this. By an examination of the deeds of trust it will be perceived that neither the rules, nor the reason of the rules, have been transgressed. The land is as alienable, in legal contemplation, as if the deeds had never been executed. No provision is disclosed looking to any future, contingent or remote estate, which, springing into being in future, would hinder free alienation by imposing a clog on the title which those now vested with the present title and possession could not remove.

But there is another point which is fatal to the plaintiff's contention that these trust deeds are obnoxious to the rule against perpetuities. This rule does not apply to interests which though future are destructible at the mere will and pleasure of the present owner of the property. "A future estate which at all times until it vests is in the control of the owner of the preceding estate, is, for every purpose of conveyancing, a present estate, and is therefore not obnoxious to the rule against perpetuities." Gray on Perpetuities, § 443. The author clearly points out in sections 140 and those that follow, that a perpetuity is an indestructible interest, and while he shows that it has another artificial meaning, or "an interest which will not vest till a remote period," yet in all his illustrations he shows clearly that interests which are destructible are not perpetuities. This doctrine is laid down by Chief Justice Gibson in *Hillyard* v. *Miller*, 10 Penn. 334, wherein he cites with approval the definition of a perpetuity as given by Lewis, and also in *Mifflin* v. *Mifflin*, 121 Pa. St. 205. In the latter case, the court, in considering the provisions of certain deeds which were claimed to be inoperative because of the rule against perpetuities, uses this language: —"But the estate of Mrs. Mifflin was neither inalienable nor indestructible. It was entirely within her power to become the owner in fee of the estates granted and to totally defeat any ulterior limitations. It proves nothing to say she did not exercise her power and that therefore the situation is the same as though she never had the power. For certain pur-

poses and in certain cases that, of course, is true. But in considering merely the application of the rule against perpetuities, it is not true, because that rule requires that the estates in question should be indestructible, and an estate which can be destroyed by the person who holds it for the time being is not indestructible."

So in another recent case in Pennsylvania the court say: "Aside from this it was competent for all the parties in interest at any time to defeat the power and to take the property discharged thereof; under these circumstances, we cannot say that the trust created a perpetuity." *Cooper's Estate*, 150 Pa. St. 576; *Lovering* v. *Worthington*, 106 Mass. 86, 88; *Bowditch* v. *Andrew*, 8 Allen, 339; *Goesele* v. *Bimeler*, 14 How. (U. S.) 589.

The very definition of a perpetuity as given by Lewis has its application to a future limitation "which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." The deeds in question contain certain express powers of revocation. The equitable owners of the estate have therein expressly reserved the right at any and all times "to alter, change, revoke, annul and destroy all and every the trusts hereby created as respects their respective shares and interests in the premises, and to declare, direct and appoint such other uses and trusts if any concerning their respective shares and interests in the said trust estate or any part thereof, as they shall respectively choose or think proper, anything herein contained to the contrary notwithstanding."

These powers clearly provide for a complete revocation of the trusts at any time, and thereby remove the case from the rule against perpetuities.

But it is argued for the plaintiff that, admitting the interest of the beneficial owners to be vested, and alienable, the existence of the legal estate in the trustees with a power of sale of indefinite duration, which may be exercised after the expiration of lives in being and twenty-one years, tends to a perpetuity; and that, under the authorities, a power of sale conferred upon one not the owner

of the beneficial interest in land, if it may be exercised at an indefinite or too remote period, is void.

It is true that if an unlimited indestructible power exists, it does restrain free alienation by the one, who, subject to that power, is the owner of the fee. "A power of sale suspended indefinitely over the fee is open to the same objection as an executory devise or springing use to take effect whenever A or his heirs shall do a given act." Lewis on Perpetuities, 547. Thus in *Tullett* v. *Colville*, 2 L. R. Ch. (1894,) 310, a devise of certain property was made to trustees, and the trustees were directed to carry on the business of the testator as a gravel contractor "until my gravel pits are worked out, and then sell the said gravel pits and the freehold land on which the same is situated." The court held that this power of sale was too remote and that the rule was violated, because, while the gravel pits might be worked within the prescribed limits of the rule, yet they might not be so worked out, and the power of sale might not go into operation until an uncertain and possibly too remote time in the future. "The true reason for holding such powers good," says Gray in his work on Perpetuities, "is that the trusts to which they are attached must come to an end, or can be destroyed, within the limits fixed by the rule against perpetuities." Speaking further in relation to powers, he says, § 506 :— "To sum up the law as to powers in connection with settled property : —(1) Sometimes the power ceases as soon as the equitable fee or absolute interest vests in possession: (2) Sometimes the power can be exercised until the owner of the equitable fee or absolute interest calls for the legal estate: (3) Sometimes the power can be exercised within a reasonable time after the fee or absolute interest has vested in possession, such reasonable time being not over twenty-one years after lives in being: (4) Sometimes the power is created to be exercised on a contingency which may happen after the legal fee or absolute interest has vested in possession, and which may be more than twenty-one years after a life in being. In the first three cases the power is not void for remoteness; in the last case it is."

In the case at bar the powers of sale in the trust deeds are

within the second class. The owners of the equitable fee are by the express terms of the deeds entitled to call for a conveyance of the legal estate from the trustees and thereby to destroy and finally determine the trust. The power, therefore, does not hang suspended over the fee like an unbarrable executory devise, but is subject to be barred and destroyed by the cestuis que trustent, or any one of them. *Biddle* v. *Perkins*, 4 Simons, 135; *Wallis* v. *Thurston*, 10 Simons, 225. True, here is a trust to sell for all time, but revocable at pleasure. What is there in these deeds that tends to a perpetuity if we clearly observe what that means? There is in these deeds that which it is settled makes the power valid although in terms perpetual,—and that is the power of revocation. 2 Sug. Pow. 472. A trust and a power of sale that continue only at the pleasure of the beneficial owner cannot possibly be said to be an illegal restraint on alienation. The purpose of the trust was lawful and in harmony with the policy of the law. It was created to secure a more convenient management of these large landed estates, and less trouble and delay in passing title to the grantees who might from time to time purchase portions of these distant and unsettled tracts.

A recent case in Illinois involved a conveyance to three trustees in trust for an unincorporated company, the property being conveyed to the trustees and their heirs and assigns forever. They were given power to sub-divide, improve, sell and convey. The court, after noting several definitions of the rule against perpetuities, makes use of the following language: — "The mere creation of a trust does not ipso facto suspend the power of alienation. It is only suspended by such trust when a trust-term is created, either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust; where the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended although the alienation is in fact postponed by the non-action of the trustee or in consequence of a discretion reposed in him by the creator of the trust. . . . . There is nothing in the trust agreement in this case having the slightest tendency to create a perpetuity. The land was to be

conveyed to the trustees to be sub-divided and improved and then sold, and the time of sale was left wholly to their discretion; indeed the whole scheme of the association was to purchase, subdivide and improve suburban property for the purpose of placing it at once upon the market for sale. No trust-term was created and a conveyance of the land, or any part of it, at any time was no violation of the trust. Where there are persons in being at the creation of an estate capable of conveying an immediate and absolute estate in fee in possession, there is no suspension of the power of alienation, and no question as to perpetuities can arise." *Hart* v. *Seymour*, 147 Ill. 598.

There is nothing whatever done by the terms of these deeds, in the case before us, but to create an agency to sell land; an agency, to be sure, that is to continue after death and to be exercised for heirs, devisees, grantees, etc., until, and only until, any one sees fit to put an end to it. But an agency to continue after death being impossible, the mode of doing it was by a trust with powers by which the ownership is vested in trustees, and the beneficial interest dealt with under these powers.

When the position of the parties and of the property is considered, it becomes apparent that this was the object of the arrangement. The property was land bought in the last century. The owners lived in England and France. A sale required that all should join, and agencies were always liable to be revoked, or become impracticable by settlements, so that there would be no delegation of authority. The remedy was an agency that would continue, and there could be none unless the title was transferred, the legal title thus being vested in trustees, and the equitable title in the beneficial owners. The parties by executing these deeds attempted to accelerate alienation and avoid any retarding of it. The purpose of these deeds was to make property more readily marketable, more conveniently alienable,—the very object which the rule against perpetuities was adopted to subserve. When the reason of the rule fails, the rule itself has no application.

It may be proper to state that we have carefully examined the decisions to which our attention has been called by the learned

counsel for the plaintiff, and which, perhaps, are not in complete harmony with some of the views enunciated in this opinion.

The case of *Slade* v. *Patten*, 68 Maine, 380, is one of those cases. There the testator devised to his four daughters certain portions of his estate with the proviso that the parts and proportions devised and bequeathed to his four daughters, and their heirs, instead of passing into their hands, were to go into the hands of two trustees, "to hold, manage and dispose of said parts and the property received therefor, for the use and benefit of said [four daughters] and their heirs, according to the discretion of said trustees."

This devise is distinguishable from the Bingham trust in the important respect that the will contained no clause giving to the cestuis que trustent the right to revoke or annul the trust. The power of revocation reserved in the trust deeds in the case at bar makes a most important difference between those deeds and the devise involved in *Slade* v. *Patten*. The decision there seems to be based on the conclusion that no provision was made for the termination of the trust, but that it was to be continued for the benefit of the "heirs" of the daughters, and therefore to continue indefinitely. "There is no provision for the termination of the trust estate," remarks the court.

In one paragraph of the opinion the court makes use of the following language: —"But assuming it to have been the testator's intention that on the decease of his daughters their respective shares should go to the heirs of such daughters in fee simple, still, this would create a perpetuity, because it was possible, that they might have heirs unborn at the testator's death and in whom the estate would not vest within lives in being and twenty-one years and a fraction afterwards."

This statement is absolutely inconsistent with the facts of the case as well as the well settled principles of law. It cannot admit of doubt even that a devise of property to a daughter for life and at her death to her heirs in fee is perfectly good.

But the foregoing statement from the opinion may be regarded as only a dictum. The real question which the court decided was

that the word "heirs" was a word of general import and not limited to those persons who would be heirs within a life in being and twenty-one years and a fraction thereafter, and therefore the trust undertook to preserve the estate for persons who might become heirs indefinitely and hence violated the rule.

The interests devised, however, were clearly vested interests. The legal title was given to the trustees, the equitable fee to the daughters and their heirs, but all interests were present and vested. The legal estate vested in the trustees at the testator's death, and at the same time the entire equitable interest limited to the daughters and their heirs vested in them. No other interest was devised or bequeathed. All the estates and interests that were ever to arise vested immediately upon the testator's death. After correctly stating the rule, the court says:—"In view of the trust, therefore, it must be deemed void as creating a perpetuity."

From the expressions in the opinion to which we have referred, it seems to have been assumed that a trust which will not or may not *terminate* within lives in being and twenty-one years and a fraction afterwards is void as creating a perpetuity. But this is not correct. It cannot be sustained either upon principle or authority. A future limitation that may not *vest* within that period creates a perpetuity, and is therefore void. But a limitation that must vest, if at all, within the period does not create a perpetuity, and it makes no difference when the trust or interest limited *terminates*, if it has *vested* within the period. "All that is required by the rule against perpetuities is, that the estate or interest shall vest within the prescribed period." *Seaver* v. *Fitzgerald*, 141 Mass. 401, 403. The right of possession or enjoyment may be postponed longer.

The reasoning of the court was wrong. No injustice was done to the testator's daughters, however; for, owing to his having used language which by itself expressed an absolute gift to his daughters and their heirs, followed by a proviso that trustees should hold the legal title in trust for them and their heirs, the court, by rejecting the proviso in reference to the trustees as void, decided that there was an absolute gift by devise to the daughters which took effect.

The opinion, therefore, in *Slade* v. *Patten* cannot be sustained upon authority. *Barnum* v. *Barnum*, 26 Md. 119, is a case where the owner of hotel property devised it to trustees with directions to lease it, but prohibited alienation during the term of a trust which exceeded lives in being and twenty-one years thereafter. The court held such a trust void, and gave effect to an alternative limitation contained in the will. In this case there was an absolute suspension of the power of alienation for a period prohibited by the rules of law, unlike the case at bar.

The cases of *Deford* v. *Deford*, 36 Md. 168, *Gouldsboro* v. *Martin*, 41 Md. 488, and *Collins* v. *Bernard*, 63 Md. 162, would seem to support the dictum of the reasoning in *Slade* v. *Patten*, and these Maryland cases are the only ones to which the attention of the court has been called, or which in the examination of the case before us, we have been able to find, supporting that doctrine. But the doctrine of these cases is opposed to the great trend of authority elsewhere, and Gray, in his very thorough and valuable work, speaks of these cases as grave, practical errors growing out of confounding the rule against perpetuities with the rules disallowing restraints on alienation.

It is unnecessary to consider any of the other objections raised, inasmuch as the conclusion to which the court has arrived determines the validity of the trust deeds, and thus disposes of the case.

Judgment for defendant.

THOMAS DINSMORE *vs.* JOSEPH ABBOTT, and others.

Kennebec. Opinion December, 1896.

Bailment. Burden of Proof.

The plaintiff left in defendants' store-house, with their consent, a quantity of beans. There was no agreement for compensation, and, so far as the case shows, neither of the parties expected that any compensation for the storage would be required. The defendants were not ware-house men, the store-house being used by them for their own purposes in connection with their

business as retail traders. The plaintiff alleged that the defendants refused to deliver to him the property stored, upon demand.

Held; That the burden was upon the plaintiff, in the first instance to prove such a refusal, and that if this had been done he would have made out a prima facie case; and it would have been incumbent upon the defendants to explain the cause of their refusal, such as by showing the loss of the property by theft or burglary, or its destruction by fire or otherwise. Then it would have been incumbent upon the plaintiff to show that the loss or destruction occurred by reason of the defendants' failure to exercise such a degree of care of the property as the law requires of a gratuitous bailee.

Also held; That the plaintiff had failed to sustain the burden resting upon him and that the verdict in his favor was not authorized.

ON MOTION BY DEFENDANTS.

The case appears in the opinion.

J. H. Greeley, E. W. Whitehouse and W. H. Fisher, for plaintiff.

W. H. Fogler, for defendants.

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

WISWELL, J. The plaintiff left in the defendants' store-house, with their consent, a quantity of beans in bags. There was no agreement for compensation; and, so far as the case shows, neither of the parties expected that any compensation for the storage would be required. The defendants were not ware-house men; the store-house was used by them for their own purposes in connection with their business as retail traders. The transaction was therefore a gratuitous bailment.

The plaintiff alleges that the defendants refused to deliver to him the property stored upon demand. The burden was upon the plaintiff, in the first instance, to prove such a refusal; if this had been done he would have made out a prima facie case, and it would then have been incumbent upon the defendants to explain the cause of their refusal, such as by showing the loss of the property by theft, or burglary, or its destruction by fire or otherwise. Then it would have been incumbent upon the plaintiff to show that the loss or destruction occurred by reason of the defendants' failure to exercise such a degree of care of the property as

the law requires of a gratuitous bailee. The plaintiff did not prove such a refusal, nor whether he had received all of the property left in the store-house, or not. It appears that, at one time, he gave an order for all of these beans to a third party who did take from the store-house a portion of them, at least, but the case does not show whether he took them all or not.

Nor did the plaintiff introduce any evidence tending to prove a want of sufficient care upon the part of the bailees. The loss of the property was a sufficient excuse for the failure to return, unless the loss occurred through the fault or want of ordinary care of the defendants. *Smith* v. *First National Bank*, 99 Mass. 605.

The evidence for the defense was positive and uncontradicted that they did not have the property in their possession at the time of demand; that they had not used or disposed of it, with the exception of one bag, containing two bushels, which they were willing to pay for; and that if the plaintiff had not received the property, it had been lost without their fault. The burden was upon the plaintiff, whatever the form of action, to show a breach of the implied contract of the defendants as gratuitous bailees, viz., to use ordinary care in keeping the property and to deliver it upon demand, if after using due care, they should have it in their possession. *Winthrop Bank* v. *Jackson*, 67 Maine, 570; *Willett* v. *Rich*, 142 Mass. 356.

From the evidence in behalf of the plaintiff alone, the loss of the property without the fault of the defendant was as consistent as a loss occurring through their negligence. It is of course true that, in this action, before the plaintiff was required to introduce any evidence of the defendants' negligence, it was necessary for the defendants to satisfactorily explain the cause of their refusal to redeliver, if such a refusal had been proved. We think that the defendants did this so as to overcome such a prima facie case as the plaintiff would have made out, if the evidence in relation to the refusal to deliver had been sufficient.

It is the opinion of the court that the evidence did not authorize a verdict for the plaintiff.

Motion sustained.

CROSBY O. HOWE *vs.* WILLIAM KLEIN.

SAME *vs.* SAME.

Penobscot. Opinion December 15, 1896.

Bills and Notes. Set-off. Attorney's Lien.

An agreement, without consideration, made by the payee and holder of certain promissory notes, payable at definite times, that the time of the payment of each might be extended one year, is of no binding force and does not affect the maturity of the notes referred to.

Upon the same day that the notes in suit were made and delivered by the defendant to the plaintiff, the latter signed and gave the defendant this memorandum: "This is to certify that I consent to receive payment on any of William Klein's notes which I now hold at any time when he wishes to make a payment. Also that the time of payment of the first five notes may be extended one year each."

Held; That the language quoted shows that the agreement was made after the signing and delivery of the notes, and that as the case shows no consideration therefor, it does not affect the maturity of the notes referred to.

When judgments, which should be set off against each other, are recovered in different counties, the law court may order such set off; but not so as to affect the attorney's lien upon the taxable costs in each case.

ON EXCEPTIONS BY DEFENDANT.

The facts appear in the opinion.

S. S. Brown, for plaintiff.

Peregrine White, for defendant.

In Parsons on Bills and Notes, Vol. 2, page 539, that author says:—"A contemporaneous memorandum on the note, or as we have just seen, *even on a separate paper*, if made by agreement of all the parties before signing, will bind all parties, and all who have, or are legally presumed to have, notice thereof, and may be pleaded either by plaintiff or defendant." *Bonney* v. *Morrill*, 57 Maine, 373.

The case of *Heywood* v. *Perrin*, 10 Pick. 228, would seem to be decisive of the present case. In that case, after the note was signed and witnessed, the memorandum was written at the bottom.

The note was on demand. The memorandum was in these words: "One-half to be paid in 12 months, the balance in 24 months."

Whether the notes and memorandum were made and signed under such circumstances as to make them one transaction and parts of one contract, was a mixed question of law and fact; fact for the jury and law for the court. That is to say, what the circumstances were under which the memorandum was given, whether before or after the notes were signed and delivered, were questions of fact for the jury; and the court erred in attempting to decide them as it did by the ruling complained of. *Thruston* v. *Thornton*, 1 Cush. 89; *Drury* v. *Vannevar*, Id. 276; *Swazey* v. *Allen*, 115 Mass. 594; *Tompson* v. *Fisher*, 123 Mass. 559; *Perkins* v. *Hinsdale*, 97 Mass. 157; *Lasky* v. *C. P. R. R. Co.*, 83 Maine, 470; *Rogers* v. *Rogers*, 139 Mass. 440, and cases cited; *Neal* v. *Flint*, 88 Maine, 83; *Farwell* v. *Tillson*, 76 Maine, 239.

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

WISWELL, J. These two cases were presented together. One is a suit upon two promissory notes, both dated April 15th, 1893, payable respectively in one and two years from their date. The writ is dated April 30th, 1895. The defendant claimed at the trial that, as to the second note, the action was prematurely brought because of the following memorandum written upon a separate piece of paper, and signed by the payee of the notes.

"DIXMONT, MAINE, April 15, 1893.

This is to certify that I consent to receive payments on any of William Klein's notes which I now hold, at any time when he wishes to make a payment. Also that the time of payment of the first five notes may be extended one year each. C. O. HOWE."

It was admitted that the first five notes referred to in the memorandum include the two notes sued. The bill of exceptions contains this statement: "It also appeared in evidence that this memorandum was prepared by the plaintiff's wife and signed the same day with the notes."

The presiding justice ruled that this memorandum did not affect the maturity of the notes referred to, and consequently did not prevent a recovery upon the second note.

We have no question as to the correctness of this ruling. The memorandum, although made upon the same day as the notes, as shown by the dates of each and by the statement in the bill of exceptions, must have been made after the signing and delivery of the notes, because it refers to notes "which I now hold," and, so far as the case shows, there was no consideration whatever for this subsequent agreement made by the payee.

It is unnecessary to inquire as to what its effect would have been if the agreement had been made by the payee prior to the signing or delivery of the notes.

The other exception, which relates to both cases, and is the only one in the other suit, is not urged and need not be discussed. The exceptions, therefore, in both cases must be overruled.

The defendant in this action has recovered a verdict against this plaintiff in a suit growing out of the same transaction. The case came to the law court upon a motion for a new trial, which has been overruled, and judgment will be ordered upon the verdict,— the announcement of the decision being made simultaneously with this. The counsel for the plaintiff in these cases has moved that the judgments, when recovered, both amounting to a less sum than the judgment that will be recovered by this defendant, be set off against the judgment in favor of this defendant, pro tanto. This should be done, but not so as to affect the attorney's lien upon the taxable costs in each case.

As the cases are pending in different counties, the set-off of the judgments is ordered by the law court. The entry, therefore, in each of these cases, will be,

Exceptions overruled. Judgment upon the verdict.

The judgment to be set off pro tanto against a judgment recovered by this defendant against this plaintiff in Penobscot County, and ordered by the law court simultaneously herewith, except as to the taxable costs upon which the plaintiff's attorney has a lien.

JOHN P. WEBBER *vs.* LEWIS F. STRATTON.

Penobscot. Opinion December 18, 1896.

Deeds. Acknowledgment. Evidence. R. S., c. 82, § 110.

When called for, the execution of a deed to a party, as grantee, must be proved.

The certificates of acknowledgment and registration, appearing upon a recorded deed, are not proof of its execution.

ON REPORT.

The facts appear in the opinion.

C. A. Bailey, for plaintiff.

D. F. Davis, F. H. Appleton and H. R. Chaplin, for defendant.

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

EMERY, J. This is an action of trespass for cutting timber on wild land. The plaintiff did not undertake to show any actual possession of the locus, but only such constructive possession as would follow from proof of title in him. Such proof of title, therefore, was essential to his right of action. In support of his claim of title he offered in evidence, among other documents, a paper purporting to be an original deed of conveyance of the locus to himself, regularly signed, sealed and acknowledged before a notary public in the State of New York, and recorded in the proper registry of deeds in this State.

Proof of the execution of this deed was seasonably called for by the defendant, and its admissibility without such proof was objected to. The plaintiff offered no proof whatever of its execution; but it was admitted subject to the defendant's objection and exception.

The question presented by this exception is whether the official certificate of the statute acknowledgment of the deed, appearing upon a recorded deed, dispenses with other proof of its execution

when offered by the grantee therein as evidence of title. Since the certificate is purely a creature of statute it cannot have that effect except by force of some statute provision. In many and probably most of the States, the statutes are held to have that force, but those decisions are based on the peculiar language of those statutes.

We have in Maine no statute providing in terms for such an effect of a certificate of acknowledgement. The statute of conveyances, R. S., c. 73, requires deeds of conveyance to be acknowledged before being recorded in the official registry. The only purpose of this requirement seems to be to protect the registry from misuse. The certificate of acknowledgement is to be evidence to the register, sufficient to admit the deed to registration. There is in this statute no indication of any other purpose in requiring an acknowledgement.

The only statute concerning proof of the execution of deeds, when offered in evidence in court, is R. S., c. 82, § 110, which provides that a party may offer in evidence attested copies of anterior deeds from the registry "without proof of their execution."

Under our system of conveyancing these anterior deeds would not usually be in the possession of the party, and it might often be practically impossible for him to prove their execution. If these deeds possess the requirements for official registration and are registered, then attested copies from the official registry are properly assumed to be copies of duly executed deeds. The original of such an anterior deed bearing the certificate of official registration may also be assumed to have been duly executed. *Knox* v. *Silloway*, 10 Maine, 201.

The statute, however, only applies to anterior deeds, and expressly excludes from its operation the deed to the party himself. Moreover, the legislature seems to have carefully guarded against any inference that without the statute the originals of such deeds, though acknowledged and recorded, would be admissible without proof of execution. Office copies and originals of anterior deeds duly acknowledged and recorded are by the statute made admissible "without proof of execution." The inference would seem to be that acknowledged and recorded deeds to the party,

being without the statute, are not to be admitted without proof of execution.

The necessity of proof of the execution of such deeds, if called for, seems to have been hitherto assumed without question by the courts and the legal profession in this State. The method or sufficiency of the proof has sometimes been considered, but we find no case in which it was suggested that no proof was necessary. *Woodman* v. *Segar*, 25 Maine, 90; *Kent* v. *Weld*, 11 Maine, at page 460; *Dunlap* v. *Glidden*, 31 Maine, 510; *Hutchinson* v. *Chadbourne*, 35 Maine, at page 192; *Bird* v. *Bird*, 40 Maine, 392; *Knox* v. *Silloway*, 10 Maine, 201; *Emery* v. *Legro*, 63 Maine, 357; *Jones* v. *Roberts*, 65 Maine, 273; *Patterson* v. *Snell*, 67 Maine, at page 562; *Elwell* v. *Cunningham*, 74 Maine, 127.

A rule that acknowledgement and registration should be prima facie proof of the execution of a deed might in many cases save expense and trouble, but such a rule does not seem to have been established in this State either by legislation or by judicial custom.

The plaintiff in this case having failed to offer any proof of the execution of his deed, such proof having been called for, has failed to prove his title and hence must be nonsuited. In a new action he will have the opportunity to supply the proof.

Plaintiff nonsuit.

HOWARD F. MASON

vs.

BELFAST HOTEL COMPANY, and TRUSTEE.

Waldo. Opinion December 18, 1896.

Taxes. Trustee Process. R. S., c. 86, §§ 55, 61.

In a collector's suit for taxes a school district tax can be joined with the town, county and state taxes.

Rent payable monthly cannot be attached until the complete expiration of the month.

Rockland v. *Ulmer*, 84 Maine, 503; Id. 87 Maine, 357, affirmed.

ON EXCEPTIONS BY DEFENDANT AND TRUSTEE.

The case appears in the opinion.

R. F. Dunton, for plaintiff.

The words "due" and "due absolutely" as used in the statute, do not have the same signification as the word payable, for R. S., c. 86, § 61, provides that any money or other thing due absolutely to the principal defendant may be attached before it has become payable.

The contingency named in the statute is one which may prevent the principal from having any claim upon the trustee or right to call him to account. *Wilson* v. *Wood*, 24 Maine, 123; *Cutter* v. *Perkins*, 47 Maine, 569; *Ware* v. *Gowen*, 65 Maine, 534; *Dwinel* v. *Stone*, 30 Maine, 384; *Rowell* v. *Felter*, 54 Vt. 524.

Jos. Williamson, for defendant.

It has been held that causes of action for non-payment of taxes, imposed by different political bodies, could not be joined in the same action; nor for taxes imposed for different periods. Several causes of action, when properly joined, must be separately stated, and must all belong to one class, and affect all the parties to the action. 25 Am. & Eng. Ency. Law, 320.

Counsel cited: *City of Davenport* v. *R. R. Co.*, 38 Iowa, 633; *The People* v. *C. P. R. R.*, 83 Cal. 393; *Nevada* v. *Yellow Jack Mining Co.*, 14 Nev. 221.

Trustee not chargeable: Taylor, Land. and Ten. § 391, and cases; *Atkins* v. *Sleeper*, 7 Allen, 487; Daniel on Neg. Inst. § 1210; *Peterson* v. *Loring*, 135 Mass. 397.

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

EMERY, J. I. It is a recognized principle in suits for taxes that mere irregularities in the previous procedure, which do not work any injustice or hardship to the tax payer, and which he did not seek to have corrected on appeal or certiorari, are not a bar to the suit. *Rockland* v. *Ulmer*, 84 Maine, 503; Id. 87 Maine, 357. The only objection urged against the procedure in this case is that

the collector has joined in his declaration the school district tax with the state, county and city taxes. In *Rockland* v. *Ulmer*, 84 Maine, 503, it was held proper to join the state, county and city taxes in the same action. We do not see why the school district tax may not also be joined. It was assessed at the same time, by the same board of assessors, and was committed to the same collector and in the same warrant. The defendant is not under a separate, distinct obligation to each of the political organizations named. The collector is not suing here as the agent of either organization. He is suing as a single public officer to enforce a single public duty upon the defendant, that of paying the entire tax assessed upon him for all the various public purposes stated.

II. The trustees were tenants to the principal defendants under a written lease. The term was three years "from the thirtieth day of December, A. D. 1893." The rent was "sixteen hundred dollars yearly by equal monthly payments," to be paid "on the first day of each and every month in every year during said term. Each and all payments to be made at the Belfast National Bank." The first service of the writ upon the trustees was made on the thirty-first day of May, 1895, between seven and eight o'clock in the forenoon. At that time the May rent had not been paid to the defendant. The second service of the writ upon the trustees was made on the first day of August, 1895, at half-past twelve in the morning. At that time the July rent was unpaid.

Under our statutes money due absolutely from the trustee to the principal defendant may be attached before it has become payable, but to be so attachable it must be due absolutely and not upon any contingency. R. S., c. 86, §§ 55 and 61.

The first service of the writ was in the forenoon of the last day of the month of May. The month of May had not then expired. The liability of the tenants to pay the rent for May had not then become absolute. It was contingent upon their being undisturbed in their possession and holding throughout the remainder of that day and month. They might after the service of the writ, and before the full expiration of the month, have been evicted under a superior title, or by their own landlords. The May rent, therefore,

was not attachable at that time. *Wood* v. *Partridge*, 11 Mass. 488; *Norton* v. *Soule*, 75 Maine, 385.

The second service of the writ was made after the complete expiration of the month of July. The July rent had then been fully earned, and was due absolutely. It was not payable till the close of that day and then only at the Belfast National Bank, but there was no contingency. The duty of payment was sure to come with the natural efflux of time. The July rent was therefore attachable. *Ware* v. *Gowen*, 65 Maine, 534.

Principal defendant's exceptions overruled.
Trustees' exceptions sustained as to the May rent.
Trustees charged as to the July rent only, $133.33 less their legal costs.

HOWARD F. MASON *vs.* BELFAST HOTEL COMPANY.

Waldo. Opinion December 18, 1896.

Taxes. Officer. Oath. Evidence. Stat. 1893, c. 314.

The court adheres to its former decisions that, where forfeitures are not involved, proceedings for the collection of taxes by an action at law, should be construed practically and liberally.

In this case, which was an action of debt to recover a tax, *held;*

1. That the official oath of the custodian of a public record was irregular does not make the record inadmissible in evidence:
2. When the abbreviation "do." in a public record unmistakably stands for a particular word, it may be read as such word:
3. Evidence that a particular person was once chosen treasurer of a private corporation, and has continued to act as such treasurer, is sufficient evidence that he is still treasurer as to third parties:
4. Under the statute of 1893, c. 314, the collector of taxes may take his description of the land taxed from the assessor's books:
5. The requirement of the statute, that suits for county taxes shall be brought in an adjoining county, does not include suits brought by a town collector to recover taxes assessed by the town assessors for state, county and town purposes:
6. The statute is to be liberally interpreted. The court will not assume that the land owner is unwilling that his land should be taxed, and will not regard him as an unwilling party to the tax proceedings.

On Report.

This was an action of debt brought for the recovery of a tax assessed against the defendant corporation, for the year 1894, and to enforce the lien provided by chapter 314 of the statute of 1893.

The tax was committed to the plaintiff for collection, August 4th, 1894, and having given the defendant corporation notice in writing stating the amount of the tax and describing the real estate on which the tax was assessed as required by the act, in July, 1895, prior to the commencement of this action, suit was brought on the 20th day of July, A. D. 1895. The action was brought more than eight months and within one year from the date of the commitment of the tax to the plaintiff, as is required by the act.

Norman Wardwell, for plaintiff.

Jos. Williamson, for defendant.

When requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injurious, they are not directory, but mandatory. They must be followed, or the acts done will be invalid. The power of the officer is limited by the manner and conditions prescribed for its exercise. *French* v. *Edwards*, 13 Wall. 506. The case is not governed by the principles applicable to the milder remedies of suits in the ordinary course of legal procedure, brought by a town or by a collector, but it comes within the strict rule given in *Tucker* v. *Aiken*, 7 N. H. 113, adopted in *Dresden* v. *Goud*, 75 Maine, 301, which expresses "that in order to maintain a title to land sold for taxes, or to justify a distress, every substantial regulation of the law must be shown to have been complied with." It is not simply a remedy for the recovery of money; it involves forfeiture of the whole property described.

Counsel also cited: *Machias* v. *Small*, 77 Maine, 109; *Bowler* v. *Brown*, 84 Maine, 376.

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

EMERY, J. Prior to the statute of 1893, c. 314, authorizing the collector of taxes to enforce by judicial process the tax lien upon the real estate assessed, he assumed the existence of the lien and enforced it summarily and directly by a sale of the real estate, giving the owner no opportunity to question the lien. In such proceedings he was held to great strictness since he was enforcing a forfeiture. Under this statute, however, the collector may proceed less summarily, and give the land owner an opportunity to show cause against the proceedings. This course has been taken in this case and we are to determine before any sale, whether the alleged tax lien really exists.

It is true, as a general proposition, that to establish a statute lien upon property without the consent of the owner, all the provisions of the statute must be fully complied with. But the owner of land under civil government can hardly be considered as refusing his consent to the assessment of any tax upon his land. In becoming the owner he may be considered as consenting to its being lawfully taxed, and made subject to its fair share of the public burdens. He can properly object only to its being overtaxed, or taxed for an unlawful purpose, or by an illegal assessment, or else to some irregularity in the procedure which may do him an injustice. The court will not assume that the land owner desires to avoid all taxation of his land.

In this case the land owner makes the following objections to a tax lien judgment:

I. A witness testified that he was deputy city clerk of Belfast and, as such, then had the custody of the city records. He produced certain books of record which he testified to be the regular records of the city as made up and kept by the city clerk. By these same records the witness appeared to have been appointed and sworn as deputy clerk by the city clerk. The defendant now objects to the records being received as evidence, on the ground that the oath to the deputy could not be administered by the city

clerk. This is immaterial. The witness was acting as deputy clerk and as such had and produced the city records. These records were not invalidated by any irregularity in the official oath of their custodian.

II. The qualification of one assessor was not questioned. The record of the oaths of the other two assessors for 1894 was as follows: "Personally appeared on the day set against their names, the following persons who have been elected to the offices set against their names, (and took their oath of office.)

Charles Baker. Assessor. March 20th.

Simon A. Payson. do. March 24th."

The defendant insists that this record is fatally incomplete as to Payson and cites *Bowen* v. *Brown*, 84 Maine, 376. That was a case of forfeiture and there was in the record a hiatus which made it uncertain to what the "do" referred. Here there is no hiatus and the "do" unmistakably stands for "Assessor." *Opinion of Justice*, 70 Maine, 567.

III. The preliminary notice was served upon one Calvin Hervey as treasurer of the defendant company. It is contended that there is no evidence that Hervey was then the treasurer of the company. There is evidence, however, that Hervey was made treasurer of the company at its organization, and has acted as such treasurer up to the date of the writ. In the absence of any evidence to the contrary, it may be assumed that his official relation continued.

IV. The collector's warrant and lists did not contain a description of the real estate, and the collector in making up the notice to the defendant copied into it the description on the assessors' book. We find in the statute nothing limiting the collector to his warrant as a source of information. To what better source could he resort than the records of the assessment itself?

V. The declaration included the defendant's "proportion of the city tax, and the due proportion of the state and county taxes

allotted to said city." The statute provides that, when the action is brought to collect a county tax, it shall be brought in the county adjoining that in which the land lies. This provision is evidently intended to apply a county tax assessed directly upon the land by some state or county tribunal, as in the case of lands in plantations or unincorporated places. In such case the county has a direct, special interest in subjecting the land to the tax lien, as otherwise it might entirely lose the tax. But where, as in this case, the county has merely allotted a certain proportion of the county tax to an incorporated town, it has laid no tax on any particular land in that town, and is not concerned in its assessment or collection. This tax was assessed on this land by the assessors of Belfast, and is to be enforced by Belfast or its collector. The county has no voice nor interest in the assessment or collection of this defendant's share of any of the taxes assessed by the city assessors. Hence the collector of Belfast is not required to bring the action out of the county.

Judgment for the plaintiff, against the defendant and against the land described in the writ.

MARY C. LAFONTAIN *vs.* JOHN W. HAYHURST.

Kennebec. Opinion December 18, 1896.

Assumpsit. Contract of Marriage.

Services rendered in expectation of marriage with the party served and without any expectation of other remuneration will not sustain an action of assumpsit, even though the party served refuses the expected marriage. The remedy, if any, is an action for the breach of the contract to marry, and the offering in evidence the services as elements of damage.

ON EXCEPTIONS BY PLAINTIFF.

This was an action of assumpsit on an account annexed for board of defendant and family, washing, mending, clothing and labor for five years, amounting to one thousand dollars. The plaintiff testified that, for a period of about four months, the

defendant and his four children lived at her house, during which time she entirely carried on the house, furnished the table, etc., and that after said period, on various occasions, he stayed at her house through a period of several years, from Saturday until Monday and upon holidays; that she furnished more or less clothing for the defendant and his family, did their washing and rendered other services; that she also let him have various sums of money. The action was to recover for this board and for these services and for clothing and other things furnished. She testified that during all of this time she and defendant were engaged to be married, and it was admitted that on the 24th day of December, 1895, the defendant did marry another woman. Upon cross-examination and upon interrogatories by the court she testified as follows:

By Mr. Brown: And as I understand you, all these acts of kindness to him, and all these acts of letting him have money, and all that you did for him and his children by way of board and care and clothing, and everything of the kind, you let him have because you were going to marry him?

Ans. Yes, sir.

Ques. You didn't intend to charge him for it?

Ans. No, sir.

Ques. Never expected pay only that you were to be married?

Ans. I thought I was going to be married.

Ques. And that was the ground on which you let him have it?

Ans. Yes, sir.

Ques. And all these acts were of that character, all these acts you did?

Ans. Well, I guess it is.

By the Court: You say that during the four months before you went to Manchester, while the defendant and the four children were living with you, you didn't expect he would pay you any board for it?

Ans. No; the bargain was for him to come and live to the house and we should be married, and I took care of the children.

The Court: And all the services you rendered him during his

sickness and in performing washing for him, etc., you did without any expectation of pay?

Ans. No, without being married.

The Court: That is the only thing you expected?

Ans. Yes, sir.

The Court: And that was so in regard to every item you have sued for, is it?

Ans. Yes, sir.

The Court: All of your services and board and clothing?

Ans. Yes, sir.

She subsequently said that this statement in regard to the money furnished by her to him was a mistake, and that this money was loaned under an expectation of payment. The court ruled that in regard to the board, washing and all services rendered and clothing furnished by the plaintiff to the defendant for himself or his family without any charge or expectation of payment, she could not recover; that so far as those services and board and articles furnished were concerned, the law implied no promise upon the part of the defendant to pay therefor, if they were rendered and furnished without any expectation of payment other than her marriage to the defendant.

To this ruling of the presiding justice, the plaintiff took exceptions.

E. F. Webb and L. T. Carleton, for plaintiff.

When one person performs services for the benefit, and with the knowledge and tacit consent of another, that the law implies a promise to pay a reasonable compensation for them, is, of course, a well established doctrine. *Weston* v. *Davis*, 24 Maine, 374; *Abbot* v. *Hermon*, 7 Maine, 118.

Whenever one person furnishes anything valuable to another, not being under legal obligations to do so, generally the presumption or implication is, that the thing furnished is to be paid for. The relationship of the parties is an element of importance in determining whether the services were gratuitous or not. *Godfrey* v. *Haynes*, 74 Maine, p. 96.

Counsel also cited: *Cook* v. *Bates*, 88 Maine, 455.

S. S. Brown, for defendant.

Counsel cited: *Holmes* v. *Waldron*, 85 Maine, 312; *Withee* v. *Brooks*, 65 Maine, 14; *Shepherd* v. *Young*, 8 Gray, 152.

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

EMERY, J. No binding promise to make compensation can be implied or inferred in favor of one party against another, unless the one party, the party furnishing the consideration, then expected and from the language or conduct of the other party under the circumstances had reason to expect such compensation from the other party.

In this case the plaintiff alleged a promise to make her compensation in money for the various services she rendered to the defendant. She testified, however, that she did not at the time expect any compensation in money or money's worth,—that she was engaged to be married to the defendant and rendered the various services to him solely in consequence of that relation and of that expectation of marriage. The defendant afterward married another woman, and the plaintiff now claims that the defendant, having repudiated the promise of marriage, must now be held to have promised a money compensation for her services. She cites the case of *Cook* v. *Bates*, 88 Maine, 455.

In *Cook* v. *Bates*, the plaintiff furnished board to the defendant without expecting money payment, but with the expectation that it would offset the labor furnished by the defendant to her for the same time. The defendant sued for his labor, and obtained judgment by default through some mistake. Thereupon the plaintiff sued for the board, and it was held that a promise to pay for the board could be inferred. The plaintiff expected compensation not in money, but in money's worth, in the defendant's labor. The defendant, in suing for his labor, indicated an intention to pay for the board in money, and the plaintiff accepted this election. The defendant could not then be heard to say that his labor was to pay for the board.

Marriage or a promise of marriage may be a good consideration for a conveyance or a contract when it appears that the conveyance or contract was made in consideration of the marriage or promise of marriage. In the case at bar, however, the plaintiff's services were not rendered as a consideration for the defendant's promise of marriage. That promise had been made before the rendering of the services, and upon another and different consideration,—the promise of the plaintiff to marry the defendant.

The only contract between them was the mutual promise to marry. If the defendant has broken that contract, her remedy is by an action upon that contract for that breach. The services sued for here were no part of that contract but merely incidents or consequences of it. The plaintiff expected no pay for them. Her expectation was confined to the promised marriage. With that she would have been satisfied. With damages for its loss she must be satisfied.

Exceptions overruled.

BELLE P. REMICK *vs.* GEORGE H. WENTWORTH.

York. Opinion December 18, 1896.

Officer. False Return. Attachment.

The false return of a levy or sale upon execution by an officer makes him liable to an attaching creditor who has thereby lost his attachment.

ON EXCEPTIONS BY PLAINTIFF.

This was an action on the case against an officer for making a false return. The case was heard in the court below upon a demurrer to the declaration and which was sustained. To this ruling the plaintiff excepted.

The case appears in the opinion.

Geo. F. and Leroy Haley, for plaintiff.

B. F. Hamilton, B. F. Cleaves and M. A. Drew, for defendant.

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

HASKELL, J. This is an action on the case against an officer for false return. The declaration, stripped of verbiage, states that the plaintiff had a valid attachment on certain land June 11, 1894; that defendant thereafterwards, while such attachment was in full force, falsely returned upon an execution in favor of a stranger, but against the same debtor, a seizure and regular sale of the debtor's interest in the same land, under a prior attachment of February 20, 1893, whereby the plaintiff lost his attachment and the satisfaction of his debt.

The plaintiff has stated a cause of action. If the officer falsely returned a levy upon the land under an attachment prior to the plaintiff's, and thereby defeated her attachment, she certainly should have damages suffered by the effect of the false return.

The general rule is that an officer's return is conclusive on the parties and their privies. *True* v. *Emery*, 67 Maine, 28, and cases cited. One exception is, that the return of an attachment in the registry of deeds may be used to contradict the return of the same officer on the writ, because the return in the registry is a primary act of the officer, an original record, that should control the certificate of the officer, as to itself, made on the writ. It is not a contradiction of the officer's return by parol evidence. *Dutton* v. *Simmons*, 65 Maine, 583.

Here the officer is charged with falsely returning that he had given statute notices of sale on execution, thereby passing title to the land levied upon from the debtor, and his return is conclusive evidence that he did so. *True* v. *Emery*, supra, is directly in point. So is *Whitaker* v. *Sumner*, 7 Pick. 551; and *Sykes* v. *Keating*, 118 Mass. 517.

It follows, therefore, that, if the plaintiff cannot contradict the officer's return in an action to establish her title to the land, she would be remediless, unless she may have her remedy against the officer whose falsehood caused the mischief.

Exceptions sustained.

CHARLES H. MILLIKEN *vs.* CHARLES W. WALDRON.

Androscoggin. Opinion December 19, 1896.

Pleading. Declaration. Time. Delivery. Price.

A special demurrer was filed in an action of assumpsit upon the following account annexed: "Mechanic Falls, Me., Nov. 15, 1895. To balance due on agreed price of letters patent and patent sales book-case $420. Amount of price $500. Credit by cash $35, and cash $45."

Held; that the declaration alleges a date upon which the contract in suit was made, and states a gross price for the two articles sold.

Also; that delivery and acceptance of the articles sold need not be alleged, for it is the agreed price of them that is sued for; and it may be that the articles were not to be delivered until the price was paid.

Also; that the articles are named as those for which a fixed price was agreed upon; and need not be further described or identified, since the agreement for their price gives the defendant sufficient notice of their identity.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

Geo. C. Wing, for plaintiff.

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

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

HASKELL, J. Assumpsit upon the following account annexed: "Mechanic Falls, Me., Nov. 15, 1895. To balance due on agreed price of letters patent and patent sales book-case $420. Amount of price $500. Credit by cash $35, and by cash $45." Exception is taken to the overruling of a special demurrer to the same, for three causes in substance.

I. Because the time when the contract was made is not alleged. But it is alleged, Nov. 15, 1895, when two sums of money owing from defendant were applied to the contract price then made.

II. Because two articles are named and the price of each is not stated. Perhaps there was no price for each. Both may have been sold for a gross sum.

III. Because the articles sold are not identified, and no delivery or acceptance is alleged. Delivery and acceptance need not be alleged, for it is an agreed price that is sued for, not articles sold and delivered. May be the articles were not to be delivered until the price should have been paid. The articles are named and identified as those for which defendant agreed to pay a fixed sum. If he did not agree to pay that sum he is not liable for it. If he did agree to pay it, he knows very well what the particular articles were. The suit is to recover an agreed price for chattels, not for the sale and delivery of chattels.

Exceptions overruled.

LEWISTON *vs.* JOHN E. GAGNE, and others.

Androscoggin. Opinion December 19, 1896.

Official Bond. Alteration. Surety. Release. Mistake.

One who signs an official bond at the request of the principal, thereby, *qua* the obligee, gives him implied authority to procure additional sureties to make the bond satisfactory to the obligee, and it makes no difference when the additional sureties are obtained; and any representations by the principal to a surety that certain other persons are also to sign as sureties who do not, will not release such surety.

When a surety has once signed an official bond, and the bond has been accepted by the obligee, nothing short of information to him of such a character that, in the exercise of prudence would require a withholding of official duties from the principal, can release the surety.

Notice by sureties of their claim to be relieved from an official bond by reason of the principal having procured an additional surety, will not have any effect after the approval of the bond.

When all parties agree, in a case submitted on report, that a mutual mistake exists in the condition of the bond in suit, it may be corrected in equity before damages shall be assessed.

ON REPORT.

The case is stated in the opinion.

F. L. Noble and R. W. Crockett, for plaintiff.

J. W. Mitchell, W. H. Newell and W. B. Skelton; D. J. McGillicuddy; *W. H. White and S. M. Carter*; *J. G. Chabot, A. R. Savage and H. W. Oakes*, for defendants.

Counsel cited: *Smith* v. *United States*, 2 Wall. 219; *Miller* v. *Stewart*, 9 Wheat. 681; *Woodworth* v. *Bank*, 19 Johnson, 391, (10 Am. Dec. 267, note;) *Chadwick* v. *Eastman*, 53 Maine, 12; *Hewins* v. *Cargill*, 67 Maine, 554; *Waterman* v. *Vose*, 43 Maine, 504; *Lee* v. *Starbird*, 55 Maine, 491; *Croswell* v. *Labree*, 81 Maine, 44; *Dover* v. *Robinson*, 64 Maine, 183; *Doane* v. *Eldridge*, 16 Gray, 254; *Miller* v. *Finley*, 26 Mich. 249, (12 Am. Rep. 306); *Mersman* v. *Werges*, 112 U. S. 139; *Barrett* v. *Thorndike*, 1 Maine, 73; *Pigot's case*, 11 Co. 27; *Markham* v. *Gonaston*, Cro. El., 626; 1 Shep. Abridg. 541; Shep. Touchstone, 69; *O'Neale* v. *Long*, 4 Cranch, 60; *Lewis* v. *Payn*, 8 Cow. 71; *Vanauken* v. *Hornbeck*, 2 Green, (N. J. Law,) 178; *Brackett* v. *Mountfort*, 11 Maine, 115; *Farmer* v. *Rand*, 14 Maine, 225; *Sheridan* v. *Carpenter*, 61 Maine, 83; *Aldrich* v. *Smith*, 37 Mich. 468; *Hamilton* v. *Hooper*, 46 Iowa, 515, (26 Am. Rep. 161); *Wallace* v. *Jewett*, 21 Ohio St. 163; *Smith* v. *Weld*, 2 Pa. St. 54; *Fairhaven* v. *Cowgill*, 8 Wash. 686; *Gardner* v. *Walsh*, 5 E. & B. 83, overruling *Cotton* v. *Simpson*, 8 A. & E. 136; *Booth* v. *Powers*, 56 N. Y. 30; *Montgomery* v. *Crosthwait*, 90 Ala. 553; *Singleton* v. *McQuerry*, 85 Ky. 41; *Honck* v. *Graham*, (Ind.) 3 West, 670; *Robinson* v. *Berryman*, (Mo. App.) 3 West, 905; *State* v. *McGonigle*, 101 Mo. App. 353, (20 Am. Rep. 609); *Anderson* v. *Bellenger*, 87 Ala. 334, (13 Am. St. Rep. 46); *Hewey* v. *Coates*, 17 Ind. 161; *Bowers* v. *Briggs*, 90 Ind. 139; *Browser* v. *Rendall*, 31 Ind. 178; *Crandall* v. *Bank*, 61 Ind. 349; *McVean* v. *Scott*, 56 Barb. 379; *Reese* v. *U. S.* 9 Wall. 13; *Dolbier* v. *Norton*, 17 Maine, 307; *McCoughey* v. *Smith*, 27 N. Y. 39; *Shipp* v. *Suggett*, 9 B. Monroe, 5; *Hall* v. *McHenry*, 19 Iowa, 521; *Dickerman* v. *Miner*, 43 Iowa, 508; *Sullivan* v. *Radsil*, 63 Iowa, 158; *Martin* v. *Thomas*, 24 How. 315, 317; *Sharp* v. *U. S.* (28 Am. Dec. 676, note); *King* v. *Smith*, 2 Leigh, 157; *Fertig* v. *Bucher*, 3 Pa. St. 308; *Howe* v. *Peabody*, 2 Gray, 556; *Franklin Bank* v. *Stevens*, 39 Maine, 532, 539; *Bryant* v. *Crosby*, 36 Maine, 562, 571; *Rutledge* v. *Town-*

send, 88 Ala. 706; 1 Greenl. Ev. 565; 1 Am. and Eng. Enc. 506; 2 Daniel, Neg. Inst. 350; 3 Randolph, Com. Paper, 859; 2 Pars. Notes and Bills, 539; Brandt, Surety, 9.

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

HASKELL, J. Debt upon the bond of a collector of taxes. The declaration calls for the penal sum of the bond as damages without suggesting that any condition whatever is contained in the bond. The action is against the principal and five sureties. The first four sureties plead non est factum. Under this plea they assert an assurance by the principal, at the time they signed the bond, that certain persons were to become sureties who did not do so. Failure to procure those persons as sureties could not affect the liability of the four sureties who did sign. They may have been deceived by their principal, but the obligee is innocent of the deception and should not be affected thereby, otherwise it could not safely accept an apparently good bond when presented for approval. *State* v. *Peck*, 53 Maine, 284.

By brief statement the four sureties also say, that they signed the bond "on or about the second day of June, 1893," and that it was on that day "approved and accepted" and "placed in the files of the papers of the City of Lewiston," the obligee. This statement makes it the valid bond of the principal and these four sureties. These sureties further plead that thereafterward the obligee procured the fifth surety, thereby altering the bond in a material particular and destroying its validity. The evidence does not fully support these averments. The record of the meeting of the board of mayor and aldermen, June 2, reads: "Bond of J. E. Gagne accepted and approved." . . . "Voted to adjourn to June 14, at 7.30 P. M." At that meeting: "The matter of requiring extra bonds of the tax collector referred to Messrs. Barker and Provost." In pursuance of this vote it is to be inferred that the collector was called upon to furnish another surety, for that surety testifies:

Q. "How came you to sign the bond?

A. "Gagne asked me if I was going to sign the bond. I told him I would see who was on, and see what I would do. The next morning he came to me, and said will you sign the bond? I said I will see; he said the bond is down to Reny's. I said I will go down and see; he says, Provost and Auger are going to sign the bond. I said, Provost is going to be on there? He says, yes; and Auger? he says, yes. I went down there and went to the store. L'Heureux and I had some conversation together; then he presented the bond; L'Heureux says, will you sign the bond? I said, I don't think I will; he says, why? Said I, I want a few more names on. He says, Provost is going to sign. After he told me that Provost was going to sign, well, says I, if Provost signs, I will sign. I did sign it.

Q. "You declined to sign until you were assured by Mr. L'Heureux that Mr. Provost was going to sign?

A. "Yes, sir.

Q. "Was that the inducement that made you sign the bond?

A. "Yes, sir.

Q. "His assurance?

A. "Yes, sir."

From this evidence it appears that the collector applied to the surety to sign his bond and assured him that certain other persons were also to sign who did not, and told him that the bond was at Reny's store, and the surety said he would go down and see. One of the aldermen, other than those to whom the matter had been referred, produced the bond and after assuring him that the other persons named by the collector were going to sign, and upon the strength of that assurance he signed it. This representation originally was made by the collector, and as the bond could not properly be intrusted to strangers, the aldermen who had the matter in charge for the city undoubtedly intrusted it to one of their associates as the collector's friend to enable him to procure the additional surety. To compass this result, the bond was produced by the alderman to whom it had been loaned, not as an agent of the city, but as a friend of the collector; and any repre-

sentations of the collector repeated by this alderman were in no sense representations of the city. They were representations of the collector only, and therefore the fact pleaded, that the city procured the fifth surety, is not proved; so that the question is, whether the procurement of an additional surety by the collector himself releases the four sureties who had already signed the bond.

One who signs an official bond as surety, at the request of the principal, thereby, *qua* the obligee, gives him implied authority to procure additional sureties to make the bond satisfactory to the obligee. That is the only practical way to procure an official bond, and it makes no difference when the additional sureties are obtained. If the bond be approved by the obligee, and before the principal enters upon the duties of his office, at the request of the obligee, the principal procures additional sureties, the act comes within the implied authority given when the existing sureties executed the bond on their part. The proceedings would be wholly for their benefit, and not change the obligation between the obligor and obligee in the slightest particular, and upon no principle of law can it be said to destroy the bond. The defense of the four sureties, that a fifth had been added after the bond had once been approved and before the principal entered upon the duties of his office, must fail. Nor, after the approval of the bond and before the commitment of taxes, can notice by these sureties of their claim to be relieved by reason of procuring a fifth surety have any effect. They had become legally bound for the official conduct of the collector. Nothing short of information that would require the city government, in the exercise of proper prudence, to withhold the commitment of taxes from the collector could relieve them from liability on their bond. It is not pretended that any such information was furnished, nor that any facts existed that would warrant such action by the city. This defense therefore must fail.

The fifth surety defends upon the ground of being induced to sign by reason of the assurance that certain other persons were also to sign. As before shown, this defense cannot prevail, inasmuch as it was not the inducement of the obligee.

All the sureties plead that the bond contained a condition for

the faithful performance of official duty for the municipal year "ensuing the month of March, 1894," and that the principal has performed the same. All the parties agree that the bond was intended for the municipal year "ensuing" the month of March, 1893, and supposed that it was so conditioned. It is a clear case of mutual mistake which equity corrects. This case is on report with a stipulation that, if damages are recoverable, they may be assessed below as upon motion to chancer the penalty of the bond.

We are satisfied that the bond is the valid deed of all the defendants and that the plaintiff should recover damages. To this end a default should be entered, in order that, on process in equity, the bond may be corrected, unless the parties may so agree, after which appropriate damages may be assessed.

Defendants defaulted.
Damages to be assessed below.

STATE *vs.* JONATHAN DARLING.

Penobscot. Opinion December 24, 1896.

Pleading. Indictment. Officer. Stat. 1891, c. 75.

Irregular and improper conduct on the part of a public officer, when made the subject of a criminal charge of violating his duty in neglecting to arrest parties for an infringement of the law, must be directly alleged and proved.

ON EXCEPTIONS BY DEFENDANT.

This was a complaint which was instituted in the Bangor Municipal Court by Benjamin Atwood of Winterport, on the 18th day of November, A. D. 1895, in which the said Atwood complains that "Jonathan Darling of Lowell, in the County of Penobscot, laborer, on the fifteenth day of January, A. D. 1894, with force and arms, at Lowell aforesaid in the county aforesaid, then and there being a fish and game warden in and for the State of Maine, and by law then and there required to enforce all laws relating to game and the fisheries, arrest all violators thereof, and prosecute

all offenses against the same, did then and there with knowledge that W. H. Lewis, Edward Jackman, James Lewis and Pearl Young were violaters of the law relating to the manner of fishing to wit, Chapter seventy-five of the Public laws of Maine, approved March 19th, A. D. 1891, corruptly and with improper motives, neglect and refuse to arrest said W. H. Lewis, Edward Jackman, James Lewis and Pearl Young, or either of them, or prosecute either of them, the said W. H. Lewis, Edward Jackman, James Lewis and Pearl Young, being then and there liable to prosecution for such violation, against the peace and dignity of said State."

Upon this complaint Darling was arraigned, pleaded not guilty, and waived an examination; whereupon, it was adjudged by the court that he was guilty in manner and form as alleged in said complaint, and it was thereupon considered and ordered by the said court that the said Jonathan Darling for the offense aforesaid be imprisoned in the county jail for the space of three months, and that he pay the costs of prosecution taxed at $13.67, and that he stand committed until said sentence be performed. From this judgment and sentence Darling appealed to this court, sitting below on the first Tuesday of February, A. D. 1896. And at said February term the respondent was before the said court upon the complaint aforesaid and filed a special demurrer by consent thereto, and the demurrer was overruled pro forma by the presiding justice. It was also stipulated that if the exceptions be overruled by the law court, the case was to come back for trial upon the merits.

(Demurrer.) "And the said Jonathan Darling in his own proper person comes into court here and having heard the complaint read, says that the said complaint and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he the said Jonathan Darling is not bound by the law of the land to answer the same, for the following reasons:

"First—For that the said complaint does not directly aver that said W. H. Lewis, Edward Jackman, James Lewis and Pearl Young, or either of them, had been guilty of violating any law. . . .

"Third—For that said complaint does not show what particular provision or provisions of chapter seventy-five of the Public Laws of 1891, if any, have been violated by said Lewis, Jackman, Lewis and Young or either of them, or whether they had been guilty of one or many violations of said chapter.

"Fourth—For that the said complaint does not show when said supposed offense or offenses against the law as relating to fishing were committed, or in what place, or in what county even, or in what county, or counties, the alleged offenders might have been tried or prosecuted.

"Fifth—For that the complaint does not show what act, acts or things, if any, the said Lewis, Jackman, Lewis and Young, or either of them, had done in violation of the law relating to fish or fishing.

"Sixth—For that the complaint does not show where said Lewis, Jackman, Lewis and Young lived, or were, or could be found, to be arrested or prosecuted.

"Seventh—For that the complaint does not show by any proper averments that the said Lewis, Jackman, Lewis and Young, or either of them, have at any time been where the respondent could have arrested them, or caused their arrest, since he is alleged to have had knowledge of their said supposed offense; nor does the complaint show that they, or either of them, have at any time since then been within reach of process from any court in this state, nor does it show that they, or either of them, have since then been within the limits of the state. . . .

"Ninth—For that said complaint does not give the respondent any sufficient information so that he can intelligently prepare to defend himself against it. . . .

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

C. J. Hutchings and M. S. Clifford, for defendant.

Counsel cited: 19 Am. and Eng. Enc. Law, p. 562; *Com.* v. *Dean*, 109 Mass. p. 352; 10 Am. and Eng. Enc. Law, p. 566; *Phipps* v. *State*, 22 Md. 380; *State* v. *Seay*, 3 Stewart, p. 71,

S. C. 20 Am. Dec. p. 123; *State* v. *Learned*, 47 Maine, pp. 433-4; *State* v. *Thurstin*, 35 Maine, 206.

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

FOSTER, J. The only question presented is in relation to the validity of the complaint upon which the respondent, as a fish and game warden, is charged with neglect in the performance of his official duty.

In the appellate court a special demurrer, by consent of counsel, was duly filed, and overruled, and the question is presented on exceptions.

The complaint cannot be sustained. While it alleges a violation of official duty in neglecting to arrest certain parties as violators of the law in relation to fishing, there is no specific averment in the complaint that these parties were violators of any law of this state, nor are any facts set forth showing that they had, by such acts, violated any law.

While it may not be necessary to set out specifically all the allegations necessary to constitute the offense, as in case the parties themselves were being prosecuted for the alleged offense (*State* v. *Miles*, ante, p. 142), yet in this case, where the officer is charged with violating his duty in neglecting to arrest parties for violating the law, there should be a specific averment that the parties, or some one of them, were guilty of a violation of the law.

Irregular or improper conduct on the part of a public officer, when made the subject of a criminal charge, must be directly alleged and proved. It should not be left to inference. The charge must be laid positively and not inferentially. This is the well-settled doctrine of criminal pleading as laid down in many decided cases. "In all matters of criminal pleading, the want of a direct and positive allegation in the description of the substance, nature or manner of the offense, cannot be supplied by any intendment, argument or implication whatever." *State v. Bushey*, 84 Maine, 459, 461; *State* v. *Paul*, 69 Maine, 215.

The allegation of knowledge on the part of the officer that the parties were violators of the law is not distinctly or affirmatively alleged. Nor is the allegation in the complaint—"with knowledge that" they "were violators of the law,"—sufficient to meet the requirement of direct and positive averment necessary in criminal pleading.

There are several other objections urged against the validity of the complaint, but it becomes unnecessary to consider them.

Exceptions sustained.
Complaint adjudged bad.

JOHN P. WEBBER *vs.* HENRY H. PROCTOR, and another.

Aroostook. Opinion December 24, 1896.

Deeds. Trees. Sales.

When a grantor in a deed conveys hemlock bark and trees upon a certain tract of land "with the right to enter upon said lot of land at any and all times during the term of ten years to cut any trees and make necessary roads to remove said bark and trees during said term without being liable for trespass," there is not an absolute sale of all the bark and trees upon the land, but only so much as the vendee may cut and remove within the term mentioned.

Pease v. *Gibson*, 6 Maine, 81; and *Howard* v. *Lincoln*, 13 Maine, 122, affirmed.

ON REPORT.

The case is stated in the opinion.

C. P. Stetson and H. L. Mitchell, for plaintiff.

By the deed plaintiff had an estate of inheritance in the land. *Clap* v. *Draper*, 4 Mass. 266; *White* v. *Foster*, 102 Mass. 378.

The deed gave to plaintiff full title to the hemlock bark on the land; and the provision, that he shall have the right to enter during the term of ten years, does not deprive him or take away his title to the trees and bark.

The deed conveys a fee and this cannot be controlled by the subsequent clause in the deed, giving the right to enter for the

term of ten years without being liable for trespass. *Maker* v. *Lazell*, 83 Maine, p. 566.

Where the terms of description are uncertain, they shall be construed most favorably for the grantee. *Esty* v. *Baker*, 50 Maine, 331.

If there are two clauses in a deed which are so repugnant so as not to stand together, the first is held to prevail over the last.

The case of *Pease* v. *Gibson*, 6 Maine, 81, differs from the case at bar, because in that case the defendant did not offer any proof of title to the premises, but only a license to enter and cut timber within two years from date. There is the same distinction in subsequent Maine cases and cases cited by defendant's counsel.

F. A. & D. A. Powers, *D. Lewis*, for defendant.

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

FOSTER, J. Action of trover to recover the value of one hundred and twenty cords of hemlock bark. The plaintiff claims title to the same under a warranty deed from Lucien B. Grout and wife to him, dated July 19th, 1881, conveying "all the hemlock bark and one-half of the hemlock logs on the following described land situated in Sherman aforesaid, to wit: Lot numbered seventy-two containing one hundred four and 28-100 acres, more or less, with the right to enter upon said lot of land at any and all times during the term of ten years to cut any trees and make necessary roads, to remove said hemlock bark and hemlock trees or logs from the land during the term aforesaid without being liable for trespass.

"Also all the hemlock bark of every description on the following described land situated in said Sherman aforesaid, to wit: Lot numbered one hundred and thirty-nine, excepting land owned by A. T. Robinson in said lot, meaning all the hemlock bark on land conveyed to Lucien B. Grout by Joseph H. Dolley, May 14th, 1878, containing seventy-five acres more or less, with the right to enter upon said land at any and all times during the term of five

years from March 30, 1882; to cut any trees and make necessary roads to remove said hemlock bark from the land without being liable for trespass during term aforesaid. Reserving the right to peel and yard the hemlock bark on such land as we wish to clear for farming purposes for said Webber, for which the said Webber is to pay two dollars per cord tannery survey for so peeling and yarding said bark into the clearing where we can protect it from fires from the choppings, all the work being done in a workmanlike manner,"—habendum to him, his heirs, and assigns forever.

The time limit in the deed expired long before the summer of 1894, at which time the bark in question was cut and removed by parties under whom the defendants claim by purchase, and who had all the rights of the grantors in the bark, logs and land which the grantors had subsequent to their deed to the plaintiff.

Whatever rights the plaintiff might have had in bark peeled, or timber cut, prior to the expiration of the time mentioned in the deed, but not removed from the land, as in *Plummer* v. *Prescott*, 43 N. H. 277, it is unnecessary to consider, as no such facts appear in the case.

The plaintiff's claim is that the property in the bark and logs still remains in him, notwithstanding the expiration of the five and ten years mentioned in the deed; and that he can maintain trover for their conversion; or enter and remove the same, although liable in trespass for damages in so doing.

The question to be determined is one of title, and the rights of the parties, therefore, must depend upon the construction to be given to the deed under which the plaintiff claims.

Such a construction as is contended for by the plaintiff, that it was an absolute sale of all the bark and one-half the logs upon the land, and not merely such as might be peeled, cut and taken off within the periods mentioned, would be to disregard the true intent and meaning of the parties as evidenced by the language of the deed. We do not think the plaintiff had any title or interest in the bark or logs which remained unappropriated after the respective limits of five and ten years. The plaintiff had been granted all the hemlock bark, and one-half the hemlock logs on

one lot, and all the hemlock bark on another. If this grant had stopped here, and these periods of time had not been inserted in the deed, there could be no question that, as incident to the grant, there would have passed the right to enter and cut trees and make roads necessary to remove the bark and logs. Why, then, were these clauses inserted, not only in reference to time, but also authorizing the grantee, "to cut any trees and make necessary roads to remove said hemlock bark and hemlock trees or logs from the land during the term aforesaid without being liable for trespass?" They were inserted for some purpose. The most satisfactory conclusion is, that they were designed to limit the grant to so much only as should be taken off within the respective periods, and that no more than that was granted. It is only by such a construction that we can give full scope to the obvious intention of the parties as expressed by the instrument of conveyance, and at the same time relieve it of irrational consequences. The parties could not have intended to subject the grantee to actions of trespass in removing his own property from the premises, after five and ten years respectively, every time he and his assigns, or their agents or servants, entered upon the land to peel and remove the bark and logs. Under such a construction an action of trespass could be brought and maintained every day in the year that an entry was made upon the land subsequent to the periods mentioned, and such multiplicity of actions would render the right of comparatively little value to the grantee. It is difficult to conceive that two parties should make a contract which, in effect, would give to one the ownership in hemlock bark and timber trees after a certain time, but which he could not cut, peel, or remove after that time without being a trespasser. The court will be slow to give such a construction to an instrument as will tend to a multiplicity of law suits, as it is not to be presumed that such was the intention of the parties.

The construction which we have given to this deed is sustained by numerous authorities. The case of *Pease* v. *Gibson*, 6 Maine, 81, is an early and leading case in this State upon this subject. In that case there was a sale under seal of all pine trees fit for mill

logs on certain land, the vendee to have two years from date to take off said timber. It was contended that there was an absolute sale of all the timber on the land, and not merely of such as the vendee should get off during the two years, and that the limitation to that term of time was only an indication of the period within which he might enter and carry away timber without the payment of damages. But the court held that it was a sale of only so much of the timber as the vendee should cut and remove within the two years. The court say: "To admit the construction given by the defendant's counsel, and consider such a permission as a sale of the trees, to be cut and carried away at the good pleasure of the purchaser, and without any reference to the limitation, in point of time, specified in the permit, would be highly injurious in its consequences. It would deprive the owner of the land of the privilege of cultivating it and rendering it productive, thus occasioning public inconvenience and injury; and, in fact, it would amount to an indefinite permission. The purchaser, on this principle, might, by gradually cutting the trees and clearing them away, make room for a succeeding growth, and before he would have removed the trees standing on the land at the time of receiving such a license, others would grow to a sufficient size to be useful and valuable, and thus the owner of the land would be completely deprived of all use of it. Principles leading to such consequences as we have mentioned, cannot receive the sanction of this court."

This case was followed and approved in *Howard* v. *Lincoln*, 13 Maine, 122, which was a sale of pine timber on a certain tract, the vendee "to have the term of three years from the date hereof, to haul said timber," and the court held that it was a sale of only so much of the timber as the vendee might get off within the time limited.

Pease v. *Gibson* was also cited and approved by the court in *Davis* v. *Emery*, 61 Maine, 141, and must be regarded as the settled law of this State.

To the same effect are the cases of *Reed* v. *Merrifield*, 10 Met. 155; *White* v. *Foster*, 102 Mass. 375; *Putney* v. *Day*, 6 N. H.

430; *Judevine* v. *Goodrich*, 35 Vt. 19; *Kelham* v. *McKinstry*, 69 N. Y. 264, and *McIntire* v. *Barnard*, 1 Sand. Ch. 52.

The case last cited is very similar to the case at bar, and was decided upon the authority of *Pease* v. *Gibson*, and *Howard* v. *Lincoln*, supra. In that case there was a grant of all the pine timber standing and lying on a certain tract of land, with habendum to the grantee, his heirs and assigns forever, "together with the right of entering upon the land until January 1, 1841, to cut and remove the said timber." It was held that the grantee had no right or interest in the standing pine timber after that date, and must account for all cut and removed thereafter, and an injunction was granted against further cutting.

Upon the construction which we think should be given to the deed in this case, the entry must be,

Judgment for defendants.

JAMES S. CONDON, and others, Appellants,

vs.

COUNTY COMMISSIONERS.

Hancock. Opinion December 28, 1896.

Way. Laying Out. Notice of Hearing.

On petition for a town way which the selectmen refused to locate, the petitioners appealed to the county commissioners and that board located the way. On appeal therefrom by the appellants to the Supreme Judicial Court, a committee appointed by that court, made report, wholly reversing the action of the county commissioners. The original petitioners excepted to the acceptance of that report. *Held;* that a careful examination of all the objections raised fails to disclose any legal objection to the doings of the committee, or the acceptance of their report.

The objection most relied on, that the court did not order notice, has no merit. The objecting parties attended at the hearing before the committee and were fully heard. In their written objections they say that "having appeared before said committee at the hearing, upon proper notice as set forth in said report," of the committee. No objection to the notice was made at the hearing. *Held;* that they cannot now object.

ON EXCEPTIONS BY APPELLEES.

A. W. King, for appellants.

O. F. Fellows, for appellees.

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

STROUT, J. On petition for a town way, which the selectmen had refused to locate, the petitioners appealed to the county commissioners to locate the way, upon the alleged ground that the selectmen had unreasonably refused to locate. The petition was duly presented to that board, and after regular proceedings thereon, the commissioners located the way. Thereupon the appellants appealed to the Supreme Judicial Court, and that court duly appointed a committee to view the route, hear the parties and determine whether the action of the county commissioners should be affirmed or reversed. That committee attended to their duty, and made report to the court, wholly reversing the action of the county commissioners. The original petitioners objected to the acceptance of the report upon various grounds, but the presiding judge overruled the objections and accepted the report.

The case is here upon exceptions to the acceptance of the report, taken by the original petitioners. A careful examination of all the questions raised fails to disclose any legal objection to the doings of the committee, or the acceptance of their report.

The objection most relied on, that the court did not order notice, has no merit. Ample notice was given by the committee. The objecting parties attended at the hearing before the committee and were fully heard; and they say in their written objections to the acceptance of the report that "having appeared before said committee at the hearing upon proper notice as set forth in said report" of the committee, they now object to its acceptance. They admit that they had proper notice, and attended. No objection was made at that time to the notice. They cannot now object, even if the notice had been insufficient, or if no notice had been given. *Raymond* v. *County Commissioners*, 63 Maine, 110.

Exceptions overruled.

CYRUS A. SHERMAN *vs.* WILLIAM A. HALL, Admx.

Kennebec. Opinion December 28, 1896.

Witness. Parties. Evidence. R. S., c. 82, § 98, par. II.

The defendant was sued in his representative capacity, and introduced a witness who testified to a conversation with the plaintiff before the death of the defendant's intestate, but not in the latter's presence. The plaintiff was then allowed to testify in regard to that conversation. *Held;* that the plaintiff's competency as a witness is to be determined by the rules of the common law, under which he was incompetent as a witness.

Also, that the case does not fall within any of the exceptions of the statute under which, in a few specified instances, the defendant is a competent witness.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit brought to recover for the personal services of the plaintiff and his crew, teams and machinery, while cutting the hay of the defendant's intestate in the season of 1894. The verdict was for the plaintiff. During the trial both the defendant and the plaintiff were allowed to testify as to matters occurring after the death of the intestate without objection. The defendant claimed that the haying was to be done by the job, an entire contract, for the sum of sixty dollars. But the plaintiff contended that no contract was made and that he was entitled to his pay, for what his services were reasonably worth, and offered evidence of the amount of work done, the number of days, and the price per day, supported by the testimony of his neighbors upon the going price of wages for similar services.

The defendant, to support his contention that the work was to be done by the job for the sum of sixty dollars, called a witness who testified that prior to the death of the intestate and not in his presence he met Sherman, the plaintiff, alone upon the road and asked him if he was going to cut Hall's, the intestate's, hay, and what he got for it. To which Sherman, the plaintiff, replied that he was, and that he got sixty dollars for it, but that it was not enough.

The plaintiff was then called and testified as follows:—

Q. "You heard what this last witness said?"

A. "Yes, sir."

Q. "What have you got to say to it?" (Objected to because something that happened prior to the death of the defendant's intestate. Admitted. Exception allowed.)

A. "I don't remember anything of that kind; but if there was anything of that kind, it was what Mr. Hall paid me the year before. As for having sixty dollars, I never had it but one year, and never was anything—"

The defendant was allowed his exceptions to the last question and answer.

W. T. Haines, for plaintiff.

Harvey D. Eaton, for defendant.

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

STROUT, J. Defendant was sued in his representative capacity. Defendant introduced a witness who testified to a conversation with plaintiff before the death of defendant's intestate, but not in his presence. Plaintiff was then allowed to testify in regard to that conversation. Exception is taken to the admission of this testimony from plaintiff.

The statute allowing parties to be witnesses, in express terms is made not to apply to cases where one of the parties is an administrator or executor, except in a few specified instances. This case does not fall within any of the exceptions. The plaintiff's competency was to be determined by the rules of the common law, under which he was incompetent as a witness. The statute is plain and imperative, and does not admit of any other construction.

Exceptions sustained.

INSURANCE COMMISSIONER, in equity,

vs.

PROVIDENT AID SOCIETY,

BAY STATE BENEFICIARY ASSOCIATION, claimant.

Cumberland. Opinion December 28, 1896.

Assessment Insurance Company. Mortuary Fund. Reinsurance. R. S., c. 49, § 67; Stat. 1889, c. 237; Priv. Laws, 1885, c. 505; 1887, c. 184; 1889, c. 382; 1893, c. 387.

The mortuary fund at the date of the transfer and reinsurance of the risks of a domestic life insurance company conducted on the assessment plan, under the laws of Maine, is a trust security for all its members; and should be apportioned equitably to secure protection to all.

Upon a receiver's bill it appeared that the defendant had previously transferred its risks and assets to another company, and that only a part of its members had assented and taken certificates in the latter company, which claimed the entire mortuary fund. *Held;* that the agreement to reinsure became a contract with such members only as consented to the change and accepted the liability of the new, in lieu of the old, company.

Also; that the rights of the parties in this case are to be determined by the charter of the company and R. S., c. 49, § 67; and not by Stat. of 1889, c. 237.

The court states the proportions of the division of the fund between the two companies.

Equity requires that the distribution of the balance of this fund to members of the defendant company, and who did not reinsure, should be in proportion to the assessments paid. To accomplish exact equity, *held;* that the last assessment paid by each member should be returned to him, if the funds are sufficient; and if not, the ratable share, based upon the amount of each assessment. The balance, if any, should be applied to the next preceding assessment in the same ratio, and so continued until the fund is exhausted.

ON REPORT.

Bill in equity, heard on bill, answer, decree appointing receiver and master, master's special report and receiver's report.

The bill was filed by the insurance commissioner in this court, in Cumberland County, and prayed for an injunction and the appointment of a receiver.

After the appointment of a master, the Bay State Association filed with him various claims to the funds of the Provident Aid; among them the following which he reported specially to the law court:—1. Claim to the entire mortuary fund, including the amount deposited with the state treasurer, by virtue of a contract made in July, 1895. 2. If not to the whole of said fund, at least to that proportion of the same to which the members would be entitled who had taken out new policies in the Bay State.

The case is stated in the opinion.

L. C. Cornish, for Receiver.

The statute of 1889 did not authorize the transfer of the mortuary fund and the contract for its transfer is ultra vires and void.

Lucas v. *White Line Transfer Co.*, 70 Ia. 542, (s. c. 59 Am. Rep. 449); *Davis* v. *Old Colony R. R. Co.*, 131 Mass. 258, (s. c. 41 Am. Rep. 221); *Twiss* v. *Guaranty Life Ass'n*, 87 Ia. 733, (s. c. 43 Am. State Rep. 418); *N. O. J. & G. N. R. R. R. Co.* v. *Harris*, 27 Miss. 517, holding:

(1.) An amendment to the charter of a corporation is absolutely void unless accepted by all the stockholders of the corporation:

(2.) A transfer of all the rights and property of a corporation to another corporation authorized by the legislature, and assented to by less than all the stockholders of the transferring company, is void, and may be repudiated by the transferring company, although the statute authorizing the transfer provides that the assent of the holders of a majority of the stock of the transferring company shall be sufficient, and such assent is obtained.

This reserve or mortuary fund which the Bay State now claims, is in reality a trust fund, made so by the contract between the Provident Aid and its certificate holders, toward the formation of which each certificate holder has contributed his part and in which each certificate holder has a vested interest so long as he keeps his assessments paid and is in good standing in the company. This

interest in the trust fund is one that cannot be taken away from a beneficiary, even by a majority vote, or a two-thirds vote. The courts are very strict in the construction of trusts and will not allow any disposition of a trust fund impairing the obligation of the contract of the members contributing towards said fund. *Carey Library* v. *Bliss*, 151 Mass. 364; *American Legion of Honor* v. *Smith*, 45 N. J. Eq. 466; *Same* v. *Perry*, 140 Mass. 580; *Elsey* v. *Odd Fellows' Mutual Relief Ass'n*, 142 Mass. 224; *Tyler* v. *Same*, 145 Mass. 134; *Skillings* v. *Mass. Benefit Ass'n*, 146 Mass. 134; *Mass. Order of Foresters* v. *Callahan*, 146 Mass. 391;—Morawetz, Priv. Corp. §§ 413–433.

The principle of subrogation can apply only to such members of the Provident Aid as actually accepted the Bay State policies.

Clarence Hale, for Bay State Ben. Assoc.

1. The contract of the Bay State Beneficiary Association and the Provident Aid Society should be sustained by this court, and all the mortuary funds of the society, as set forth in the answer, should be decreed to pass to the Bay State with all other assets under said contract.

The contract of reinsurance effected a complete and actual reinsurance of all members of the Provident Aid with the Bay State. *Com.* v. *Weatherbee*, 105 Mass. 160; May, Ins. § 14; *Taylor* v. *Ins. Co.*, 9 How. 390; *Com. M. Ins. Co.* v. *Union Ins. Co.*, 19 How. 318; *Blanchard* v. *Waite*, 28 Maine, 51; 11 Am. and Eng. Enc. p. 280, and cases.

The contract is in pursuance of the charter of the Provident Aid and of its implied contract with its policy holders.

The funds which were placed on deposit in the state treasury are general funds of the Provident Aid and pass under this contract, it being the clear intention of the charter not to impose such a trusteeship upon the state treasurer as to prevent the passage of the funds.

The clear intention of the legislature under the charter was to make the state treasury a repository of funds, just the same as it might make a bank a repository. It makes the State the repos-

itory because the State is the safest institution that can be found.

If the legislature had intended to make the State more than a mere repository, and especially, if it had intended to make the State a technical trustee, it would not have given the power which is given in § 4, of the charter, viz., "to reduce the number or amount of assessments upon members, such part of the reserve fund may be applied to payment of benefits as deemed advisable by the directors."

Clearly, the directors are here given the discretionary power, but no such power is lodged with the state treasurer. It is clear that if the legislature had intended the State, or the state treasurer, to act as a technical trustee to have charge of the funds, it would not have given the powers to the directors of the Provident Aid which the charter gives. By § 4 of the charter; "The directors may from time to time withdraw from the reserve fund or surplus fund such amounts as may be required to comply with the contracts between the society and its members, and apply said amounts in payment of claims arising under said contracts."

Clearly, if the legislature had intended to make the treasurer of the State, or the State itself, a trustee for the policy holders and reposed in the State, or the state treasurer, the power of a trustee and imposed the duties of a trustee, it would not, at the same time have given the directors full power to withdraw a part of this reserve fund at any time. The legislature could not have intended these inconsistent things. 27 Am. & Eng. Enc., p. 107, and cases; *Ins. Com.* v. *Accident Assoc.*, 86 Maine, p. 231. The State not capable of taking as trustee or managing agent. *Levy* v. *Levy*, 33 N. Y. p. 123; *Cook* v. *Warner*, 56 Conn. 234; *Sperry's Appeal*, 71 Pa. St. p. 11; *Gardner* v. *Pollard*, 10 Bosw. p. 691. No trust between the parties by virtue of the policies. *Taylor* v. *Ins. Co.*, 59 How. Pr. Rep. p. 468; Angell and Ames, Corp. § 313, and cases; 77 Am. & Eng. Enc. p. 348.

If the mortuary funds which were placed on deposit with the state treasurer should be held to be in any sense trust funds, even then, they were transferred under this contract and should pass from the Provident Aid to the Bay State subject to the original

trust which remains attached to such funds, such trust being merely to keep the funds safely and to have them ready to pay death claims. Cooke, Life Ins. § 4; 4 Am. Eng. & Enc. p. 272, note and cases; *Goodrich & Hicks' Appeal*, 109 Pa. St. 523; Beach, Priv. Corp. § 342, and cases; *P. W. & B. R. R.* v. *Moreland*, 10 How. 376.

After the Bay State has paid the accrued mortuary claims upon accrued certificates, there will be no balance left from the mortuary funds for certificate holders.

The Bay State might compel the state treasurer by suit against the Provident Aid to apply said fund to the satisfaction of a judgment obtained in the name of a beneficiary of any deceased policy holder; or might compel a receiver to so apply, he having received the funds under decree of this court.

Under section four of the charter, in case of a judgment against the Provident Aid, the treasurer of State "may apply said fund to the satisfaction of said judgment." Under the rules of interpretation in this State, the word "may" in the statute is to be construed "must" or "shall" when the public interest or rights are concerned or third persons have a claim *de jure* that the power shall be exercised: *Monmouth* v. *Leeds*, 76 Maine, p. 31; *Lowe* v. *Dunham*, 61 Maine, 569.

Under the general principle of equity the mortuary fund should pass with the other assets to the claimant, the Bay State, under its contract. Thomp. Corp. § 343.

If our former contention should not be sustained, then, in any event, the Bay State has been subrogated to the interest of all the members of the Provident Aid who paid the assessment due October first, and continued their membership in the Bay State; and such association as the equitable assignee of each member so having insured, under the ordinary rules of equitable assignment, is entitled to the pro rata amount of said mortuary fund which would have gone to all such insured members.

North British Co. v. *London L. & G. Co.*, 5 Ch. D., 516; *Darrell* v. *Tibbetts*, 5 Q. B. D., 560; Rapalje Law Dict., Insurance, Nature of Indemnity and Subrogation; 2 Beach, Law of Ins.

Chap. 30, title Subrogation; *Rowlett* v. *Greve's Syndics*, 8 Martin, 483, (13 Am. Dec., p. 296, note p. 297.)

R. I. Thompson, for Prov. Aid Society.

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

STROUT, J. When this bill was filed, October 18, 1895, the defendant company had on deposit with the state treasurer, securities of the par value of seven thousand dollars, and on deposit in Portland Trust Company three thousand fifty-one dollars and sixty cents, and an unliquidated balance in the hands of B. N. Johnson. All of these funds belonged to the mortuary fund of the Society, and were charged with a trust for the security of its certificate holders.

In August, 1895, and before the filing of this bill, the Provident Aid made a contract with the Bay State Beneficiary Association of Massachusetts, by the terms of which the Provident Aid undertook to transfer to the Bay State all its risks, and all of its funds, including the mortuary fund; and the Bay State agreed to assume the liability of the Provident Aid upon its outstanding certificates then in force, and reinsure its members. This contract was approved by a two-thirds vote of those present and voting at a meeting of the insured in the Provident Aid, called to consider the same, on July 30, 1895, in accordance with § 5 of c. 237 of the laws of 1889. Thirty-eight voted to approve the contract and six voted against it. Although the contract bound the Bay State to reinsure all members of the Provident Aid who so desired, it became a contract only with such members as consented to the change, and accepted the liability of the Bay State in lieu of that of the Provident Aid. Those holding certificates in the Provident Aid, and not electing to accept the contract with the Bay State, had the right to retain their certificates in the Provident Aid, and rely upon its liability. The master has found that eight hundred and fifty-five members of the Provident Aid, accepted insurance in the Bay State, and paid to it the assessment due October 1, 1895;

and that six hundred and seventeen members of the Provident Aid did not accept insurance in the Bay State, nor pay the assessment due October 1, 1895, to that company, but retained their standing in the Provident Aid. He has also found that the amount of insurance held in the Provident Aid by the eight hundred and fifty-five members who went into the Bay State, was $2,404,500, but the Bay State reinsured these for $2,328,500 only; and the amount held by the six hundred and seventeen members who did not go into the Bay State, was $1,635,500. The mortuary fund, being a trust security at the date of the contract of reinsurance for the entire fourteen hundred and seventy-two members of the Provident Aid, should now be apportioned equitably to secure protection to all. Of the amount of the mortuary fund which shall remain when final decree shall be entered, after payment of all death losses accrued before the filing of this bill and the expenses of this suit, there should be paid to the Bay State as a trust security for the eight hundred and fifty-five members of the Provident Aid reinsured by it, that proportion which the $2,328,500 of insurance of the eight hundred and fifty-five members who have gone into the Bay State, bears to the $1,635,500 of insurance of the six hundred and seventeen members who did not go into the Bay State.

The amount that will remain, after this payment to the Bay State, the Provident Aid having ceased business, belongs to the members of the Provident Aid who held certificates upon which all assessments had been paid.

The bill was amended, so that the rights of the parties are to be determined by the provisions of the charter of the company, § 8, and R. S., c. 49, § 67; and not by c. 237 of the laws of 1889. The funds are to be paid over to the certificate holders ratably.

Equity requires that this distribution should be in proportion to the assessments paid by the members. As the amount of assessment depends upon the age of the insured, it is manifestly unjust that one should receive back as much as another member whose assessment for the same insurance was much larger. To accomplish exact equity, the last assessment paid by each member should

be returned to him, if the funds are sufficient; and if not, the ratable share, based upon the amount of each assessment. If the funds are sufficient to pay this assessment in full, and leave a balance, that balance should be applied to the next preceding assessment in the same ratio, and so continued till the fund is exhausted.

When the amount to be refunded to the members of the Provident Aid shall be ascertained, the master will determine and report the proper distribution upon the principle herein stated, and final decree will then be entered.

Recommitted to the Master.

DAVID B. FLINT, in equity,

vs.

WINTER HARBOR LAND COMPANY, AND WEST SHORE LAND COMPANY.

SAME *vs.* SAME.

SAME *vs.* SAME.

Hancock. Opinion December 28, 1896.

Mortgage. Foreclosure. Deficient Security. Stat. Frauds. R. S., c. III, § 2.

When in a conveyance of land, subject to a mortgage, it is provided in the deed that the conveyance is made subject to a mortgage of the premises, "which said mortgage this grantee by acceptance of this deed hereby assumes and agrees to pay and fully discharge," the grantee becomes liable to the mortgagee, in equity, for the mortgage debt; or the mortgagee may maintain assumpsit for the debt against either the mortgagor, or the grantee, in the deed.

The mortgage debt, in such case, is part of the purchase money, and the promise of the grantee to pay it, is a promise to pay his own debt, and not the debt of another within the statute of frauds.

Held; that the mortgage having been foreclosed, the debt is paid to the extent of the value of the mortgaged property, at the date that the foreclosure became absolute. If of less value than the debt, complainant is entitled to

recover the deficiency from the original mortgagor, or from its grantee; and will be entitled to separate decrees against each for the full amount of such deficiency,—but can have only one satisfaction.

The court appoints a master to ascertain and report to the court the value of the mortgaged property, at the date when complainant's title became absolute, and the amount of the mortgage debt at the same date.

ON AGREED STATEMENT.

These were three suits in equity; the first two to recover the interest, and the third to recover the principal and interest, due on a mortgage, given by the Winter Harbor Land Company to Alice I. Hammond.

The cases were reported to the law court upon the following agreed statement:

"On the twenty-seventh day of June, A. D. 1892, the Winter Harbor Land Co. gave a mortgage to Alice I. Hammond of the real property described in the bills to secure the payment of a note of said corporation dated the same day for the sum of $7,000, payable in three years from date, with interest annually at the rate of five per cent per annum until paid. Said mortgage contains a one-year foreclosure clause.

"December 8th, 1892, said Alice I. Hammond, for a valuable consideration, sold and assigned to the complainant said mortgage and note, indorsing the note without recourse.

"On March 14th, 1893, said Winter Harbor Land Co. sold and conveyed said property, with other lands, to the West Shore Land Co., subject, however, to said mortgage. Said conveyance contained the following stipulation:—

'Also made subject to a mortgage deed of the said premises for seven thousand dollars with interest at five per cent given by this grantor to said Alice I. Hammond, dated June 27th, 1892, and recorded in said registry, in Vol. 263, page 165, and by said Hammond assigned to D. B. Flint by assignment dated December 8th, 1892, and recorded with said registry in Vol. 266, page 302, which said mortgage this grantee by acceptance of this deed hereby assumes and agrees to pay and fully discharge.' . . . .

"In July, 1895, said complainant began foreclosure of said mort-

gage by publication, the first publication having been made on July 3d, 1895.

"On September 17th, 1893, the complainant began the above named suit in Equity No. 106, to recover the first year's interest accrued on said mortgage of three hundred and fifty dollars.

"On September 23d, 1894, the complainant began the above named suit in Equity No. 125, to recover the second year's interest accrued on said mortgage of three hundred and fifty dollars.

"July 1st, 1895, said complainant began the above named suit in Equity No. 163, to recover the principal and interest of said mortgage.

"Said complainant has discontinued as to the defendant, Alice I. Hammond, and the bills have been taken pro confesso as to the Winter Harbor Land Co."

The questions involved were:

1. Whether the West Shore Land Co., is liable for any part of the principal and interest due upon said mortgage upon the foregoing statement of facts.

2. If liable under the foregoing statement of facts, whether for the full amount of the principal and interest due, or for the excess of principal and interest over the value of the mortgaged property.

3. Whether or not the issue of fact between the parties, as to whether or not the Winter Harbor Land Co. has any property, is material.

The causes came on to be heard June 1st, 1896, before the presiding justice, and being of the opinion that there were questions of law involved in the same of sufficient importance and doubt to justify the same, and the parties agreeing thereto, he reported the causes upon the foregoing agreed statement of facts, and upon any other facts set forth in the bills that are not denied by the answers, to the next law court within and for the Eastern District; and the parties consenting thereto, said causes to be entered and heard in the Western District. The parties further stipulated that "if the law court shall determine that the West Shore Land Co. is liable, but that the extent of its liability in either of the suits depends upon the value of the mortgaged property, then it

shall fix the mode of ascertaining the value of said property by sending the causes to a master or otherwise.

"And if the law court shall determine that the issue as to whether or not the Winter Harbor Land Co. has any property is material, it shall also fix the mode of ascertaining that issue.

"If the law court shall determine that neither the value of the mortgaged property nor the issue as to whether the Winter Harbor Land Co. has any property is material, then the law court shall order such a decree as the rights of the parties require."

Answer of the West Shore Land Company. . . .

8. And further answering the said defendant says that if any such contract on its part was made as is set forth in the plaintiff's bill, whereby the said defendant agreed to assume and pay the mortgage given by the Winter Harbor Land Co., to Alice I. Hammond, such contract or agreement was a promise to pay the debt of another, and was void under c. III, § 2, R. S. of Maine; and the defendant says that such contract or agreement was not in writing, nor was there any memorandum or note thereof in writing signed by this defendant, or by any person thereunto lawfully authorized by said defendant.

And further answering the said defendant says that the plaintiff has no remedy in equity against it.

And it asks that it may have all the rights, under this answer against the said plaintiff's bill, that it would have had if it had demurred thereto.

L. B. Deasy, for plaintiff.

The Winter Harbor Land Company, could have maintained an action of assumpsit upon the agreement of its grantee. Even without paying the debt, an action at law could have been maintained and the whole amount of the debt recovered of its grantee. *Locke* v. *Homer*, 131 Mass. 93; *Barron* v. *Paine*, 83 Maine, 323.

But there being no privity of contract with the mortgagee, an action at law cannot be maintained by him. *Prentice* v. *Brimhall*, 123 Mass. 293; *Mellen* v. *Whipple*, 1 Gray, 317.

In New York, and possibly some other states, an action at law will lie in favor of the mortgagee, but this is an exception to

the general rule. *Thorp* v. *Keokuk Coal Company*, 48 N. Y. 259.

The mortgagee may by bill in equity enforce such a covenant. This in some jurisdictions is based upon the avoidance of circuity of action and in others upon the doctrine of subrogation. Upon one or the other of these grounds jurisdiction in equity has been sustained where equity has been invoked. There are general statements contained in some cases that a covenant by a purchaser to assume and pay a mortgage cannot be enforced by the mortgagee; but these statements are contained in opinions in suits at law and do not apply to or preclude the remedy in equity. Counsel cited: *Pruden* v. *Williams*, 26 N. J. Eq. 210; *Klapworth* v. *Dressler*, 13 N. J. Eq. 62, (78 Am. Dec. 69); *Crowell* v. *Hospital*, 27 N. J. Eq. 656; *Norwood* v. *DeHart*, 30 N. J. Eq. 414; *Trotter* v. *Hughes*, 12 N. Y. 74, (62 Am. Dec. 137); *Marsh* v. *Pike*, 10 Paige, 595; *Cornell* v. *Prescott*, 2 Barbour, 16; *Corbett* v. *Waterman*, 11 Iowa, 86; *Bowen* v. *Kurtz*, 37 Iowa, 239; *Higman* v. *Stewart*, 38 Mich. 523; *Stuart* v. *Worden*, 42 Mich. 154; *Booth* v. *Conn. Mut. Life Ins. Co.*, 43 Mich. 299; *Waters* v. *Bassell*, 58 Miss. 602; *Hare* v. *Murphy*, (Neb.), 29 L. R. A. 851. See also *Coffin* v. *Adams*, 131 Mass. 137, and note in 78 Am. Dec. 72, 75 and 77.

Stat. of Frauds: *Locke* v. *Homer*, 131 Mass. 102; *Hubon* v. *Park*, 116 Mass. 541; *Alger* v. *Scoville*, 1 Gray, 391.

A. W. King, for West Shore Land Company.

Counsel argued that, as to the second question, the value of the mortgaged property should be determined in some way which will insure a fair result; and that if the amount due under the mortgage is in excess of the value, judgment should be rendered only for such excess.

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

STROUT, J. The complainant is the holder of a mortgage upon real estate given by the Winter Harbor Land Company to Alice I. Hammond, and by her assigned to complainant. Two of the

bills are to recover accrued interest upon the mortgage debt, and the third to recover the excess of the mortgage debt over the value of the estate mortgaged. The mortgage has been foreclosed, and complainant has full title to the premises. He alleges that the mortgaged property is of less value than the amount of the mortgage debt. This is denied by the West Shore Land Company, who hold a conveyance of the property from the Winter Harbor Land Company, which was made subject to this mortgage, and contains the provision "which said mortgage this grantee by acceptance of this deed hereby assumes and agrees to pay and fully discharge."

Under this provision in the deed, the West Shore Land Company became liable to the holder of the mortgage, for the entire mortgage debt. It was part of the purchase money, and the promise to pay it was a promise to pay its own debt and not the debt of another within the statute of frauds. Complainant not being a party to that deed, he may have remedy in equity, against the mortgagor and his grantee, or implied assumpsit against either. *Baldwin* v. *Emery*, post.

Having acquired absolute title to the mortgaged property, the debt is thereby paid if the value of the property equals or exceeds the amount of the debt. If less than that, complainant is entitled to recover the deficiency from the original mortgagor, or from its grantee, and will be entitled to separate decrees against each for the full amount of such deficiency,—he can have, however, but one satisfaction.

The cases must go to a master to ascertain and report to the court the value of the mortgaged property, at the date when complainant's title became absolute, and the amount of the mortgage debt at the same date. Upon the coming in and acceptance of his report, final decree to be made.

Bill sustained. Master to be appointed.

OSCAR GETCHELL *vs.* INHABITANTS OF OAKLAND.

Kennebec. Opinion December 31, 1896.

Way. Towns. Water Course. Municipal Officers. R. S., c. 18, § 67.

When surveyors of highways have constructed a water course "by the side of a way so as to incommode any person's house or other building," the municipal officers, under R. S., c. 18, § 67, on complaint and after view, "may cause it to be altered as they direct."

Held; that the municipal officers are made agents of the town, by this statute, for such purposes; and may do the work at the town's expense.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action of assumpsit on account annexed. The action was tried in the Superior Court, Kennebec county, where the plaintiff recovered a verdict of $21.17.

The case is stated in the opinion.

S. S. Brown, for plaintiff.

W. C. Philbrook and George W. Field, for defendants.

Exceptions: When a town at its annual meeting has elected a highway surveyor or road commissioner, who is duly sworn and is in the discharge of his duties, the selectmen have no power to make a contract with reference to the repairs of highways which will bind the town. *Tufts* v. *Lexington*, 72 Maine, 516; *Bryant* v. *Westbrook*, 86 Maine, 450; *Goddard* v. *Harpswell*, 88 Maine, 228.

Motion: (Form of action). *Bangor House* v. *Hinckley*, 12 Maine, 385; *Keene* v. *Chapman*, 25 Maine, 126; *Bangor* v. *Co. Coms.* 30 Maine, 270; *Mason* v. *Railroad Co.*, 31 Maine, 215; *Hovey* v. *Mayo*, 43 Maine, 322; *Briggs* v. *Railroad Co.*, 79 Maine, 363. (Time of action). R. S., c. 18, § 68, as amended, Freem. Sup. p. 184. (Parties) Ib. (Tort of Surveyor). *Small* v. *Danville*, 51 Maine, 359; *Woodcock* v. *Calais*, 66 Maine, 234; *Bulger* v. *Eden*, 82 Maine, 352; *Goddard* v. *Harpswell*, 84 Maine, 499.

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

HASKELL, J. The road commissioner of Oakland constructed a ditch between the road and the plaintiff's premises to take the water from above. The plaintiff complained to the selectmen about the inconvenience therefrom in approaching his premises. They instructed him to fix it and said "we would pay; that it would not make any material difference to us whether it was done with tiling, or plank driveway, two good wide plank." The plaintiff did fix it, and recovered a verdict for $21.17. There is no good reason for disturbing the verdict if the action of the selectmen made the town liable.

The cases of *Tufts* v. *Lexington*, 72 Maine, 516, where it was held that selectmen could not bind the town on a contract for the repair of roads when highway surveyors had been appointed, etc.; *Bryant* v. *Westbrook*, 86 Maine, 450, where it was held that municipal officers who act without direction of the town or express statute authority in the repair of roads are not agents of the town, and for whose acts the town is not liable; and *Goddard* v. *Harpswell*, 88 Maine, 228, where it was held that selectmen, empowered by the town to borrow money for road building, could not act as agents of the town in doing the work, are cited as decisive of the case at bar.

These authorities are not in point, nor is *Goddard* v. *Harpswell*, 84 Maine, 499, for here the statute, R. S., c. 18, § 67, provides that when surveyors of highways have constructed a water course "by the side of a way so as to incommode any person's house or other building," the municipal officers, on complaint and after view, "may cause it to be altered as they direct." They are made agents of the town for the purpose, and may do the work at the town's expense. Here they employed the plaintiff to do the work for which the town became liable just the same as if they had employed a stranger to do it.

Motion and exceptions overruled.

JOHN B. REDMAN, in equity *vs.* JEREMIAH HURLEY.

Hancock. Opinion December 30, 1896.

Equity. Verdict. Practice. Insolvency.

The soundness of verdicts in actions at law are first determined before judgment. Not so in equity, because some decree should follow the trial, either upon the verdict or against it; and therefore, when a cause in equity comes up on appeal, it comes up for final decision, unless the court shall otherwise order,—which is rarely the case,—and the regularity of procedure upon the trial to the jury becomes wholly immaterial.

A cause in equity in the appellate court is heard anew, and the admission or exclusion of evidence below is of no consequence, except so far as it shall be considered competent for consideration on appeal.

Upon a hearing of an appeal in equity, accompanied by a motion to set aside a verdict and exceptions to the rulings in the court below, *held;* that the motion and exceptions need not be considered on the hearing in the law court; for the vital question is whether there is sufficient legal evidence in the cause to sustain the decree below, which carries with it a presumption in its favor.

Held; in this case, that the decree of the court below setting aside a fraudulent conveyance by an insolvent should be sustained.

See *Stuart* v. *Redman*, post, p. 435.

IN EQUITY. ON DEFENDANT'S APPEAL, EXCEPTIONS AND MOTION FOR NEW TRIAL.

This was a bill in equity under which the plaintiff, as assignee in insolvency of Colin McKenzie, sought to recover as assets of said McKenzie an undivided half of the Eagle Hotel, so-called, at Bar Harbor, together with an undivided half of the furniture in the hotel.

The defendant claimed title to the same, it being personal property, and situated on leased land, by a bill of sale to him from the said McKenzie dated November 7, 1892, and recorded November 9, 1892, in the town of Eden.

The plaintiff claimed that the transfer was void for the reason that it was made by McKenzie within six months before the filing of the petition in insolvency against him, and that said McKenzie,

at the time of the alleged transfer, was either insolvent or acting in contemplation of insolvency, and made the alleged transfer to prevent the property from being distributed among his creditors under the insolvent laws of Maine. And, also, that the defendant, at the time, had reasonable cause to believe that said McKenzie was either insolvent or acting in contemplation of insolvency; and that the transfer was thus made to him to prevent the property from coming to the assignee.

BILL IN EQUITY.

To the Supreme Judicial Court, in equity.

John B. Redman, of Ellsworth, Hancock County, Maine, assignee in insolvency of the estate of Colin McKenzie, of said Ellsworth, insolvent debtor, complains against Jeremiah Hurley of said Ellsworth and says:—

First. That he is the assignee of Colin McKenzie, insolvent debtor, duly appointed as such assignee by the judge of insolvency within and for the County of Hancock on the 10th day of May, 1893, on the petition of the creditors of said debtor, filed in said court March 17, 1893, as appears by the records of said court of insolvency.

Second. That said Colin McKenzie, on the seventh day of November, 1892, was the owner of one-undivided half of a three-story frame building situated on West street in the village of Bar Harbor, Town of Eden, Hancock County, Maine, and known as the Eagle Hotel, together with one-undivided half of the furniture and fixtures belonging to said building, and all of great value, to wit, the value of two thousand dollars.

Third. That on the 7th day of November, 1892, the said Colin McKenzie being then insolvent, and acting in contemplation of insolvency, which said 7th day of November was within six months before the filing of the petition against him, the said Colin McKenzie, the said insolvent debtor, did make a certain transfer and conveyance of said property described in the foregoing paragraph second, to said Jeremiah Hurley, all of which appears by a certain bill of sale of that date recorded November

9th, 1892, in Vol. 9, page 279, of the mortgage records of the town of Eden, an attested copy of the record of said bill of sale to be here in court produced.

Fourth. That said transfer and conveyance of said property was made by the said Colin McKenzie, he then being insolvent and acting in contemplation of insolvency with a view to prevent said property from coming to his assignee, and to prevent the same from being distributed under revised statutes, chapter 70, of the laws of the State of Maine, and to defeat the object of and to impair, hinder, impede and delay the operation and effect of the provisions of said chapter 70 of the revised statutes of Maine; and that said Jeremiah Hurley, at the time of the taking and receiving said transfer and conveyance, had reasonable cause to believe the said Colin McKenzie to be insolvent and acting in contemplation of insolvency, and that such transfer and conveyance was made with a view to prevent said property from coming to his assignee, and to prevent the same from being distributed under chapter 70 of the laws of Maine, and to defeat the object of, and to impair, hinder, and impede and delay the operation and effect of the provisions of said chapter.

Wherefore, the said plaintiff believing that he is entitled to relief in equity prays:

1. That a subpœna, in usual form required, issue unto said Jeremiah Hurley commanding him to appear at a certain day and make full answer to this bill, but not under oath, answer under oath being hereby waived.

2. That said transfer and conveyance, as set forth in paragraph second, be declared by this court to be void, and that the plaintiff recover of the defendant said property as assets of the insolvent.

3. That said defendant, by an order and decree of this court, be prohibited from exercising any acts of control over said property whatever.

4. That the said defendant may be ordered and decreed by this court to make, execute and deliver to your complainant a sufficient conveyance of said property.

5. That an account may be taken of the rents and profits which said defendant has received from said property so transferred and conveyed to him, and that he may be ordered to pay over such rents and profits to the plaintiff.

6. That such further orders and decrees may be made as the nature of the case may require.

Dated this 25th day of September, A. D. 1893.

JOHN B. REDMAN, Assignee.

A. W. KING, Solicitor.

The defendant answered with a general denial and asked to have the issues of fact submitted to a jury. The following are the issues passed upon by the jury with their findings:—

1. Was Colin McKenzie acting in contemplation of insolvency in making the transfer to the defendant of an undivided half of Eagle Hotel, dated November 7, 1892? Answer, yes.

2. Was said transfer of an undivided half of Eagle Hotel to the defendant made by Colin McKenzie with a view to prevent said property from coming to his assignee, and to prevent the same from being distributed among his creditors under the insolvent laws of the State? Answer, yes.

3. Did the defendant, Jeremiah Hurley, then have reasonable cause to believe that Colin McKenzie was acting in contemplation of insolvency in making said transfer of an undivided half of Eagle Hotel, and that said transfer was made by Colin McKenzie with a view to prevent said property from coming to his assignee and to prevent the same from being distributed among his creditors under the insolvent laws of the State? Answer, yes.

DECREE.

This cause came on to be heard, this second day of May, A. D. 1896, on bill, answer and proofs; and thereupon after hearing thereon, it is ordered, adjudged and decreed as follows:

1. That the transfer and conveyance from Colin McKenzie to Jeremiah Hurley, dated November 7th, 1892, of one-undivided half of a three-story frame building situated on West street, in the

village of Bar Harbor, town of Eden, Hancock County, Maine, and known as the Eagle Hotel, together with one-undivided half of the furniture and fixtures belonging to said building, together with the leasehold interest and rights and privileges belonging thereto, all as set forth in the third paragraph of complainant's bill, and all of which appears by the certain bill of sale referred to in said third paragraph of said bill, is hereby declared void; and that the complainant may recover of said Jeremiah Hurley said undivided half of said property as assets of said insolvent, Colin McKenzie.

2. That said Jeremiah Hurley is hereby prohibited from exercising any acts of control over said property whatever.

3. That the said Jeremiah Hurley make, execute and deliver to the said John B. Redman, assignee in insolvency of Colin McKenzie, within ten days after notice of this decree, a sufficient bill of sale and transfer of said one-undivided half of said property, viz: the same undivided half of the same property as was described as conveyed in the certain bill of sale, dated Nov. 7th, 1892, from Colin McKenzie to said Jeremiah Hurley and recorded Nov. 9th, 1892, in Vol. 9, page 279, of the mortgage records of the town of Eden, which said bill of sale is referred to in paragraph third of the complainant's bill.

4. That the said Jeremiah Hurley render an account of all the net rents and profits which he has received from said property since the same was so transferred and conveyed to him, before L. B. Deasy, master in chancery appointed for that purpose, at such time and place as such master shall appoint. The report of said master to be rendered to this court as soon thereafter as may be, upon which further proceeding may be had.

From this decree the defendant appealed to the law court. He also filed a general motion for a new trial, and had exceptions to the rulings of the justice presiding upon the admissions of evidence, and a portion of the charge to the jury. The disposition made by the law court of the motion and exceptions, similar to those in *Stuart* v. *Redman*, post, p. 435, renders a further statement of them unnecessary.

A. W. King, for plaintiff.

Exceptions: The weight of all the authorities, bearing upon this part of the case, is that it is the duty of the court to receive liberally evidence of the acts of the party whose intention it is sought to determine, both before and after the alleged transaction, so far as any of those acts tend in any way to indicate the intention or motive. Wait, Fraud, Convey, pp. 308, 381; *B. & O. R. R. Co.* v. *Hoge*, 34 Pa. 221; *Brittain* v. *Crowther*, 54 Fed. Rep. 295; *Haskins* v. *Warren*, 115 Mass. 538; *Lincoln* v. *Claffin*, 7 Wall. 132; *Burdick* v. *Gill*, 7 Fed. Rep. 668; *Edgell* v. *Lowell*, 4 Vt. 405; *Ingersoll* v. *Baker*, 21 Maine, 274.

H. E. Hamlin, for defendant.

The greater part of the deeds admitted in evidence were given some time after sale of the building in dispute to defendant and only three of them were given to defendant. These deeds were improperly admitted in evidence, as against this defendant. He was in no way connected with them and they have no bearing upon the question of McKenzie's condition more than one month before the greater number of them was given.

Plaintiff also introduced the schedule of creditors filed by McKenzie in the insolvent court. This was inadmissible. It was a mere declaration made by McKenzie months after his transfer to defendant, and therefore incompetent to affect defendant's title.

Certified copies of the schedule of debts and list of claims filed in insolvency are incompetent to prove that the debtor was insolvent at the time of making an alleged preference, in a suit by the assignee to recover back the property conveyed. *Simpson* v. *Carleton*, 1 Allen, 109; *Holbrook* v. *Jackson*, 7 Cush. 144.

Counsel also cited: *Thayer* v. *Smith*, 9 Met. 469.

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

HASKELL, J. This is a bill in equity, brought by the assignee of an insolvent debtor, to set aside a conveyance by the insolvent to the defendant in fraud of the insolvent law.

A verdict was rendered below in favor of the plaintiff, and was followed by a decree thereon granting the relief prayed for. Exceptions to the admissibility of evidence, and to the rulings of the presiding justice to the jury were allowed below and are presented here. A motion filed below to set aside the verdict, as against both law and evidence, is also presented here for decision. The defendant also brings the cause up on appeal from the decree below.

The verdict below is advisory only. The court there might grant a decree following the verdict, or directly against it, as the equity of the cause might require. *Metcalf* v. *Metcalf*, 85 Maine, 473.

The soundness of verdicts in actions at law are first determined before judgment. Not so in equity, because some decree should follow the trial, either upon the verdict or against it, and therefore when a cause in equity comes up on appeal, it comes up for final decision, unless the court shall otherwise order,—which is rarely the case,—and the regularity of procedure upon the trial to the jury becomes wholly immaterial. The cause in the appellate court is heard anew, and the admission or exclusion of evidence below is of no consequence, except so far as it shall be considered competent for consideration on appeal. The motion and exceptions, therefore, need not be considered here; for the vital question is whether there be sufficient legal evidence in the cause to sustain the decree below, which carries with it a presumption in its favor.

The insolvent and defendant were close friends and neighbors. The conveyance in question was dated November 7, 1892. More than a score of conveyances of various kinds from the insolvent were recorded during the months of October, November and December, 1892. Three thousand dollars were drawn from the bank by the insolvent December 23, 1892. Assets amounting to less than one hundred dollars came to the hands of the assignee on the following March. The defendant is shown to have been familiar with the business of the insolvent, and must have known that he was placing his property beyond the reach of

his creditors. Yea, more, the court below was justified in finding that defendant, in receiving the conveyances attacked in this cause, aided thereby in the fraud, and therefore should not hold under the same.

Appeal dismissed.
Decree below affirmed with additional costs.

DONALD M. STUART *vs.* JOHN B. REDMAN.

Hancock. Opinion December 30, 1896.

Insolvency. Evidence. Fraud. Indirect Preference. R. S., c. 70, § 52; Stat. 1887, c. 132.

In an action of replevin against an assignee of an insolvent debtor, by a purchaser of chattels from the insolvent before insolvency, the question before the jury was whether the purchase by the plaintiff was in fraud of the insolvent law. *Held;* that the plaintiff may be inquired of as to his knowledge of the insolvent's financial condition and the property that he held and disposed of, both before and after the sale, to the plaintiff.

Also; that the witness' knowledge of the insolvent, his business, his property and his disposal thereof, as well as his habits, attention to business, soberness and thrift, are all material and sometimes vital, as to whether a pretended purchaser of property knew the condition of his vendor, and under the insolvent law should be held chargeable with a fraudulent purpose to aid the insolvent in disposing of the property.

Deeds, given by the insolvent or recorded during the same year, some before and some after the pretended sale of chattels to the plaintiff, are admissible in evidence, as bearing upon a contemplated insolvency.

When exceptions fail to state what the testimony is that is excluded under objection, *held;* that such exclusion of testimony is not error.

Held; that evidence of the state of the insolvent's bank deposits about the same time of the pretended sale is admissible, upon the foregoing issue.

The insolvent law of this State inhibits conveyances, etc., of two kinds, first, those made to creditors within four months of the commencement of proceedings, known as preferences; second, conveyances, etc., made to third persons within six months of the commencement of the proceedings with the view of preventing the property from being distributed among creditors.

Held; under the second clause, that an assignee may recover the property, when it appears that the conveyance was made in contemplation of insolvency, and with a view to put the property beyond the reach of creditors, and the defendant, the grantee, had reasonable cause so to believe.

See *Redman* v. *Hurley*, ante, p. 428.

On Motion and Exceptions by Plaintiff.

This was an action of replevin. The property in suit was thirty thousand feet, more or less, of soft-wood boards of the value of $450; two thousand feet, more or less, of hard-wood boards of the value of $40; fifteen thousand cedar shingles, more or less, of the value of $18.75; and one piano, of the value of $190.

The jury returned a verdict for the plaintiff for the cedar shingles and, as to all the other property, they returned a verdict for the defendant.

The plaintiff claimed title to all the property replevied by purchase from Colin McKenzie, declared an insolvent within six months after the purchase, and who was at one time owner of all; and introduced certain bills of sale from McKenzie covering the property.

The defendant claimed title to the articles as assignee in insolvency of said McKenzie and asserted that the alleged transfers from McKenzie to the plaintiff were void, because made by McKenzie when he was either insolvent, or acting in contemplation of insolvency, and with the view of preventing them from coming to his assignee to be distributed among his creditors, and when the plaintiff had reasonable cause to believe McKenzie was insolvent or acting in contemplation of insolvency.

It was admitted that the petition in insolvency was filed by the creditors of McKenzie, March 17, 1893, and the defendant was appointed assignee and received his assignment May 10, 1893.

The bill of sale of the shingles is dated September 9, 1892; that of the piano, December 12, and that of the lumber, December 20, 1892.

Besides the exceptions by the plaintiff to the admission of evidence, which are found in the opinion, the plaintiff also took exception to the following portion of the charge of the presiding justice: —

"Then the defendant says that you must also examine these transactions in the light of all the surroundings of the parties; observe just what attitude Mr. McKenzie occupied at that time in relation to other creditors, as well as to this plaintiff, for the pur-

pose of determining whether in fact he was insolvent or acting in contemplation of insolvency; secondly, so far as it throws any light on that question, whether this plaintiff, not that he knew that he was insolvent, not that he actually in any other way participated or aided in consummating the fraud, but simply whether this plaintiff had reasonable cause to believe that Colin McKenzie was insolvent or acting at that time in contemplation of insolvency, and that he was doing this for the purpose of preventing the property from being equitably and equally distributed among his directors.

"An insolvent debtor may transfer his property for a fair equivalent and for an honest purpose for reasons which have been explained; because the equivalent will pass to the creditors and they lose nothing by it. It takes the place of the property. But the legislature anticipated that it is often much more difficult to follow money than specific property which is in bulk; and hence it says that if within the period named of six months he makes this assignment for the purpose of preventing it from coming to his creditors, and to a person who has the cause to believe, which I have explained, it shall not be a valid sale.

"No other conspiracy is required to invalidate the sale than that which is involved in the simple cause to believe, on the part of the person who thus purchases this property; under this statute no other fraudulent purpose or actual participation than that which is involved in the simple cause to believe that the man was insolvent or acting in contemplation of insolvency and that he was making these transfers for the purpose named here."

H. E. Hamlin, for plaintiff.

It was error to admit the deeds offered by defendant, as it was not shown or offered to be shown that plaintiff had any connection with them or knew that they were given. So with the testimony of Parsons as to McKenzie's dealings with the bank.

None of this testimony offered by defendant had any tendency to show that plaintiff had reasonable cause to believe McKenzie insolvent or contemplating insolvency.

In an action brought by the assignee of an insolvent debtor to

recover back money paid by the debtor by way of preference, it is incumbent on the plaintiff to establish by competent and sufficient evidence, that the defendant, at the time of receiving the money, had reasonable cause to believe the debtor insolvent; and if there is no evidence to show that the defendant was aware of any fact indicating the debtor's insolvency, such as a failure to meet debts which had fallen due, or an excess of liabilities over the means of meeting them, the judge may properly direct a verdict for the defendant. *Everett* v. *Stowell*, 14 Allen, 32.

The instructions of the presiding justice upon the point as to plaintiff's reasonable cause to believe the insolvency of McKenzie were misleading and did not present to the jury the precise question necessary for them to determine.

In *Morey* v. *Milliken*, 86 Maine, 464, HASKELL, J. says:—

"Having reasonable cause to believe" is defined by our court in the language of the Supreme Court in *Grant* v. *Nat. Bank*, 97 U. S. 80, to mean:—'It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security for his debt. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be willing to trust him further; he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting.' *King* v. *Storer*, 75 Maine, 63. That definition is, 'knowledge of such facts as to induce a reasonable belief' of the resultant fact, insolvency; hardly short of knowing it."

A. W. King, for defendant.

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

HASKELL, J. Replevin of certain chattels from an assignee of an insolvent debtor, by a purchaser thereof from the insolvent before insolvency.

The question at issue before the jury was whether the purchase by the plaintiff was in fraud of the insolvent law.

The plaintiff took the stand as a witness, and defendant was allowed to interrogate him concerning his knowledge of the insolvent's financial condition and the property he held and disposed of, both before and after the sale to the plaintiff, to which the plaintiff has exception; but it is not well taken. The witness' knowledge of the insolvent, his business, his property and his disposal thereof, as well as of his habits, attention to business, soberness and thrift, all are material and sometimes vital, as to whether a pretended purchaser of property knew the condition of his vendor and should be chargeable with a fraudulent purpose in disposing of the same.

Exception is also taken to the admission in evidence of twenty-three deeds from the insolvent, either given or recorded during the same year, some before and some after the pretended sale of chattels to the plaintiff. These deeds were clearly admissible as bearing upon a contemplated insolvency.

Exception is taken to the exclusion of the testimony of a witness, as to what he said in the presence of both plaintiff and the insolvent; but what the conversation was about or when it occurred, the case does not show. It does not, therefore, appear to have been material.

Exception is taken to the admission of evidence showing that the insolvent's deposit in bank December 22, 1892, was $28.01, that on the next day it was $3028.01, of which $3000 was drawn by check. One of the sales to plaintiff was December 12, and another December 20, 1892. Insolvency proceedings were filed by creditors March 17, 1893.

This evidence, taken in connection with the sales of property and assets shown when insolvency followed, might have a strong bearing upon contemplated insolvency. It might negative it, or it might strongly indicate it, according to its relation with other conduct or conditions of the debtor. It was clearly admissible.

Exception is taken to the charge of the presiding justice touching what knowledge on the part of plaintiff might charge him with the consequences of his vendor's fraud. The justice points the

jury to the transactions of the insolvent, to observe his attitude towards his creditors, to see whether he was acting in contemplation of insolvency, and whether the plaintiff had reasonable cause to believe it. Some might draw from the language an inference of what the justice thought the logical inference from the facts ought to be, but that is not error. All men cannot give the same rule in the same language, and yet the same rule may be given by them all. We think the rule given was that required by the act of 1887, c. 132.

That act, amendatory of R. S., c. 70, § 52, inhibits two classes of acts, first, conveyances, etc., made to secure existing creditors, known as fraudulent preferences; second, conveyances, etc., made with a view to prevent the property from being distributed among creditors under the insolvent law. The latter inhibition applies to this case. If the conveyance to the defendant was made in contemplation of insolvency, and with a view to put the property beyond the reach of creditors, and the defendant had reasonable cause to so believe, and the conveyance was made within six months of insolvent proceedings, the same may be avoided by the assignee who may recover the property.

Finally, it is argued that defendant could not, of his own motion, take the property until he shall have first, by some procedure, annulled the sale to the plaintiff. *LaPage* v. *Hill*, 87 Maine, 158, is cited in support of the doctrine, but it does not support it. That case was trespass. This, replevin. There, the fraudulent conveyance might be shown in reduction of damages. Here, it may be shown to prevent the recovery of property by a person to whom it does not belong. If there were a trespass by the officer or assignee in taking this property, a remedy for that wrong still remains, although damages may be nominal. In *LaPage* v. *Hill*, supra, the property had been delivered to the mortgagee, and was taken from him by the messenger.

The evidence is conflicting. The case has been twice tried. We cannot say that the verdict is not supported by evidence. That depends very much upon where the truth lies, and the jury said it was with defendant.

Motion and exceptions overruled.

BENJAMIN F. FRENCH *vs.* THADDEUS H. DAY, and others.

Kennebec. Opinion December 31, 1896.

Burden of Proof. Exceptions. Practice.

Objections to the admission and exclusion of testimony in a trial are not considered by the law court when the exceptions fail to state what the evidence was thus admitted or excluded.

In trespass de bonis, where the defendants justify the asportation, an instruction "that it is incumbent upon the defendants to show by a clear preponderance of the evidence and by convincing proof their right to do so" is erroneous.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

The case appears in the opinion.

Jos. Williamson, Jr., and L. A. Burleigh, for plaintiff.

Emery O. and Fred E. Beane, for defendants.

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

HASKELL, J. Motion and exceptions. Upon the motion the court considers that there is testimony in the case upon which the verdict can stand. Whether this testimony be true was entirely for the jury, who saw the witnesses and could best judge of their credibility. From reading the case the court cannot say that it is untrue, or that the damages are excessive although they appear to to be large.

There are exceptions to the admission and exclusion of evidence; but what evidence, the exceptions do not state, and the court cannot be expected to examine a report of evidence to ascertain. It should have been stated in the exceptions.

This action is trespass d. b. for carrying away two small buildings standing upon land of one of defendants, of which the plaintiff had been tenant and for sundry chattels therein. As to the chattels, the judge instructed the jury: —"As to the other property,

the furniture and other articles, the plaintiff claims that they were in his house and that the house was entered in his absence and the things taken and carried away without his knowledge or consent. If you believe this, it is incumbent on the defendants to show, by a clear preponderance of the evidence and by convincing proof, their right to do it in order to prevent a verdict against them."

This instruction was error, for two reasons:

I. Unless the property was taken and carried away by defendants, it was not incumbent upon them to prove anything.

II. Assuming that it had been carried away by them, and assuming it incumbent upon them to justify their acts, still they were only required to do so by a preponderance of the evidence, not by a "clear preponderance and by convincing proof." Perhaps the adjectives were intended for emphasis only, but the testimony upon the issues tried was so evenly balanced, that the instruction may have misled the jury, and very likely did so. Preponderance means to outweigh. To weigh more. A clear preponderance may mean that which may be seen, is discernible and may be appreciated and understood. In this sense, the expression might be unobjectionable; but it may convey the idea, under emphasis, of certainty, beyond doubt, and very likely would do so to the common mind. At any rate, the expression is equivocal and mischievous. "Convincing proof" may be said to mean that degree of certainty required to sustain a given postulate. But that view assumes that the hearer knows the rule that governs such case, which jurors are not supposed to know, but of which they should be informed. The two expressions coupled must have conveyed to the jury an erroneous basis for their verdict.

Exceptions sustained.

JAMES P. RANDALL *vs.* JAMES E. TUELL.

Kennebec. Opinion January 5, 1897.

Inn Holder. License. Void Contract. R. S., c. 27, § 13.

Where a license is required for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act, is void.

By R. S., c. 27, § 13, it is expressly provided that "no person shall be a common innholder or victualer without a license, under a penalty of not more than fifty dollars."

This statute is explicitly prohibitory, and the license required is clearly for the protection of the public and to prevent improper persons from engaging in a particular business.

The plaintiff, as innholder, furnished board and lodging to the defendant at his inn. He had not obtained the license required by statute. This action is based upon a clear violation of the statute, and the plaintiff cannot successfully invoke the aid of the court to enforce it.

ON EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit for board and lodging furnished at the Cony House, in the city of Augusta, between April 26, 1894, and May 10, 1894. The plea was the general issue. The case was tried to a jury in the Superior Court for Kennebec County.

That the plaintiff boarded a lady at his hotel, the Cony House, in Augusta, Maine, for fourteen days from April 26, 1894, to May 10, 1894, was admitted. It was not in controversy that the price charged, $28.00, and claimed in the writ, was reasonable.

The plaintiff contended that he furnished the board under an oral contract with the defendant, whereby the defendant engaged the room and originally promised to pay for the board and lodging subsequently so furnished.

The defendant contended that in making the contract, relied on by the plaintiff, he was merely the agent of the lady to whom the board was so furnished, and that the contract was hers and not his.

The cause was submitted to the jury upon the foregoing issue

and a verdict rendered for the plaintiff for the sum $28.00 with interest from demand.

It was not in controversy that the Cony House, during the time covered by plaintiff's claim was a public inn in the city of Augusta, in the county of Kennebec, and that the contract relied on was for board and lodging furnished by the plaintiff at said public inn, as an innholder. It was admitted that during the time covered by the contract the plaintiff had no license as an innholder in the city of Augusta, as required by statute.

The defendant seasonably requested the presiding justice to instruct the jury that under the foregoing facts, the plaintiff could not maintain his action, and that a verdict should be rendered for the defendant.

The presiding justice declined to give the instruction so requested and ruled, pro forma, that the action was maintainable; and to this ruling the defendant excepted.

E. W. Whitehouse and W. H. Fisher, for plaintiff.

The statute does not make contracts of unlicensed innkeepers void. There is nothing in the statute by which such an intention of the legislature can even be implied. Forfeitures and confiscation of honest debts must be the result of express legislation; these are not to be implied. In *Burbank* v. *McDuffie*, 65 Maine, 135, APPLETON, C. J., says: "It is not for the court to interpolate by judicial construction what the legislature did not deem wise to insert," and in the same case, the court cites and approves *Harris* v. *Runnells*, 12 How. (U. S.) 79. This case seems to be parallel with the one at issue, in which it was held that when the sale was an offense by reason of a statute, but the act itself was not criminal, and the sale itself was not declared void by the statute, there was no implication from the mere infliction of the penalty that the contract was void. That is the law as declared by the Supreme Court of the U. S. and it seems that it should be and is law in the State of Maine.

In *Norcross* v. *Norcross*, 53 Maine, 163, it was held that a suit could be maintained against an unlicensed innkeeper, and the court said: —"A license does not change the character of the busi-

ness of those who entertain travelers. The possession of it does not make, or the want of it prevent, a person from being an innkeeper, at common law; it is his business alone that fixes the status of a party in this respect." *Atwater* v. *Sawyer*, 76 Maine, 541.

H. M. Heath and C. L. Andrews, for defendant.

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

FOSTER, J. The only question presented in this case is, whether an innholder who has no license under R. S., c. 27, can recover for board and lodging furnished by him in such inn.

While the statute contains no express provision declaring contracts by an unlicensed innholder to be void, it does by § 13 expressly provide that "no person shall be a common innholder or victualer without a license, under a penalty of not more than fifty dollars."

It is the general doctrine now settled by the great weight of authority, that where a license is required for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void.

Did the legislature by the requirement of a license intend to prohibit the exercise of the business without a license, or was the statute enacted for revenue purposes only?

It can hardly be contended that the statute is in any sense for mere revenue. The fee required is only one dollar. The licensee must show that he is a man of good moral character, must give bond not to violate the prohibitory law, and must allow no gambling on his premises. The legislative intent is best inferred from the language of the statute itself. The statute is explicitly prohibitory, and the license required is clearly for the protection of the public and to prevent improper persons from engaging in a particular business.

This question has come before the courts not only in this but in other states, and the great trend of authority is in but one direction.

The same principle was established in *Harding* v. *Hagar*, 60 Maine, 340. There the plaintiff was a commercial broker within the meaning of a statute of the United States, which provided that no person should be engaged in prosecuting or carrying on any trade, business or profession thereinafter mentioned until he should obtain a license therefor, under a penalty. That statute contained no express provision declaring the contracts of unlicensed persons void. Like the statute under consideration, it prohibited unlicensed employments. Suit was brought to recover for services as broker, and in the course of the opinion KENT, J. says:—"It is too-well settled to require the citation of authorities, that no party can recover for acts or services done in direct contravention of an express statute, or for property sold and delivered. When the case develops such forbidden acts, unless protected by a license or authority, it is incumbent on the plaintiff to show such license."

The same question was determined, authorities reviewed, and the principle affirmed in *Harding* v. *Hagar*, 63 Maine, 515. In *Stanwood* v. *Woodward*, 38 Maine, 192, an innholder, without license, sought to establish a lien for board upon the property of a guest committed to his charge, and the want of a license was held to be fatal to his claim.

This case falls within the rule laid down by this court in *Durgin* v. *Dyer*, 68 Maine, 143, where the court say:—"The rule is well established that contracts for the sale of chattels entered into in contravention of the terms and policy of a statute cannot be enforced; and it is immaterial whether the sale is expressly prohibited, or a penalty imposed therefor, because the imposition of a penalty in such case implies prohibition."

So under a statute which in terms provides that "whoever offers for sale or shipment any pressed hay not marked" as required by law "forfeits one dollar for each bale so offered, to be recovered by complaint," this court has held that contracts for the sale of such hay was void. *Burton* v. *Hamblen*, 32 Maine, 448. The

court there say that "the statute though not in express terms, yet by unavoidable inference, prohibits every such sale." *Pickard* v. *Bayley*, 46 Maine, 200.

A contract for shingles not surveyed as required by law was held void in *Richmond v. Foss*, 77 Maine, 590, although the statute contained no express prohibition.

In *Cope* v. *Rowland*, 2 Mees. & W. 149, it was held that a person acting as a broker without license could not recover his commissions, where the statute required a license and imposed a penalty for its violation. "It is perfectly settled," says Baron Parke, "that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition."

In Massachusetts the decisions are numerous that where a statute imposes a penalty for a failure to comply with its provisions, it is to be construed as prohibitory, and that contracts made in direct contravention of its requirements are unlawful and void. *Miller* v. *Post*, 1 Allen, 434, where milk was sold by the can and the cans were not sealed. *Libby* v. *Downey*, 5 Allen, 299, where coal was sold without being weighed by a sworn weigher. *Sawyer* v. *Smith*, 109 Mass. 220, hay sold without being weighed as required by statute. *Prescott* v. *Battersby*, 119 Mass. 285, lumber sold without being properly surveyed.

The same doctrine was affirmed in Illinois in *Hustis* v. *Picklands*, 27 Ill. App. 270, where, under a statute making it unlawful for persons to exercise the business of brokers without a license, it was held that one who sold stocks without a license could not maintain an action for his commissions. And also in *Tedrick* v. *Hiner*, 61 Ill. 189.

Also in Pennsylvania, in *Johnson* v. *Hulings*, 103 Penn. St. 498 (49 Am. Rep. 131); *Holt* v. *Green*, 73 Penn. St. 198 (13 Am. Rep. 737.)

In California, where it is made a misdemeanor for a person to

practice medicine without a license, an action will not lie to recover for services so rendered. *Gardner* v. *Taturn*, 81 Cal. 370.

In Tennessee the court say that the revenue test is to be applied only where there is doubt from the language of the statute itself whether or not the legislature intended to prohibit the exercise of the privilege without a license, and that under a statute providing that the business of a real estate broker shall not be pursued without a license, it was held that an unlicensed broker could not recover his commission. *Stephenson* v. *Ewing*, 87 Tenn. 46.

If the statute in question was enacted for revenue purposes only, instead of being prohibitory, the plaintiff might properly recover. But we are satisfied that such was not the intention of the legislature. The statute being by implication prohibitory by reason of the penalty attached, the plaintiff is precluded from recovering. Basing his action upon a clear violation of the statute, he cannot successfully invoke the aid of the court. *Miller* v. *Post*, 1 Allen, 434.

Exceptions sustained.

STATE, by information, *vs.* DANIEL J. DONOVAN.

Hancock. Opinion January 6, 1897.

Officer. Removal. Statutes. Repeal. Ellsworth City Charter. R. S., c. 3, § 34.

The removal of an officer for cause is held to be a judicial act, and the mayor and aldermen must act together, and each officer is entitled to notice and hearing.

A local statute enacted for a particular municipality is intended to be exceptional from the general statute, and for the benefit of such municipality.

General acts are held not to repeal the provisions of charters granted to municipal corporations though conflicting with the general provisions, unless the words of the general statute are so strong and imperative as to render it manifest that the intention of the legislature cannot be otherwise satisfied.

ON EXCEPTIONS BY DEFENDANT.

This was an information in the nature of quo warranto filed by the Attorney General, at and by the relation of Thomas J. Holmes, against the respondent for usurping the office of city marshal of the city of Ellsworth.

The hearing was on information, answer, replication and testimony; and the following decree was made by the presiding justice:

"This cause came on to be heard this second day of June, A. D. 1896, and was argued by counsel, and thereupon, upon consideration thereof it is adjudged and determined as follows, viz:—

"That the relator, Thomas J. Holmes, was duly and legally appointed city marshal of said city of Ellsworth on the 16th day of March, A. D. 1896, that said relator duly qualified for said office on the 17th day of March, A. D. 1896, and ever since has been and still is the legal city marshal of said city of Ellsworth; that the attempted removal of said relator from said office by Mayor Gerry was not in accordance with the requirements of the city charter of said city of Ellsworth and is illegal and void; that the respondent, Daniel J. Donovan, on the fourth day of May, A. D. 1896, usurped, used and exercised the said office of city marshal of said city of Ellsworth, and ever since has usurped, used and exercised said office without any lawful authority therefor; and that judgment of ouster be and is hereby rendered against said respondent, Daniel J. Donovan, and he is hereby directed not in any manner to intermeddle or concern himself in and about the holding of, or exercising, the said office of city marshal of said city of Ellsworth.

WM. P. WHITEHOUSE,
Justice Sup. Jud. Court."

To this decree the respondent took exceptions.

H. E. Hamlin, for relator.

G. B. Stuart and D. E. Hurley, for respondent.

Only the first twelve lines of section four of the city charter apply to the appointment of city marshal, and the remainder of the section, commencing with "All the powers, etc.," applies to all other subordinate officers, being those which are elected by the city council without the mayor having any voice or vote.

Under the general laws of Maine the legislature conferred upon the mayor the power of removal of all officers elected or appointed by the mayor and aldermen, and he need not specify cause for removal, and his decision is final. Am. & Eng. Enc. of Law, p. 562, note I.

The clause in city charter giving power to the city council to remove officers for cause, applies only to such officers as were created by them alone, and that clause is not repugnant to, nor inconsistent with, the act of 1896, and would not deprive the mayor of his rights under said act of 1896.

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

FOSTER, J. By an express provision of the city charter of the city of Ellsworth, the mayor and aldermen hold their office for one year from the second Monday in March, and until others shall be elected in their places.

There having been no election of mayor at the annual election in March, 1896, the mayor then in office was in all respects legally acting until his successor was chosen on the sixth day of April following, and was authorized to perform all the duties granted to the mayor by the city charter.

The city charter provides that the mayor and aldermen shall elect or appoint subordinate officers on the second Monday of March, or as soon thereafter as conveniently may be. That meeting, as appears from the records, was adjourned from time to time until the sixteenth day of March, when the mayor appointed the relator as city marshal, which appointment was confirmed by the board of aldermen. This appointment by the mayor and confirmation by the board of aldermen was equivalent to an appointment by the mayor and aldermen as specified in the city charter.

The relator was duly qualified and entered upon the discharge of his duties.

On the sixth day of April, 1896, at a special election for the choice of mayor, Robert Gerry was elected as mayor. On the fourth day of May, 1896, at a regular meeting of the city govern-

ment, the mayor nominated the respondent as city marshal, which nomination the board of aldermen refused to confirm. Thereupon the mayor appointed the respondent as "acting city marshal," who took the oath of office, and proceeded to exercise the authority and perform the duties incident to the office of city marshal.

When the appointment of respondent was made there was no vacancy in the office of city marshal. This fact the mayor must have understood, for afterwards on May 20, 1896, he caused a written notice of removal to be served on the relator.

By section 4 of the city charter, "The mayor and aldermen may remove officers, when in their opinion sufficient cause for removal exists."

Under this section only have the mayor and aldermen power to remove officers elected, or appointed for a fixed term, before the expiration of that term, and even then the removal must be for cause.

The removal of an officer for cause is held to be a judicial act. The mayor and aldermen must act together, and the officer to be removed is entitled to notice and hearing. *Andrews* v. *King*, 77 Maine, 224; *Ham* v. *Boston Board of Police*, 142 Mass. 90.

No action has ever been taken by the mayor and aldermen upon the question of removal of the relator. The matter has never been brought officially before the board of aldermen. The mayor acted upon his own motion and attempted to remove the relator without formulating any charges against him or granting him the privilege of a hearing.

The mayor's only claim for any such authority to remove officers upon his own motion, without cause, and without the concurrence of the board of aldermen, is under the last clause of R. S., § 34, c. 3, which reads as follows:—"Whenever appointments to office are directed or authorized to be made by the mayor and aldermen of cities, they may be made by the mayor with the consent of the aldermen, and such officers may be removed by the mayor."

It is an established rule in the construction of statutes that a local statute enacted for a particular municipality, for reasons

satisfactory to the legislature, is intended to be exceptional and for the benefit of such municipality. Black on Interpretation of Statutes, 116.

In accordance with this principle, general acts are held not to repeal the provisions of charters granted to municipal corporations though conflicting with the general provisions, unless the words of the general statute are so strong and imperative as to render it manifest that the intention of the legislature cannot be otherwise satisfied. Endlich on Int. of Statutes.

It appears, however, that the special act of the legislature incorporating the city of Ellsworth was passed in 1869, while the general statute, found in § 34 of c. 3, R. S., was enacted in 1866. The re-enactment of the general statute in 1895 was for the purpose of adopting an amendment not affecting the question here presented, and discloses no intention to repeal the special provisions of municipal charters granted after 1866. *State* v. *Cleland*, 68 Maine, 258.

The legislature must be presumed to have had in mind the act of 1866 when granting the city charter in 1869, and to have intended the substitution of the latter for the former in prescribing the methods of removal. *Weeks* v. *Walcott*, 15 Gray, 54; *Smith* v. *Sullivan*, 71 Maine, 150, 152, 153. It was in accordance with this doctrine that the court, in *Starbird* v. *Brown*, 84 Maine, 238, held a prior private act to be so amended by a subsequent general act as to render it conformable with the latter. "The test is," say the court, "whether a subsequent legislative act is so directly and positively repugnant to the former act that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident?" In this case, as in that, the legislative intent to amend is evident, and that intent must prevail.

It follows that the question here presented must be settled and the rights of the parties determined in accordance with the provisions of the city charter of Ellsworth. Under the rule there prescribed for the appointment and removal of subordinate officers, the city marshal can only be appointed or removed by the mayor

by and with the advice and consent of the aldermen. He cannot be appointed or removed by the act of the mayor alone.

This conclusion will be found to be fully supported by the Massachusetts court in the recent case of *Copeland* v. *Springfield*, 166 Mass. 498, 504, citing a large number of authorities. That court says:—"The legislature could repeal all or any of the special or the general acts which have been cited, either wholly or as affecting cities alone, and could set up the provisions of stat. 1895, c. 444, as the only rules concerning the matters dealt with to be thereafter followed in any city. If it clearly appears that it was intended to impose upon all cities the system of that statute as the only rule for constructing and completing sidewalks, and of making assessments for their cost, that intention is to have effect, although the repugnant rules which were previously in force in any city are found in its charter, or in some other special act granted to its inhabitants. But, in accordance with the rule of construction stated in *Brown* v. *Lowell*, 8 Met. 172, when special acts growing out of the peculiar wants, condition, and circumstances of the locality have been granted to a particular place, and afterwards a general law is passed having some of the same purposes in view, and extending them to places in which the special acts had no operation, whether the general act is an implied repeal of all repugnant special acts depends upon a careful comparison of the statutes and the objects intended to be accomplished; and, speaking generally, it requires 'pretty strong terms in the general act, showing that it was intended to supercede the special acts, in order to hold it to be such a repeal.'"

The act of the mayor in attempting to remove the relator from the office of city marshal was ineffectual because not done by and with the advice and consent of the aldermen. There being no vacancy in the office of city marshal, the act of the mayor in attempting to appoint the respondent to that office was unauthorized and illegal; and in any event was wholly ineffectual because not done by and with the advice and consent of the board of aldermen.

Hence the relator, having been legally appointed to the office of

city marshal of Ellsworth by and with the advice and consent of the board of aldermen, and not having been legally removed therefrom, is now entitled to said office. The respondent is not entitled to it.

Exceptions overruled.

HORACE E. FIELD *vs.* PETER H. LANG.

Somerset. Opinion, January 16, 1897.

Trial. Cases tried together. Trespass. Exceptions. New Trial.

It is not error for the presiding justice, in the exercise of his discretion, to order several cases of the same nature between the same parties tried together.

An exception that does not disclose to what particular legal propositions it applies, and therefore is too indefinite, will not be considered by the court.

An exception to a ruling, in substance, that if plaintiff held possession of the locus through an agent he might have trespass for injury to his possession, is not well taken.

A new trial will not be granted when it appears from a careful examination of the case that there is no error. The court observes that verdicts are hardly to be disturbed on motion of defendant where the damages assessed are nominal and the judgment will settle little but damages.

Newly-discovered evidence that does not come within the rules to make it effective, is not sufficient to grant a new trial.

See *Field* v. *Lang*, 87 Maine, 442.

ON MOTIONS AND EXCEPTIONS BY DEFENDANT.

These were four actions for trespass quare clausum brought on the same day, August 2, 1893, to recover for trespasses upon the same lot of land in Palmyra during the summer of 1893. The jury returned a verdict for the plaintiff in each action for nominal damages.

The presiding justice directed the parties, against the objection of the defendant, to try the four cases in a group to the same jury at the same time. To this order the defendant seasonably excepted.

After the evidence was all in, the presiding justice ruled that the legal title to the lot of land was in the plaintiff, and further

ruled that the evidence would not authorize the jury to find any estoppel against the plaintiff to recover damages for the alleged trespasses, or to find a license for the entries alleged.

As to the alleged entries in July, 1893, the presiding justice instructed the jury that the only question for them was, whether the defendant, by himself, or his servants or agents, had entered upon the lot as alleged in the declaration. As to the alleged entry in June, 1893, the presiding justice instructed the jury that if the tenant of the plaintiff had abandoned his possession as tenant, and was holding possession merely as the agent of the plaintiff at the time of the alleged entry, then, if they found that the defendant had entered as alleged in the writ, they should find him guilty of the trespass.

To these rulings the defendant seasonably excepted, and after verdict filed a general motion for a new trial, and also moved for a new trial because of newly-discovered evidence.

The first act of trespass complained of was the taking of rhubarb on the first day of June, 1893—the second for cutting grass and hauling the same away on the tenth day of July of the same year. The third act of trespass complained of was that the defendant on the next day was on the premises and with divers threats tried to menace and dispossess the plaintiff. The fourth act was that the defendant nailed up the plaintiff's barn on the premises on the twenty-sixth day of July of the same year.

To the first two actions, namely, the taking of the rhubarb and cutting and hauling off the hay, the plaintiff pleaded the general issue, and denied that he had ever taken off the rhubarb or the hay; and though there was some evidence of acts and conduct between the parties indicating other defenses, the denial of ever taking the rhubarb or hay was the principal defense; and in these two cases there was no equitable defense filed.

In the other two cases, namely, the acts of trespass complained of as taking place on July eleventh and twenty-sixth, the defendant filed a plea in equity under the Stat. of 1893, c. 217, and in which he alleged:—" . . . that he was authorized and directed by the said Horace E. Field on the 13th day of September, 1890, to

purchase for and in behalf of the said Horace E. Field the premises described in this action; and thus acting under the authority and by the direction of said Field, said Lang purchased said premises of Lucinda H. Field, widow of the late Cyrus Field, and paid therefor from his own money $150; and that he the said defendant now claims that said title is in himself and that he has always been and is ready and willing to deed said premises to said Field and will now upon being reimbursed for said sum paid out for said real estate—and furthermore he had a license from said Field to have charge and control of said premises long before this title was conveyed to said Lang; and said license has never been revoked and the defendant now asks that said plaintiff be restrained, estopped and enjoined from prosecuting said defendant for trespass on said property, and be either compelled to pay said defendant the money said Lang has paid for said premises or release his, said Field's claim, on said premises."

Besides the facts stated in the former case, 87 Maine, 442, it appeared subsequently that dower was set out to the widow, Lucinda H. Field, and it was taken and sold upon execution in favor of the plaintiff, Horace E. Field, in this action. The acts of trespass complained of in these cases were, as the plaintiff alleged and introduced evidence to show, on this dower interest.

H. Hudson, for plaintiff.

F. W. Hovey, for defendant.

Actions at law and suits in equity cannot be joined. Enc. Pl. and Prac. pp. 175–176; *Cherokee Nation* v. *So. Kan. R. Co.*, 135 U. S. 641; *Hurt* v. *Hollingsworth*, 100 U. S. 100; *Donnelly* v. *Dist. of Columbia*, 119 U. S. 340.

Same rule applies to the Law and Equity Act of 1893.

The rule of consolidation, as laid down in the books, is for the benefit of defendant and where, upon his motion, his rights are better protected, he can have this done; but when he is injured thereby, the hardship becomes additionally great. In all the cases where the defenses are different the court has no discretion. 4 Enc. Pl. and Prac. 679; Chit. Pl. p. *421, note; *Worley* v. *Glentworth*, 10 N. J. L. 241; *Thompson* v. *Shepherd*, 9 Johns. 262;

Dunning v. *Bank of Auburn*, 19 Wend. 23; *Powell* v. *Gray*, 1 Ala. 77.

In all the cases the rule is recognized with steadfastness that the defenses must be the same in order to consolidate. But the courts go still further and hold that the defense must be the same, or there must be no defense, or the questions arising must be identical. *Wilkinson* v. *Johnson*, 4 Hill, N. Y. 746; *Logan* v. *Mechanics Bank*, 13 Ga. 201; S. C. 64 Ga. 684; *Young* v. *Davidson*, 31 Tex. 153.

In general, claims to equitable relief and to a judgment at law cannot be prosecuted in the same action. *Mayo* v. *Malden*, 4 Cal. 27; *Harvey* v. *De Witt*, 13 Gray, 536; *Ind. Sch. Dist.* v. *Hayes*, 50 Iowa, 322.

In the suits at bar the judgments must necessarily be different. In the two cases where the equitable defense relief is prayed for, and is a right given by statute, and when, on defendant's motion, these were transferred into equity, the same remedies were necessarily changed. The defendant had different and unlike defenses; they were not identical; and the fact that he was found guilty by his own admissions and pleadings, in the last two cases, weighed heavily against him in the first cases, where the trespasses were strongly denied.

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

HASKELL, J. Four actions of trespass q. c. brought the same day for four several trespasses upon the same close, one May 30th, one July 10th, one July 11th and one July 26th, 1893. The cases were ordered on trial together, and verdicts for nominal damages were rendered for the plaintiff in each case.

I. Exception is taken to the order that the cases be tried together. The cases were all of the same nature, between the same parties, touching the same locus and might well have been included in one action at the beginning, instead of incurring the expense of four writs all sued out the same day. The discretion

of the presiding justice in ordering one trial was wisely exercised, and, moreover, is not the subject of exception. *Dunn* v. *Kelley*, 69 Maine, 145; *Pettengill* v. *Shoenbar*, 84 Maine, 104. It should be noticed that these actions were not consolidated, but ordered on trial together, leaving each case otherwise subject to the same procedure as if tried separately. Authorities as to the consolidation of actions do not fully apply. The order complained of is the exercise of a discretion touching the order and dispatch of business long exercised in Massachusetts and hitherto here unquestioned. *Witherlee* v. *Ocean Ins. Co.*, 24 Pick. 67; *Kimball* v. *Thompson*, 4 Cush. 445; *Springfield* v. *Sleeper*, 115 Mass. 587.

II. Exception is taken to the ruling of the presiding justice made at the close of the evidence, which is voluminous, that the title to the locus was in the plaintiff, and that the evidence did not estop him from recovering damages, or show a license for the defendant's acts. The ruling is very broad, and the exceptions do not disclose to what particular legal propositions it applies, and hardly come within the rule of *McKown* v. *Powers*, 86 Maine, 291. At any rate, no error of law is perceived.

III. The remaining exception is to a ruling, in substance, that if plaintiff held possession of the locus through an agent he might have trespass for injury to the possession. Of course he could. If the possession was his, he should have damages for its disturbance. If it was not his, then he suffered no injury and can have no damages. *Bank* v. *Wallace*, 87 Maine, 33.

IV. A new trial is asked because the verdict is both against the law and evidence. A careful examination of the case does not clearly show error; and, moreover, verdicts are hardly to be disturbed, on motion of defendant, where the damages assessed are nominal, and the judgment will settle little but damages.

V. The newly-discovered evidence does not come within the rules that, in such cases, make it effective. *Michaud* v. *Canadian Pacific Railway Co.*, 88 Maine, 381.

Motion and exceptions overruled.

WALTER A. WOOD & CO. *vs.* LEROY FINSON, and another.

Hancock. Opinion January 18, 1897.

Sales. Agent. Contract.

Persons dealing with a merchant's traveling salesman have a right to presume that his agency is general touching the business he is engaged in.

If such agent sells goods upon terms not authorized by his principal he cannot reject the terms of sale and recover for goods sold. He cannot enforce part of a contract and reject the remainder of it; nor can he recover upon an implied contract where there was an express one.

In such case the rights of the parties do arise from contract, but the goods remain the property of the vendor.

ON MOTION AND EXCEPTIONS BY DEFENDANTS.

This was an action of assumpsit on account annexed. At the conclusion of the evidence the presiding justice ruled that the admissions and evidence did not establish a defense, and directed the jury to return a verdict for the plaintiff, which was done, and the defendant excepted.

The case appears in the opinion.

H. E. Hamlin, for plaintiff.

A traveling salesman is a man "whose business it was to solicit orders for the plaintiffs for their goods." *Clark* v. *Murphy*, 164 Mass. 490–492. Authority of an agent, who travels to solicit orders for a commercial house, does not embrace power to cancel his contracts and receive back goods shipped to and not satisfactory to a customer. *Diversy* v. *Kellogg*, 44 Ill. 114, (92 Am. Dec. 154); *Clark* v. *Murphy*, supra.

O. F. Fellows, for defendants.

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

HASKELL, J. Assumpsit for the sale of burning oil, to be delivered free on board vessel in Boston. Defense, that the contract of sale called for its insurance by the vendor, and that, from

failure to do so, the oil being lost at sea, the vendee lost its value; and also that, thereafterwards, the vendor agreed to replace the oil and did so by the delivery of other oil now sued for. Of course, the agreement to replace the oil need not avail, if the failure to insure does so.

Plaintiffs were merchants in Boston. Defendants, traders in Bucksport. One Carlow was the traveling salesman of the plaintiffs prior to April, 1894, and had repeatedly sold the defendants burning oil. One Emery succeeded Carlow and sold the oil now sued for. Defendants testify that they had instructed Carlow to always insure burning oil shipped to them by vessel. Emery sold the oil in suit, but did not insure it and it was lost on the voyage. The presiding justice instructed the jury that Carlow had no authority, as salesman, to contract for insurance of future sales not made by him.

Carlow had authority to sell goods, to fix the price and the terms of payment, when and where the goods should be delivered and by what carrier they should be sent. These powers were all incident to his authority to sell goods. They are all to be exercised by him for his principals, not for himself. Why, then, should he not bind them as to conditions of a continuous trade with their customer so long as they continued it? Defendants testify that Carlow promised to notify plaintiffs to insure the oil purchased by defendant, and that with the exception of once or twice plaintiffs did so and they paid the bill. Had Carlow remained in plaintiffs' employ, the condition of sale requiring insurance would have bound the plaintiffs. Carlow left their employ, but his customers remained, and plaintiffs continued to solicit their trade. Had they not a right to suppose that the same conditions of dealing obtained? They were not notified of any change. A new representative of the house visited them,—that was all. Their continued custom was sought and obtained. Why not under the existing terms? No good reason is plain. It is fair to assume that the old arrangement as to insurance was to continue, and we think it did. "Persons dealing with an agent have a right to presume that his agency is general and not limited, and

notice of the limited authority must be brought to their knowledge before they are to regard it." *Trainer* v. *Morison*, 78 Maine, 163; *Methuen Co.* v. *Hayes*, 33 Maine, 169.

The oil in the first item in the account sued was lost in transit, and the second item is a duplicate of it, furnished, as the defendants testify, on condition that no charge should be made for the goods lost. The presiding justice instructed the jury that, Emery, the plaintiffs' salesman, had no authority to sell the goods upon such terms. The goods, according to the defendant's testimony, were either sold upon such terms or not at all, and the case of *Billings* v. *Mason*, 80 Maine, 496, is directly in point. There, a salesman sold goods upon stipulation that certain like goods of the vendee should be taken in payment. To do this, he had no authority from his principals, but the court held the agreement valid. It says, "that he not only assumed the authority so to do, but did actually make such a contract." It further says the vendor "cannot hold him [the vendee] upon a contract he did not make, or repudiate the contract in part and hold the remainder valid." *Brigham* v. *Palmer*, 3 Allen, 450. "Nor can he be holden upon an implied contract, for that is excluded by the express." So here, the salesman seems to have sold the oil upon the surrender of defendant's claim for breach of the contract to insure. That sale was express. If that contract be invalid, then the law implies none, and the remedy is not assumpsit for goods sold.

These defenses should have been submitted to the jury, and it was error to direct a verdict for plaintiffs.

Exceptions sustained.

SARAH J. DAY *vs.* HORACE PHILBROOK.

Cumberland. Opinion January 18, 1897.

Real Action. Lost Deed. Adverse Possession. R. S., c. 104, § 10.

In a real action the plaintiff must recover, if at all, upon the strength of his own title. When he attempts to do so by proving a lost deed under which he claims title, *held;* that in such cases the law is very strict.

Titles to real estate pass by deed, and when such deed has not been recorded and cannot be produced and no copy of it is in evidence, the testimony of witnesses as to the existence of such deed and of its contents must be so clear and convincing as to almost preclude the possibility of mistake.

It would be dangerous to allow record titles to be destroyed by the testimony of witnesses, unless the testimony be very clear and explicit; and in this case *held;* that the testimony is not of that character.

When the existence of a lost deed has already been considered by the court in another case between the same parties, and while that case was disposed of by nonsuit and decided nothing but that action, *held;* that it is proper to refer to the opinion of the court in the former case, as bearing upon this case; and the court concludes, as it did in the former case, that the existence of such a deed as claimed in this case, is not satisfactorily shown; nor is such conduct shown on the part of defendant as to raise an equitable estoppel upon him to deny its existence.

Plaintiff claimed title by twenty years' adverse possession of the land that he sought to recover in this action; but, during such twenty years, the plaintiff had brought suit against the defendant to recover the same land and in that action he alleged that the defendant had disseized him and held him out of possession of the land. *Held;* that such disseizin and possession by the defendant would interrupt the plaintiff's continued possession. He cannot acquire title by adverse possession while he has been disseized by the true owner of the land; and this fact he has admitted by his former writ.

See *Day* v. *Philbrook*, 85 Maine, 90.

ON REPORT.

This was a real action brought to recover a certain lot or parcel of land situate in Brunswick, Cumberland County, bounded and described as follows:—beginning on the easterly side of the road leading from Brown's Corner to Freeport, at the corner of the Philbrook road so-called; thence south thirty-two and one-half degrees east, seventy-one rods and ten links by said road to the land of Horace Philbrook; thence south forty-five degrees west

thirty-seven rods by said Philbrook's land to stake and stones; thence north forty-five degrees west seventy-one rods by land sold to James Cox by Thomas Coombs to the above mentioned road; thence northeasterly by said road fifty-three rods to the first mentioned bounds.

The plaintiff deraigned her title, as follows:—

Thomas Coombs, the original proprietor, conveyed by warranty deed to Henry V. Rowell, July 10, 1867, the demanded premises, together with other land, taking a mortgage back;—said Rowell quitclaimed to Horace Philbrook, the defendant, the demanded premises, July 6, 1868. Then she offered evidence to prove that Horace Philbrook conveyed the equity of redemption by quitclaim to Coombs, the mortgagee, and that the deed had never been recorded and was lost. Said Coombs conveyed to Silas F. Brown, November 9, 1869;—Silas F. Brown conveyed to Charles E. Coburn, May 18, 1881;—and Charles E. Coburn conveyed to the plaintiff May 27, 1882. She did not offer any specific evidence of the execution of this lost deed, or of its contents. The plaintiff further claimed that Philbrook conveyed this parcel to Coombs prior to the time that Coombs conveyed it to Brown, and relied upon the evidence drawn from Philbrook's admissions and conduct for proof of the fact. These admissions, as the plaintiff contended, were made by Philbrook, about 1880, when, searching for a deed, he went to the widow of Thomas Coombs and talked with her, and her son, in the presence of other persons. The conduct of Philbrook, relied on by the plaintiff as disproving his ownership, was that the defendant, from 1869 to 1892, did not enter upon the land, make any claim to it, pay taxes on it, or perform acts of ownership upon it; also, that on the same day, November 9, 1869, when Coombs conveyed to Brown, he conveyed another parcel, being a portion of the adjoining premises, to James H. Cox which was surveyed by a surveyor in the presence of Philbrook who knew the sale was made, saw it chained off, but made no objection. The plaintiff also claimed title to the demanded premises by adverse possession.

The defendant in reply contended that the question presented by the plaintiff has been fully settled and determined by this court in the former suit between the same parties, relating to the same premises, and reported in 85 Maine, 90. The following is the description of the premises demanded in that action:— "A parcel of land situated in said Brunswick, and bounded on the west by the public highway leading from Brown's Corner to Freeport; on the south by land of James Henry Cox; on the east by land of Horace Philbrook; and on the north by a straight line extending from said highway to said land of the defendant and parallel with and three rods distant northerly from a straight line drawn on the site of an old farm fence, the post holes of which remain in several stones now remaining at different points along the way."

The defendant further contended that, although he was present on November 9, 1869, during the survey of the parcel sold to James H. Cox by Coombs, yet the evidence proved that nothing was said in his presence as to the purpose of the survey; and that he was there to object to what was going on, so far as he understood it, and his old age and blindness enabled him to appreciate it.

Other facts are stated in the opinion.

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

A judgment of nonsuit is no bar unless it settled the merits. *Jay* v. *Carthage*, 48 Maine, 359; *Lord* v. *Chadbourne*, 42 Maine, 443. It is only when the point in issue has been determined that the judgment is a bar. I Greenl. Ev., § 530, cited in *Lord* v. *Chadbourne*, supra. If the real merits of the action are not decided in the first action, the prior judgment is no bar.

Herman on Estoppel and Res Adjudicata, p. 236, and cases cited. Parol evidence is admissible to show what points were really in controversy under a general plea. *Merritt* v. *Morse*, 108 Mass. 270; *White* v. *Chase*, 128 Mass. 158; *Rogers* v. *Libbey*, 35 Maine, 200; *Dunlap* v. *Glidden*, 34 Maine, 517. Herman, supra, pp. 111–112.

The burden is upon the defendant, setting up the prior judgment, to show that the precise point in issue here was raised and

determined there. *Young* v. *Pritchard*, 75 Maine, 513; *Smith* v. *Brunswick*, 80 Maine, 189.

The court will refer to its former decisions to point out just what was and what was not decided in that case. *Campbell* v. *Knights*, 26 Maine, 224; *Camden* v. *Belgrade*, 78 Maine, 204; *Cary* v. *Whitney*, 50 Maine, 322; *Call* v. *Houdlette*, 73 Maine, 293; *Call* v. *Foster*, 52 Maine, 257; *Andrews* v. *Marshall*, 48 Maine, 26.

The court say in *Day* v. *Philbrook*, 85 Maine, 90:—"This is a real action to recover seizin of a narrow strip of land one and a half rods wide, over which a town road had been laid out and afterward discontinued."

The court merely refrained from rendering judgment for plaintiff. It did not decide that Coombs owned the land. Nonsuit on agreed statement of facts held not a bar to subsequent suit. *Homer* v. *Brown*, 16 How. 354.

Nonsuit on the merits, in assumpsit, held not a bar in case. *Bridge* v. *Sumner*, 1 Pick. 370. So in writ of entry. *Wade* v. *Howard*, 8 Pick. 353.

Judgment on nonsuit before verdict is no bar to another action for the same cause. *Morgan* v. *Bliss*, 2 Mass. 111.

If the plaintiff be nonsuit for want of proof, or because his allegata and probata do not agree, or for any other cause, he may commence another action. *Wilbur* v. *Gilmore*, 21 Pick. 250. Where judgment was for defendant in replevin, because no demand had been made before suit, it was not a bar to a second suit, commenced after demand. *Roberts* v. *Norris*, 8 C. L. J., 39, cited in Herman on Estoppel, p. 240. See also *Bank* v. *Lewis*, 8 Pick. 113.

Judgment of nonsuit no bar, though there had been an agreement to abide result in another suit, which had terminated adversely to the plaintiff in that suit. *Ensign* v. *Bartholomew*, 1 Met. 274.

A nonsuit is "but like blowing out of a candle, which a man at his own pleasure lights again." Quoted in *Clapp* v. *Thomas*, 5 Allen, 158.

Demandant having failed because his grantor was disseized at time of deed to him was not barred in second suit, having fortified his title in that respect. *Perkins* v. *Parker*, 10 Allen, 22; *Pendergrass* v. *York Mfg. Co.*, 76 Maine, 509; *Knox* v. *Waldoborough*, 5 Maine, 185; *Sheldon* v. *Edwards*, 35 N. Y. 286.

Adverse possession: Judgment upon a suit begun in 1884 would not be a bar to a suit brought upon a claim by prescriptive title, which did not ripen into a title until after that suit was brought.

To avoid the bar of a former judgment, it may be shown that the plaintiff had acquired some new title since. Herman on Estoppel, p. 226. *Perkins* v. *Parker*, 10 Allen, 22.

It has been several times held that adverse holding is not interrupted or suspended by an action of ejectment brought by the owner and afterwards dismissed. *Langford* v. *Poppe*, 56 Cal. 73; *Workman* v. *Guthrie*, 29 Pa. St. 495; *Ferguson* v. *Bartholomew*, 67 Mo. 212; *Kennedy* v. *Reynolds*, 27 Ala. 364.

H. W. Gage and C. A. Strout, for defendant.

The premises demanded in the prior suit extended three rods further in a northeasterly direction than the premises demanded in the pending suit, but all the other boundaries are the same; and consequently the premises demanded in the prior suit completely included the premises demanded in the pending suit.

A judgment rendered by a court of competent jurisdiction is conclusive, so far as the subject matter thereof, upon the parties and their privies in estate; and may be pleaded by way of estoppel, or given in evidence under the general issue. *Blodgett* v. *Dow*, 81 Maine, 197, and cases in briefs and opinion; *State* v. *Brownrigg*, 87 Maine, 502, 503.

The nonsuit in the former action was rendered after a full trial on the merits; the issue presented by the pleadings was fairly tried out; the evidence was voluminous and exhaustive and completely covered the title to the whole premises, and was calculated and intended to do so. 1 Herm. Estop., c. 4.

The plaintiff's claim that she brought her suit in consequence of acts of Philbrook within the limits of the discontinued road is

unreasonable. The road was discontinued in 1878, and she made no objection whatever until 1884, when it becoming perfectly clear that Philbrook intended to dispute her title to the whole premises, she then attempted to help her case by suing first.

Upon every discontinuance or interruption of the possession, the possession of the rightful owner is restored, and nothing short of an actual, adverse and continuous possession for the statutory period can destroy his right. *Thompson* v. *Burton*, 70 N. Y. 99; *Bliss* v. *Johnson*, 94 N. Y. 235; *Sherman* v. *Kane*, 86 N. Y. 56; *Armstrong* v. *Merrill*, 14 Wall. 120.

There must be open, adverse, notorious, exclusive and continued possession for twenty years. Burden on party setting it up. *Eaton* v. *Jacobs*, 52 Maine, 455; *Moore* v. *Moore*, 61 Maine, 419; *Martin* v. *M. C. R. R.*, 83 Maine, 103 and cases cited.

Suit of ejectment interrupts running of statute. *Dunn* v. *Meller*, 70 Mo. 260.

Agreement to arbitrate will interrupt the running of the statute. *Perkins* v. *Blood*, 36 Vt. 273.

Lost deed: *Connor* v. *Parks*, 86 Maine, 302.

Due execution of a deed, claimed to be lost, must be proved before oral testimony of its contents will be admissible. *Elwell* v. *Cunningham*, 74 Maine, 129; *Dunlap* v. *Glidden*, 31 Maine, 512; *Kimball* v. *Morrill*, 4 Maine, 369.

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

HASKELL, J. Writ of entry to recover land. Plea, nul disseisin. The case comes up on report. The burden is upon the plaintiff to show a legal title.

I. The plaintiff contends that she acquired such title under a lost deed.

No person has ever seen such a deed. There is not a scintilla of evidence of the execution of such a deed. The only evidence is the admission of the defendant. He is said to have made inquiries about such a deed. There was a dispute about the

ownership of land within the limits of a discontinued road. The defendant was the grantee of a mortgagor. The mortgage debt seems to have been satisfied in some way and the notes surrendered. The presumption is just as strong that they had been paid in some other way as by a release of the equity. Defendant's inquiries are said to have been about this supposed release, if the witnesses correctly understood him. He is described as being somewhat infirm and partially blind. He may have forgotten how the transaction of the mortgage was consummated. If he had thought it to have been by deed, his inquiry about the deed, or for the deed, certainly should not conclude him from denying the existence of such deed. To prove a title under a lost unrecorded deed, the rule is very strict, and ought to be. *Connor* v. *Pushor*, 86 Maine, 302.

The existence of this lost deed depends upon substantially the same evidence that has been considered before. *Day* v. *Philbrook*, 85 Maine, 90. That was a writ of entry between the same parties as this case, and the land demanded was the same as here, with an additional strip once covered by a town road then discontinued. If the court had been satisfied in that case of the existence of this deed, a nonsuit could never have been entered, but instead, judgment for the plaintiff for the land here demanded, at least. R. S., c. 104, § 10; *Hazen* v. *Wright*, 85 Maine, 314. While that judgment of nonsuit decides nothing but that action, *Pendergrass* v. *York Mfg. Co.*, 76 Maine, 512, it is proper to refer to the opinion as bearing upon the case at bar. We conclude in this case, as we did in that one, that the existence of such a deed as plaintiff claims is not satisfactorily shown. Record titles must not be sworn away with vague recollections of what another may have said.

But the plaintiff says that defendant is estopped from disputing her title, because he was present when a survey of the premises was being made, in 1869, preparatory to a conveyance by the mortgagee to her grantor. The defendant is shown to have been present, but what he said, or did, depends upon the memory of a witness of what took place a quarter of a century before. At most he was around, when Coombs, the mortgagee, was surveying this

and other land; but little reliance can be placed upon the memory of witnesses to correctly reproduce, after the lapse of so long a period, what the circumstances were. At any rate, we are not satisfied of such knowledge and conduct on the part of the defendant as should estop him from relying upon a perfectly good record title.

II. Plaintiff contends that she has acquired title by adverse possession.

In 1884 she brought the action of *Day* v. *Philbrook*, argued in 1891 and decided in 1892, 85 Maine, 90. She there demanded the same land that she demands here, and alleged that the defendant in this case had theretofore disseized her of the same and then still held her out of possession thereof. How can she set up adverse possession of land, while she alleges that the true owner had disseized her thereof, and gain title by lapse of time against a man whom she alleges meantime to be in possession of the same? Such a position is absurd. We think the litigation over this land had best, this time, be ended.

Judgment for defendant.

JOHNSON KNIGHT *vs.* JOHN G. TRIM.

Knox. Opinion January 18, 1897.

Award. Assumpsit. Action. Pleading.

Assumpsit upon an award on submission under seal cannot be maintained; nor can the form of action be changed to debt.

ON EXCEPTIONS BY PLAINTIFF.

This was an action on an award, the agreement to submit to arbitration being under seal, and the award of the arbitrators thereon being in writing.

The action was "of the case," in assumpsit.

The plea of defendant was the general issue.

The plaintiff moved to amend the writ from assumpsit to debt.

The presiding justice refused the amendment, and ordered a nonsuit. The plaintiff excepted.

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

The cause of action is not changed by the amendment. The defendant is not called upon to answer to anything he has not been notified of. It is the same cause of action. The change is in mere matter of form.

It comes within the statute allowing amendments when the person and case can be rightly understood. R. S., c. 82, § 10.

Counsel cited: *Bell* v. *Austin*, 13 Pick. 93; *Rand* v. *Webber*, 64 Maine, 195; *Hathorn* v. *Calef*, 53 Maine, 478; Oliver's Prec. pp. 181, 655.

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

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

HASKELL, J. Assumpsit upon an award on submission under seal cannot be maintained. *Holmes* v. *Smith*, 49 Maine, 242. Nor can the form of action be changed by amendment from assumpsit to debt. *Flanders* v. *Cobb*, 88 Maine, 488.

Exceptions overruled.

AUGUSTUS R. HARRINGTON *vs.* EMERY O. BEAN, Adm.

Kennebec. Opinion January 18, 1897.

Deed. Covenant. Damages. Interest.

An action for a breach of the covenants of warranty in a deed of real estate is maintainable by the grantee although the deed in question and the mortgage back from the grantee to the defendant were a part of the same transaction and contained the same covenants of warranty; and although the relation of mortgagor and mortgagee still subsists between the parties.

The exercise by a stranger of his paramount right of flowage is an interruption of the grantee's full enjoyment of the premises. It is a permanent subtraction from the substance of the estate. *Held;* that all the damages resulting from the encumbrance created by a covenantor's former grant of a

perpetual easement to flow a portion of the land are suffered by the grantee, in contemplation of law, on the day of the conveyance to him.

The rule of damages in this class of cases, as in all others, is designed to give the aggrieved party a fair indemnity for the damages sustained,—an exact equivalent for the loss or injury. He is to be made whole as far as money is a measure of just compensation. *Held;* in this case that the defendant must make good his warranty; he must pay a sum of money which will put the plaintiff in as good condition as if the defendant had kept his covenants.

Where the cause of action is not only a breach of the covenant against encumbrances but also of the covenant to warrant and defend; and it appears that by the exercise of an outstanding right to flow, a portion of the land was flooded and covered with water, and the plaintiff was deprived of the use of such land, as well as of the possession, *held;* that there was substantially an eviction; and it may properly be deemed an eviction pro tanto.

In such case, the measure of damages are as follows:—

The plaintiff is entitled to recover as damage the difference between the value of the farm as it was in fact, and its value as it would have been without the encumbrance of the paramount right to flow, with interest thereon from the date of the conveyance to the plaintiff.

See *Bean* v. *Harrington*, 88 Maine, 460.

ON EXCEPTIONS BY DEFENDANT.

The case is stated in the opinion.

L. T. Carleton, for plaintiff.

Emery O. and Fred E. Beane, for defendant.

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

WHITEHOUSE, J. The plaintiff in this case recovered a verdict for $350, as damages for a breach of the covenants of warranty contained in a deed of real estate given to him by Francis Dexter, the defendant's intestate, and the defendant alleged exceptions to the rulings of the presiding justice.

May 1, 1878, Dexter conveyed the premises in question to the plaintiff by deed of warranty containing these covenants:—"And I do covenant with the said grantee, his heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all encumbrances; and further that I, and my heirs, shall and will warrant and defend the same to the said Augustus R. Harrington, his heirs and assigns forever, against the lawful claims and demands of all persons."

On the same day, Harrington reconveyed the premises to Dexter by deed of mortgage containing the same covenants, to secure the payment of a part of the purchase money.

It appears, however, that long prior to this transaction, viz: on the 2d day of November, 1854, Dexter had conveyed to other parties a perpetual easement in a portion of the estate in question, being the "full right and lawful authority to flow all the land on the northerly side of the brook" and on "the westerly side of the road" as high as a certain dam therein named, would flow.

The defendant contends, in the first place, that as the deed of the premises to the plaintiff and the mortgage back to Dexter, in 1878, contained the same covenants of warranty and were parts of the same transaction, and as the relation of mortgagor and mortgagee still subsists between the plaintiff and the defendant, this action for a breach of covenant of warranty cannot be maintained.

This precise question appears to have been directly raised and definitely settled in *Hardy* v. *Nelson*, 27 Maine, 526, and *Hubbard* v. *Norton*, 10 Conn. 422. In the latter case the court say in the opinion by Williams, C. J.:—"Unless all principles of common sense are disregarded, we must suppose that the deed of the defendants, conveying the land, in fact preceded that of the plaintiff, which was given to secure the consideration money for the land so conveyed. There must then have been a seizin in the plaintiff under and by virtue of the defendant's deed to him. . . . . If then we must consider the plaintiff's deed as subsequent to that of the defendants, it can be no estoppel; because a warranty of title by the plaintiff, in a subsequent deed, will not prove that the defendants had title when they conveyed to the plaintiff; for the plaintiff might at that time, or immediately after, have purchased in another title. . . . . The construction contended for by the defendant would rather tend to defeat than to carry into effect the intention of the parties."

In the former case the facts were exactly analogous to those in the case at bar, and the court held that the plaintiff was entitled to recover. These authorities are conclusive upon this branch of the case.

The defendant again contends that the rule of damages given to the jury was erroneous with respect to the allowance of interest.

The instructions given were as follows:—"How much would that particular farm have been worth on the first day of May, 1878, provided there had been no right outstanding and existing in anybody else to flow it? . . . . How much less was the farm worth, May 1st, 1878, by reason of this outstanding right to flow, by reason of this encumbrance? . . . . Settle that, in the first place, upon the evidence which has been introduced. . . . . After ascertaining what the amount of the damage is, you may, by way of damage for the detention of the money belonging to the plaintiff, add a sum equivalent to interest from the time it was sold to the present time."

The defendant insists that in such a case interest is allowable only from the time of demand, and as there is no evidence of a demand in this case prior to the commencement of the action, that interest should have been computed only from the date of the writ.

It is the opinion of the court, however, that the ruling was in substance correct. It authorized the jury to add interest from the time the estate was sold and conveyed to the plaintiff. At that time there existed an outstanding right to flow a portion of these premises,—a perpetual easement which was incapable of being removed at the option of the covenantee. At that time the value of the estate was diminished by the existence of this paramount right of flowage, and the amount of such decrease in the value was the damage to which the plaintiff would have been entitled, at that time, in an action for a breach of the covenant of warranty. The commencement of this action was evidently delayed in the erroneous belief that his claim for damages could be offset against the mortgage debt. (*Bean* v. *Harrington*, 88 Maine, 460.) During all these years he has been deprived of the beneficial enjoyment of a part of the estate conveyed to him, while the covenantor, the defendant's intestate, was receiving the income accruing from the proceeds of the sale of this outstanding right of flowage.

The rules which have been established to determine the measure of damages in this class of cases, as in all others, are designed to give the aggrieved party a fair indemnity for the damages sustained. He is entitled to an exact equivalent for the loss or injury; he is to be made whole so far as money is a measure of just compensation. This is the guiding principle to be kept in view in the application of all rules of damages.

So in an action for breach of covenant the defendant must make good his warranty; he must pay a sum of money which will put the plaintiff in as good condition as if the defendant had kept his covenant.

In this case the exercise by a stranger of his paramount right of flowage, was an interruption of the plaintiff's full enjoyment of the premises. It was a permanent subtraction from the substance of the estate. On the day of the conveyance to him, the plaintiff, in contemplation of law, suffered all the damage resulting from the encumbrance created by his covenantor's former grant. The covenant was broken as soon as made. A rule of damages which would relieve the defendant from paying and prevent the plaintiff from receiving interest from that time on the amount then paid by the plaintiff, for which he received no equivalent and the income of which the defendant's intestate has continually enjoyed, would be clearly inadequate and unjust; while the rule actually given is not only reasonable and manifestly equitable, but when the facts to which it was applied are critically analyzed, it will be found in no degree in conflict with the rule established by the great weight of authority.

For a breach of the covenant of seizin resulting from a total or partial failure of title, the authorities are all agreed that the purchaser is entitled to recover the consideration paid, which was the agreed value of the estate of which he has been deprived, with interest from the time of payment. *Montgomery* v. *Reed*, 69 Maine, 515; *Wheeler* v. *Hatch*, 12 Maine, 389; *Stubbs* v. *Page*, 2 Maine, 378; Sedgwick on Damages, 195; 2 Sutherland on Dam. 257. So, for breach of the covenant to warrant and defend, the plaintiff is entitled to recover the value of the land which he lost

by the injurious act of the defendant, with interest from the time of the eviction. *Williamson* v. *Williamson*, 71 Maine, 447; *Hardy* v. *Nelson*, 27 Maine, 526.

But the defendant insists that, in the case at bar, there was no failure of title and no eviction, and that the rule which gives interest from the time of eviction is therefore inapplicable.

It must be remembered, however, that the cause of action in this case was not only a breach of the covenant against encumbrances, but also of the covenant to warrant and defend the premises against the lawful claims of all persons; and this latter covenant, so far as the question of eviction is concerned, is precisely equivalent to the covenant for quiet enjoyment found in deeds of warranty in other jurisdictions. *Lamb* v. *Danforth*, 59 Maine, 322; *Shattuck* v. *Lamb*, 65 N. Y. 503. In Rawle on Cov. (4th Ed.) 154, after a careful review of the cases, it is said that the rule best supported by reason and authority is this:—"When at the time of the conveyance the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment, or of warranty, will be held to be broken without any other act on the part of either the grantee or the claimant." See also 3 Washburn on Real Prop. 398. So, if the paramount title is only an outstanding right to an easement in the premises conveyed, which naturally impairs the value of the estate and interferes with the use and possession of some portion of it, the covenant for quiet enjoyment or of warranty is held to be broken, although there is not a technical, physical ouster from the actual possession of any portion of it; it is deemed an eviction pro tanto. *Lamb* v. *Danforth*, 59 Maine, 322; *Clark* v. *Estate of Conroe*, 38 Vt. 469; *Russ* v. *Steele*, 40 Id. 310; *Scriver* v. *Smith*, 100 N. Y. 471. In the last named case the facts were closely analogous to those at bar and the court say in the opinion:—"Douglass had a paramount right to an easement to set back the water of the river, and to flood the land conveyed; and in the exercise of that right he did cause a portion of the land conveyed to be flooded and covered with water, and of such land the plaintiff was deprived of the use and really and practically of the

possession, and thus there was substantially an eviction." See also *Rea* v. *Minkler*, 5 Lans. 196; *Adams* v. *Conover*, 87 N. Y. 422; *Flanders* v. *Fay*, 40 Vt. 310.

The result must be the same if the plaintiff's cause of action be deemed simply a breach of the covenant against encumbrances; for in such a case when the encumbrance is of a permanent nature and not removable at the will of the purchaser, it is uniformly said to be the rule that the covenantee should recover a just compensation for the real injury resulting from its continuance. Sedgwick on Dam. 199; 2 Sutherland on Dam. 327; *Harlow* v. *Thomas*, 15 Pick. 66; *Wetherbee* v. *Bennett*, 2 Allen, 428.

And it has been made manifest that the damages to which the plaintiff in this case would have been entitled, at the time of the conveyance, could only become just compensation at the time of judgment by the addition of interest from the time he paid the purchase money to his grantor.

Exceptions overruled.

MARTIN COFFIN *vs.* HENRY J. BRADBURY.

York. Opinion January 20, 1897.

Payment. Stat. of Frauds. R. S., c. III, § I, par 2.

A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well be to pay another's debt as to do any other act. This promise may be absolute or conditional; to pay money or perform labor; and having a valuable consideration to rest upon, it is a new, original and independent undertaking, and may be enforced.

The plaintiff had a preferred claim against the insolvent estate of Jacob Bradbury. His widow, Mrs. Bradbury, was his administratrix, and in that capacity, sold real estate of her intestate to the defendant, and at the same time released her dower to him. For the dower interest the defendant paid one hundred dollars and agreed to pay plaintiff's preferred claim against the intestate estate when he sold the land purchased. In effect he agreed to pay her for her dower interest two hundred and thirty-two dollars and fifty cents—one hundred to her directly, and the balance to the plaintiff. Defendant sold the land before suit brought, and his promise of payment to the plaintiff had matured. *Held;* that this promise, though oral, was not a promise to pay the debt of another, within the statute of frauds, but was a promise to pay his own debt to the appointee of Mrs. Bradbury, the plaintiff.

Also; that as she directed the payment to the plaintiff, it is immaterial whether she was indebted to him or not; nor does the fact that the payment operates to discharge the estate of the intestate, render the payment by defendant any the less a payment of his own debt.

ON REPORT.

This was an action of assumpsit reported to the law court upon the following facts as found by the presiding justice:—

Jacob Bradbury died intestate December 30, 1890. Elizabeth M. Bradbury, his widow, was appointed administratrix upon his estate at the February term, 1891, of the probate court for York County. The estate was decreed insolvent at the August term, 1891, and commissioners of insolvency appointed. Before these commissioners, Martin Coffin, the plaintiff, presented and made proof of a bill for medical services as a preferred claim to the amount of $132.50. This claim was allowed by the commissioners as a preferred claim, and by them returned with other claims, to the probate court, which accepted and confirmed the report of the commissioners at the February term of said court, 1892.

The dower of Elizabeth M. Bradbury, as widow of said deceased, was assigned to her by commissioners duly appointed by the probate court, their assignment of dower being confirmed at the July term, 1891. Elizabeth M. Bradbury obtained license to sell the real estate of said estate at the February term, 1892. Under said license she advertised and offered for sale said real estate, to be sold on the twentieth day of August, 1892, at Buxton, and also in the advertisement offered to sell her dower interest in the same. On the day of sale Elizabeth M. Bradbury, the administratrix, and Henry J. Bradbury, the defendant, met at Buxton at the time and place of sale and arranged for a sale of the real estate of the deceased and of the dower interest of Elizabeth M. Bradbury to the defendant, Henry J. Bradbury. It was a part of that arrangement that the defendant, Henry J. Bradbury, should pay to the widow on account of her conveyance of her dower interest, the sum of one hundred dollars, and he gave his note for that sum at that time, which he afterwards paid.

It was also agreed between Elizabeth M. Bradbury and the defendant, Henry J. Bradbury, as a part of the same transaction,—

the purchase of the dower interest,—that he should pay the preferred claims against the estate of Jacob Bradbury, including the claim of the plaintiff, Dr. Coffin, as soon as he was able to sell the real estate that day purchased. Dr. Coffin, the plaintiff, did not release his claim against the estate, but after hearing of the arrangement between Elizabeth M. Bradbury and the defendant, called upon the administratrix for the payment of the bill.

There was no indebtedness from Elizabeth M. Bradbury personally to Dr. Coffin, the plaintiff. The only indebtedness to Dr. Coffin was from the estate of Jacob Bradbury, deceased, her intestate.

The defendant, Henry J. Bradbury, afterward sold the real estate thus purchased. After that sale Dr. Coffin, the plaintiff, made a demand upon the defendant for the payment of this bill under the arrangement between the defendant and Mrs. Bradbury. He also, previous to that sale, called upon Bradbury for payment after the sale and after the refusal to pay.

This action was brought to recover the amount of the preferred claim.

The parties agreed that if upon the foregoing facts, this action could be maintained against the statute of frauds previously pleaded, the defendant is to be defaulted for the sum of $132.50, with interest from the date of the writ, May 4, 1896; otherwise the plaintiff to be nonsuit.

Samuel M. Came, for plaintiff.

Henry W. Swasey, for defendant.

Privity: *Jefferson* v. *Asch*, 53 Minn. 446 (39 Am. Rep. 618.)

A stranger to a contract between others, in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, can not recover on it. See also *Vrooman* v. *Turner*, 69 N. Y. 280, (25 Am. Rep. 195.)

The question as to a consideration for the alleged promise is distinct from the evidence demanded by the statute to support an action upon a promise based on a sufficient consideration; for from

the early history of this statute it has been consistently held that there must not only be a consideration for the promise; but, if the promise be for the debt of another, it must be in writing. *Stone* v. *Symmes*, 18 Pick. 469; *Stewart* v. *Campbell*, 58 Maine, 443, and cases cited.

To take the case out of the statute of frauds, the verbal promise of a third person made to a debtor of the plaintiff to pay the latter the debt, which the immediate promisee owes him, must find its consideration in a purchase of property from the promisee, so that the amount which is promised to be paid is to be paid in discharge of the promisor; and the promise must be such, that, making the promised payment to the plaintiff as creditor of the promisee, will operate incidentally as a satisfaction of the debt of such promisee, and primarily as a payment of the debt of the promisor.

Counsel also cited: *Neeson* v. *Troy*, 29 Hun, 173; *Furbish* v. *Goodnow*, 98 Mass. 296; *Whittemore* v. *Wentworth*, 76 Maine, 20, 24.

The declaration, in the case at bar, clearly sets out a promise of defendant to answer for the debt of Jacob Bradbury and made to Elizabeth M. Bradbury who is neither privy in law, representation or estate with Jacob Bradbury, and who was under no debt or duty to Dr. Coffin the party claiming to sue upon the promise; and the promise is clearly a promise to pay the debt of another and has not the evidence demanded by the statute pleaded for the support of this action.

Mr. Came, in reply, cited: *Schemerhorn* v. *Vanderheyden*, 1 Johns. 139, (3 Am. Dec. 305, note); *Burr* v. *Boers*, 24 N. Y. 178; *Fiske* v. *Tolman*, 124 Mass. 254, (26 Am. Rep. p. 659, notes, pp. 663–666); *Meech* v. *Ensign*, 49 Conn. 191, (44 Am. Rep. 225); *Merriman* v. *Moore*, 90 Pa. St. 79; *Dean* v. *Walker*, 107 Ill. 540, (47 Am. Rep. 467–473.)

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

STROUT, J. Plaintiff had a preferred claim against the insol-

vent estate of Jacob Bradbury, of which his widow, Elizabeth M. Bradbury, was administratrix. Under license from the Probate Court, the administratrix sold the real estate of her intestate to the defendant, and at same time conveyed to him her dower in the premises which had been regularly set out to her. For this dower interest defendant paid her one hundred dollars and agreed to pay plaintiff's preferred claim against the intestate estate, when he sold the land purchased. In effect he agreed to pay her for her dower interest two hundred thirty-two dollars and fifty cents: one hundred directly to her, and one hundred thirty-two dollars and fifty cents to plaintiff. He sold the land before suit brought, and his promise to pay plaintiff had matured. Defendant claims that his promise to pay the plaintiff, is a promise to pay the debt of another; and being verbal, is within the statute of frauds, and not binding upon him. In this he is in error. When he pays the plaintiff he is only paying the full purchase price which he agreed to pay for the dower interest; and it is immaterial to him whether he pays it directly to Mrs. Bradbury, or to her appointee, the plaintiff. As administratrix she had imposed upon her the duty to pay the plaintiff out of the property of her intestate. If for any reason she found it convenient or expedient to pay him from her own funds, she had the right to do so, and adjust it in the settlement of her account in probate; or, if she chose, she might treat it as a gift to the estate for the benefit of its creditors or its heirs. The result would be the same, if the amount agreed to be paid to plaintiff was a gratuity from Mrs. Bradbury. In paying it, defendant is only paying the consideration for his purchase. He cannot hold the property and escape payment of the agreed price. This result is abundantly sustained by the authorities. *Dearborn* v. *Parks*, 5 Maine, 81; *Brown* v. *Atwood*, 7 Maine, 356; *Goodwin* v. *Bowden*, 54 Maine, 424; *Bohanan* v. *Pope*, 42 Maine, 96.

That the payment may extinguish a debt due from the estate of the intestate, makes it none the less a payment by defendant of his own debt, and not a promise to pay the debt of another within the statute of frauds.

Although the promise was to Mrs. Bradbury, it was for the benefit of the plaintiff, and he can recover in this action. *Dearborn* v. *Parks*, supra. The case of *Stewart* v. *Campbell*, 58 Maine, 439, is not in conflict with this position. In that case, WALTON, J., concurring in the opinion drawn by the chief justice, says:— "A person who receives a consideration may be bound by any lawful promise founded upon it, and that promise may as well be to pay another's debt as to do any other act. This promise may be absolute or conditional; to pay money or perform labor; and having a valuable consideration of its own to rest upon, it is a new, original and independent undertaking," and may be enforced. This precise statement of the law in this state applies to the facts of this case. The consideration for defendant's promise was the dower interest conveyed to him. In payment for that, he promised Mrs. Bradbury to pay the plaintiff. This was a "new, original and independent undertaking," having a "valuable consideration of its own to rest upon," and is not affected by the statute of frauds. In accordance with the stipulation in the report, the entry will be,

Defendant defaulted.

CITY OF ROCKLAND *vs.* LUCY C. FARNSWORTH.

Knox. Opinion January 27, 1897.

Domicile. Evidence. Tax.

Upon the trial of the issue, whether the defendant was a resident of Rockland, April 1, 1894, so as to be taxable there, it is error to admit in evidence a writ dated November 27, 1894, in an action brought by him and pending in court at the time of trial, wherein he is described as plaintiff "of Rockland," it not appearing that his residence was inserted therein with his knowledge or by his direction.

Pleadings in another suit may be used as admissions of a party, where they bear upon the material issues on trial and appear to have been made by his direction, or adoption, and shown by prosecuting the action upon them, as the foundation of his claim.

ON EXCEPTIONS BY DEFENDANT.

This was an action of debt to recover the sum of twelve hundred and sixty dollars, the amount of a tax assessed in the city of Rockland for the year 1894 upon the personal estate of the defendant, together with interest thereon from October 15th of that year at the rate of eight per cent. The tax upon defendant's real estate had been paid prior to the commencement of this action. The plea was the general issue with a brief statement setting forth that she was an inhabitant of the town of Camden and had been such inhabitant since some time in the month of March, A. D. 1885, at which time she claimed to have removed from Rockland and taken up her abode in Camden.

The verdict was for the plaintiff.

The defendant took exceptions to the admission and exclusion of evidence. The court considered but one of the exceptions, which arose as follows:—

Counsel for plaintiff offered a writ issued from the office of Mortland & Johnson, dated November 27th, 1894, returnable to the December term, 1894, in which Lucy C. Farnsworth was named as plaintiff and described in the writ as of Rockland, against Oscar G. Burns, defendant, as an admission bearing on the residence of the defendant, which was admitted against the objection of defendant.

W. R. Prescott, City Solicitor, for plaintiff.

Grounds of objection should have been set forth specifically when the objection was made. Record is silent.

Counsel cited: *Grant* v. *Libby*, 71 Maine, 429; *State* v. *Savage*, 69 Maine, 114; *Longfellow* v. *Longfellow*, 54 Maine, 246; *White* v. *Chadbourne*, 41 Maine, 149; *Holbrook* v. *Jackson*, 7 Cush. 136; *Ruggles* v. *Coffin*, 70 Maine, 472. Objection comes too late. *Walters* v. *Gilbert*, 2 Cush. 28, 29; *Harriman* v. *Sanger*, 67 Maine, 444; *Coe* v. *Washington Mills*, 149 Mass. 545; *Connolly* v. *Beverly*, 151 Mass. 537; *Bonney* v. *Morrill*, 57 Maine, 373; *Baker* v. *Cooper*, Id. 390; *Staples* v. *Wellington*, 58 Maine, 460.

It must affirmatively appear that the ruling is erroneous. *Fairfield* v. *Old Town*, 73 Maine, 573; *Reed* v. *Reed*, 70 Maine, 504; *Barrett* v. *Bangor*, Id. 335; *Reed* v. *Reed*, 78 Maine, 276.

Evidence admissible. 12 Am. & Eng. Enc., p. 149, e; *Southard* v. *Wilson*, 21 Maine, 495; *Ellis* v. *Jameson*, 7 Maine, 235.

Proper instructions presumed to have been given, nothing to the contrary appearing. *Lord* v. *Kennebunkport*, 61 Maine, 465.

D. N. Mortland and M. A. Johnson, for defendant.

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

HASKELL, J. The issue to the jury was whether the defendant was a resident of Rockland April 1, 1894, so as to be there taxable. Plaintiff read in evidence, as tending to show defendant's residence in Rockland, April 1, 1894, a writ dated November 27, 1894, by her against a stranger to this suit, wherein she described herself as "of Rockland." To the admission of this writ defendant has exception.

The writ could only have been admissible as an admission of the fact of residence at its date. If competent for that purpose, it might tend to show the same residence on the preceding April. Its competency must depend upon whether it was an admission of the plaintiff therein. If merely the recital of her attorney, without her knowledge or direction, it certainly could not be her admission. Nothing of the sort is shown. The fact that she still prosecuted the suit at the time of the trial of this action could make no difference, because it was an immaterial recital therein. Had she been described as of Camden, or Thomaston, it would have been just as well, so far as that suit was concerned. It is not a declaration for the recovery of a specific claim that negatived her interest in another claim, as in *Boston* v. *Richardson*, 13 Allen, 162, where the declaration in a former suit by the defendant to recover a certain parcel of land negatived the ownership of the land by him, to which he claimed title in the suit on trial; nor, as in *Gordon* v. *Parmlee*, 2 Allen, 215, "in the nature of an admission by the defendants of the nature and amount of damages which they claimed of the plaintiffs in reduction of the amount due on the notes" in suit; nor, as in *Bliss* v. *Nichols*, 12 Allen, 443, where, in suit against the drawer of a bill of exchange, protest

being denied, one defendant had previously sued the acceptor upon his agreement to pay the same, her declaration in that case was admitted as competent evidence, it appearing to have been made by her authority; nor, as in *Central Bridge Corporation* v. *Lowell*, 12 Gray, 122, where the defendant's deliberate answer in another case between the same parties was thought competent evidence.

The evidence relied upon here is much like that in *Saunders* v. *McCarthy*, 8 Allen, 42; a statement of the attorney that cannot bind his client.

The doctrine seems to be settled that pleadings in another suit may be used as admissions of the party, where they bear upon the material issues on trial and appear to have been made by his direction, or adoption, shown "by prosecuting the action upon them, as the foundation of his claim." *Dennie* v. *Williams*, 135 Mass. 28. In that case, an answer signed by the attorney in another case, without direction by the party shown, was held incompetent evidence as the admission of such party. See also *Elliott* v. *Hayden*, 104 Mass. 180. The evidence admitted was incompetent and mischievous.

Exceptions sustained.

AMELIA MORGAN *vs.* J. FRANK HOWLAND.

Oxford. Opinion January 27, 1897.

Corporation. Stockholder. Creditor. Unpaid Stock. R. S., c. 46, §§ 45, 46, 47, 48.

When it is not shown that the defendant subscribed for and took shares in a corporation of a par value aggregating more than he has paid towards the debts of the corporation, he is not liable to a judgment creditor under R. S., c. 46.

Nor is he liable to corporation creditors on account of non-assessable shares subscribed for and taken by another in good faith, that were afterwards assigned to him, although the par value thereof may not have been paid to the corporation.

ON REPORT.

This was an action on the case, under R. S., c. 46, §§ 46 and

47, to recover a judgment from the defendant obtained October 13, 1894, in the Municipal Court of the Dorchester District, Boston, against the Dorchester Press Company, a corporation organized under the laws of Maine, but doing business in Massachusetts, and where the parties resided.

The plaintiff claimed that the defendant was liable under the statute for the debt of the corporation, because he was a stockholder in the Dorchester Press Company.

The case is stated in the opinion.

Joseph Cummings, for plaintiff.

The defendant acquired, by assignment, numerous shares from Pitman who never paid anything for the stock, which the defendant knew. It is in evidence that this was done to give the defendant a majority of the stock, and he had a controlling voice in the corporation, which he managed as his own private business. In fact, the defendant was the corporation, according to his own testimony, during the time the plaintiff's bill was contracted.

These shares, except one, had been issued to others, but were surrendered to the corporation which issued them to the defendant.

Shares of stock in a corporation are not necessarily extinguished by being transferred to the corporation, so that they cannot be reissued. *Com.* v. *Boston & Albany Railroad Co.*, 142 Mass. 146; *Crease* v. *Babcock*, 10 Met. 525-556; *American Railway Frog Co.* v. *Haven*, 101 Mass. 398-402; *Dupee* v. *Boston Water Power Co.*, 114 Mass. 37-43; 1 Morawetz on Corp. § 114.

This rule prevails in this country generally.

City Bank v. *Bruce*, 17 N. Y. 507; *Coleman* v. *Columbia Oil Co.*, 51 Penn. St. 74; *State* v. *Smith*, 48 Vt. 266-285; *Williams* v. *Savage Manufacturing Co.*, 3 Md. Ch. 418-452; *Taylor* v. *Miami Exporting Co.*, 6 Ohio, 176-219; *Robinson* v. *Bealle*, 20 Ga. 275.

When a subscriber fails to take his stock, and never intends to pay for the same, the corporation, having incurred no liabilities, may accept his surrender of the stock.

Where a subscription is not paid, and the stock is transferred to the corporation as "treasury stock," and then sold below par, the

purchaser is liable for the unpaid par value. *Alling* v. *Wenzell*, 133 Ill. 264.

The defendant, as assignee of Pitman's stock, is subrogated to the liabilities, as well as the rights, of the original holder thereof. *R. R. Co.* v. *Boorman*, 12 Conn. 530; Angell & Ames on Corp., § 534; 1 Redf. Railw. § 42, n. 3; *Webster* v. *Upton*, 1 Otto, 65-72; 2 Morawetz on Corp., § 824.

As the defendant took the stock from the corporation, and it was not paid for by Pitman, or the others to whom it was issued originally, he received it subject to all liabilities and for all debts incurred since it was first issued to them. As this covered the entire period when the plaintiff's services were performed, she is entitled to recover. 1 Cook on Stock and Stockholders, § 258.

James S. Wright, for defendant.

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

HASKELL, J. November 10, 1891, three men, Morgan, W. F. and F. L. Davis, organized a corporation with 200 shares of stock at a par value of $50 each, $10,000. Each one subscribed for two shares. January 15, 1892, Morgan sold his publishing plant to the corporation for 101 shares of stock, and one share was issued to Bailey, the book-keeper, for services. Shares apparently issued, 108.

March 24, 1892, there was a re-organization of the company by F. L. Davis and Bailey retiring and Pitman and Howland taking their places. The arrangement was, and it was voted at directors' meeting, to give Pitman 98 shares and Howland one share, but as there only remained 92 shares of treasury stock it became necessary to increase the number of shares for the purpose, and so it was voted by the directors to purchase F. L. Davis' two shares and Bailey's one share and accept the surrender of W. F. Davis' one share, for which he had not paid, thereby making in all 96 shares, an insufficient number to comply with the vote, if the two shares originally subscribed for by Morgan had been paid for by him and issued,—which is not probable,—nor unless one more share should

be returned to the treasury. The records says Morgan transferred to Pitman and Howland one share each, thereby giving Pitman 99, Howland 1, Morgan 99 and Davis 1, total 200 shares, equally divided between the new and old stockholders, 100 shares each. The record seems to indicate that Howland's share was transferred to him by Morgan, but that the directors "voted to give Pitman 98 shares and Morgan one share." Taken altogether, the proceedings seem to show that Morgan's one share was given to him from the corporation, and that 98 shares were given to Pitman for which nothing was paid.

Prior to November 19, 1892, Pitman's 99 shares were pledged to Howland for indorsements for the company, and then were transferred to him absolutely. This debt, together with other indorsements amounting to $7005, was secured to Howland by a mortgage of the assets of the corporation, the plant, which was foreclosed by sale at auction in July, 1893, and purchased by one Sanderson for the sum of $7000, the receipt of which Howland acknowledged in his deed of the property to Sanderson. This sale substantially satisfied the mortgage debt, and left Howland holding 99 shares of stock received from Pitman, one from the company and two from other sources, in all 102 shares. While holding at least 100 shares the plaintiff's bill for services accrued. She was the wife of Morgan. Morgan testified that Pitman's 99 shares and his own 99 shares were surrendered to the company and issued by the company to Howland as security during the season of 1892, for the indorsements then made by him and afterwards satisfied by the mortgage. Howland denies this, and Pitman, who must know, does not testify.

Morgan purchased his 101 shares for value—the plant—and that may be the reason why his 99 shares pledged to Howland with Pitman's 99 shares were returned to him, and Pitman's transferred to Howland, they having been issued to Pitman without cost. Still, we cannot say from the evidence that Pitman's stock had not been issued to him in good faith. He became president of the company, and retired when Howland appears to have furnished means for the business to an extent beyond the ability of

the corporation to pay, so that Pitman might well transfer his stock to Howland and be relieved from liability thereon to him by his securing the payment of his debt from the corporation assets by way of mortgage.

If Pitman's stock was really given to Howland, but in Pitman's name, then Howland would become liable for the par thereof. *Barron* v. *Burrill*, 86 Maine, 66-72. Plaintiff's counsel does not squarely so contend, nor are we satisfied of the fact. He does contend that the assignment to Howland, with knowledge that Pitman paid nothing for his stock, casts a liability upon Howland as if he had been the original subscriber therefor; but that is not the law of this state. The shares were not assessable, and if issued in good faith to Pitman and afterwards transferred to Howland, Pitman remains liable; but Howland does not become so. *Libby* v. *Tobey*, 82 Maine, 397.

The evidence shows that whatever Howland's liability may have been touching his other three shares of the aggregate par value of $150, he has paid unsecured debts of the corporation in excess of that sum and, therefore, under the statute, R. S., c. 46, § 48, cannot be held in this action. *Appleton* v. *Turnbull*, 84 Maine, 72.

Judgment for defendant.

NETTIE S. JOHNSTON *vs.* NORRIS H. HUSSEY, Executor.

Lincoln. Opinion February 1, 1897.

Stat. Limitations. New Promise. R. S., c. 81, § 97.

No acknowledgment or promise by a debtor will defeat or postpone the operation of the statute of limitations, "unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby." R. S., c. 81, § 97.

Held; that the acknowledgment must be in writing,—must be contained and found in the writing. It must be an "express" acknowledgment also. It is not enough that the original promise is proved. The new promise or acknowledgment must be proved to have been expressly made; and the proof of this must be found in the signed writing.

Held; in this case, that there are no words in the writing indicating that the person sought to be charged promised to make a money payment for the services and supplies sued for, or that he expressly acknowledged any liability therefor. An acknowledgment of a mere moral obligation, however strong is not sufficient.

Also; that the interpretation of such writing is for the court, and not for the jury.

ON EXCEPTIONS BY DEFENDANT.

Assumpsit on account annexed to the writ. The writ was dated November 16, 1886. The action was originally brought against Job Hussey, who was then living, but died soon afterwards; and upon his decease the present defendant came in as executor and assumed the defense of the suit.

The defendant pleaded the statute of limitations, by brief statement under the general issue. The last item in the account annexed is dated June 18, 1879.

It was admitted at the trial that the demand would be barred by the statute of limitations, unless that statute was avoided. For the purpose of such avoidance the plaintiff introduced a paper, in the form of a letter, signed by William Johnston, the husband of the plaintiff, dated February 4, 1886, and addressed to Norris H. Hussey, as follows:

Brother Norris H. Hussey.—A letter addressed to mother Hussey in reply to one written to yourself by Hattie at mother's dictation, has come into my hands as it very properly should, from the fact that by intimation and direct reference both myself and family are involved. Now as you could not have possibly made the suggestion with a clear understanding of existing facts, I shall merely set them before you, and not allow the matter to further annoy me. I refer to your letter wherein you suggest that your father call upon me for money on account of the horse, and "if he can't pay him why not sell him to someone who can," and again, "they take his (father's) goods and that seems to be the last of it." If that is the fact I have no part of the imputation to take to myself or family and as you further ask to "know how matters stand" I put a statement in at this time when living witnesses may give undoubted evidence of the truth of the statement and to the

end that our future family relations may in no way be marred or inharmonious.

STATEMENT.

Twenty-one years since I married your sister, Hattie A. Hussey, and for a few weeks boarded with your parents paying my board. Then we went to housekeeping in the neighborhood, but it is a fact that Hattie took nothing from home but her little trunk of personal apparel, and she certainly received nothing thereafter excepting small items of parental affection, and for such items, at all times and by different methods seeking to return an equivalent. You well know that all too soon we were called to lay her in the church yard, and that in time, I reunited my family circle in the person of a younger sister, Nettie S. Chase. Did she ever seek to rob her parents? Let the facts speak for themselves. By your mother's invitation, at her husband's, Capt. Chase's departure for sea, Nettie with her little child returned to her former home, and cared for her parents filially, giving herself untireingly to the household duties, largely relieving your mother in her advancing years from cares and fatigue; thereby to the satisfaction of your parents, making ample remuneration for the board of the child and herself. The household furniture she possessed was also taken to the old home, and made useful both to her gratification and that of your parents, for the family benefit, replacing that which time and wear had consumed and destroyed; meantime the sorrow of her life came, and she was left a widow, and so remaining with her father and mother until our subsequent marriage. During the interval wherein she remained at her father's house, aiding and assisting as stated; she also from to time and upon their necessity advanced money for provisions, clothing and repairs as shown by her memorandum and as follows:—[Items omitted.]

Additional to the cash advanced before stated Nettie S. Chase furnished for the use of her parents and leaving the same in their possession and in their care for proper usuage as long as they may need or until she may reclaim it, the following itemized list of furniture, dishes, clothing, etc., fairly valued as follows:—[Items omitted.]

Having made statements in regard to your sister's relations and accounts of home expense, I will now refer to myself. As before stated I boarded at your father's for a period when I was first married in 1864 and 5, paying my board, and again after Hattie's decease with myself and children, paying regularly for both the board of myself and family at a fair price, or at least paying a price for which other good parties would have boarded us at the time, and for which if it may at any time be deemed proper I shall be able to show account.

And now let me pass to the matter of the horse to which you specially refer. After 1881 both as regards to the statement of your father's and my own knowledge, that the horse was for most part of the time doing nothing and on expense.

In order to decrease your father's expenses by making the horse earn something and at the request of your father, I took the horse at various times when he could not use him keeping him in all, from four to five months, frequently boarding him when I had no use for, and at one time immediately after J. P. Hatch had used him in haying leaving him sick, I took care of him for a period of ten days going myself to the stable and hiring a horse; and for such time of use I paid in cash and merchandise over forty-four dollars for his use and furnishing during the same period my own carriage. Sometime during the spring of 1885, the horse being at home and doing nothing, and your father being unable to tend him, I wished to go to two or three different places and I got the horse and kept him for one month, when all my hay having been used, I returned him to your father, he then told me he was sorry to have him come back, that he was not able to take care of him, I replied that I had no hay, well he said, go to the barn and get the hay. Furthermore he said he wished to sell him, and "Noll" said that he was not worth over sixty-five dollars. I told him that I considered the horse worth more, I took the horse home with me and a small amount of hay at different times, in all not more than 300 pounds, thinking of some pedling I might do. I one day told "Hattie" that if I could not sell the horse, if business proved favorable, I might buy the horse, she told your father what

I had said and he told her that I could have the horse and harness for eighty-five dollars; since that time I have had no talk about buying the horse with him, and there has been no time but what the horse has been in the market for sale, and if you want him or can sell him, he is at your disposal. Meantime I have found that your parents were in need of money for various objects and were I in a paying business, I would have with pleasure advanced to their necessity. And as it is I have paid out on bills of their account thirty-eight and twenty-four hundredths dollars which to-day remains as a bill on account of the horse.

If you then have a place for him I shall be exceeding glad of the turn of events as I am aware that they need any balance to be obtained above the amount named as advance and with a fair sale it would help them much as the horse is conceded by all to be worth from ten to fifteen dollars more than he was when he came into my possession. Yours very truly,

Damariscotta, Feb'y 4th, 1886. WM. JOHNSTON.
JOB HUSSEY.
RUTH HUSSEY.

Witness to the above signature of Job Hussey and Ruth Hussey after a complete reading of it in their hearing, each personally acknowledging the accounts as valid and statements true.

HATTIE M. JOHNSTON.

Damariscotta, Feb'y 4th, 1886.

The plaintiff contended that the paper above mentioned had the effect of taking the case out of the operation of the statute of limitations; and the defendant, per contra.

The presiding justice instructed the jury as follows:

Now comes the claim that it is outlawed. I shall rule that if he signed that paper which was within six years of bringing the action, if he signed it knowing what it was, if he was not defrauded when he signed it, cheated, deceived, if he signed it, and then knew what it was, its legal effect would be assenting to all the statements in the paper, and assenting to that would be an acknowledgment which would take the case out of the statute of limitations. The legal effect, and it is on the paper itself, that is

for the court to say. All papers are for the court, and when the court gives a construction to a paper, that is to be taken in connection with the other circumstances in the case. Now the legal effect. There is a letter written to the man who is now executor, and certain declarations and statements are made, and these accounts are both set out upon that statement, and Mr. Johnston signs it, and Job Hussey and wife sign it. It is in the form of a letter written by three persons, and if they understood it, it is just the same as if each one had written the same letter; and the legal effect of that paper, if fairly made and understood by the party who signed it, is that he assented to all that preceded his name, and that assent is an acknowledgment in writing which takes this claim out of the operation of the statute of limitations.

The verdict was for the plaintiff, and the defendant took exceptions.

W. H. Hilton, for plaintiff.

Where the courts have held that the acknowledgment or promise must be made to the creditor, his agent or attorney, the decisions have been qualified with the proviso that where the acknowledgment is to a stranger and it appears that it was the intention that the acknowledgment made to him should be communicated to and influence the creditor, it is just as effectual to defeat the statute of limitations as if it had been made directly to the creditor or his authorized agent. 13 Am. and Eng. Ency. of Law, page 760 and cases.

In *Whitney* v. *Bigelow*, 4 Pick. 109, the court holds that the acknowledgment is binding whether made to a party or his agent or to a stranger. This doctrine is recognized and cited by this court in *Peavey* v. *Brown*, 22 Maine, 103–104.

It is immaterial whether the acknowledgment was before or after the statute bar had fallen. In either case it set the statute running afresh from its date, and it is generally held that no stronger evidence is required in one case than in the other.

W. H. Fogler and G. B. Sawyer, for defendant.

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

EMERY, J. This was an action by a married daughter against her father to recover for supplies furnished her father and mother. The action was prima facie barred by the statute of limitations pleaded by the defendant. Within six years before the date of the writ, however, the husband of the plaintiff wrote out a statement of the supplies and services furnished, as set out in the account annexed to the writ. This statement was in the form of a letter written to the brother of the plaintiff and was signed by the writer. Under the signature of the writer was added the signature of the father. Under their signatures was a statement signed by one Hattie M. Johnston to the effect that the father acknowledged the accounts as valid and the statements true. It is to be noticed, however, that this latter statement was not signed by the father. His signature only applied to the letter itself. The presiding justice ruled that the letter signed by the father was sufficient to remove the bar of the statute of limitations, and the jury found for the plaintiff.

After much and varying judicial exposition, statutes of limitations are now almost universally held to be statutes of repose, to be interpreted and applied to effect that purpose. Any act or declaration interposed to defeat or postpone that effect is to be closely scrutinized. The legislature of this state has enacted that no acknowledgment or promise by the defendant shall defeat or postpone the operation of the statute "unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby." R. S., chap. 81, § 97. The acknowledgment must be in writing,—must be contained and found in the writing. It must be an "express" acknowledgment also. It is not enough that the original promise is proved. The new promise or acknowledgment must be proved to have been expressly made, and the proof of this must be in the signed writing. The acknowledgment must also at least savor of a promise to pay. It is not enough that a jury could, or probably would, infer a new promise from the terms

of the acknowledgment. The terms must be such that the court itself will infer a new promise from them. The most profuse acknowledgment of gratitude, or of any other moral obligation, for articles or services furnished will not do. The acknowledgment must be of an existing legal cause of action. It must show a recognition of a legal obligation and an intention, or at least a willingness, to be bound by it. It must be an acknowledgment of a legal debt, a legal duty. A mere acknowledgment that a cause of action once existed is not enough. A full acknowledgment of all the facts alleged by the plaintiff will not suffice unless there appears also a recognition of the legal duty. In fine, in the words of the usual replication to the plea, it must appear from the writing alone that "the defendant promised within six years." Wood on Lim. pp. 128, 129, 139 and notes; *Perley* v. *Little*, 3 Maine, 97; *Porter* v. *Hill*, 4 Maine, 41; *Miller* v. *Lancaster*, 4 Maine, 159; *McLellan* v. *Allbee*, 17 Maine, 184; *Warren* v. *Walker*, 23 Maine, 453; *Lunt* v. *Stevens*, 24 Maine, 534; *Perry* v. *Chesley*, 77 Maine, 393; *Bangs* v. *Hall*, 2 Pick. 368; *Barnard* v. *Bartholomew*, 22 Pick. 291-3; *Weston* v. *Hodgkins*, 136 Mass. 326; *Clementson* v. *Williams*, 8 Cranch, 72; *Bell* v. *Morrison*, 1 Pet. 351; *Shephard* v. *Thompson*, 122 U. S. 231.

Recurring now to the writing to be construed in this case, it may be conceded that the father acknowledged in writing over his own signature that the plaintiff paid bills for him and his wife, and furnished money, provisions and clothing to them, as shown by the memorandum in the letter, and the same sued for. But we do not find in the letter any intimation that the plaintiff intended to charge her parents or either of them for such assistance. Neither the letter nor the memorandum in it contains any words of charge. No claim is made in the letter that the plaintiff had any right of action therefor. On the other hand, it appears from the letter that the plaintiff was living with her parents at the time. It is stated that she "cared for her parents filially." Indeed, throughout the letter the writer claims for his wife credit for her generosity in so freely relieving her parents' necessities, and repels the suggestion that he or she had acted toward them

unfairly or ungenerously. The father by signing the letter may have acknowledged in writing the kindness of his daughter and the justice of her claim that she had been filial and generous; but we do not find in the letter any words indicating that the father promised to make a money payment for the services and supplies, or that he expressly acknowledged any liability therefor.

It is suggested that the father, beside signing the letter, acknowledged the account to be valid. But this acknowledgment of the validity of the account is not signed by the father and hence is not his written acknowledgment. It is suggested, again, that as the jury found for the plaintiff, it must be assumed that the father did originally promise to pay for the services and supplies, and hence his written acknowledgment that he received them is an acknowledgment of his legal liability to now pay for them. This does not follow. The writing signed by the father is alone to be searched for evidence of a promise. This search is to be made by the court, not by the jury. The opinion of the jury is immaterial.

Exceptions sustained.

MELVIN R. BALDWIN *vs.* H. CHESTER EMERY, Exor.

Somerset. Opinion February 1, 1897.

Action. Assumpsit. Covenant. Deed.

The acceptance of a deed poll by the grantee, or obligee, renders him liable to perform all the acts therein required of him as effectually as if it were an indenture executed under his own hand and seal; but the remedy is assumpsit or debt, and not covenant.

While suits upon covenants in sealed instruments must be either debt or covenant, as between the covenantor and covenantee; yet a sealed instrument may be used as evidence in an action of assumpsit when there is no covenant for payment or performance to the party to be benefited, or to some other person for his use.

The defendant received a deed of land from the plaintiff which recited that the land was subject to a mortgage and which mortgage the defendant "assumes and agrees to pay as part of the purchase price" of the land. The defendant

did not pay the mortgage debt and the plaintiff brought an action at law to recover it from his grantee, the defendant, basing his action upon the stipulation in the deed that he would pay it as a part of the purchase price. *Held;* that an implied assumpsit arises in favor of the plaintiff, from the recital in the deed thus taken by the defendant, to recover the sums named in the deed as due on the mortgage; *also*, that the deed is evidence of the promise and the amount to be paid under it.

Held; that the plaintiff may maintain this action although he, himself, has not paid the mortgage debt.

The court observes that had this been a suit upon the notes, or for their contents, the point of a variance between the plaintiff's declaration and proof might have been well taken; but as it is a suit for the amounts named in the deed, an implied assumpsit, the point must be overruled.

Burbank v. *Gould*, 15 Maine, 118, overruled.

ON REPORT.

The case appears in the opinion.

Chas. F. Johnson and F. E. McFadden, for plaintiff.

E. N. Merrill and G. W. Gower, for defendant.

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

HASKELL, J. The material facts in this case are as follows:—December 15, 1890, the plaintiff, being the owner in fee of certain land in Minnesota subject to a mortgage, conveyed the same to the defendant's executor by deed containing the provision:—"Subject to the payment of one certain mortgage for $1,020, dated November 12, 1890, and due as follows:—$510 due November 12, 1891, and $510 due November 12, 1892, with interest at the rate of eight per cent per annum payable annually and which said second party [meaning the grantee] assumes and agrees to pay as part of the purchase price of above described property."

Plaintiff has paid $600 on the mortgage, but brings this action at law to recover the whole mortgage debt from his grantee by reason of the stipulation therein, that he would pay it as a part of the purchase price.

The settled law of this state is that, where one covenants with another by deed, under his own hand and seal, to pay him money for his own use or for the use of another, the obligee alone can sue

upon the covenant, and the action must be covenant or debt and not assumpsit; and the beneficiary can have no action at law, but may have remedy in equity. But where the sealed instrument contains no covenant to pay or perform to the obligee or to the beneficiary, assumpsit will lie in favor of either one of them, as if the promise were shown by parol to be express, instead of implied from a statement of the respective rights of the parties in the deed.

This doctrine was early stated by Chief Justice SHEPLEY in *Hinkley* v. *Fowler*, 15 Maine, 289. One clause in that opinion read literally is misleading, but taken in connection with the context and authorities cited should read, "When one covenants or agrees under seal with another to pay a sum or to do an act, the other cannot maintain assumpsit." The words "under seal" as limiting the word "agrees" were omitted in the text, when manifestly their meaning was implied. The opinion further says:— "It will be found, upon examination of the cases which decide that assumpsit cannot be maintained where the rights of the party are secured by deed, that there is in the deed some stipulation for payment or performance to himself or to some one for his benefit."

The following cases sustain the doctrine stated above. *Packard* v. *Brewster*, 59 Maine, 404; *Farmington* v. *Hobert*, 74 Maine, 416; *Varney* v. *Bradford*, 86 Maine, 510, 514.

If a covenant be relied upon, the beneficiary's remedy is in equity only. If the recitals from which a promise to pay either the obligee or the beneficiary may be implied by law, either one may have assumpsit, and the beneficiary may also have relief in equity against both parties to the deed when thereby he may have a more adequate remedy than at law. *Flint* v. *Winter Harbor Land Co.*, ante, p. 420.

The acceptance of a deed poll by the grantee or obligee renders him liable to perform all acts therein required of him as effectually as if it were an indenture executed under his own hand and seal, but the remedy is assumpsit or debt, and not covenant. *Huff* v. *Nickerson*, 27 Maine, 106; *Sawyer* v. *Lufkin*, 58 Maine, 429; *Locke* v. *Homer*, 131 Mass. 102, and cases cited.

Whether the language in a deed be a covenant or raises an implied promise depends wholly upon the terms expressed. An agreement under seal to pay money or perform to A for his own use or for the use of B would be a covenant. An agreement to pay a given debt of A not to A would raise an implied promise to pay to A, or to the creditor of A, the subject of assumpsit. In short, a covenant, upon which debt or covenant can only be brought must be a particular obligation to pay or perform to a particular person and if to a person other than the obligee, his remedy is in equity only, for our decisions say so.

The plaintiff has not paid the full mortgage debt, but this makes no difference. The defendant agreed to pay it and the law implies a promise that he shall pay it either to the plaintiff or to the mortgagee. By paying it to the mortgagee he would defeat the plaintiff's action. By not paying it, he withholds from the plaintiff means with which to pay it, and no good reason can be given why the plaintiff shall not recover it. We are aware that it was otherwise held in *Burbank* v. *Gould*, 15 Maine, 118, but that case has been repeatedly questioned and may as well now be overruled as both against reason and authority. In the opinion, *Dearborn* v. *Parks*, 5 Greenl. 81, is cited; but that case holds that assumpsit lies in favor of a grantor's creditor to recover of the grantee the grantor's debt that was a part consideration for the deed which the grantee promised to pay to the grantor's creditor. The opposite doctrine of *Burbank* v. *Gould*, supra, is commended in *Barron* v. *Paine*, 83 Maine, 323, and fully sustained in *Locke* v. *Homer*, 131 Mass. 93, where many authorities are considered. So also in *Muhlig* v. *Fiske*, 131 Mass. 113; *Gaffney* v. *Hicks*, 131 Mass. 125; *Reed* v. *Paul*, 131 Mass. 129; *Williams* v. *Fowle*, 132 Mass. 385; *Wilson* v. *Bryant*, 134 Mass. 299; *Shattuck* v. *Adams*, 136 Mass. 36; *Paper Stock Disinf. Co.* v. *Boston Disinf. Co.*, 147 Mass. 322; *Rice* v. *Sanders*, 152 Mass. 108; *Wamesit Power Co.* v. *Sterling Mills*, 158 Mass. 444.

Had this been a suit upon the notes or for their contents, the point of variance might have been well taken; but as it is a suit for the amounts named in the deed, an implied assumpsit, the point must be overruled.

From the recitals in the deed in the case at bar, an implied assumpsit arises in favor of the plaintiff to recover the sums named in the deed as due on the mortgage and no more. That deed is the evidence of the promise and the amount to be paid under it. The sum named is $1020:—$510 due November 12, 1891, and $510 due November 12, 1892, with annual interest at eight per cent.

Defendant defaulted for $1020 with interest at eight per cent until the same became payable; after that at six.

BATH SAVINGS INSTITUTION

vs.

SAGADAHOC NATIONAL BANK, and others, and Trustee.

Sagadahoc. Opinion February 1, 1897.

National Banks. Stock. Transfer. Dividends.

Liquidation dividends of a national bank belong to the holder of the shares, whether those shares be recorded upon the books of the bank or not, and must be paid to the holder of such shares on demand. The negotiability or transferable quality of the stock of a national bank depends upon the laws of the United States, and is not governed by state laws.

A national bank may, by law, subject the shares of a stockholder to a lien for his indebtedness to the bank, and the assignee of such shares cannot procure a transfer of the same upon the books of the bank until such indebtedness shall have been paid.

Where there is no provision in the law of the bank subjecting shares to the payment of a shareholder's debts to the bank, *held*; that a transferee of shares, that are transferable only on the books of the bank by the shareholder or his attorney and a surrender of the certificate, takes a perfect title to the shares and may assert the same by transferring the shares under a power for the purpose to himself, and require the bank upon surrender of the certificate to give a new one therefor, certifying that the shares stand recorded in his own name; *also*, he may do this against subsequent purchasers from, or attaching creditors of, the assignor, or his assignees in insolvency or bankruptcy.

Without the surrender of the certificate of stock, a bank cannot issue another upon a transfer made by the apparent owner, either in person or by attorney, that will deprive the real owner of his shares.

Held; that if the apparent owner cannot transfer shares that he has already conveyed away, he cannot pro tanto transfer them to the bank itself by receiving liquidation dividends. The holder is not required to give notice, for his certificate informs him that so long as he retains it, the shares cannot be transferred to another; and the bank has given him this assurance by its own certificate, and he may safely rely upon it.

But this rule does not apply to the payment of dividends that do not partake of the transfer of the corpus of the shares, but are only a distribution of their increase, that may well be made among stockholders of record at a given date.

ON REPORT.

The case appears in the opinion.

J. M. Trott, for plaintiff.

The reports abound in cases relative to transfer of stock, but almost invariably they involve the question of equities as between two alleged transferees, third parties to the corporation, or the right of the holder of an unrecorded certificate either to be admitted to the corporation as a stockholder on the books, or to recover damages for a refusal to make a transfer of record. Diligent search fails to disclose any case where it is a question of the rights of the holder for value of an unrecorded certificate as against the corporation in liquidation, seeking to deprive him for its own benefit of the proportional share of distributive assets represented by the certificate.

Counsel cited: *Fitchburg Savings Bank* v. *Torrey*, 134 Mass. 239; *Bank* v. *Lanier*, 11 Wall. 369; *Supply Ditch Co.* v. *Elliott*, 10 Colo. 327 (3 Am. St. Rep. 586); 1 Wood, Ry. Law, §§ 95, 96; *Continental Nat. Bank* v. *Eliot Nat. Bank*, 7 Fed. Rep. 369, (37 Am. Rep. 353, in note); *Johnston* v. *Laflin*, 103 U. S. 532; Lowell, Transfer of Stock, §§ 121–129.

Notice: *Conant* v. *Seneca Bank*, 1 Ohio St. 306; *Cent. Neb. Nat. Bank* v. *Wilder*, 32 Neb. 456; 16 Am. and Eng. Enc. 792; *Knapp* v. *Bailey*, 79 Maine, 204; *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268; *Loring* v. *Brodie*, 134 Mass. 453; *Webb* v. *Graniteville Mfg. Co.*, 11 So. Car. 396 (32 Am. Rep. 479;) *National Security Bank* v. *Cushman*, 121 Mass. 490; *U. S.* v. *State Nat. Bank*, 6 Otto, 30; *Bridgewater Co.* v. *Lissberger*, 116 U. S. 8.

C. W. Larrabee, for defendants.

Committee, thus constituted under the laws of congress, represented the stockholders of the bank, and the bank itself in all its lawful powers, and their doings were within the scope of their duties, by the banking act under which the bank was organized. They knew no stockholders other than such as appeared upon the record of the bank. R. S. of U. S., § 5210. The records were the chart and the only chart by which they could safely steer, and the certificate determines this.

We have no need of the by-laws of the bank; the certificate in express words stipulates the terms and conditions of the contract between the stockholder and the bank. *Union Bank of Georgetown* v. *Laird*, 2 Wheaton, 390, in which Story, J., says:—"No person, therefore, can acquire a legal title to any share except under a regular transfer according to the rules of the bank. See also *Fisher* v. *Essex Bank*, 5 Gray, 373.

There does not appear ever to have been a demand for transfer of stock and completion of title, and therefore there was no perfection of title. The committee of liquidation had no authority, no right to liquidate otherwise than according to the record of the bank and its list of stockholders kept in obedience to the law of congress before quoted.

The application of the dividends toward Weeks' notes had been made with his knowledge and assent. No information had been given to the liquidating committee, that the certificate of these shares of stock had been transferred, pledged or hypothecated. And the committee had been so careful as to obtain the consent of Weeks, the owner of the stock to the application of the dividends to his notes. Not a word of information was given the defendant bank of the transfer of this certificate to plaintiff, and no claim had been made by plaintiff, or information given to defendant till March 20, 1895.

Of the chancering the sum: The payments on Weeks' note prior to the notice of March 20th, can not be disturbed; that once lawfully applied, the bank has right to hold them as a pro tanto payment. When they were so applied, there had been no change

of title in the stock made by Weeks and none attempted, and no notice from any party having the right to claim a transfer.

Shaw, Chief Justice, in *Fisher* v. *Essex Bank*, supra, says: "All these objects are most effectually accomplished by making the transfer at the bank the decisive act of passing the property, the legal, transferable, attachable interest."

It is necessary to fix some act and some point of time at which the property changes and vests in the vendee; and it will tend to the security of all parties concerned, to make that turning point consist in an act, which while it may be easily proved, does at the same time give notoriety to the transfer.

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

HASKELL, J. The shareholders of the defendant bank on April 11, 1894, voted voluntary liquidation, and appointed a committee with power to accomplish that result. The committee voted to pay liquidation dividend No. 1 May 1, 1894, of four dollars per share. That and various subsequent similar dividends amount to $103 a share. To recover these dividends on ten shares amounting to $1030 this action is brought.

Prior to the vote of liquidation the plaintiff bank acquired ten shares in defendant bank, recorded in the name of one Weeks, as collateral security for a loan, and still holds the same, the loan being unpaid and amounting to more than the liquidation dividends on the shares. The certificate contained the usual stipulation, "Transferable only on the books of said bank in person or by attorney on the surrender of this certificate." Weeks signed in blank the usual transfer and power of attorney printed on the certificate. The plaintiff did not present its certificate for transfer at the defendant bank, nor did the bank, or its committee, know of the transfer until seventy per cent of the dividends had been paid to Weeks in the following manner. The first dividend in cash, and the others by indorsement by his consent upon his paper held by the bank. The bank confesses its liability for the thirty-

three per cent unpaid, but denies its liability for seventy per cent paid to Weeks.

"The negotiability or transferable quality of the stock of a national bank depends upon the laws of the United States," and is not governed by state laws. *Continental Nat. Bank* v. *Eliot*, 7 Fed. Rep. 370; *Dickinson* v. *Central National Bank*, 129 Mass. 279; *Merchants Bank* v. *State Bank*, 10 Wall. 604; *Central Nat. Bank* v. *Williston*, 138 Mass. 248.

A national bank may, by law, subject the shares of a stockholder to a lien for his indebtedness to the bank, and the assignee of such shares cannot procure a transfer of the same upon the books of the bank until such indebtedness shall have been paid. *Knight* v. *The Old National Bank*, 3 Cliff. 429; *Union Bank*, v. *Laird*, 2 Wheaton, 390.

The assignee of shares with power to transfer the same takes an absolute title to the shares subject to any lien created by the articles of association, or by-laws thereunder, and on presentment of his certificates may require new ones to be issued to him as against subsequent assignees or attaching creditors. *Bank* v. *Lanier*, 11 Wall. 369; *Moores* v. *Bank*, 111 U. S. 163-166; *Dickinson* v. *Bank*, supra; *Sibley* v. *Quinsigamond Nat. Bank*, 133 Mass. 515. Upon this subject, *Bank* v. *Eliot*, supra, is very instructive and collates and compares many authorities upon the subject. See also *Johnston* v. *Laflin*, 103 U. S. 800.

The doctrine of the cases is, where there is no provision in the law of the bank, as in this case, to subject shares to the payment of any debt of the shareholder to the bank, that the transferee of shares that are made transferable only on the books of the bank by the shareholder or his attorney, and a surrender of the certificate, as here, takes a perfect title to the shares and may assert the same by transferring the shares under a power for the purpose to himself and require the bank, upon surrender of the certificate, to give a new one therefor, certifying the shares to stand recorded in his own name; and this he may do against subsequent purchasers from, or attaching creditors of, the assignor, or his assignees in insolvency or bankruptcy.

If the assignee may hold the shares against subsequent transfers by the assignor, against his attaching creditors, against his assignee in insolvency or bankruptcy, shall he not hold them against the assignor himself? By the terms of the certificate the shares are transferable only upon the books of the bank and the surrender of the certificate. Without the surrender of the certificate the bank cannot issue another upon a transfer made by the apparent owner, either in person or by attorney, that shall deprive the real owner of his shares; and if the apparent holder cannot transfer shares, that he has already conveyed away, a fortiori, he cannot pro tanto transfer them to the bank by receiving liquidation dividends. He should not hold and enjoy the corpus of the shares in that way, as against the real owner, any more than the shares themselves. These he cannot sell to a stranger; why should he sell them to the bank?

It is said the bank has no notice and pays innocently, while the holder is guilty of negligence in not giving notice of his title to the shares. Not so. The holder is not required to give notice, for his certificate informs him that so long as he retains that, the shares cannot be transferred to another; and the bank has given him this assurance by its own certificate, and he may safely rely upon it. Let the bank follow its own stipulations. Let it not countenance the transfer of shares, in violation of its own rules, or pay their corpus in liquidation, which is an equivalent, without requiring the production of the certificate of shares, and then bank shares will hold that confidence among merchants and bankers and persons who deal in stocks that congress intended they should hold, thereby giving them value and making them desirable property for those who may be borrowers of money in the market.

This doctrine should not, and does not, apply to the payment of dividends that do not partake of the transfer of the corpus of the shares, but are only a distribution of their increase, that may well be made among stockholders of record at a given date.

Defendant defaulted.

ALFRED GOODWIN, in equity *vs.* ELLEN C. SMITH.

York. Opinion February 1, 1897.

Equity. Pleading. Spec. Performance. Rule IV.

It is no longer necessary for the plaintiff in equity to allege in his bill that he has not a "plain, adequate and complete remedy at law."

This, known as the jurisdiction clause, has been abolished by Rule IV of this court, in order to avoid unnecessary prolixity; and its utility has been denied in other courts, when the facts stated, sustained by the proof, do show jurisdiction, although it is omitted.

Upon a bill in equity praying for the specific performance of an oral contract for the sale of land, it appearing beyond a reasonable doubt that the defendant made the contract set out in the bill, accepted money in part payment, permitted the plaintiff to take possession of the land and expend a large sum in improvements on it, *held;* that the plaintiff is entitled to a good and sufficient deed of the land.

ON REPORT.

This was a bill in equity praying for specific performance of an oral contract to convey a lot of land, and was heard by the law court on bill, answer and proofs.

The case is stated in the opinion.

J. M. Goodwin, for plaintiff.

H. H. Burbank, for defendant.

The plaintiff does not allege in his bill that he has not a "plain, adequate and complete remedy at law." Such an allegation is necessary, and its absence is fatal to the maintenance of this complaint. *Porter* v. *Land & Water Co.*, 84 Maine, 198; *Jones* v. *Newhall*, 115 Mass. 252, and cases cited.

Assuming that the contract was as the plaintiff alleges, his expenditures could be amply remunerated by a verdict in an action at law. His occupation of the premises for the time were to his sole advantage and convenience in transporting his stone to the wharf for shipment. *Richards* v. *Allen*, 17 Maine, 296; *Kneeland* v. *Fuller*, 51 Maine, 520; *Plummer* v. *Bucknam*, 55 Maine, 106; *Jellison* v. *Jordan*, 68 Maine, 373; *Segars* v. *Segars*, 71 Maine, 534; *Thompson* v. *Gould*, 20 Pick. 138; *Cook* v. *Doggett*,

2 Allen, 440; *McKowen* v. *McDonald*, 43 Pa. St. 441; *Moyer's Appeal*, 105 Pa. St. 432; *Burns* v. *Daggett*, 141 Mass. 373.

That he should be entitled to a remedy in equity upon a parol contract (void by the statute of frauds), the agreement must be "concluded and unambiguous," and "so plain as to preclude doubt or hesitation in reaching a conclusion." *Woodbury* v. *Gardner*, 77 Maine, 71; *Bennett* v. *Dyer*, ante 17; *Williams* v. *Morris*, 95 U. S. 457; *Tilton* v. *Tilton*, 9 N. H. 390; *Lord's Appeal*, 105 Pa. St. 459; *Brown* v. *Brown*, 33 N. J. Eq. 660; Browne, Frauds, § 452.

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

WALTON, J. This is a suit in equity.

The plaintiff says that, being a shipper of granite, he bargained with the defendant for a parcel of land, consisting of about five-eights of an acre, over which he was desirous of constructing a road for the transportation of his granite to the Saco River; that for said parcel of land he agreed to pay her and she agreed to accept three hundred dollars; that in pursuance of said agreement, and in part performance of the same, he paid the defendant one hundred dollars, and entered upon and took possession of the land and expended a large sum of money (about one hundred and seventy-five dollars) in building a culvert and making a passable road over the same, and has at all times been ready to pay the balance due for the land, and has several times offered so to do, if the defendant would give him a deed of it; but that the defendant, although she accepted and still retains the one hundred dollars advanced to her, has hitherto refused, and still refuses to give the plaintiff a deed of the land, falsely giving as an excuse for such refusal, that the contract was for a lease and not for a sale of the land; and the prayer of the plaintiff's bill is that the defendant may be compelled to specifically perform her said agreement, and give the plaintiff a good and sufficient deed of said land.

It is insisted in defense that the plaintiff's bill is fatally defect-

ive because it does not contain an allegation that the plaintiff has not a "plain, adequate, and complete remedy at law." If such an allegation was ever necessary, it is not so now. It is known as the jurisdiction clause, and to avoid unnecessary prolixity, has been abolished by a rule of this court. (Rule IV.) It has also been abolished by the United States Supreme Court. (Rule XXI.) And Judge Story says it was never necessary; that if the other facts stated in the bill do not show jurisdiction, this clause will not give it; and if the other facts stated in the bill do show jurisdiction, and are sustained by the proof, the bill will be sustained though this clause is omitted. Story's Equity Pleadings, § 34; and note 2, citing the rule of the United States Supreme Court.

It is further insisted in defense that the contract was oral, and that the evidence is insufficient to take it out of the operation of the statute of frauds. We think the evidence is sufficient. It is true that to take an oral contract for the sale of land out of the operation of the statute of frauds, the proof of a part performance of the contract, and the proof of the contract itself, must be clear and convincing. Or, as the rule is stated in *Bennett* v. *Dyer*, ante, 17, "the party making the attempt to take the case out of the statute of frauds must establish the existence of the oral contract by clear and satisfactory evidence." But we think the evidence in this case is clear and satisfactory. Viewed in the light of the undisputed acts of the parties, we think the oral proof shows beyond a reasonable doubt that the defendant did make such a contract as is set out in the plaintiff's bill, and that she accepted a hundred dollars in part performance of the contract, and permitted the plaintiff to take possession of the land and expend a large sum of money in constructing a road over it. And we think she must now be required to complete the performance of her contract, and give the plaintiff a good and sufficient deed of the land, as prayed for in his bill.

Decree accordingly, with costs.

F. OZIAS LEAVITT

vs.

BANGOR AND AROOSTOOK RAILROAD COMPANY.

Penobscot. Opinion February 1, 1897.

Negligence. Master and Servant. Remote Cause.

It is the settled law in this state, that an employer is not liable for the negligent acts of a contractor, or his servants, where the contractor carries on an independent business, and in doing his work does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on; and that such employment does not create the relation of master and servant.

A fortiori, an employer is not responsible for the acts of a contractor, or his servants, that are not negligent.

The independent act of a third person that intervenes between the wrong complained of and the injury sustained, is a good test of remoteness of cause that forbids recovery.

The defendant contracted to have its wood, along the line of its railroad, sawed in lengths suitable for fuel at a stipulated price per cord; the contractor owned and used for the purpose three railroad cars; one for a living-car for his men, one for a tool-car and one for a cooking-car, in which a fire was kept for the purpose. To enable the contractor to do his work conveniently, the defendant placed these cars on one of its spur-tracks, about one hundred feet from the plaintiff's mill. *Held;* that this act of the defendant did not make it liable for the burning of the mill from fire kept by the contractor in his cooking-car.

There is a distinction between placing the car on the spur-track, and the act of using it with fire. The former is the act of the defendant; the latter, of the contractor, and for which the defendant is not to be held responsible.

ON MOTION BY DEFENDANT.

This was an action brought against the defendant corporation to recover damages for alleged negligence on its part in placing a cooking-car together with a sleeping-car on its spur-track, in the city of Old Town, in such close proximity to the mill of the plaintiff that a spark from a funnel in the cooking-car, as the plaintiff alleges, communicated fire to his, the plaintiff's mill, whereby and on account of which it was burned and consumed.

The first count in the plaintiff's declaration is as follows :—

In a plea of the case, for that the said plaintiff at Old Town in the county of Penobscot aforesaid, on the twelfth day of May, A. D. 1894, and long before said date, was the owner of a certain wooden building situate in said Old Town and used and occupied then and there by said plaintiff as a saw-mill, and also of two shingle-machines and one boiler and the engine in said building; and said defendant on said twelfth day of May, A. D. 1894, and long before and ever since said date, was and has been a public corporation doing and carrying on the business of a common carrier of persons and freight and personal property, and was then and there possessed of a certain railroad extending from the Maine Central Railroad Company's station in said Old Town northward past and near the aforesaid building through said Old Town to some point beyond the limits thereof, and was also then possessed, as a part of its railroad, of a siding or spur-track, near said mill and leading from the main line of its said railroad to said mill-building; and said defendant on said twelfth day of May, A. D. 1894, and long before said date, was in full occupation of said railroad and of said spur-track, and running thereon locomotive engines and cars, and had the control, management and direction of said railroad and spur-track and of the engines and cars on the same; and on the thirtieth day of April, A. D. 1894, and continuously thereafter until and including the said twelfth day of May, A. D. 1894, there was by the side of the main track of said railroad and in the near vicinity of said mill-building a large quantity of wood belonging to and owned by said defendant, which wood had been placed in said situation by said defendant and was by said defendant intended to be used by defendant as fuel in the operation of its said railroad; and said defendant, on the first day of May, A. D. 1894, with the intention and for the purpose of having said wood sawed into shorter lengths and thereby fitted to be used by defendant for fuel in operating its said railroad as aforesaid, transported over its said line and brought to the place where said wood was as aforesaid placed, a crew of men who were to saw said wood and fit the same to be used by defend-

ant as aforesaid, and also certain cars, to wit, three cars of said defendant and then and there under the control and charge of said defendant said cars being then and there intended for use and occupation of said men while at work in sawing said wood as aforesaid, one of said cars being then and there fitted up and intended to be used as a cooking-car for the cooking of food for said men while so at work, and the other two of said cars being then and there fitted up and intended to be used, the one as a sleeping-car for said men and the other as a tool-car by said men while thus at work; and during the whole period from the first day of May A. D. 1894, to the twelfth day of May, A. D. 1894, both days included, the said cars were used as cooking-car, a sleeping-car and a tool-car respectively by said men, and during the said whole period a fire was necessary in said cooking-car for the purpose of cooking food for said men and was each day during said whole period kindled and kept burning therein by reason of said necessity; and during each day of said whole period there was in the natural course of events a liability and danger that said fire thus kindled and kept burning in said cooking-car, would communicate fire to said mill-building; all of which said defendant then and there well knew.

And said defendant, well knowing all of the aforesaid facts, and the location of said mill-building and its situation relative to said spur-track, did nevertheless on the first day of May, A. D. 1894, although then and there having full control of moving said cars and of determining where the same should be stationed while they were used by said men as aforesaid, and although then and there having ability and opportunity to place said cars at such distance from said mill-building and in such location as would avoid any reasonable danger and liability of the setting or communicating of fire to said building from any fire in said cooking-car, negligently, carelessly, unnecessarily and against the wish and objection of said plaintiff, seasonably made known to defendant, place said car near to said mill-building upon the aforesaid spur-track and keep the same thereon during the whole period from said first day of May, A. D. 1894, to and including said twelfth day of May, A. D. 1894; and on said twelfth day of May, A. D. 1894, while said

cooking-car was standing on the said spur-track and near to said mill-building, to wit, at a distance of one hundred feet therefrom, a fire was as usual and for the purpose aforesaid kindled and kept burning in said cooking-car; and then and there, through and because of the aforesaid negligence, careless and unnecessary placing and keeping of said car near to said mill-building and upon said spur-track by said defendant the said mill-building was set on fire by and from a spark of fire which was then and there in the natural course of events and as was naturally to have been expected carried through the air from the aforesaid fire in said cooking-car towards and near said mill-building, and by reason of said mill-building being thus set on fire, said building was then and there totally consumed and destroyed, and said machines and boiler and engine were destroyed and rendered totally useless and valueless.

And plaintiff says that at the time and place of the aforesaid setting fire to said building, and before and after said time, he was in the exercise of due care and diligence, and that said setting fire to said building and the said destruction thereof of the said machines and engine and boiler were in no way his fault, nor attributable to any fault or defect in said building, or said machines, or said boiler or engine, but that the same were wholly caused by the fault and negligence of said defendant; all which facts the said defendant then and there well knew.

Plea, the general issue with the following brief statement:—

That on said first day of May, A. D. 1894, and for a long time prior thereto, one F. S. Marden was the owner of three cars, to wit, a cooking-car, a sleeping-car and a tool-car, being the same cars described in said plaintiff's declaration and fitted, used and kept by said Marden for the purpose of sawing and preparing cord wood for fuel and for boarding the men in his employ while engaged in said work; and that on and before said first day of May, the said defendant company having some wood along side of its main line in Old Town as described in plaintiff's writ, which it desired to have sawed into proper lengths for fuel, entered into a contract with said Marden whereby the said Marden agreed to saw said wood and to provide, at his own expense, all necessary power,

tools, appliances and labor therefor for the sum of forty-five cents per cord, which said sum said defendant company agreed to pay said Marden; and the said Marden desiring to enter upon his said contract on the said first day of May, 1894, had his said three cars which were then and there under his, the said Marden's sole charge and control, and a crew of men then and there in his employ, brought to and set off on said spur-track near where said wood was as aforesaid placed. And thereupon said Marden by his own servants entered upon the work of sawing said wood as aforesaid and used his said three cars in connection with his said work for the purposes heretofore described and continued to use them as aforesaid until and after the twelfth day of May, 1894. And defendant company says, that during all said time, said cars and all stoves, tools and appliances therein were under the sole charge and control of said Marden and his servants; and that the said men employed in and about said cars were all employed by said Marden and were under his exclusive direction and control and that all the fires, if any, which were kindled and kept burning in the stove in the cooking-car as alleged in the plaintiff's writ were kindled and kept burning by said Marden and his servants as aforesaid and were under his and their care and control; and that said defendant company, its servants or agents, during all said time from said first day of May until said twelfth day of May inclusive, kindled no fire in the stove in said cooking-car or in the stoves in any of said cars, and directed and authorized no fire to be kindled therein as alleged in the plaintiff's writ.

At the close of the testimony the presiding justice made the following ruling:

The Court: I shall rule that the evidence in this case would not justify a finding that the defendant was in any way negligent in the watching and tending the fire in the car; and I shall ask the opinion of the jury, their advice upon two questions of fact: First, whether the fire that consumed the mill was set by fire from the cooking-car; and, second, whether the defendant company was guilty of negligence or carelessness in setting that cooking-car where they did; reserving all points for the plaintiff.

The jury returned a verdict of $2010.30 for the plaintiff, and the defendant filed a general motion for a new trial.

P. H. Gillin and C. J. Hutchings, for plaintiff.

The defendant corporation placed the car on the spur-track, and it alone could place it there.

The early case of *Bower* v. *Peate*, L. R. Q. B. Div. 1, 321, clearly points out the distinction between the case at bar and the point upon which the defendant relies. The defendant was held liable, in that case, on the ground that the thing did happen which he might have expected to happen, which from the surrounding circumstances was liable to happen; and as the work was being done for him, even though by an independent contractor through which the injury accrued to the plaintiff, yet he was not relieved from liability.

Where the right exists of placing this car in any position that the defendant deems proper and convenient for its own purpose, then the law may require the employer at his peril to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs. *Sturges* v. *Theolog. Education Soc.* 130 Mass. 414; *Stewart* v. *Putnam*, 127 Mass. 403, 407; *Gorham* v. *Gross*, 125 Mass. 232, 240; *Bower* v. *Peate*, 1 Q. B. D. 321, approved in *Dalton* v. *Angus*, 6 App. Cas. 740, 4 Q. B. D. 162, and 3 Q. B. D. 88; *Pickard* v. *Smith*, 10 C. B. (N. S.) 470; *Hole* v. *Sittingbourne, etc., Ry. Co.*, 6 H. & N. 488, 500; *Circleville* v. *Neuding*, 41 Ohio St. 465; *Woodman* v. *Metropolitan Railroad*, 149 Mass. 335; *Norwalk Gas Light Co.* v. *Borough of Norwalk*, 63 Conn. 495; Cooley, Torts, 2d Ed. 644.

Counsel also cited: *McCafferty* v. *S. D. & P. M. R. R. Co.*, 61 N. Y. 178; *Ellis* v. *The Sheffield Gas Consumers' Co.*, 2 E. & B. 767; *Koch* v. *Sachman-Phillips Inv. Co.*, 9 Wash. 405; *Garman* v. *S. & I. Ry. Co.*, 4 Ohio St. 399; *Burns* v. *K. C. & F. S. & M. Ry. Co.*, 129 Mo. 41; *Moore* v. *Sanborn*, 2 Mich. 519; *Engel* v. *Eureka Club*, 59 Hun, (N. Y.) 593; *Southern Ohio R. Co.* v. *Morey*, 47 Ohio St. 207, (7 L. R. A. 701); *Hughes* v. *C. & S. R. Co.*, 39 Ohio St. 461. Remoteness of cause: *Webb* v. *R. W. & O. R. R. Co.*, 49 N. Y. 420; *Woodman* v. *Met. R. R. Co.*,

149 Mass. 335 (340); *Sioux City etc., R. R. Co.* v. *Strout*, 17 Wall. 657; *Veazie* v. *P. R. R. Co.*, 49 Maine, 119, 123; *Conlon* v. *Eastern R. R. Co.*, 135 Mass. 195.

F. H. Appleton and H. R. Chaplin, for defendant.

Counsel argued:

(1.) That it was not, per se, negligence for defendant company to leave the cooking-car, in which it was expected that a fire might be or would be built, 140 feet from plaintiff's mill; and if not, per se, negligence, the defendant company is not liable in this action.

(2.) If the company was guilty of negligence in leaving the car under the circumstances, the contractor was also guilty of negligence in kindling a fire under the same circumstances.

(3.) That defendant company is not liable for the negligent acts of the contractor—especially when they are collateral to the contract.

(4.) That the negligent act was not directed by the company, but was done by the contractor of his own motion and volition.

(5.) That the defendant company had a legal right to assume that the contractor would exercise due care in what he did.

(6.) And that having such legal right to assume the exercise of due care it was not bound to foresee that he would not exercise due care.

Counsel cited: *Rood* v. *N. Y. and E. R. Co.*, 18 Barb. 80; Shear. & Red. on Negligence, 4–23; Wharton on Negligence, 25; *McCafferty* v. *S. D. & P. M. R. R. Co.*, 61 N. Y. 178; *Hofnagle* v. *N. Y. C., & H. R. R.*, 55 N. Y. 608; *Eaton* v. *E. & N. A. Ry.* 59 Maine, 520; *Ferguson* v. *Hubbell*, 97 N. Y. 507; *McCarthy* v. *2nd Parish*, 71 Maine, 318; *Callahan* v. *Burlington & Missouri River Railroad*, 23 Iowa, 562, (cited approvingly in *Eaton* v. *E. & N. A. Railroad*); *Gillson* v. *North Grey R. Co.*, 35 U. C. Q. B. 475; *Lannen* v. *Albany Gas Co.*, 44 N. Y. 459; *Pickard* v. *Smith*, 10 C. B. (N. S.) 470; Shear. & Red. on Negligence, 3d Ed. 15–84–175; *Hall* v. *Smith*, 2 Bing. 156; *Duncan* v. *Findlater*, 6 Cl. & F. 894; Ray on Imposed Duties (Personal) 665; 16 Am.

& Eng. Enc. of Law, 446, note 2; *Rich* v. *Basterfield*, 56 Eng. C. L. 782; *Lee* v. *McLaughlin*, 86 Maine, 410.

Proximate and remote cause: Bigelow Leading Cases in Torts, 698; *O'Brien* v. *McClinchy*, 68 Maine, 557; Shear. & Red. on Negligence, 26; *Milwaukee, etc., R. R. Co.* v. *Kellogg*, 94 U. S. 469; *Louisiana Mut. Ins. Co.* v. *Tweed*, 7 Wall. 44; *Lewis* v. *Flint etc. R. R. Co.*, 54 Mich. 55; *Washington* v. *Baltimore R. Co.*, 17 W. Va. 190; *Cuff* v. *Newark etc. R. Co.*, 35 N. J. L. 32; *Thomas* v. *Winchester*, 6 N. Y. 397; *Carter* v. *Town*, 103 Mass. 507; Bigelow's Leading Cases in Tort, 609; *Scheffer* v. *Washington etc. Railroad*, 105 U. S. 251; Cooley on Torts, 2d Ed. 73.

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

HASKELL, J. This is an action of case, by the owner of a lumber mill, against a railroad company for burning the same by fire communicated from the premises of the company.

The first count charges the defendant with negligently maintaining a cooking-car, in which a fire was kept, on its premises so near to the plaintiff's mill as to endanger its safety, whereby the same was burned. In short, with maintaining a nuisance from which danger ensued.

The second count charges the defendant with negligence in the management of its fire so kept in the cooking-car, by reason whereof the plaintiff's mill was burned.

The jury found specially that plaintiff's mill was destroyed by fire communicated from the cooking-car, and that defendant was guilty of negligence in locating the same; whereupon they were instructed to assess damages for the plaintiff, which they did.

The case comes up on motion to set aside the verdict as against law.

The undisputed facts of the case material to the consideration here are, that the defendant contracted to have its wood, along the line of its railroad, sawed in lengths suitable for fuel at a stipulated price per cord; that the contractor owned and used for the purpose

three railroad cars; one for a living-car for the men, one for a tool-car and one for a cooking-car in which a fire was kept for the purpose.

To enable the contractor to conveniently do his work, the defendant placed these cars on one of its spur-tracks, some seventy-five or one hundred feet from plaintiff's mill; and the question is, did this act make the defendant liable for the burning of the same from fire maintained by the contractor in the cooking-car?

It is settled, in this state, that an employer is not liable for the negligent acts of a contractor, or his servants, where the contractor "carries on an independent business, and in doing his work does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on;" and that such employment "does not create the relation of master and servant;" a fortiori, the employer cannot be responsible for acts of the contractor, or his servants, that are not negligent. *McCarthy* v. *Second Parish*, 71 Maine, 318. In that case the authorities are examined and considered, and need not be reviewed here. The facts of this case come within the doctrine of that case. The contractor here was carrying on an independent business, and was in no sense the servant of the defendant company.

But it is argued that the mischief of which the plaintiff complains was not the negligent act of the contractor or his servants, but the direct result from using, carefully if you please, an appliance located by defendant; that the proxima causa was the location of the car, the use of which naturally would and did cause the damage.

But the act of locating the car, and of using it with fire, must be distinguished. The former was the act of the defendant. The latter, of the contractor. The car itself was harmless, and its location, when unused, threatened no injury to plaintiff. The use might create mischief. The thing unused was harmless.

The doctrine of *Burbank* v. *Bethel Steam Mill*, 75 Maine, 373, applies. There it was contended that the location of a steam engine, for propelling a mill in violation of statute regulations made a nuisance of it per se, whereby the plaintiff might recover

damages for the burning of his buildings from fire used to make steam for the engine; but the court held that he could not, that the engine itself where located did not become a nuisance per se, but that its negligent use might create liability.

So in this case. Here, cars themselves were not objectionable. It was the use that might make them so, and the use was the act of the owner, not of the defendant. Fire in the cooking-car might be dangerous at some times and unobjectionable at others. If the wind be strong and blowing towards inflammable property, it might be gross carelessness, with the short funnel as a chimney, to burn shavings, shingles and other light and highly inflammable fuel that sends out with the draft, sparks, coals, and pieces of wood on fire, while it might be prudent to have a fire of hard coal that would not emit matter in the process of combustion. In such case everything would depend upon conditions. The height and size of the chimney, the strength of the draft, the kind of fuel, the weather, wind and care given to the fire. These conditions are all elements of the use, and the use is the creature of the tenant, not of the land-owner, who does not control the use.

True, there might be cases where the land-owner would be liable if the use was contrived by him for the purpose of mischief, with intent of avoiding liability; but there is no element of that sort here. The car was located without intent to injure. The liability for its imprudent use then rested upon its owner, who was tenant. There is no principle of law that can be invoked to charge the defendant. It did not create or maintain a nuisance, nor a condition that directly caused the mischief. That was perhaps caused from the misuse, by another, of the conditions created by defendant, for whose acts defendant is in no way responsible.

Lee v. *McLaughlin*, 86 Maine, 410, sustains the doctrine of this case. There, the owner of a building in possession of a tenant was held not liable for injury caused by a snow slide into the street. The building was not a nuisance per se. The accumulated snow upon the roof might make it so, and that was the fault of the tenant. See also, *Eaton* v. *Railway*, 59 Maine, 520; *Tibbetts* v. *Railway*, 62 Maine, 437.

Veazie v. *Railroad*, 49 Maine, 119, does not conflict with this doctrine. There, a highway was made dangerous by the work of contractors, and the employer was held liable. Any obstruction of a highway is a nuisance per se. *Corthell* v. *Holmes*, 88 Maine, 376; *Penley* v. *Auburn*, 85 Maine, 278. No private person or corporation has a right to interfere with a highway, and can only do so by authority from the legislature; and then, as the authority is personal, the act, by whomsoever done, remains personal. The act of a contractor, being unauthorized except from the legal privilege of his employer, logically becomes the act of the latter, permitted by law in derogation of the public right. That is the doctrine of *Veazie* v. *Railroad*, supra, and is not applicable here. Nor is *Southern Ohio Railroad Co.* v. *Morey*, 47 Ohio St. 207, where the plaintiff, by contractors, dug a ditch across a street, and left the same unguarded, into which a traveler fell and was injured. Nor is *Circleville* v. *Neuding*, 41 Ohio St. 465, where the city itself was held liable to a traveler for the negligence of its contractor in sinking a reservoir in a street. The opinion cites numerous cases holding the doctrine of *Veazie* v. *Railroad*, supra.

The doctrine of *Norwalk Gaslight Co.* v. *Norwalk*, 63 Conn. 528, is well stated in the opinion. "It is a sound rule of law as of morals, that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound, so far as it lies in my power, to see to the doing of that which is necessary to prevent the mischief. Failure to do so would be culpable negligence on my part." *Bower* v. *Peate* L. R. 1 Q. B. Div. 321. Certainly, there the blasting by dynamite in digging sewers caused the injury complained of to plaintiff's gas pipes. The blasting was contracted to be done, and was done, as the very act of the employer, and as the court says, was "intrinsically dangerous." The act complained of in the case at bar was locating a car upon the employer's land, an act not dangerous to any one. Its use might, or might not be. A dangerous use was not contracted for. Had it been, it might have come within the doctrine of the above case. The same

doctrine was applied in *Gorham* v. *Gross*, 125 Mass. 232. Defendant contracted to have a retaining wall built against his neighbor, and it fell, causing damage to the neighbor. Of course defendant was liable. The same doctrine was applied in *Sturges* v. *Educational Society*, 130 Mass. 414.

Woodman v. *Railroad*, 149 Mass. 335, cites with approval *Veazie* v. *Railroad*, supra, and confirms the same doctrine. *Conlon* v. *Railroad*, 135 Mass. 195, applies the same principle. *Ellis* v. *Sheffield*, 2 E. & B. 767, is cited. It charmingly states the doctrine of the above case: "If the contractor does the thing which he is employed to do, the employer is responsible for that thing, as if he did it himself." These are all the authorities cited by plaintiff that require notice.

Among the many cases cited by the defendant, the principle governing the present case was applied in *Rich* v. *Basterfield*, 4 C. B. 783. There, the owner of land built a chimney upon it, and leased the land. The tenant lighted a fire from the smoke of which the plaintiff was injured. There, as here, it was contended that the owner, having provided the appliances for a fire, impliedly authorized the lighting of the fire. But it was held otherwise, and that the damage resulted from the act of the tenant, and that the owner was not liable, although he enabled the tenant to make fires if he pleased.

The independent act of a third person that intervenes between the wrong complained of and the injury sustained is a good test of remoteness that forbids recovery. *Cuff* v. *Railroad*, 35 N. J. Law, and cases cited. Where the fire is negligently set by the owner, or his servant, the liability attaches. *Webb* v. *Railroad*, 49 N. Y. 420. But if set by a contractor, it does not attach. *Ferguson* v. *Hubbell*, 97 N. Y. 507.

Motion sustained.

STATE *vs.* FRED HUFF.

Lincoln. Opinion February 4, 1897.

Exceptions. Evidence. Intent. Smelts. Spec. Laws, 1895, c. 28.

Upon a motion in arrest of judgment for irregularities and omissions in a recognizance and other papers sent up on appeal from a trial justice's court, none of the papers complained of were made part of the bill of exceptions, and none were before the law court. *Held;* that the court cannot determine whether there was error in overruling the motion, and exceptions thereto should be overruled.

Evidence is not admissible to show in a criminal prosecution that the defendant is innocent of turpitude, when the statute makes the act charged an illegal one without reference to the intent of the doer.

The acts prohibited by special statute of 1895, c. 28, for the protection of smelts in Damariscotta River are made unlawful absolutely; and the belief of persons violating the act is no defense.

ON EXCEPTIONS BY DEFENDANT.

This was a complaint for fishing for smelts with a drag seine in Damariscotta river in violation of the special laws of 1895, c. 28.

The complaint was heard January 15, 1896, before a trial justice in the county of Lincoln, and the respondent was found guilty and fined one hundred dollars. An appeal was taken to this court below, where the case came on for trial at the April term, 1896. No objection was made to the form of the complaint and warrant. At the trial the respondent offered two letters written to him by a commissioner of sea and shore fisheries, in both of which the commissioner gave to the respondent an opinion that he had a legal right to fish with purse or drag seines, at the point where he afterwards fished, and for which complaint was made. The respondent also offered to prove that, before the fishing complained of, he consulted an attorney at law who gave him a similar opinion. The presiding justice excluded the letters of the commissioner and the opinion given by the attorney at law; and instructed the jury that the testimony offered by the respondent would not constitute a justification of the offense had he admitted the same in evidence.

The jury returned a verdict of guilty.

The defendant moved in arrest of judgment for the following reasons:

(1.) Because the recognizance on appeal from the finding of the magistrate, or trial justice, before whom the case was originally tried, is not properly certified and attested by the said trial justice.

(2.) Because there is no record or copy of record of the said trial justice's proceedings, at the court where the case was first heard and from which an appeal was taken.

(3.) That the papers returned by the trial justice, and all of them, are defective in not being properly attested and certified.

The presiding justice overruled the motion in arrest of judgment and the defendant thereupon took exceptions. He also took exceptions to the other rulings above stated.

W. H. Hilton, and *Howard E. Hall*, County Attorney, for State.

True P. Pierce, for defendant.

The intent and the act must both concur to constitute the crime. 3 Greenl. Ev. 13. The evidence offered not only shows that the defendant did not intend to violate the law, but that he intended not to violate it. *U. S.* v. *Conner*, 3 McLean, 573.

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

EMERY, J. I. As to the motion in arrest of judgment for irregularities and omissions in the recognizance, copy of record and other papers sent up by the trial justice, none of the papers complained of are made a part of the bill of exceptions and none are before the law court. Hence we are unable to determine whether there was any error in overruling the motion, and must overrule the exceptions thereto.

II. The appellant was charged with doing the acts prohibited by special statute of 1895, c. 28, enacted for the protection of smelts in the Damariscotta river. He admitted that he did the acts charged and intended to do them. They were not done

unconsciously nor under compulsion. He offered to show in defense, however, that he was advised by one of the fish commissioners and also by a reputable counselor at law that, under the circumstances, it was not unlawful to do those acts. He further offered to show that in doing those acts he acted in good faith not intending to violate any law. The court ruled out this offered defense and the appellant was convicted.

Some acts are in themselves indifferent and become criminal only when done with a particular intent. For instance, many acts become criminal only when done with an intent to defraud. In such cases the intent which makes the otherwise indifferent or innocent act criminal must be alleged and proved;—and evidence tending to show the absence of the criminal intent would be admissible in defense.

Other acts, however, are sometimes made unlawful absolutely, without reference to any intent or other state of mind of the doer. In such cases no intent need be alleged or proved. The intent to do is sufficient and that can be inferred from the doing. The acts prohibited by this statute are of this latter class. They are prohibited absolutely. Having intentionally committed them, though innocent of any turpitude, the appellant has violated the statute. *State* v. *Goodenow*, 65 Maine, 30.

Exceptions overruled.

JOHN DOE, Assignee in Insolvency, *vs.* RICHARD ROE.

Franklin. Opinion February 4, 1897.

Insolvency. Fraudulent Conveyance. R. S., c. 70, § 52.

The assignee of an insolvent debtor may recover in an action of money had and received, under R. S., c. 70, § 52, the proceeds of notes and claims that have been transferred by the debtor while acting in contemplation of insolvency and with the view of preventing the property from coming to the assignee, when it appears that the person so receiving the property had reasonable cause to believe the debtor was so acting and with that view.

Of the facts that constitute such reasonable belief.

ON REPORT.

The case is stated in the opinion.

PER CURIAM. Both James Roe, the insolvent debtor, and Richard Roe, the defendant, admit that early in July, 1895, a few days before the filing of the petition in insolvency, Richard received from James notes and claims against various parties of the face value of $1251.25, and by both declared to be of that value. The evidence admissible against James, the insolvent, especially the testimony of Smith, fully establishes the proposition, that in making such transfer he was acting in contemplation of insolvency, and was making the transfer with a view of preventing the property coming to the assignee, etc., as set forth in § 52 of the Insolvency Statute. (R. S., c. 70.)

The remaining question is, does the evidence admissible against Richard, the defendant, (excluding the testimony of Smith and others affecting James alone) show that he had reasonable cause to believe that James was so acting and with that view?

We think it does. The following circumstances among others appear from the statements of James and Richard:—Richard at the time was in debt, so much so that he dared not keep any bank account in his own name. The transaction was a very unusual one for each of them. It included nearly all of James' assets. There was no discount from the face of the claims. Richard did not know the debtors and made no inquiries about them. James did not want bank funds, but currency, and Richard says he went to much trouble to get the currency. Immediately after receiving the claims and notes he turned them over to his mother and wife and one Brown, whose given name he does not know, but who had been a student in his law office. He refused to give the assignee any account of them and advised James not to do so. He was brother to James and was to some extent his attorney. Generally, without further specification, the whole tone and tenor of the statements of Richard in response to his examination before the Court of Insolvency imposes upon the court the belief that the transaction was intended by both James and Richard to defeat the operation of the insolvent statute.

This being the result the court must render judgment that the

defendant be defaulted for the admitted sum of $1251.25 with interest from the date of the writ.

Ordered accordingly.

INHABITANTS OF CUSHING *vs.* INHABITANTS OF FRIENDSHIP.

Knox. Opinion February 8, 1897.

Reform School. Truants. Judgments. Evidence. R. S., c. 142, §§ 3, 5. Stats. 1887, c. 22; 1893, c. 206.

Truancy is an offense unknown to the common law; but boys, between ten and fifteen, who refuse to attend school and wander about the streets and public places during the hours when the school, of which they are legally scholars, is in session, are truants under the statute.

Towns where truants have their pauper settlement, at the time of their commitment to the reform school, are liable for the support of such truants.

To sustain an action by the plaintiff town,—from whence such truants were committed,—of the defendant town, where they had their pauper settlement at the time, it must appear: (1.) That the boys were convicted of truancy, and committed to the reform school therefor, while having their residence in the plaintiff town. (2.) That the plaintiff town has paid to the superintendent of the reform school the expenses of the boys' sustenance at the rate of not over one dollar per week, each. (3.) That at the date of commitment to the reform school the boys' pauper settlement was in the defendant town.

To prove the conviction of the truancy, the record of the court is the only competent evidence; and the complaint after conviction and commitment should not be judged of upon objections as if made by the truants themselves upon a hearing and trial of the complaint.

Held; that the record in this case is sufficient, and until reversed is conclusive upon the parties to the action.

It is always competent to ask a witness what his motive was when it is material to some act of his own. Such evidence is admissible as res gestae.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

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

The mittimus being regular upon its face, it is not open to the defendant to show irregularities in the original proceedings.

Process regular upon its face, issued by a magistrate having jurisdiction of the offense charged, is a complete justification to the officer to whom it is directed. *Chase* v. *Fish*, 16 Maine, 132; *Pooler* v. *Reed*, 75 Maine, 488; 7 Am. & Eng. Enc. p. 672, note and cases; *Wilmarth* v. *Burt*, 7 Met. 257; *Donahue* v. *Shed*, 8 Met. 328; *Twitchell* v. *Shaw*, 10 Cush. 46; *Dwinnels* v. *Boynton*, 3 Allen. 310; R. S., c. 80, § 10; *Scammon* v. *Wells*, 50 Maine, 587.

It would be absurd to hold that the state superintendent was compelled to receive a boy into his custody, and that the instrument, which was sufficiently regular upon its face to bring about that result, would not be a sufficient justification for him in establishing the right of the state to recover of the town from which the boy was committed; and a fortiori, the plaintiff town.

In the case of a commitment to the reform school, the town in which the boy resided at the time of the commitment is not a party to the proceedings; neither the town in which the boy resided at the time of the commitment or the town in which he has his settlement is a party to the proceedings; and they have no right or power to collaterally attack or impeach them. It is the judgment of an independent tribunal against a third party, and being regular on its face, is conclusive as to all persons not parties to the proceedings. Cases of commitment to the insane hospital do not, therefore, apply.

W. H. Fogler, for defendant.

Counsel argued:—

(1.) That the mittimuses were not admissible to prove conviction of the boys. (2.) That the plaintiffs, failing to offer any other proof of such conviction, were not entitled to recover. (3.) That if the mittimuses shall be held to be evidence of conviction, they are only prima facie and may be rebutted. (4.) That the records of the cases were admissible to rebut the recitals of the mittimuses.

The present defendants could introduce no testimony before the

magistrate; could not have been permitted to raise the point of the sufficiency of the complaint; could not have taken an appeal. A record of conviction is not conclusive in a civil suit. Freeman on Judgments § 319. I. Greenl. Ev. § 537.

A town cannot recover of another town in which the insane person has a pauper settlement unless it appear that the municipal officers by whom he was committed followed the directions of the statute. *Naples* v. *Raymond*, 72 Maine, 213.

Complaint void:—A complaint for truancy can be made only by a truant officer. Previous to making such complaint he is required to notify the truant or absentee, and also the persons having him under control, of the offense committed and the penalty therefor, and if he can obtain satisfactory pledges that the child will conform to the statute, he shall forbear to prosecute so long as such pledges are faithfully kept.

Not only, therefore, must the complaint be made by the truant officer, but such officer, before he is authorized to make complaint, is obliged to perform that preliminary duty.

The jurisdiction must appear upon the face of the record and unless the record discloses jurisdiction the proceedings are void. *State* v. *Whalen*, 85 Maine, 469–472 and cases.

To give the magistrate jurisdiction, the complaint should not only be made by a truant officer but should allege that such officer had complied with the provision of the statute in relation to giving notice, etc.

The trial justice had no jurisdiction and his proceedings and sentences are void: (1.) Because the complaints do not allege that the complainant was a truant officer. (2.) Because the complaints do not allege that the complainant notified the respondents or the persons having them under their control of the offense and the penalty, etc. (3.) Because the complaints do not set forth any offense punishable by any law. Freem. Judg. §§ 619, 622.

Evidence of the father inadmissible, his declarations not being accompanied by any act. *Baring* v. *Calais*, 11 Maine, 463; *Corinth* v. *Lincoln*, 34 Maine, 310; *Etna* v. *Brewer*, 78 Maine, 377; *Deer Isle* v. *Winterport*, 87 Maine, 37–42.

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

HASKELL, J. This is an action under R. S., c. 142, § 5, to recover the sums paid for the support of two boys in the reform school, by the plaintiff town,—from whence they were committed, —of the defendant town, where they had their pauper settlement at the time.

To sustain the action, it must be shown that the boys were committed on conviction of an offense for which the statute authorized a recovery for their support of the town whose paupers they were. The remedy is given by statute, and without which there is none; therefore, the terms of the statute must be complied with. To maintain this action the plaintiff must prove:—

I. That the boys were convicted of truancy, and committed to the reform school therefor, while having their residence in plaintiff town.

II. That plaintiff has paid to the superintendent of the reform school the expenses of the boys' sustenance at the rate of not over one dollar per week, each.

III. That at the date of commitment to the reform school the boys' pauper settlement was in defendant town.

Does the record support a conviction of truancy? That is the word used in the statute, R. S., c. 142, § 3. Upon conviction thereof, sentence may be to the reform school, at the cost, for subsistence and clothing, of the town where the boy resided when committed. Now truancy is an offense unknown to the common law, and the elements which constitute the offense must be found in some ordinance, by-law or statute. The plaintiff town had neither ordinance nor by-law on the subject, so the statutes must be looked to for a definition of the offense. This definition may be found in the public laws of 1887, c. 22, as amended by the act of 1893, c. 206. It applies to boys, between ten and fifteen, who refuse to attend school and wander about the streets and public

places during the hours when the school of which they are legally scholars is in session.

The complainant charges that the boys, of proper age, "are truants from school, and will not attend nor have not attended any school during this year, as required by R. S., c. 34, § 148, against the peace of the state and contrary to the form of the statute in such case made and provided." Now there is no section 148 of chapter 34, and that chapter relates to auctioneers. The reference is to a statute that does not exist, and is like pleading an impossible date, which is no date, *State* v. *O'Donnell*, 81 Maine, 271, and therefore may be disregarded, leaving the complaint to read without the statute reference. "Truants from school, and will not attend nor have not attended any school during this year as required by revised statutes against the peace of the state and contrary to the form of the statute in such case made and provided." This reading does not charge the offense in the most artistic form, but it makes in common phrase a charge of truancy as defined by statute.

It must be remembered that the complaint should not be judged of as upon objections made by the defendants named therein. Very likely it might have been quashed on their motion, but that does not matter here. Upon it they were convicted of truancy and committed to the reform school, and must be there supported by somebody.

To prove the conviction, the record of the court is the only competent evidence. The mittimus is merely a recital of the record and is secondary, if the record be in existence, and is no more evidence of it than an execution is proof of the judgment in a civil action. It was error, therefore, to hold the mittimus conclusive evidence of the conviction recited in it—a fortiori, to exclude the record altogether. But, inasmuch as the record is before us as a part of the exceptions, we may determine its validity; and if valid and sufficient to sustain the conviction, the defendant has not been aggrieved by the ruling excepted to, for on a new trial the result must inevitably be the same.

It is competent evidence to prove the conviction for "truancy,"

and does prove it. The conviction could not have been for any other offense, and that offense is charged in common language sufficiently plain to have its meaning understood, and while the conviction stands, the plaintiff town is liable for the support of the boys in the reform school, if they resided in plaintiff town when they were committed.

It is said that the complaint and conviction are void because the former was not made by a truant officer as such, who alone is authorized by statute to make such complaints. The complainant signed the complaint "truant officer", and whether this be a sufficient compliance with the statute it is unnecessary to here decide. We place our decision upon the ground of the existence of a judgment, rendered by a court having jurisdiction of the parties and of the offense upon a complaint that shows for what the conviction was had, and while it stands unreversed, it is conclusive upon the parties in this action. It has served its purpose to commit the boys to the reform school, and it may also serve to charge the town liable for their support.

The plaintiff contended that the boys had a settlement in defendant town, derived from their father who had acquired one by five years consecutive residence. Defendant contended that this residence was interrupted by the father having lived in another town for a short period meantime. Plaintiff called the father as a witness, and was allowed to inquire of him what his intention was when he took his family from defendant town. To the admission of this testimony defendant has exception; but it is not well taken. It is always competent to ask a witness what his motive was when material to some act of his own. It is not competent to prove the declarations of a person not a party to the suit as to his motive or intent concerning acts of his own, unless the declaration be a part of the act and explanatory of it. Then it becomes admissible as res gestæ. *Belmont* v. *Vinal Haven*, 82 Maine, 524; *Etna* v. *Brewer*, 78 Maine, 377.

Exceptions overruled.

INHABITANTS OF EXETER *vs.* INHABITANTS OF STETSON.

Penobscot. Opinion February 9, 1897.

Pauper. Emancipation. R. S., c. 24.

An emancipated minor cannot acquire a pauper settlement in a town by having his home therein for five successive years.

If the eight different modes of acquiring a settlement prescribed in § 1, c. 24, R. S., are carefully distinguished, all of the decisions, as well as the general expressions of the court touching this subject, will become easily reconcilable and no further occasion for doubt or confusion in regard to it will be found to exist.

In the sixth paragraph of that section it is only "a person *of age*" who can acquire a settlement in the mode there described. A person who is not of age is excluded from the operation of this clause, while in paragraphs 4, 7, and 8 the term "person" may include minors.

North Yarmouth v. *Portland*, 73 Maine, 108; *Brooksville* v. *Bucksport*, Id. 111, affirmed.

ON EXCEPTIONS BY PLAINTIFF.

This was an action to recover for pauper supplies, being for the board of a minor duly committed to the reform school. No question was raised about the payment for the supplies and the necessity for the same or proper notices from the reform school and notices and denials between the parties.

It was admitted that the pauper is an illegitimate son of its mother, who had a derivative settlement in the town of Plymouth, unless she acquired a settlement in her own right in Stetson upon the facts hereinafter stated; that she became emancipated by a supposed marriage when eighteen years of age, said supposed marriage not being lawful because the man to whom she was supposed to have been married then had a lawful wife living. Said supposed marriage was with the consent and approval of her mother, then her only surviving parent. Immediately after said supposed marriage the mother of the pauper moved into the town of Stetson and there resided with her supposed husband for more than five consecutive years, a part of which time was during her minority, to wit: three years; and a part after she became of age, to wit: four years, all with the approval of her mother.

The only question presented was, whether an emancipated minor can gain a pauper settlement in her own right by a continuous residence of five consecutive years, a part of which time was during such minority as aforesaid.

The presiding justice was of opinion that she could not and therefore directed a verdict for the defendant. To this ruling, that an emancipated minor cannot gain a settlement in her own right as above stated, the plaintiff excepted.

J. and J. W. Crosby, for plaintiff.

F. J. Martin and W. S. Townsend, for defendant.

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

WHITEHOUSE, J. The mother of the pauper whose settlement is brought in question in this action, at the age of eighteen years contracted marriage with one who at that time had a prior wife living, and thereafter the parties lived together as husband and wife for seven consecutive years in the defendant town. This marriage being illegal by reason of the existence of the former wife, the pauper must be deemed illegitimate and under our statutes have the settlement of his mother at the time of his birth. R. S., c. 24, § 1, par. III. Thereupon, it is contended in an elaborate argument for the plaintiffs that the pauper's mother became emancipated at her supposed marriage and by a continuous residence thereafter of more than five years in the defendant town, acquired a settlement therein in her own right under the sixth mode of acquisition described in section one of chapter 24 of the revised statutes. This mode is as follows:—"A person of age, having his home in a town for five successive years, without receiving supplies as a pauper, directly or indirectly, has a settlement therein." The plaintiffs insist that the mother had a settlement in the defendant town at the time of the pauper's birth.

It has been seen, however, that the mother was but eighteen years of age when she removed to the defendant town, and that her residence there after she attained her majority, was less than

five years. Unless by reason of her emancipation she could be deemed "a person of age" under the sixth mode above stated, before she was twenty-one years old, she could not begin to acquire a settlement by this mode, until she actually ceased to be a minor.

The only question presented for the determination of the court, therefore, is whether the pauper's mother could gain a pauper settlement in her own right by a residence of five consecutive years in the defendant town, of which one year, at least, was during her minority. The presiding justice ruled that she could not, and ordered a verdict for the defendants; to which ruling the plaintiffs excepted.

The just and poetic tribute to the sanctity of motherhood and the strength of parental affection, which gives such a literary charm to the argument of the learned counsel for the plaintiffs, would almost persuade us that the law ought to be in harmony with his contention; but it cannot be permitted to blind our eyes to the plain and unambiguous language of the statute and the repeated decisions of this court already announced.

The ruling of the presiding justice was undoubtedly correct. The question is res judicata in this court. It was directly involved and distinctly determined in *Veazie* v. *Machias*, 49 Maine, 105, and later in *North Yarmouth* v. *Portland*, 73 Maine, 108, and *Brooksville* v. *Bucksport*, Id. 111; and if the eight different modes of acquiring a settlement prescribed in section one of chapter 24, R. S., are carefully distinguished, all of the decisions, as well as the general expressions of the court touching this subject, will become easily reconcilable, and no further occasion for doubt or confusion in regard to it will be found to exist.

It has been seen that in the sixth paragraph of section one, it is only "a person *of age*" who can acquire a settlement in the mode there described. A person who is not "of age" is excluded from the operation of this clause; while in paragraphs four, seven and eight the term "person" may include minors.

In the language of the chief justice in *Brooksville* v. *Bucksport*, supra: "It has frequently been said, speaking generally, that a minor who has been emancipated may acquire a legal settlement in his own right, and the statement without qualification is mis-

leading. He may acquire a settlement in his own right under certain modes and conditions, but not in all the modes prescribed by statute for acquiring settlements, and not by residing in a town continuously for five years."

Exceptions overruled.

HARRIET S. GRISWOLD, Executrix, *vs.* JAMES W. LAMBERT.

Penobscot. Opinion February 9, 1897.

Verdict. New Trial. Payment.

To authorize a law court to set aside a verdict, it must appear that it is so clearly and palpably wrong that no jury of unprejudiced and impartial men could reach such a conclusion except by misapprehension and mistake.

To set aside the verdict of a jury, is to say that the inference drawn by them is indisputably wrong,—that no such inference can fairly be drawn by any fair-minded men,—that the contrary inference is not only the more reasonable inference, but is the only reasonable inference.

In an action upon a promissory note, by the executrix of the payee, the jury returned a verdict for the defendant, who produced testimony of third parties that the note had been paid before maturity to the payee at his office; that the note was then in a safety-deposit vault and the payee promised to obtain it and surrender it to the maker, but died soon after without doing so. Upon the contention that the evidence of payment did not relate to the note in suit, *held;* that in the absence of any evidence showing that the testator held other notes of the defendant, it is a reasonable, if not necessary, conclusion that the money was paid to extinguish the note in suit.

Also; that if the note in suit was not in the safety-deposit vault at the time of the payment, or if some other note for the same sum signed by the defendant was there, it must have been in the power of the plaintiff to produce evidence of it.

If the defense of payment was a complete fabrication based entirely upon false testimony, it would hardly fail to appear from the conversation at the office at the time of the alleged payment, that the money was accepted by the testator in payment of the only note which he held against the defendant,—a temporary loan and not an investment,—and in full of all accounts between the parties.

The testator's books were not in evidence; the plaintiff was not offered as a witness; the defendant was debarred from testifying; and in the absence of any evidence that the testator held another note for the same amount against the defendant at that time, *held;* that it would seem to be a reasonable, if

not a necessary, conclusion that the money was paid to extinguish the note in suit.

ON MOTION BY PLAINTIFF.

The case appears in the opinion.

C. H. Bartlett, for plaintiff.

J. F. Robinson, for defendant.

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

WHITEHOUSE, J. This was an action on a promissory note signed by the defendant and payable to the plaintiff's testator as follows:

$100. June 9, 1888.

One year from date I promise Wm. H. McCrillis to pay him or order one hundred dollars with interest value received borrowed money. J. W. LAMBERT.

(Six Mile Falls).

This instrument was introduced in evidence by the plaintiff's attorney.

The payee therein named died in May, 1889, a month before the note would have matured; but it was alleged in the defendant's brief statement that "before said note became due, viz: in the fall of the year, in which it was given, the defendant paid to the testator the sum of one hundred dollars which was accepted in full payment of said note and interest," and taking upon himself the burden of proof, as he was compelled to do, the defendant introduced evidence having a tendency to support this allegation of payment.

The jury returned a verdict for the defendant. The plaintiff seasonably filed a motion for a new trial, first, "because the verdict is against the evidence," second, "because there is no evidence connecting any payment with the note declared upon;" and the plaintiff's counsel now asks this court to sustain this motion and thus in effect declare that the verdict is so clearly and palpably wrong that no jury of unprejudiced and impartial men

could reach such a conclusion except by misapprehension and mistake; for "to set aside the verdict of the jury, is to say that the inference drawn by the jury is indisputably wrong,—that no such inference can fairly be drawn by any fair-minded men,—that the contrary inference is not only the more reasonable inference, but is the only reasonable inference." *York* v. *R. R. Co.*, 84 Maine, 117; *Pollard* v. *R. R. Co.*, 87 Maine, 61.

As the testator's books were not in evidence and the plaintiff was not offered as a witness, the defendant himself was excluded from testifying to any facts happening before the death of the testator. No receipt or other memorandum signed by the testator was produced by the defendant as evidence of the payment of the note. But it was claimed that the entire sum of one hundred dollars was delivered to the testator on one occasion, in the month of October, 1888, and accepted by him in full payment of the note, in the presence of the two witnesses whom the defendant produced in court.

Charles McDonald, called by the defendant, stated that he resided in Glenburn and worked for the defendant a short time in October, 1888, driving a milk cart; that on the day in question he went to Bangor with the cart and after driving around on one side of the river, went to the steamboat wharf to ask defendant about the milk accounts and defendant said he wanted witness to go up to McCrillis' office; that the defendant got onto the cart and they went up there. In response to a request by the defendant's attorney to state "all the conversation that took place in the office that morning," the witness further testified as follows:—

"Well, sir, Mr. Lambert took his pocket-book out of his pocket and counted out one hundred dollars and says to McCrillis, "You take and count that and see if it ain't right." Mr. McCrillis took the money and counted it and said:—"It's all right." Mr. Lambert said:—"What about the interest?" He says:—"You have done a lot of choring round and I ain't going to charge you interest;" . . . . "told him the note was down in Merrill's safe and he could get it for him most any time."

James L. Dolliff, of Hudson, stated that he worked for the

defendant at Six Mile Falls in the fall of 1888; that he came down to Bangor with the defendant to haul some goods for another party; that he saw the milk cart in front of McCrillis' office and went up there to get some money of the defendant to buy a pair of shoes; that he found the defendant and McDonald in the office. In answer to inquiries by counsel the witness continued as follows: —"I heard Mr. Lambert tell McCrillis there's one hundred dollars, and I didn't see or didn't count it, and McCrillis turned round and counted it and said it was all right; he said the interest on the note was all right, that Mr. Lambert had done quite a lot of running around for him and he would charge him nothing for interest." Being asked if there was anything else said, the witness added: "He said the note was down to Merrill's safe; that he couldn't get it that day." Lambert says:—"I am in a hurry, and I will call in some other day and get it."

Daniel Lord, of Bangor, testified that he performed some clerical services for the testator during the last year of his life and that Mr. McCrillis was accustomed to keep his mortgages and notes in Bowler & Merrill's safe, during that period.

The counsel for the plaintiff suggests that it is quite remarkable that the defendant should have paid this note eight months before it was due, and still more extraordinary that he should have done so without insisting upon having either the note itself, or a receipt specifying for what purpose the money was paid. But notwithstanding the shadow of doubt thus thrown upon the credibility of this testimony, the plaintiff's counsel is compelled to admit that it would warrant the jury in finding that, on the occasion in question, the defendant did pay to the testator the sum of one hundred dollars to take up a note: he still insists, however, that it has no tendency to prove that it was paid to take up the particular note in suit.

According to the testimony of both witnesses, Mr. McCrillis stated to the defendant on the occasion of the payment of the one hundred dollars, that the note was in Merrill's safe.

It does not appear that the defendant, or either of these witnesses, had learned from any other source that the note was in Merrill's

safe. But they confidently testified that McCrillis so stated; and if the note in suit was not there, or if some other note for precisely one hundred dollars, signed by the defendant, was there, it must have been in the power of the plaintiff to produce evidence of it.

The memorandum of "Six Mile Falls" placed on the note to indicate the residence of the defendant, is another circumstance not unworthy of mention, as having a tendency to suggest that this was probably the first and the only transaction of the kind between the parties. If the defense had been a complete fabrication based entirely on false testimony, it is scarcely conceivable that it would have failed to appear, from the conversation had in the office at the time the payment is alleged to have been made, that the money was accepted by the testator in payment of the only note which he held against the defendant, and in full settlement of all accounts between the parties.

The defendant was excluded from testifying in relation to all such matters, and in the absence of any evidence that the testator held another note for one hundred dollars against the defendant at that time, it would seem to be a reasonable, if not a necessary, conclusion that the money was paid to extinguish the note in suit.

Motion overruled.

MAXCY MANUFACTURING COMPANY *vs.* HATTIE BURNHAM.

Kennebec. Opinion February 8, 1897.

Husband and Wife. Agency. Issues of Fact.

An unknown principal may be held upon discovery for the acts of an agent.

A wife may be held liable to parties furnishing materials for the finishing and repairing of her dwelling-house, sold and delivered upon the husband's credit under the belief that he was the owner, when it appears that he acted as her agent.

When a wife allows her husband to exercise general authority in the management and control of her property and the purchase of lumber for the repairs on her house, she cannot repudiate a particular act performed for her benefit, within the scope of such authority, simply because, in that instance, the conduct of her agent was not in harmony with her private opinion or wishes,—her repudiation not having been made known to the plaintiff.

An objection, that the wife is not liable for a portion of the material thus furnished because it did not go into the house but had been sold to third parties by the husband, *held not tenable;* as it appeared that the credits given the husband in the account were properly appropriated to the payment of such material.

ON MOTION AND EXCEPTIONS BY DEFENDANT.

This was an action of assumpsit on account annexed to recover the price of certain lumber and materials alleged to have been sold and delivered to defendant through her husband.

The case was tried to a jury in the Superior Court, for Kennebec County, who returned a verdict for the plaintiff.

The defendant took exception to the following portion of the presiding justice's charge to the jury:—

Now, principally, the point here is whether there was an undisclosed principal who was in fact responsible for the goods, and that is the issue. If you shall find, under the evidence in this case, that Mr. Burnham was acting as the agent of his wife in the building, improvement or repairing of her house, living at the time with her in the house, she having knowledge of the repairs or improvements which were going on, she would be responsible for debts contracted by him in pursuance of such building, improvements or repairs;—and this notwithstanding she might have objected to him, to certain improvements, if her objections or protests were not with the knowledge of the plaintiffs.

G. W. Heselton, for plaintiff.

E. O. & F. E. Beane, for defendant.

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

WHITEHOUSE, J. The plaintiff corporation obtained a verdict against the defendant for the price of certain lumber alleged to have been furnished upon the order of her husband and used in finishing and repairing the dwelling-house owned by her and occupied by her and her husband, and the defendant brings the case to this court on exceptions and motion for a new trial.

It satisfactorily appears from the evidence that all of the lumber

and materials comprised in the account annexed to the writ, with the exception of a portion of the flooring described in the first item, were used, with the knowledge of the defendant for the improvement of her property; but it is contended in her behalf that she was not the contracting party and had no responsibility for the payment of the debt.

Neither the plaintiff corporation, nor any of its servants had any knowledge at the time of the delivery of the lumber, nor for several years thereafter, that the defendant had title to the house in which it was to be used. The items were all charged to the defendant's husband, and were undoubtedly sold on his credit upon the assumption that he was the owner of the estate. But, it is confidently urged in behalf of the plaintiff that the evidence was ample to warrant the jury in finding that the defendant's husband, in making the purchase of this lumber was authorized to act and did act as the agent of his wife, and although this fact was not disclosed by him at the time, the plaintiff on discovering the agency, could rightfully proceed as it did, directly against the defendant as principal.

In her direct examination the defendant stated, it is true, that she never authorized or directed her husband to "purchase any of the goods charged in this bill;" that on one occasion he wanted to get some material to lay the floors and she told him they owed enough, she would "put no more money into it; she didn't wish to run in debt any more." But on cross-examination she testified inter alia, as follows: "I bought the land on which the house sits. The house is in my name. . . . We live together there on the premises and have since the house was built. My husband had the entire management of getting the lumber to build the house and the materials that were put into the house; he superintended the construction of the house. . . . I never forbid him from getting lumber to put into the house. . . . He generally got what he wanted and put into the house; he consulted me about some things. Some things that he got we talked over and some we did not."

It also appears in evidence that, some three years prior to the transaction in question, another bill of lumber was purchased of the

plaintiff by the defendant's husband, paid for by him, and used in the construction of the same dwelling-house. The defendant admitted that she never gave notice to the plaintiff, or any one else, not to sell her husband lumber to go into the house.

What facts shall be deemed sufficient evidence of a husband's agency under such circumstances is a question that has frequently been considered by this court. In *Verrill* v. *Parker*, 65 Maine, 578, it is tersely stated by the court that the wife was liable "because the labor was done upon her property and for her benefit and expended before her eyes." In the recent case of *Roberts* v. *Hartford*, 86 Maine, 460, the general principle is clearly stated as follows: "When a husband has the general management of his wife's property and with her knowledge orders lumber which is used in the erection or repair of buildings upon her land, a jury will be justified in finding that the husband acted as her agent." And in conclusion it is further said: "On the whole, it is the opinion of the court that it is best in all such cases to leave the question of agency to the jury; that in most cases, they will be likely to decide truthfully as well as equitably."

In the case before us the question of agency was fairly submitted to the jury under instructions which were in substantial accordance with the principle laid down in the cases cited.

The counsel for the defendant, however, specially complains of the instruction that the defendant might be liable notwithstanding the objections she may have made to her husband respecting certain improvements, provided her objections were not made known to the plaintiff. But if the defendant had allowed her husband to exercise general authority in the management and control of her property and the purchase of lumber for the erection of the house, it is an elementary principle of agency that she could not repudiate a particular act performed for her benefit within the scope of that authority, simply because, in that instance, the conduct of her agent was not in harmony with her private opinion or wishes. Third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation

of his agency, unless notified of such revocation. Wharton's Agency, § III, and cases cited.

Again, there was testimony tending strongly to show that a large part of the flooring, charged in the first item of the account, was never used in the defendant's house, but was sold by the husband to another party; and the defendant insists that in no event could the jury have been authorized to find the defendant liable for the part thus sold.

But it was in evidence, and not controverted, that the items of credit came from the separate property of the defendant's husband; and as these items would be legally appropriated to extinguish the earliest items on the debit side of the account, the disposition of the lumber obtained under the first item became immaterial.

The evidence was sufficient to authorize the verdict, and there seems to be no valid reason for disturbing it.

Motion and exceptions overruled.

STATE *vs.* SWANZEY GROSS, and another.

Hancock. Opinion February 9, 1897.

Fish and Game. Clams. Towns. R. S., c. 40, § 25; Stat. 1885, c. 257.

When a town has never fixed, at any town meeting, the times in which clams may be taken within its limits, nor the prices for which its municipal officers may grant permits therefor, *held;* that residents of the town may take clams without written permit free from all restrictions as to their use.

AGREED STATEMENT.

This was a complaint for taking clams April 16, 1895, in the town of Brooklin, Hancock County, heard before the Western Hancock Municipal Court, where the defendants were convicted and appealed to this court sitting at nisi prius, below. The presiding justice reported the case to the law court upon an agreed statement as follows:—

It was agreed that the complainant and both respondents were residents of the town of Brooklin and that the land, to which the

flats described in said complaint were adjacent, together with the flats, also, are situated in the town of Brooklin.

It was agreed that the respondents did take the clams described in said complaint from said flats and at the time in said complaint alleged.

It was also agreed that the respondents were fishermen, but that the clams so taken were not for purposes of bait, nor for the use or consumption of said respondents, or their families.

It was further agreed that the town of Brooklin had fixed no time in which clams might be taken within its limits and had made no regulations of any kind in relation to the taking of clams or other shell-fish.

Upon the foregoing statement of facts, together with a copy of the the complaint, warrant and record, the case was submitted to the law court. If the complaint was sufficient in law and the law court found the respondents guilty thereunder upon the foregoing statement of facts, the sentence of the lower court was to be affirmed with costs; otherwise the respondents were to be discharged; or the law court to make such other entry or order as might seem to it proper.

E. S. Clark, County Attorney, for State.

H. E. Hamlin, for defendants.

PER CURIAM. The respondents, residents of Brooklin, took a quantity of clams from flats in Brooklin, not for bait nor for consumption in their own families, but without any written permit from the municipal officers of the town. The town had never at any town meeting fixed the times in which clams might be taken within its limits, nor the prices for which its municipal officers should grant permits therefor.

By the first clause of section 25, c. 40. R. S., as amended by Statute of 1885, c. 257, it is expressly provided that, unless the town so regulates the matter by vote, residents of the town may take clams without written permit. The respondents, therefore, cannot be held for taking the clams they did without such permit.

Respondents discharged.

MARK EMERY, and another, Appellants.

Somerset. Opinion February 15, 1897.

Insolvency. Proof of Debt. Judgment. Bankruptcy. R. S., c. 70, § 25.

If, after proceedings in insolvency have been instituted, judgment is recovered upon a debt provable under those proceedings, the original debt is thereby merged in the judgment, so far as to defeat any claim for an allowance under it against the insolvent estate.

The judgment is not provable against the estate of the debtor, because it did not exist at the time of the commencement of insolvency proceedings.

The original claim ceased to be provable, because it was extinguished by the judgment, so far as to defeat any allowance under it.

The court observes that, for constitutional reasons, a different rule applies in bankruptcy under the decisions of the Supreme Court of the United States, as laid down in *Boynton* v. *Ball*, 121 U. S. 457, and which holds that such a judgment is barred by a discharge in bankruptcy.

AGREED STATEMENT.

A. Simmons, for appellants.

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

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

FOSTER, J. The appellants on December 6, 1889, brought suit in this court on a claim due them from Leonard H. Walker, who was afterwards, on March 18, 1890, adjudged insolvent on petition of his creditors by the insolvent court of Somerset county.

The appellants proved their claim in the insolvency court April 8, 1890, in accordance with § 25, c. 70, R. S.

Walker's discharge was denied in the insolvency court, September 12, 1891.

Judgment was rendered in the original suit in this court at the September term, 1892, and execution issued thereon for the full amount of the appellants' claim.

In July 1895, before any dividend was declared, the creditors of Walker filed objections to the claim of the appellants in the

insolvency court, on the ground that the appellants had recovered judgment on this claim in the Supreme Judicial Court subsequent to the commencement of insolvency proceedings.

Those objections were sustained, and an appeal taken to this court.

We think the objections were properly sustained, and the ruling of the court below correct. It was in accordance with a series of decisions by which it has been held that if, after proceedings in insolvency have been instituted, judgment is recovered upon a debt provable under those proceedings, the original debt is thereby merged in the judgment, so far as to defeat any claim for an allowance under it against an insolvent estate, and the judgment is not provable against the estate of the debtor, because it did not exist at the time of the initiation of insolvency proceedings. *Sampson* v. *Clark*, 2 Cush. 173; *Bradford* v. *Rice*, 102 Mass. 472; *Wyman* v. *Fabens*, 111 Mass. 77, 80; and if recovered after the first publication of notice of issuing the warrant, it will defeat the proof of the original debt. *Sampson* v. *Clark*, supra; *Wyman* v. *Fabens*, supra. And the original claim ceased to be provable, because it was extinguished by the judgment, so far as to defeat any claim for allowance under it.

The creditor by proceeding to take judgment has changed the form of his debt and secured the benefit of conclusive evidence of it, as well as an extension of the period of limitation thereon, and is thereby held to have elected to abandon his right to prove the claim against the estate, and to look to the debtor personally for the collection of his judgment.

It must be borne in mind that this claim was one that arose after the enactment of the insolvent law, and therefore the reasoning applied in *Ross* v. *Tozier* and *Wilson* v. *Bunker*, 78 Maine, 312, 313, in reference to imparing the obligation of contract, has no application here, for in those cases the contracts were in existence at the time of the passage of the insolvent law.

Nor do we go further than to hold the doctrine herein enunciated applicable to insolvency proceedings under the insolvent law of this State, and not to proceedings under the bankruptcy law of

the United States. A different rule might be held to apply in such case, and for constitutional reasons, as stated in *Boynton* v. *Ball*, 121 U. S. 457, where the Supreme Court of the United States has decided that a debt provable in bankruptcy, although merged in a judgment entered up after the commencement of bankruptcy proceedings, still remains the same debt on which the ction was brought, and that such a judgment is discharged by the debtor's discharge in bankruptcy. And the very recent case of *Huntington* v. *Saunders*, 166 Mass. 92, is to the same effect, holding that a discharge in bankruptcy is a bar to a judgment entered after the commencement of the bankruptcy proceedings, upon a claim provable in such proceedings, and thereby modifying the previous decisions in that State so far as they differ from it in respect to the effect of discharges in bankruptcy.

In the case at bar no discharge was ever obtained in the insolvent court. The appellants having presented their claim in the insolvent court, it became subject to the jurisdiction of that court, and the evidence of indebtedness should not have been withdrawn to form the basis of a judgment in the other court until the amount of the dividend had been ascertained, paid and indorsed thereon. The action in the Supreme Court could have been continued for judgment until the dividend had been declared and paid. But by withdrawing the evidence of indebtedness, or taking judgment upon the same in full in the Supreme Court, after commencement of proceedings in insolvency (*Sampson* v. *Clark*, supra) the claim was merged in that judgment, and thereby the appellants must be held to have waived their rights in the insolvent court, and cannot have judgment in both courts, for the reasons hereinbefore stated.

Appeal dismissed with costs.

AGNES QUIMBY *vs.* ALICE B. LOWELL.

Cumberland. Opinion February 16, 1897.

Sale. Assumpsit. Warranty. Waiver.

By a written contract between the parties the defendant made a conditional sale of a bicycle to the plaintiff, whereby she reserved the title until the property was fully paid for. The plaintiff, on the other hand claimed that her signature to the contract was fraudulently obtained, and that the sale was in fact made by parol on credit, prior to the written contract, and that the property had passed to her absolutely. The plaintiff, however, failed to make the payments when they matured, and the defendant resumed possession of the bicycle. Thereupon, the plaintiff brought an action of assumpsit to recover the money paid on account of the purchase. *Held;* that the defendant had a right to take possession of the property, if the written contract governs; but otherwise, if the property had passed to the plaintiff, and the taking would be a tort; and that an action of assumpsit cannot be maintained upon either theory.

Also; there being no evidence that the defendant had sold the wheel and converted it into money, the plaintiff cannot waive the tort and maintain assumpsit.

It is only when a chattel wrongfully taken has been converted into money, or its equivalent, by the wrong-doer, that the other party can waive the tort and maintain assumpsit for the money actually received.

A vendor impliedly warrants the title of an article in his possession at the time of sale. *Held;* in this case, that the defendant had a good title to the bicycle when the sale was made to the plaintiff,—it appearing that the defendant's vendor had waived whatever claims he had to the property.

ON MOTION BY DEFENDANT.

This was an action of assumpsit for money had and received. The case was tried to a jury in the Superior Court, for Cumberland County, and a verdict of thirty-nine dollars was rendered for the plaintiff.

The case appears in the opinion.

R. T. Whitehouse, for plaintiff.

Counsel argued:

1. The entire contract was rendered voidable by fraud and the plaintiff having elected to avoid is entitled to recover. The real oral contract was a sale outright. The written lease was fraudulently substituted for the real contract of sale. The avoidance of

the written contract by fraud avoids all the contractual relations between the parties and entitles the plaintiff to recover.

2. If we regard the oral agreement as still existing after the avoidance of the written contract by fraud, nevertheless the plaintiff is still entitled to recover on the ground of failure of consideration for want of title. If the defendant acted fraudulently, knowing her want of title and concealing it, then the oral agreement itself was voidable. If the defendant acted innocently not knowing her want of title, nevertheless the act of selling impliedly warranted the title. A breach of implied warranty of title may be taken advantage of in two ways, first, by an action of assumpsit to recover the purchase price; second, by an action for damages on the warranty. The plaintiff chose the former. A warranty of title is broken by any prior incumbrance. The breach of an implied warranty of title occurs at the time of the sale if title is defective, whether the vendee is disturbed in his possession or not.

3. Under the oral agreement, aside from the question of title, the plaintiff would be entitled to recover for the conversion of the wheel by the defendant.

Counsel cited: Benj. on Sales, 6th Ed. pp. 371, 376, 379, 591, 631, 632, 893; *Thurston* v. *Spratt*, 52 Maine, 202; *Maxfield* v. *Jones*, 76 Maine, 137; *Shattuck* v. *Green*, 104 Mass. 42; *Grose* v. *Hennessey*, 13 Allen, 389; *Perkins* v. *Whelan*, 116 Mass; 542; *Richardson* v. *Kimball*, 28 Maine, 463; *Enfield* v. *Buswell*, 62 Maine, 128.

George Libby, for defendant.

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

STROUT, J. Defendant, in possession of a bicycle, which she represented as her property, sold it to the plaintiff on May 2, 1895, as plaintiff claims, by absolute sale, part of the price being paid at the time, the balance being on credit; or, as claimed by defendant, by a conditional sale, evidenced by a written contract signed by

plaintiff, under which the title to the property was to remain in the seller till full payment made. Plaintiff claimed that she did not read or know the contents of the paper she signed, and that it was fraudulently obtained from her. The contrary was claimed by the defendant. There was evidence introduced by both parties tending to sustain their several contentions. The purchase price was sixty dollars; but to be fifty-five dollars if that amount was paid within three months, as plaintiff's witnesses say, or within sixty days as stated in the written contract. Plaintiff paid in all thirty-nine dollars, and neglected or refused to pay any more, because, as she says, she had heard that defendant did not have title to the wheel, nor the right to sell it. Thereupon, about September 13 or 14, 1895, defendant took the wheel from plaintiff, against her objection, and retained it thereafter. The jury returned a verdict for plaintiff for thirty-nine dollars, the full amount paid by plaintiff; and the case is here upon motion by defendant to set the verdict aside as against law and evidence.

If the written contract controls, the defendant had the right to take the wheel, the plaintiff having failed to make payment according to its terms; and the plaintiff would have no cause of action. If the written contract is set aside, on the ground of fraud, as plaintiff claims it should be, and under the parol contract of sale testified to by plaintiff, it was a sale partly upon credit, the title to the wheel passing to plaintiff upon delivery, the defendant committed a trespass in taking the wheel from plaintiff; but her remedy would be in tort and not by an action for money had and received, as this action is. There is no evidence that defendant has sold the wheel taken from plaintiff and converted it into money. The plaintiff, therefore, cannot waive the tort and bring assumpsit. It is only when the chattel wrongfully taken has been converted into money, or its equivalent, by the wrong-doer, that the other party can waive the tort and maintain assumpsit for the money actually received. *Water Power Co.* v. *Metcalf*, 65 Maine, 41; *Railroad* v. *Mayo*, 67 Maine, 470.

But, it is said that at the time of sale, the defendant, though in possession of the wheel, had not legal title thereto, nor authority

to sell it; that there was an implied warranty of title upon which an action could be brought; or, after defendant had deprived plaintiff of the possession of the wheel, and received and retained it herself, the plaintiff can recover back the money paid. This result would follow, if the premises were established.

It appears that Albert H. Lowell, the defendant's husband, on July 2, 1894, bought of H. W. McCausland two bicycles, one of which is the one in controversy, and gave his note therefor for one hundred and eighty-five dollars with interest, payable in a second hand bicycle at twenty-five dollars, and in painting a house and stable at one hundred and fifteen dollars, and the balance of forty-five dollars in the first week in January, 1895; and gave McCausland an agreement, in writing, duly recorded, that the bicycles should remain the property of McCausland till the note was fully paid. September 18, 1894, Albert H. Lowell sold the bicycle in controversy to his wife, the defendant in this suit, and gave her a bill of sale of it. Albert Lowell paid to McCausland the second hand bicycle and did the painting, called for by the note, apparently before the sale by him to his wife, leaving due upon the note about forty-five dollars, which was finally paid about February, 1896. Mr. Lowell testifies that he asked McCausland for authority to sell this wheel to his wife, and that although McCausland did not want to change the note and agreement he then held, duly recorded, he told him that "if I [Lowell] wanted to sell her a bicycle it was all right to sell it to her." If this permission was given by McCausland to Mr. Lowell it authorized a sale to the defendant and McCausland would be estopped to claim the wheel, and the defendant, when she bought of her husband, obtained a perfect title to it. McCausland testifies, when asked if he ever gave permission to Mr. Lowell to sell this wheel, that "he can't say that he did;" and again says that he did not give permission. On cross-examination he says that, at the time of the sale to defendant, there was about forty dollars due on Mr. Lowell's note; that "Mr. Lowell wanted to fix it in some way so as to release his wife's wheel," but nothing of the kind was arrived at; that he can't say what he told Mr. Lowell, but no change was made in the

note. To the question whether he told Mr. Lowell that he didn't want to change the note, "but would give him verbal permission to dispose of the ladies' wheel," he says: "I wouldn't want to say I did"; and to the question if he would want to say he didn't, he says; "I should have to say I didn't. If I had given my consent I should have fixed the matter up." Then he says: "The way I looked at it, the note was all right as it was and all recorded and I wanted to let it stay as it was until it was settled. There was only a little due, and I really thought in my own mind that if Mr. Lowell was anxious for her to have the wheel, when he settled he could let her have it, and so the thing stopped there as far as any transaction was concerned." Later Mr. Lowell told him he had sold the wheel. McCausland made no objection. After plaintiff bought the wheel, she sent it to McCausland to be repaired. He repaired it and sent it back to plaintiff, making no suggestion of his claim upon it. He says he never made any claim on anybody for the wheel. While he did not wish to change the original recorded note and agreement, he was evidently content to rely upon the security of the remaining wheel, for the small balance due, and had no objection to the sale of one. It is not pretended that he affirmatively objected to the sale. When Mr. Lowell asked permission, there was no assertion that he should claim both wheels till he was paid, as there naturally would have been if he really objected to the sale of one. When informed by Mr. Lowell that he had sold one wheel, he made no complaint or protest.

This conduct of McCausland when he knew Mr. Lowell proposed to sell, and after he had sold the wheel, overcomes his argumentative denial of authority, and really gives force and effect to the positive testimony of Mr. Lowell, that McCausland told him that he might sell the wheel. It would estop him from claiming property in it against the plaintiff. The decided preponderance of evidence establishes the proposition that Mr. Lowell had authority from McCausland to sell the wheel to his wife, or that the sale was ratified by him. She, therefore, obtained perfect title thereto from her husband, and of course could convey good title to plaintiff.

No question of rescission is involved. Defendant took the wheel for non-payment, and not to rescind. She had no right of rescission and made no claim to exercise such right if it existed. To rescind, she must have returned what she had received. The plaintiff made no claim to rescind,—never offered to return the wheel,—even objected to defendant taking possession of it. She made no objection to defendant on account of title, but complained only of the quality of the wheel.

The verdict is so clearly wrong, that we feel that the jury must have misapprehended the force and effect of the evidence. It should not be allowed to stand.

Motion sustained.

LEVI O. BERRY *vs.* SOMERSET RAILWAY.

Kennebec. Opinion February 17, 1897.

Practice. Disposition of Case. Power of Court.

If the parties to an action pending in court agree to enter it "neither party, no further suit for the same cause," and it is so entered and there is neither fraud nor mistake in the making of the agreement or the entry, it is a disposition of the cause, binding upon the parties, and cannot be changed by the court, unless the parties consent to the change.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

E. W. Whitehouse and W. H. Fisher, for plaintiff.

The matter was within the province and jurisdiction of the justice presiding. *Lothrop* v. *Page*, 26 Maine 119; *Woodcock* v. *Parker* 35 Maine, 138; *Lewis* v. *Ross*, 37 Maine, 230.

The entry had not gone to final judgment. The defendant could not be injured, as all his costs of witnesses, etc., would have to be paid by plaintiff before another action could be instituted.

It is matter purely within scope of the judge's power sitting at nisi to act in such case. Like all other entries when error, manifest mistake and great wrong have been done, or committed,

to right the wrong and change decree to what it should be, to the end that justice should be done.

The fact that entry was made by agreement of attorneys does not change it in the least, for the entry is part of the record, and that entry the presiding justice, as we have seen, has the right to change, if he deems necessary.

E. F. and Appleton Webb, for defendant.

Counsel cited: Spaulding's Prac. p. 155; *Hutchings* v. *Buck*, 32 Maine, 277; *Coburn* v. *Whitely*, 8 Met. 273; *Blanchard* v. *Ferdinand*, 132 Mass. 389.

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

STROUT, J. The plaintiff not being ready for trial at the time assigned, in consequence of the absence of a witness, and the defendant being ready, was obliged to become nonsuit, unless some other disposition of the case was agreed upon by the parties. The defendant offered to have the case entered "neither party, no further suit for the same cause." The plaintiff consulted with his counsel upon this proposition, who explained to him fully the result of a nonsuit, and of the proposed entry. The plaintiff thereupon consented to have the case entered neither party, no further suit for the same cause, which was done. A few days after the entry, and during the same term of court, plaintiff changed his mind, and desired to become nonsuit. His counsel, twelve days after the entry, made a motion to the court that the entry be stricken off and plaintiff allowed to become nonsuit. This motion was entered upon the docket, and hearing upon it was postponed to the next term, at which term the motion was granted, the entry stricken off and plaintiff allowed to become nonsuit. To this ruling of the court exceptions were taken.

The original entry was made by agreement of parties. There is no suggestion of fraud or mistake, or that counsel exceeded his authority. If the agreement had been reduced to writing and signed by the parties, it would have bound them. Defendant's

relinquishment of costs was a sufficient consideration for plaintiff's agreement. Instead of putting the agreement in writing, the parties evidenced it by the entry upon the docket by permission of the court. It was not an entry ordered by the court, nor was it the result of any adjudication by the court. In fact, it was an entry the court had no power to order, except by agreement of parties. It was simply the executed agreement of parties, entered upon the docket under their authority, and was in no sense an order of court. In the absence of fraud or mistake, the court had no more authority to change that entry, than it would have had to annul the agreement if it had been reduced to writing and signed by the parties. Any disposition of a pending action, not illegal, may be fairly agreed to by the parties, and when so agreed, it becomes the duty of the court to permit such disposition; and when that is done, the action is ended, and the power of the court exhausted.

In all cases where an entry is made by the court, acting judicially, and upon its responsibility, the court has power to change the entry, if justice requires. This case does not fall within that rule. If parties agree to a judgment for a certain sum, or to waive a trial by jury, or that damages may be assessed by a person named, and no fraud or mistake exists, it would be the duty of the court to allow the entry to be made in accordance with the agreement; and in so doing the court acts permissively and not judicially; and the agreement of parties thus carried out by the proper entry upon the docket, is a disposition of the suit by the parties, and not by the court, and is not subject to change by order of court. A consent decree in equity can only be set aside by consent. *Bristol* v. *Water Works*, R. I.—(35 Atl. Rep. 884.) The exceptions must be sustained, and the original entry allowed to stand.

Exceptions sustained.
Original entry to stand.

MAINE CENTRAL RAILROAD COMPANY

vs.

BANGOR AND OLD TOWN RAILWAY COMPANY, Appellants,

AND INHABITANTS OF VEAZIE.

Penobscot. Opinion February 17, 1897.

Railroads. Crossings. Railroad Commissioners. R. S., c. 18, § 27; Stat. 1836, c. 204; 1853, c. 41; 1858, c. 36; 1883, c. 167; 1885, c. 310; 1889, c. 282; 1893, c. 205, 227; 1895, c. 72.

Under existing statutes all crossings of highways by railroads, fall within the jurisdiction of the Railroad Commissioners, and when, to effect an overhead crossing for the safety of the public, it becomes necessary to locate a short piece of highway, to connect the crossing with the existing highway, the Railroad Commissioners are alone authorized to make such location, and assess damages for the land taken.

Held; that the petition and proceedings, in this case, are according to law, except that the Railroad Commissioners did not estimate damages for the land taken.

ON REPORT.

The case is stated in the opinion.

This matter arose upon the decision of the Railroad Commissioners between the Maine Central Railroad Company and the Bangor, Orono and Old Town Railway Company as to a change in a crossing at grade by both railroads, and over a highway, in the town of Veazie.

The case was submitted to the law court upon a report of the presiding justice as follows:—

It was agreed by the Maine Central R. R. Company, the Bangor, Orono & Old Town Ry. Company and the town of Veazie through their respective counsel that the record in the case number 844 on the docket of this court, (the B. O. & O. Ry. Co. Aplt. v. Maine Central R. R. Co. pending on appeal,) and the report made by the Railroad Commissioners in this case, including the

petition, order of notice and accompanying plan, should make up the report.

The town of Veazie seasonably objected that it had not received legal notice of the pendency of the petition before the Railroad Commissioners. The town of Veazie and the B., O. & O. Ry. Co., seasonably moved for the rejection of the report upon the ground that the Railroad Commissioners had no authority in law under their report, with its accompanying petition and order of notice, to make the order and decree reported by the court.

If the law court should find the petition, proceedings and report to be in accordance with law, then the law court was to take a view of the premises, and finally determine whether or not the public safety, convenience or necessity required that the course of the highway should be changed as prayed for. If it should so determine, the law court was to finally decide all questions of law necessary to a full performance of such decree as the court may judge can and should be made under the petition. All questions of fact relative to the course and expense of the new highway, if ordered, the kind and maximum cost of the bridge and the abutments thereon, the apportionment of expense of building and maintaining the same, and the taxation and allowance of the cost to be finally determined by a single justice without right of exception to his determinations.

(Petition.)

To the Honorable Railroad Commissioners of the State of Maine:

Respectfully represents the Maine Central Railroad Company, a corporation existing under the laws of said state, and possessing and operating a line of railroad from Portland to Vanceboro, passing through the town of Veazie in the County of Penobscot, that its railroad is crossed in said town of Veazie by the electric railway of the Bangor, Orono & Old Town Railway Company, the location of the crossing in question being on the hill near the top of which hill is a church, and the crossing being between said church and the watering trough, said crossing being the one of the two crossings of this company's railroad with said electric railway which is nearer to Bangor; that the existing condition,

construction and manner of such crossing are dangerous to the public safety, including travelers upon this company's railroad, on said electric railway, and in the highway along which said electric railway extends.

Whereupon this company prays and applies to your Honorable Board for a change in the existing condition, construction and manner of such crossing, and that your Honorable Board will determine what changes are necessary, and how such crossing shall be constructed and maintained, and how the expense thereof shall be borne.

And said Maine Central Railroad Company further represents that said electric railway is in and constructed along the main highway leading from Bangor to Old Town through said town of Veazie, and that to facilitate said crossing the course of said highway near the place of such crossing should be altered so that this company's railroad may pass under the same, and this company respectfully applies to your Honorable Board to alter the course of such highway so as to facilitate such crossing, and for such purpose to take such land as may be necessary, and to award damages therefor in accordance with the provisions of Sect. 3 of Chap. 282 of the Public Laws of 1889, and to apportion the expense of such alteration as your Honorable Board may determine in accordance with the provisions of law. And as in duty bound will ever pray.

July 24th, 1895.

Maine Central Railroad Company,
by C. F. WOODARD, its Attorney.

(Report of Railroad Commissioners.)

The provisions of c. 282 of the statute of 1889 and c. 72 of the statute of 1895 seem to be embraced in this petition. Section 3 of c. 282 of the statute of 1889 is as follows: "Highways and other ways may be raised or lowered for the purpose of permitting a railroad to pass over or under the same, or the course of the same may be altered so as to facilitate such crossing or to permit the railroad to pass at the side thereof, on application to the railroad commissioners and proceeding as provided by § 27 of c. 180, as amended by this act, and for such purpose land may be taken

and damages awarded as provided for laying out highways and other ways."

It is very clear that, under this statute, the highway may be raised for the purpose of permitting the Maine Central Railroad to pass under the same, and the course of said highway may be changed to facilitate such crossing.

The question which naturally arises, however, is how shall parties proceed to have this accomplished. Can any proceeding be had which is not first instituted by the town authorities in laying out or changing said highway? Or can the board of Railroad Commissioners order the change to be made upon petition of the railroad company, as in this case?

The statute authorizes this change to be made by proceeding as provided by Sec. 27, Chap. 180 of the Revised Statutes as amended. That statute reads as follows:—"Town ways and highways may be laid out across, over or under any railroad track, in the same manner as other town ways and highways, except that before such way shall be constructed, the railroad commissioners, on application of the municipal officers of the city or town wherein such way is located, or of the parties owning or operating the railroad, shall upon notice and hearing, determine whether the way shall be permitted to cross such track at grade therewith or not, and the manner and condition of crossing the same, and the expense of building and maintaining so much thereof as is within the limits of such railroad shall be borne by such railroad company, or by the city or town in which such way is located, or shall be apportioned between such company and city or town as may be determined by said railroad commissioners. Said commissioners shall make a report in writing of their decision thereupon to the Supreme Judicial Court at its next succeeding term to be held in the county wherein such crossing is situated, and shall also make a report of such rulings, proofs and proceedings as either party desires, or as they deem necessary for a full understanding of the case.

The presiding justice at such term of court may accept, reject or recommit said report, or send the case to a new commission, or

make such other order or decree as law and justice may require, and to his ruling or order, either party may file exceptions.

The final adjudication in such cases shall be recorded as provided in section thirty of this chapter. Costs may be taxed and allowed to either party at the discretion of the court."

The board of Railroad Commissioners in this state has acted under a petition similar to the one in this case and ordered the change to be made, and this we think is the general understanding of the provisions of this statute.

We do not feel sure that this is the right interpretation of the statute, but we shall pro forma assume jurisdiction of the matter upon this petition.

The Bangor, Orono and Old Town Railway Co. has however located its railroad along this highway and across the track of the Maine Central Railroad Co. under its charter obtained from the Legislature by chapter 116 of the Private and Special Laws of 1891. By chapter 72 of the statute of 1895, § 1, it is provided that "the board of Railroad Commissioners shall have authority to determine the manner and conditions of one railroad of any kind crossing another. Any corporation or party operating such railroad may apply to said board for the change in the then existing condition, construction and manner of any such crossing. Such application shall be in writing giving the location of the crossing and said board shall give a hearing thereon, after they have ordered such notice to be given by the applicant as to time, place and purpose of said hearing as said board shall deem proper. Said board shall determine at such hearing what changes are necessary and how such crossing shall be constructed and maintained. The expense thereof shall be borne as the railroad commissioners may order."

The Bangor, Orono & Oldtown Ry. Company deny the authority of the board of railroad commissioners to order their railroad to cross the track of the Maine Central R. R. Company by any overhead bridge, and deny the authority of the board to apportion any part of the expense of said change upon said latter company.

If we have the authority to change the highway, under chapter

282 of the statute of 1889, § 3, it would seem to follow that we had the right to change also the location of the electric railroad which runs along said highway.

We find that public convenience and necessity, and the public safety, require that the said highway be raised so as to permit the Maine Central Railroad to pass under the same, and that the crossing of said highway be altered to facilitate such crossing. And we find, as a matter of fact, that this change of grade of said highway, and of the crossing of the Bangor, Orono & Old Town Railway with the Maine Central Railroad is necessary on account of the location of the Bangor, Orono & Old Town Railway along said highway.

We therefore determine that the said highway shall be changed as follows: . . . .

We also determine that the existing conditions, construction and manner of crossing of the Bangor, Orono & Old Town Rail way with the Maine Central Railroad shall be changed so that said Bangor, Orono & Old Town Railway shall cross said Maine Central Railroad by the overhead bridge along the said highway when changed as herein specified, and along the said overhead bridge in said highway on the southerly side of said bridge. . .

All of the above work for the change of said highway outside of the limits of the said Maine Central Railroad shall be done by the town of Veazie. And the land described in the aforesaid change of location may be taken for the above named purposes, and damages awarded as provided by law.

The overhead bridge and abutments and such other portion of the said changed highway as is within the limits of the Maine Central Railroad, shall be built by the Maine Central Railroad Company.

In consideration of the advantages which we believe will be derived by the Bangor, Orono and Old Town Railway Company, by the change in the existing condition, construction and manner of crossing of the said Bangor, Orono and Old Town Railway with the Maine Central Railroad, we apportion the expense as follows: And decide that the said Bangor, Orono and Old Town Railway

Company shall bear two-fifths of the whole expense of building the bridge and abutments and that portion of said way within the limits of the said Maine Central Railroad.

F. A. Wilson and C. F. Woodard, for Maine Central Railroad Company.

H. M. Heath and C. L. Andrews, *E. C. Ryder*, with them, for Bangor, Orono and Old Town Railway Company.

P. H. Gillin, for Veazie.

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

STROUT, J. This is a proceeding by petition to the railroad commissioners to effect a change in the highway crossing of the Maine Central Railroad at grade to an overhead crossing, including a like change in the crossing of the Maine Central at the same point by the Bangor, Orono and Old Town Railway, an electric road running along that highway. The Railroad Commissioners made report of their decision to the Supreme Judicial Court, as provided by section 27, of chap. 18, of Revised Statutes, as amended by chap. 310 of the laws of 1885, and by chap. 282 of the laws of 1889. The commissioners adjudged "that public convenience and necessity, and the public safety, require that the said highway be raised so as to permit the Maine Central Railroad to pass under the same, and that the crossing of said highway be altered to facilitate such crossing. And we find as matter of fact that this change of grade of said highway, and of the crossing of the Bangor, Orono and Old Town Railway with the Maine Central Railroad is necessary on account of the location of the Bangor, Orono and Old Town Railway along said highway." To effect this, the railroad commissioners changed the place of crossing to one a short distance from the existing grade crossing, but as nearly contiguous thereto as was practicable on account of the conformation of the ground, and laid out a way for a short distance, which was necessary to afford ingress and egress to and from the old line of the highway, over the elevated crossing; and thereupon deter-

mined "that the existing conditions, construction and manner of crossing of the Bangor, Orono and Old Town Railway with the Maine Central Railroad shall be changed so that the said Bangor, Orono and Old Town Railway shall cross said Maine Central Railroad by the overhead bridge along the said highway, when changed as herein specified."

The case comes up on report, by which, among other things, this court is "to determine whether or not the public safety, convenience or necessity require that the course of the highway should be changed as prayed for."

The court had a view of the premises. The highway on which the electric cars run crosses the Maine Central at an acute angle, its immediate approach from the south being down a short but quite steep declivity, with a very limited view of the Maine Central track. A signal station is there located. The safety of passengers on the Maine Central and on the electric road, depends upon the watchfulness of the signal tender, the locomotive engineer and the motorman, as well as the effective working of the car brakes. If the track of the electric road should be wet or icy on the hill, it might be impossible for the motor-man to arrest the onward movement of his car before reaching the crossing. When such result would be perceived on the Maine Central train, it would be too late to arrest its progress.

The question whether public safety requires a highway to pass over or under a railroad at a crossing, is left by the statute in the first instance, to the judgment of the railroad commissioners, and their decision should not be reversed by this court unless it is manifestly erroneous. Our judgment upon this question, from an observation of the premises, entirely coincides with that of the railroad commissioners.

The objections made to the proceeding and decision of the railroad commissioners by the electric road and the town of Veazie, render it necessary to examine the various statutes creating and giving jurisdiction to that board.

By chap. 36 of the laws of 1858, it was made the duty of the governor to appoint three railroad commissioners. Their authority

under that act, related to the condition of railroads, their rolling stock, rates of speed, time tables, times and terms of connection and junction or crossing, and rates of toll, "to the end that the public safety and convenience in the transportation of passengers and merchandise may be provided for and secured." This act was amended in 1864, but the jurisdiction of the railroad commissioners was not materially enlarged. By chap. 204 of laws of 1836, the authority to raise or lower the grade of a highway to allow a railroad to pass over or under it, and to change the course of a highway to facilitate a railroad crossing, was vested in the county commissioners. By chap. 41 of laws of 1853, "the place, manner and conditions" of crossing a highway by a railroad, was to be determined by the county commissioners. This jurisdiction remained with the county commissioners until the act of 1883, chap. 167, § 2, conferred upon the railroad commissioners the authority to determine "the manner and conditions of crossing." But the right to change the course of the highway to facilitate a railroad crossing, and to locate the necessary piece of new road to accomplish that result, was not taken from the county commissioners and conferred upon the railroad commissioners until 1889, by chap. 282, § 3. The mode of crossing of one railroad by another, when no highway or town way was involved, appears to have been left without statutory regulation until the act of 1895, chap. 72, by which the railroad commissioners were given authority "to determine the manner and conditions of one railroad of any kind crossing another." By chap. 205, of laws of 1893, the railroad commissioners were empowered to require a gate or a flagman at a crossing of a highway by a railroad. Until that act, this authority had rested with the county commissioners. And by chap. 227, laws of 1893, the railroad commissioners were empowered "on the application of any railroad corporation whose road crosses another railroad at the same level," to authorize the applicant "to establish and maintain a system of interlocking or automatic signals" at such crossing.

These various statutes indicate the purpose of the legislature to confer upon the railroad commissioners full jurisdiction as to all

crossings of ways by railroads, and of railroads by railroads, and of all matters connected with or incidental thereto, which are necessary or conducive to the safety of travelers. *In re Railroad Commissioners*, 87 Maine, 254.

These statutes being in pari materia, should be construed together, as if they were one law. "The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view or the purpose which was designed." *U. S.* v. *Freeman*, 3 How. 556. "Statute provisions, unless absolutely conflicting, are to be construed so as to make them operate harmoniously as a whole, giving each its appropriate effect, not using one section to evade or abrogate another." *Collins* v. *Chase*, 71 Maine, 436. "Statutes are to receive such a construction as must evidently have been 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 statute of 1889, amending former acts, applied solely to crossings of ways by railroads, and provided that the expense of building and maintaining so much of the way as was within the limit of the railroad, should be borne by the railroad, or by the city or town in which the way was situated, or apportioned between them as should be determined by the railroad commissioners. After making their decision, the railroad commissioners were required to report their doings, with such rulings, proofs and proceedings as either party desired, or as they deemed necessary for a full understanding of the case, in writing to the Supreme Judicial Court, at its next term, at which term the presiding justice "may accept, reject or recommit said report, or send the case to a new commission, or make such other order or decree as law or justice may require." To his ruling exceptions are allowed. The decision of the commissioners does not become operative, till final decree of the Supreme Judicial Court shall confirm them. Section 3 of this act provides for raising or lowering a way to permit the railroad to pass over or under it, by order and under

the direction of the railroad commissioners; and for such purpose "land may be taken and damages awarded as provided for laying out highways and other ways." This provision is broad, and must be regarded as applying to existing ways and railroads. The safety to be obtained and the mischief to be remedied, are as imperative as to existing as to future crossings; and it cannot be doubted that the legislature intended to provide for both. But from the important rights involved, and the granting of the right of eminent domain, it was deemed wise, after the adjudication by the railroad commissioners, to require the judgment of the presiding justice of the Supreme Judicial Court thereon, at a regular term, before it should become final. His judgment is subject to review by the law court.

The act of 1895 relates to crossing of one railroad by another, where no way is involved, and the crossing of a bridge owned by a municipality, over which any railroad may desire to pass. Under this act, the railroad commissioners are required to make a report in writing of their determination, file it in their office, and cause a copy to be sent by mail to each railroad corporation, or to the municipal officers of the city or town as the case may be. Their decision is final upon the parties, unless an appeal is taken to the Supreme Judicial Court. On appeal, the presiding justice is authorized "to make such order or decree thereon as law and justice may require;" and exceptions are allowed. It was not deemed necessary in the case of two railroads crossing each other, or of a railroad using a municipal bridge, to require the sanction of this court, before the decision of the commissioners should have force. It might well be assumed, that in many cases of the crossing of two railroads, or the use of a municipal bridge, the decision of the commissioners would be satisfactory to both parties, and no action of this court be required.

In the case at bar, we have a railroad crossing a highway, and being crossed by another railroad, a condition not specifically provided for by the statutes. It is urged that two proceedings should be had; one for a change of the highway to an overhead crossing of the Maine Central railroad, the damages to be

apportioned between that railroad and the town of Veazie, in which the way is,—under the act of 1889,—and another proceeding under the act of 1895, for the crossing of the Maine Central by the electric road upon the elevated highway to be constructed over it,—and that it is not competent for the commissioners to change the crossing at grade by the electric road, now existing, to the overhead crossing by the altered line of highway, except upon request of the electric road. But the electric road on June 19, 1895, by its petition to the railroad commissioners, asked a crossing of the Maine Central railroad at Veazie. The railroad commissioners granted a crossing at grade, "until otherwise ordered by the board." That crossing has been made, and has been and still is used by the electric road. An appeal from the commissioners' decision was taken by the electric road, and is still pending; but the reasons for the appeal to which the appellant is limited, raise no question as to the location of the crossing itself, but only object to the apportionment of the expense of its construction and the cost of the signal post and salary of the signal man. The location of the grade crossing is not appealed from, and remains established by the decision of the commissioners.

The change in the highway, when confirmed by this court, will operate a discontinuance of the highway across the Maine Central railroad, and vacate the right of the electric road in its present grade crossing. The electric road is legally located over that highway, and after the change made by the commissioners is accomplished, it remains the same highway; it is but a change from a grade to an overhead crossing; and the electric road does not need any new location or additional consent of Veazie to use it. If, as suggested, one proceeding is had for the change and alteration in the highway alone, and the Maine Central Railroad and the town of Veazie pay the entire expense, it may be that the electric road could run its cars over the bridge and overhead way, free of expense. It is doubtful if any provision of law exists, to compel it, under such circumstances, to pay its fair share of the expense, already borne by Veazie and the Maine Central. The suggestion of counsel, that a wooden bridge could be built,

sufficient for ordinary travel on the highway, but insufficient for electric cars, and that when the electric road asks to cross, it might be compelled to pay its share of the expense of a stronger structure, involves unnecessary delay and needless waste of money. A construction of the statutes which would lead to such results, ought not to be adopted, unless imperatively demanded by their language.

To accomplish the desired object of an overhead crossing of the Maine Central Railroad, by the highway and the electric road thereon, and equitably to apportion the expense between the two railroads and the town of Veazie, the whole matter should be heard at one time and upon one petition, by the railroad commissioners. The statute of 1889 relates to the crossing of a railroad by a highway; and the act of 1895, to a crossing of one railroad by another. The mode of proceeding when a construction of the three crossings at one point is involved, is not prescribed by any statute; yet the subject matter falls within the jurisdiction of the railroad commissioners, by force of the two statutes. The proper proceeding, therefore, where the three crossings are involved, is to present them all in one petition, as was done here; and have one decision, adequate to protect the rights of all parties, and equitably apportion the burden.

The primal proposition was to change the highway crossing of the Maine Central road by the highway, from grade to overhead. To effect this, the conformation of the ground required the overhead crossing to be upon the elevation, contiguous to, but a few rods removed from, the existing crossing; and this change also involved the exercise of the right of eminent domain, to secure ingress and egress to and from the old line of highway, by the overhead way. The act of 1889 conferred upon the railroad commissioners authority to do this, subject to the approval of this court. The highway leading through Veazie is the same highway after, as before, the alteration. The electric road was legally located and exists upon that highway. It now has an established crossing of the Maine Central Railroad at grade over and along the highway. When the highway is raised to pass over the railroad,

the electric road must pass over and upon the highway as then existing; and it is immaterial whether this is at the precise point of the established grade crossing, or contiguous thereto. The place, mode and manner of crossing is within the jurisdiction of the railroad commissioners. The electric road now has a grade crossing, established upon its petition, accepted and used by it. It could not cross the railroad without permission of the railroad commissioners. That permission was granted "until otherwise ordered" by the board. The electric road accepted the privilege with this condition; and now when, as incident to the change of grade of the highway, the railroad commissioners require the electric road to conform to the change, it cannot be successfully answered by that railroad, that it may choose to go elsewhere, and avoid the crossing altogether. It has not done so, but holds and uses the existing crossing, and is litigating as to the apportionment of the expense attending it. If it would escape its share of the expense of the change of grade, it can do so by abandoning its location at the grade crossing, before decree upon the railroad commissioners report, and making a location that will avoid crossing the Maine Central. But the suggestion of possible action of this kind by the electric road, with no action taken, cannot be received as a defense.

The railroad commissioners made return of their decision to the Supreme Judicial Court, as provided by chap. 282, of the laws of 1889, amending section 27 of chap. 18 of R. S.; but did not file in their office, and send copies of their decision to the railroads interested, as provided by chap. 72, section 4, of laws of 1895. These provisions are directory, and do not constitute conditions precedent to the validity of the decision. *Veazie* v. *Mayo*, 45 Maine, 564. Both railroad companies and the town of Veazie must have had actual notice of the decision of the railroad commissioners, for they all appear here and are represented by able counsel.

The railroad commissioners properly made report to this court, in the manner provided by the law of 1889; the change in the highway being the principal thing, and the change of the electric

road being the resulting incident. There was no necessity to observe the formalities prescribed in the act of 1895, relating only to a crossing of one railroad by another. The rights of all parties will be amply protected by the decree which the presiding justice, at a term of the Supreme Judicial Court, shall make, subject to be reviewed by the law court, as provided in the act of 1889.

The act of 1889, authorizing the railroad commissioners to take land, necessary to ingress and egress to and from the overhead crossing, imposed upon them the duty of assessing the damages for land so taken. They omitted to do this. If, in their decision, they had made no mention of damages, it would be equivalent to a decision that no damages had been sustained; and the land owner, if dissatisfied, would have had his remedy as provided by law. *Detroit* v. *Co. Com.* 52 Maine, 215; *Howland* v. *Co. Com.* 49 Maine, 147. But the commissioners say in their report, after having located the approaches to the overhead crossing, that "the land described in the aforesaid change of location may be taken for the above named purposes, and damages awarded as provided by law." This language implies, that in the judgment of the railroad commissioners, some damages were sustained; and if so, they should have assessed them. The report must be recommitted to allow the commissioners to assess the damages.

No other objection is perceived, to the acceptance and confirmation of the report, so far as to establish the change of grade of the highway and of the electric road. By the terms of the report, "all questions of fact relative to the course and expense of the new highway, if ordered, the kind and maximum cost of the bridge and the abutments thereon, the apportionment of the expense of building and maintaining the same, and the taxation and allowance of the cost are to be finally determined by a single justice without right of exception to his determinations." When the railroad commissioners shall have assessed the damages for the land taken, and amended their report to include such assessment, and returned the same to court, the case will be in order for the hearing by a single justice upon the matters agreed to be submitted to him; and decree should go according to the report

of the commissioners as to the change of grade and location of the approaches to the overhead bridge, and the decision of the single justice as to the matters submitted to him.

Report recommitted to have damages assessed for land taken.

CHARLES B. EATON

vs.

ATLAS ACCIDENT INSURANCE COMPANY.

Waldo. Opinion February 17, 1897.

Accident Insurance. Sunday Law. R. S., c. 124, § 20.

The plaintiff was thrown from a bicycle, while riding on Sunday, and injured. He rode about six miles to attend the funeral of his friend, and was injured when returning by another road, four miles longer than the direct road to his home. *Held;* that the act was not prohibited by R. S., c. 124, § 20, relating to the Lord's day; and did avoid a clause of an accident policy which prevents recovery for an injury received "while or in consequence of violating any law."

As the plaintiff, after attending the funeral, returned home by a circuitous route which increased the distance by several miles, *held;* that this was done as a recreation, and for health or pleasure; and brings the claim for compensation within the marginal clause of the policy which provides that, "if the insured be fatally or otherwise injured while engaged for pleasure or recreation in amateur bicycling (not racing or coasting) yachting, fishing or gunning, indemnity will be paid at fifth-class rates as given in the company's latest manual."

The same policy contained a clause, "that for any injury received while doing any act or thing pertaining to any occupation or exposure claimed by the company as more hazardous," the insured should be entitled to receive only such amount as the company pay for such increased hazard. *Held;* that this clause relates to an occupation, employment or business,—a vocation, and not an avocation, occasional, exceptional, and outside of his usual and regular vocation.

ON REPORT.

This was an action of assumpsit upon a policy of insurance, issued by the defendants to the plaintiff, insuring him against

accidental injuries, to recover twenty-five dollars per week for an injury which wholly and continuously disabled him from transacting any and all of the duties pertaining to his occupation under which he was insured. The plaintiff was injured by being thrown from his bicycle while returning to his home in Belfast from Waldo, where he had been, to attend the funeral of his friend, Sunday, October 28th, 1894. The defendants pleaded the general issue and contended that they were not liable for anything, because the plaintiff at the time he was injured, was traveling on Sunday in violation of law; and that, if they were liable, the amount for which they were liable should not exceed $12.50 per week, because when the plaintiff was injured he was doing an act or thing pertaining to an occupation classed as more hazardous than that under which he was insured. The plaintiff's occupation was a letter carrier.

The case is sufficiently stated in the opinion.

W. P. Thompson and N. Wardwell, for plaintiff.

Sunday Law: *Buck* v. *Biddeford*, 82 Maine, 433; *Sullivan* v. *Maine Central R. R. Co.*, 82 Maine, 196; *Cleveland* v. *Bangor*, 87 Maine, 266; *Horne* v. *Meakin*, 115 Mass. 326; *Gorman* v. *Lowell*, 117 Mass. 65; *Cronan* v. *Boston*, 136 Mass. 384; *Doyle* v. *Lynn, etc.*, 118 Mass. 195; *King* v. *Savage*, 121 Mass. 303; *Hamilton* v. *Boston*, 14 Allen, 475; *Barker* v. *Worcester*, 139 Mass. 74; *McClary* v. *Lowell*, 44 Vt. 117.

When the plaintiff in *Duran* v. *Standard Ins. Co.*, 63 Vt. 437, received his injury, he was hunting for pleasure on the Lord's day, in violation of the statute of Vermont, and the court very properly held that he could not recover.

Counsel also cited: *Union Mut. Accident Assoc.* v. *Frohard*, 134 Ill. 228; *North Am. L. and A. Ins. Co.* v. *Burroughs*, 69 Pa. St. 43; *Stone* v. *U. S. Casualty Co.*, 34 N. J. 375; *Miller* v. *Travelers Ins. Co.*, 39 Minn. 548; 2 Biddle on Insurance, p. 89.

R. F. Dunton, for defendant.

Counsel argued:—

(1.) That the policy does not cover plaintiff's injuries because they were received while, or in consequence of, violating a law. (2.) If it should be held that the plaintiff was not violating any law, then, being engaged in amateur bicycling for recreation or pleasure at the time of the accident, he can only recover twelve and one-half dollars per week. (3.) If plaintiff's bicycling was not for recreation or pleasure, then (not being a teacher of bicycling) he can not recover anything, for the policy does not cover bicycling of any other character, the company regarding all other bicycling as too hazardous to insure against, and making no rating therefor.

Sunday law: *Duran* v. *Standard L. & A. Ins. Co.*, 63 Vt. 437, (25 Am. St. Rep. 773); *Cratty* v. *Bangor*, 57 Maine, 423; *Tillock* v. *Webb*, 56 Maine, 100; *Hinckley* v. *Penobscot*, 42 Maine, 89.

Counsel also cited: *Keene* v. *N. E. Mut. Acc. Assoc.*, 164 Mass. 170.

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

STROUT, J. Plaintiff was thrown from a bicycle, while riding on Sunday, and injured. It is admitted that he was totally disabled from pursuing his vocation for four weeks, and that seasonable and sufficient notice was given the company. At the time of the injury, plaintiff held a policy of defendant company, insuring him at the rate of twenty-five dollars per week, not exceeding fifty-two weeks, against loss of time resulting from bodily injury which wholly disabled him from transacting any and all of the duties pertaining to his occupation, as stated, being that of a letter carrier. In the margin of the policy it was provided that "if the insured be fatally or otherwise injured while engaged for pleasure or recreation in amateur bicycling (not racing or coasting) yachting, fishing or gunning, indemnity will be paid at 5th class rates as given in the company's latest manual."

It is admitted that if the plaintiff's accident is within this clause

upon the margin of the policy, the amount recoverable is only twelve dollars and fifty cents per week.

The defendants deny liability, under a provision in the policy, that the contract shall not cover an injury received "while or in consequence of violating any law," and strenuously insist that the plaintiff's riding on Sunday was in violation of R. S., c. 124, § 20, relating to the Lord's day.

The plaintiff rode from his home about six miles to attend the funeral of his friend, and returned by another road about four miles greater distance than the direct road home. It has been held that riding to a funeral, or walking or riding for health and exercise, on the Lord's day, does not fall within the prohibition of the statute. It should not be construed to prohibit the doing of those things necessary and suitable to health. *Sullivan* v. *Maine Central R. R. Co.*, 82 Maine, 198. The defense upon this ground is without merit.

The defendants claim that, if liable at all, it is only for twelve dollars and fifty cents per week, that being the amount recoverable, if plaintiff was amateur bicycling for recreation or pleasure, within the marginal clause of the policy. If the plaintiff had ridden to the funeral and returned by the direct route both ways, it might well be held as a work of necessity or charity, and not a riding for pleasure within the marginal clause; nor would it fall within the agreement in the application, which was made part of the policy, "that for any injury received while doing any act or thing pertaining to any occupation or exposure claimed by the company as more hazardous," he should be entitled to receive only such amount as the company pay for such increased hazard. This provision relates to an occupation, employment or business,—a vocation, and not to an avocation, occasional, exceptional, and outside his usual and regular vocation. But it appears that after attending the funeral, plaintiff returned home by a circuitous route, which increased the distance by several miles. The conclusion is irresistible that this was done as a recreation and for health or pleasure; and while not obnoxious to the Sunday statute, does bring the case within the marginal clause of the policy. The plaintiff's claim is

therefore limited to twelve dollars and fifty cents per week for the four weeks of his disability.

The case discloses no ground for interest prior to the date of the writ. At the April term, 1895, defendant offered to be defaulted for fifty-one dollars, but we are not furnished with the date of writ, and cannot determine whether the amount of the offer of default is equal to or less than the amount plaintiff is entitled to recover. This can be determined below, that proper judgment as to costs may be rendered.

Judgment for plaintiff for fifty dollars and interest from date of the writ.

JUDGE OF PROBATE *vs.* FRANK QUIMBY, and another.

Androscoggin. Opinion February 18, 1897.

Probate. Bond. Surety. Decree.

In an action upon a probate bond, the sureties cannot be heard to question the validity of a decree regularly passed by the probate court against their principal in matters covered by the bond.

AGREED STATEMENT.

This was an action brought in the name of the judge of probate, for the county of Androscoggin, by William H. Newell as administrator de bonis non with the will annexed, of the estate of Caleb Blake, late of Turner, deceased, against the defendants as sureties upon the bond given by Rufus Prince as executor of the last will and testament of said Caleb Blake; and was submitted to the law court upon an agreed statement of facts which are sufficiently stated in the opinion of the court.

W. H. Newell and W. B. Skelton, for plaintiff.

Counsel argued:—

(1.) That these associations were mutual life insurance companies, that Blake legally made these sums payable to his estate, or his executor for the benefit of his estate, and that he did so make them payable as provided by the by-laws of said associations.

(2.) That Prince had the legal right to collect these sums from said associations; that he did so, and that he has failed to render an account of the same.

(3.) That no fraud or collusion is shown in the settlement of the account, that the decree thereon is binding upon these defendants, and that these defendants are legally liable in this suit to make good this deficiency.

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

The fund, in the absence of any legal designation, belonged to the widow of Caleb Blake, who survived him, and not to his estate. *Stowe* v. *Phinney*, 78 Maine, 244, and cases; *Martin* v. *Ætna Ins. Co.*, 73 Maine, 25.

The right of the beneficiaries named in the certificate or by-laws, not only to hold the fund, but to sue for and recover it in their own names, is now settled in this country by an almost universal practice.

Prince received this money in trust. It was a personal trust, not an official trust. It was a trust not contemplated by the law or by the will. It was a trust which he originated by his act after these sureties had signed his bond. It was no part of his official duty to receive this money, and the sureties should not be held liable for its payment. *Hooker* v. *Bancroft*, 4 Pick. 50; *White* v. *Ditson*, 140 Mass. 351.

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

EMERY, J. Rufus Prince was executor of the will of one Caleb Blake. As such executor he included in his inventory of personal estate two claims against certain relief associations, amounting to $2500. He afterward collected these claims and receipted for them as executor. He died before settling any account, and his account as such executor was finally settled in the probate court by his own administrator, Mr. Savage. The inventory returned by Mr. Prince in his lifetime was made the basis of this settlement. Mr. Prince was charged with the $2500

received by him and was adjudged by the probate court to owe the estate a balance of nearly $3500. The estate of Mr. Prince was thereupon represented insolvent by his administrator.

After the death of Mr. Prince, Mr. Newell was appointed administrator de bonis non with the will annexed of the estate of Caleb Blake, to which Mr. Prince had been adjudged to be indebted as above stated. The estate of Mr. Prince not being sufficient to pay the full amount adjudged to be due, Mr. Newell, for the Caleb Blake estate, obtained leave from the probate court to bring this action of debt against the sureties upon the bond given to the judge of probate by Mr. Prince as executor. There is no suggestion of any irregularity, fraud or other infirmity in any of the procedure or decrees of the probate court.

These sureties now urge that the money ($2500) received from the relief associations did not belong to the estate of Caleb Blake, but to other parties, and that Mr. Prince in fact and law held the money in trust for such other parties, and hence should not have been charged with it in his account as executor.

The plaintiff contends that the question thus mooted is solely for the probate court and cannot be litigated here. This contention must be sustained. This court is now sitting as a common law court to render a common law judgment in a common law action. The accounts between an executor and the estate he is administering are properly cognizable by the probate court. That court has the power and procedure suitable for determining and adjusting the respective accounts, duties and rights of the executor, heirs, legatees and creditors of an estate. This court (except perhaps in equity) can determine and adjust such matters only when sitting as the Supreme Court of Probate upon appeals from the probate court of the first instance. *Thurlough* v. *Chick*, 59 Maine, 395; *Hanscom* v. *Marston*, 82 Maine, 288; *Woodbridge* v. *Tilton*, 84 Maine, 94; *Morris* v. *Porter*, 87 Maine, 510. Any re-examination or re-adjustment of the accounts of Mr. Prince as executor must be in that court.

The sureties further urge, however, that they could not be heard in the probate court, and had no right of appeal, and hence are

not bound by the judgment, and must be heard here or be condemned unheard. This point must also be overruled. The bond they signed was a bond to the court, a bond in course of judicial procedure, somewhat like an appeal bond. The sureties were fully and effectually represented in the probate court by their principal, or in this case by his representative, his administrator. They signed the bond for the protection of the estate, and of all persons interested in it, against their principal. In signing it they, in effect, stipulated that their principal should abide and and perform the decrees of the court upon all questions between him and the estate within the court's jurisdiction. They did not stipulate for any opportunity to object to any proceedings. They intrusted the representation of their principal's rights and interests to the principal himself. As well might the sureties upon an appeal bond question the judgment of the appellate court, as the sureties upon a probate bond question the decree of the probate court in cases within its jurisdiction. *Woodbury* v. *Hammond*, 54 Maine, 332; *Thurlough* v. *Chick*, 59 Maine, 395; *Tuxbury's Appeal*, 67 Maine, 267.

In *Judge of Probate* v. *Toothaker*, 83 Maine, 195, it was held that the sureties upon a guardian's original bond could show, in a common law action against them, that the money with which their principal had been charged came into his hands from sales of real estate upon special licenses for which he had given other bonds with other sureties. The plaintiff simply sued upon the wrong bond. The original bond only covered transactions as to personal estate. The sureties upon it could show, not that the decree was erroneous, but that it did not concern them. In this case the transactions sought to be reviewed concerned the personal estate solely, and were directly within the purview of the defendant's obligation.

The counsel agree that the amount of the adjudged indebtedness (assuming that it cannot be re-adjusted here) remaining unpaid January 1, 1895, is $1,246.09. This sum the defendants are liable for with interest.

Judgment for the plaintiff.

INHABITANTS OF EMBDEN *vs.* GRANVILLE LISHERNESS.

Somerset. Opinion February 22, 1897.

Judgment. Estoppel. Evidence. R. S., c. 6. § 175.

A judgment, in order to be conclusive as an estoppel, must have been rendered upon the merits of the case, and the same subject matter.

Where several issues are presented by the declaration and pleadings, and the record fails to show upon which in fact the judgment was rendered, it is competent to show the fact by parol evidence, not to contradict the record but in support of it.

So where the record does not disclose the precise issues raised and claims considered and which pass into judgment in the action, they may be shown by parol evidence.

ON REPORT.

The case appears in the opinion.

E. N. Merrill and G. W. Gower, for plaintiff.

A. Simmons, for defendant.

SITTING: WALTON, EMERY, FOSTER, WHITEHOUSE, WISWELL, STROUT, JJ.

FOSTER, J. Action of debt, brought under § 175, c. 6, R. S., to recover $207, the amount of tax assessed upon defendant's real estate for the year 1889.

It is admitted that the tax was legally assessed and has never been paid; that at the December term of this court for the county of Somerset, an action of debt was tried, in which Stillman A. Walker, collector of taxes for the plaintiff town, was plaintiff, and against this same defendant; that the suit was brought by the collector under § 141, c. 6, R. S., to recover the same tax.

The plea in that action was the general issue. The jury returned a general verdict for the defendant.

In the present action the plea is the general issue, with brief statement of the former judgment as a bar to the maintenance of this suit.

The plaintiff in this action offered to prove by parol that the only issue upon which said former cause was tried was that of

"due notice and demand" given to and made upon the defendant by Walker as collector before the bringing of said former suit. This testimony was objected to by the defendant, and the only question before the court is upon the admissibility of this evidence. If admissible, judgment is to be rendered for the plaintiff.

We think it admissible.

At the former trial at which the general issue was pleaded, it was competent for the defendant to show that no "due notice" had been given before the bringing of the suit as required by the statute authorizing a collector of taxes to sue in his own name. This was the issue presented, and upon which the defendant prevailed. The merits of the case except as to the question of due notice were not passed upon.

The gist of the present suit is whether the defendant owes the tax for which he is sued. The only defense is that the collector of taxes brought suit for the same at a former term, and in the trial the defendant prevailed. In that suit it was essential to show "due notice" as well as a legal tax. Failure to do either, and the verdict would be the same. Both allegations in the writ had to be established to make out a prima facie case. The record of that case is before us; but with the general issue alone pleaded, and with a general verdict of "does not owe," how are we enabled to tell upon which allegation the defendant succeeded? There is nothing as appears from the record to determine this question. Whether it was for want of due notice, or the want of a legal tax, can be shown only by evidence aliunde the record, and the point upon which the case turned must necessarily be proved, if proved at all, by such evidence.

This is what the plaintiff in the present suit offered to prove.

A judgment, in order to be conclusive as an estoppel, must have been rendered upon the merits of the case, and the same subject matter. *Clark* v. *Young*, 1 Cranch, 181, 194; *Phelps* v. *Harris*, 101 U. S. 370; *Dunlap* v. *Glidden*, 34 Maine, 517, 519; *Hill* v. *Morse*, 61 Maine, 541; *Smith* v. *Brunswick*, 80 Maine, 189; *Young* v. *Pritchard*, 75 Maine, 513, 517; *Arnold* v. *Arnold*, 17 Pick. 4; *Cunningham* v. *Foster*, 49 Maine, 68, 70.

It is well settled that where several issues are presented by the declaration and pleadings, and the record fails to show upon which in fact the judgment was rendered, it is competent to show the fact by evidence aliunde, not however to contradict the record but in support of it. *Dunlap* v. *Glidden*, supra; *Jones* v. *Perkins*, 54 Maine, 393, 396; *Rogers* v. *Libbey*, 35 Maine, 200; *Chase* v. *Walker*, 26 Maine, 555; *Cunningham* v. *Foster*, 49 Maine, 68, and cases there cited. See also *Lander* v. *Arno*, 65 Maine, 26; *Hood* v. *Hood*, 110 Mass, 463; *Blodgett* v. *Dow*, 81 Maine, 197, 201. See also *Walker* v. *Chase*, 53 Maine 258, a leading case in this State where this doctrine is fully considered.

While the rule is strict that evidence aliunde cannot be introduced to contradict the record, it is a universally acknowledged rule that a judgment obtained upon the ground that an alleged demand is not yet due, is no bar to an action subsequently brought on the same demand, after it has fallen due. Freeman on Judgments, §§ 268, 274.

A suit upon a bond before condition broken, in which the defendant prevails on that account, is no bar to an action brought against the same defendant after condition broken. *McFarlane* v. *Cushman*, 21 Wis. 401.

So where a suit is brought for several demands, some of which are due, and others of which are not due, and a general verdict is given for the plaintiff, it has been held that he may show in a second suit brought upon the demands not due in the trial in the first suit, that they were disallowed because not due. *Kane* v. *Fisher*, 2 Watts, 246; *Ball* v. *Hopkins*, 7 Johns. 22.

Thus in *Perkins* v. *Parker*, 10 Allen, 22, in a real action where a former judgment in bar was set up in defense, the court held that it was competent for the demandant to introduce parol evidence that there were two distinct grounds of defense relied upon, one of which involved only the question whether his grantor was seized, at the time of the making and delivery of the deed to him, and that this ground of defense was established by proof, and that for this cause solely the judgment was rendered in favor of the

defendant, and not by reason of any defect in the title of his grantor.

In the case of *Whiting* v. *Burger*, 78 Maine, 287, 296, our court say: "When the record does not disclose the precise issues raised and claims considered and which pass into judgment in the action, they may be shown by parol evidence."

See also the case of *Nashua and Lowell Railroad* v. *Boston and Lowell Railroad*, 164 Mass. 222, 226 where the court hold that where there are several demands sued in one action and the plaintiff obtains a general verdict and judgment, the record of such judgment is not conclusive evidence that all of the demands were included therein, and will not bar a subsequent action for such as in fact were not adjudicated upon.

The general tendency of decisions is in accord with this doctrine.

In the recent case of *DeSollar* v. *Hanscome*, 158 U. S. 26, the court say: "Now it is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment. It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit." *Russell* v. *Place*, 94 U. S. 606.

This case comes within the rule laid down in the foregoing decisions. The evidence offered is not contradictory of the record in any way, but rather in aid of it, by showing what question was determined by the jury in finding their verdict. That question was one where want of due notice entitled the defendant to prevail. Had the suit been upon a note which was not due, and judgment been given for the defendant because the suit was prematurely commenced, that fact undoubtedly could be shown by parol in a subsequent suit after the note had become due, and would constitute no bar to the second suit.

Judgment for plaintiff.
for $207 and interest from date of writ.

INHABITANTS OF CHARLESTON *vs.* STILLMAN LAWRY.

Penobscot. Opinion February 23, 1897.

Tax-Suit. Lists. Declaration. R. S., c. 6, § 175.

Much greater particularity and precision are required in proceedings for the recovery of unpaid taxes wherein a forfeiture is sought to be enforced than in a suit at law for the mere recovery of them.

It is not necessary as a prerequisite to the validity of the tax that the lists committed to the collector should contain an exact description of the real estate taxed, or even the same as contained in the record of assessment.

Where suit is brought in the name of the inhabitants of a town for the collection of unpaid taxes, by the written direction of the selectmen, such averment is necessary to a proper declaration, and its omission would constitute a fatal defect to the declaration if advantage were taken by demurrer.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

Ira W. Davis, for plaintiff.

C. H. Bartlett, H. P. Haynes, L. B. Waldron, and P. H. Gillin, for defendant.

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

FOSTER, J. This is an action brought in the name of the inhabitants of a town to recover a tax, amounting in the whole to $3.78, assessed against the defendant for the year 1895, under § 175, c. 6, R. S.

It comes before this court on exceptions to the ruling of the justice presiding in directing a verdict for the plaintiff upon the evidence introduced, the defense offering no evidence at the trial.

The defense relied upon is that the plaintiff failed to make out a case, and that there was no evidence to show that the defendant was an inhabitant of the plaintiff town at the required time; no title or proper description to the real estate taxed; no legal commitment to the collector inasmuch as there was no description of

the real estate in his said commitment corresponding with that contained in the record of the lists of assessment; and finally that there was no proper authority to bring the suit in the name of the inhabitants of the town.

We think these objections are untenable, and that the ruling of the justice presiding was correct.

This is not a proceeding wherein a forfeiture is sought to be enforced, but a suit at law for the recovery of unpaid taxes. Much greater particularity and precision are required in the former than in the latter; and it has been held that the stringent rules which have been applied in testing the validity of arrests, and sales of property for unpaid taxes, are not applicable where the remedy sought is by an ordinary suit at law to collect unpaid taxes. *Cressey* v. *Parks*, 76 Maine, 532; *Rockland* v. *Ulmer*, 84 Maine, 503; *Rockland* v. *Ulmer*, 87 Maine, 357. As was said in *Cressey* v. *Parks*, where the distinction is properly made between collecting taxes by suit and proceedings to enforce a forfeiture: "To prevent forfeitures strict constructions are not unreasonable. But, where forfeitures are not involved, proceedings for the collection of taxes should be construed practically and liberally."

From an examination of the case we are satisfied that there was evidence establishing the residence of the defendant in the plaintiff town at the time when the tax was assessed, and moreover that the title and description of the real estate was sufficient to sustain a proceeding of this nature. Nor is it necessary as a prerequisite to the validity of the tax, that the lists committed to the collector should contain an exact description of the real estate taxed, or even the same description as contained in the record of assessment. If the collector made no objection, it is difficult to see on what ground the defendant can base his complaint. *Torrey* v. *Millbury*, 21 Pick. 64, 67. Omissions of this kind certainly do not prejudice the tax payer. If he has any doubt in reference to the property for which he is taxed, he can readily ascertain that fact from the proper record. "If it appear that the citizen was liable to taxation, and that the assessors had proper authority and jurisdiction which they did not exceed, minor irregularities in mere

procedure, which do not increase his share of the public burden, nor occasion him any other loss, should not prevent a recovery." *Rockland* v. *Ulmer*, 84 Maine, 503, 508.

The last objection which is raised by the defense, that there was no proper authority for bringing the suit in the name of the inhabitants of the town, cannot be sustained.

True, the statute requires that the selectmen should in writing, direct an action of debt to be commenced in the name of the inhabitants of the town, when this mode is resorted to for the collection of unpaid taxes. Such an averment is necessary to a proper declaration, and the omission of such averment would constitute a fatal defect in the declaration if advantage were taken by demurrer. *Wellington* v. *Small*, ante, p. 154. In the case at bar there was no such proper averment. No demurrer, however, was interposed. The written direction signed by the selectmen was introduced in evidence without objection. The only attack made under this branch of defense is, that the writing is insufficient in form to authorize the commencement of the suit. But we think it is a sufficient compliance with the statute. It authorizes the collector "to bring an action of debt in favor of the inhabitants of said town" against the defendant for the taxes assessed upon his property for that year. While the direction may not be in the exact language of the statute, it may properly be held to meet the spirit of it, thereby authorizing suit to be commenced in the name of the inhabitants of the town.

Exceptions overruled.

SAMUEL G. FLEWELLING

vs.

LEWISTON & AUBURN HORSE RAILROAD COMPANY.

Androscoggin. Opinion February 24, 1897.

Street Railways. Ways. Travelers. Contributory Negligence.

Electric street-cars have, in a qualified way at least, the right of way as against persons traveling on foot or with teams and carriages, in the same manner as ordinary steam railroads have; and all such persons should carefully observe the movements of street cars when likely to meet them, and leave them an unobstructed passage as well as they reasonably can.

Great care must also be exercised by motor-men and conductors on the street cars to see that no injury be caused by themselves to either persons or property. Street cars are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or a team, through accident or misjudgment, or for any cause, be caught in any position of peril by coming in close contact with a car, it is the duty of those managing the car to use all possible effort to avoid collision or injury.

Any person driving a horse on the street, especially an unbroken or uncertain animal, should exercise very great care and caution so as to pass the cars safely. But he is not to be debarred from reasonable opportunities in a reasonable manner to exercise his horse, young or old, spirited or dull, in the presence of either stationary or moving cars, in order to accustom his horse to such sights and sounds as the running cars produce, if he can.

ON MOTION BY DEFENDANT.

This was an action on the case to recover damages for personal injuries sustained by the plaintiff in a collision between one of the defendant's electric cars; and also by the plaintiff's horse and road-cart which he was driving along Pine street, in the city of Lewiston, April 25, 1895.

The jury returned a verdict for the plaintiff, damages $2797.85. Plaintiff's first count alleged a great and unlawful speed of the car, and the consequent loss of control of the car. His second count alleged a rate of speed in excess of that allowed by the city ordinance.

(Second count of declaration.)

Also for that the said defendant corporation, on the twenty-fifth day of April, 1895, owned and was then operating a street railway in said Lewiston, and then and there using in its said business cars driven along the street by means of electricity; that, on said day, while the plaintiff was lawfully driving his team, consisting of his horse and road-cart to which his horse was properly harnessed, said horse, harness, and road-cart being then and there suitable and proper to be used by him, over and upon Pine Street, a public highway in said Lewiston whereon said defendant was then and there maintaining its track and operating and driving its cars as aforesaid, said plaintiff being then and there in the exercise of due and proper care and without negligence on his part, an electric car of the defendant, then and there managed, controlled, directed, governed, and operated by the servants and agents of the defendant, said car being then and there propelled by the defendant at a rate of speed greatly in excess of the maximum rate of speed prescribed by law and the ordinances of the city of Lewiston in such case made and provided, and in violation of said ordinances, was then and there negligently, carelessly and at an undue, unreasonable, dangerous and unlawful rate of speed driven by the said defendant against the road-cart containing the plaintiff, so that the plaintiff was then and there thrown suddenly and with great force and violence from his seat down upon the ground and upon the track of the defendant, was stunned by the fall, his right hand run over by a wheel of said car, his body bruised and jammed, his leg and body severely burned by the electric current, and he then and there sustained other great and painful bodily injuries, external and internal; in consequence of which he suffered greatly in body and mind, was compelled to have his said right hand amputated, to submit to a long course of medical and surgical treatment for his recovery from said injuries, and put to great expense for medicine, medical attendance, and nursing, and has been otherwise greatly damaged. Plea, general issue.

The plaintiff offered testimony showing that on April 25, 1895, Fast Day, about 3 o'clock in the afternoon, he was driving on Pine

Street in Lewiston, on the right hand side of the street in a road-cart, so-called, a two-wheeled vehicle, drawn by his horse four years old and weighing about 1100 pounds, a horse of gentle disposition, well broken to harness and accustomed to electric cars. At a point in said street, opposite the residence of Z. Blouin, he met a car of the defendant corporation. The sidewalk was full of people going to a ball game. The track of the defendant was in the centre of the street, which is fifty feet wide from street line to street line outside limits. The street along by the place of the accident is practically level.

The horse of the plaintiff and the car of the defendant, coming from opposite directions were approaching each other. The horse, when at a point about sixty feet or more from the approaching car, began to act afraid of it and tried to sheer toward the sidewalk. The plaintiff reined his horse firmly to keep in the street, and avoid running down the people on the sidewalk. The car, as the plaintiff's evidence shows, was running very fast, and the heavy current was snapping and buzzing on the trolley line. The spectacle terrified the horse. Not being allowed to dash upon the sidewalk, the horse in his fright and terror suddenly bolted across the track in the face of the car. The car collided with the vehicle of the plaintiff with great force. So great was the force that the brake of the car, a rod of iron one and one-half inches in diameter was broken short off by the collision. The road-cart of the plaintiff was instantly demolished, and the plaintiff and his companion were thrown and dragged upon the ground until the car could be stopped. The injuries of the plaintiff were severe. His back was injured. His head was cut by a gash four inches long. His left hand was burned to a blister. His right leg was burned. And his right hand was crushed and had to be amputated.

On the other hand, the defendant contended that the plaintiff was guilty of contributory negligence; that the defendant was guilty of no negligence; was not running its cars at an unlawful or unreasonable rate of speed, and even if it was, such speed neither caused nor contributed to the accident. The defendant claimed that the undisputed facts were substantially as follows:—

The plaintiff at the time of the accident was engaged in handling and selling horses at Symonds' stable in Lewiston. The colt which the plaintiff was driving was one of a carload of horses brought from Kansas by a Mr. Poor, which arrived April 8th, being seventeen days before the accident occurred on Fast Day, the 25th. There was an unusual number of teams and cars in the street on that day. The plaintiff harnessed this horse into the road-cart, took in Frank Edgecomb, whose brother wanted to buy a horse, and rode out into the streets. They drove up through Main Street, passing a car in Haymarket Square, through Sabattus Street to Pine Street, which they entered near Nichols Park. They were scarcely in Pine Street when the car was noticed coming up the street, then at a long distance from them. They proceeded down the street until they came into collision with the car near Mr. Blouin's house.

W. H. Judkins, for plaintiff.

Counsel argued:—The plaintiff's horse was kind, gentle, well broken to harness and used to electric cars. The plaintiff was an experienced man in driving horses. The horse was properly harnessed in a proper vehicle. It was the defendant's duty to run its cars at a reasonable and proper rate of speed, with due care and attention to the rights of travelers having the right to pass with teams up and down the street by the side of its tracks. When the plaintiff turned into Pine Street, he had a right to presume and assume that the defendant would observe its duty in this respect. These are the factors entering into the propriety of driving into the street. The plaintiff was alert, and giving his entire attention to the care of his horse. The defendant does not claim but that the plaintiff tried to manage and control his horse to the best of his judgment, knowledge and ability.

An electric car running at a high rate of speed in the centre of a public highway is a very dangerous looking and threatening object to man or beast, and one calculated to frighten horses; that it is the high rate of speed which terrifies horses; that when horses are frightened at a rapidly approaching car, and the car is made to go slow, they pass the car safely; that their terror may be

roughly stated to be in a direct ratio to the speed of the car. I appeal to the every day observation of this court for confirmation of the truth of this proposition. You cannot ride a mile on an electric car in a busy street without observing the fact. Motormen instinctively and involuntarily act upon the idea. The ordinance established by the city of Lewiston is based upon the truth of this proposition. I emphasize this proposition because as the learned presiding judge expressed it thus in his charge:—"There is the hinge on which this case turns." The electric power was not shut off; otherwise the plaintiff and his companion would not have been burned. Science cannot lie. The motor-man had sufficient warning of the fright of the horse.

The defendant's car was running at a very high rate of speed. A fair preponderance of the evidence shows it to be from twenty to twenty-five miles an hour. The finding of plaintiff's watch five or six feet behind the car when stopped is one undisputed fact contradicting the evidence of all of defendant's witnesses as to the speed of the car. The broken brake-iron and the finding of the watch are two impregnable facts for the plaintiff.

The defendant has no testimony in the case of any act done by the plaintiff at the time of the accident that he ought not to have done, or any act of his left undone that he ought to have done; that is, assuming plaintiff had a right to be on the street with his horse, the case does not show on the defendant's testimony any act of negligence on the part of the plaintiff. Defendant's witnesses were repeatedly asked to state, if they could, anything which in their judgment, based on their direct observation of all that happened, the plaintiff did, or left undone, that was improper or negligent, and not a witness could mention a fact.

The rule of law in relation to violations of city ordinances is, that such violations are evidence, but not conclusive evidence of negligence. *Hanlon* v. *South Boston R. R. Co.* 129 Mass. 310.

The plaintiff's previous rate of speed, were it fast or slow, had nothing to do with the accident. Plaintiff at the instant of the accident, was not going toward the car at all, but was across the track. His momentum did not, therefore, increase the force of

the collision, or the severity of the injury. In other words, at the precise time of the accident, plaintiff was not violating the ordinance at all. His previous violation of the ordinance has nothing to do with the case, even if the ordinance were a reasonable one.

But the defendant was violating the ordinance at the very instant of the collision. The plaintiff and defendant are not in the same boat with respect to violations of the ordinances. A distinction fairly and truly exists.

The defendant may argue, that plaintiff should have turned up Clay Street, because the horse showed signs of fright there. Defendant also argues that the motor-man had no warning of the fright of the horse, because the horse did not show any signs of fright until within 15 or 20 feet of the car, a point from 80 to 100 feet west of Clay Street. The two positions are contradictory. Both cannot be right, and neither is right. The horse had passed Clay Street but had not had time to reach Bradley Street, when she began to be frightened. The weight of the testimony from witnesses on both sides is, that the horse began to act afraid when about 60 feet from the car.

The rate of speed can be estimated approximately. The Lewiston loop of the figure 8, so-called, is over 2 1-2 miles long. The running time was 20 minutes; this would be at the rate of 7 1-2 miles per hour, if there were no delays at crossings, turnouts or for passengers. There were about 40 passengers on the car. Inasmuch as the Lewiston loop of the figure 8 is as long as the Auburn loop, it is fair to assume that 20 passengers got on, and the same number got off in passing around the Lewiston loop. At least five seconds would be consumed on an average by the getting on, or by the getting off, of each passenger. If this be correct, 3 1-3 minutes are consumed by passengers getting on and off. That would leave 16 2-3 minutes for running the 2 1-2 miles. This would be an average of nine miles per hour. And this computation does not take into account the habitual delays at the head of Lisbon Street, where one car has to wait for the other, there being only one track there, etc. Then there are constantly occurring special delays.

Fright as related to proximate cause: *Willey* v. *Belfast*, 61

Maine, 569; *Lake* v. *Milliken*, 61 Maine, 240; *Clark* v. *Lebanon*, 63 Maine, 395; *Card* v. *Ellsworth*, 65 Maine, 547; *Cleveland* v. *Bangor Street Railway*, 86 Maine, 232; *Spaulding v. Winslow*; 74 Maine, 535.

W. H. White and S. M. Carter, for defendant.

The plaintiff was guilty of contributory negligence: Because it was imprudent and unreasonable to attempt to drive this horse upon Fast Day through streets where he must expect to meet the cars of the defendant road,—to drive this green colt out into the crowded street in the proximity of the electric cars. Because the course of the plaintiff, after he got into Pine Street and knew the car was coming, was a persistent pressing forward into a well-recognized place of danger that resulted in his injury, although the means of escape were easy at hand, easily accessible and well known to him by turning off into a side street. Not only did he reach the side street and pass it, but he even drove past Clay Street with his horse then showing evident signs of fright. No prudent man thinking only of his own safety would have done it. The plaintiff did not. The accident was due wholly to his own refusal to avail himself of the means of safety open to him and recognized by him as such, and his gross mismanagement of the horse when in close proximity to the car. He came down into Pine Street with a green Kansas colt with which he had had seventeen days experience; and according to the plaintiff's witnesses there was approaching a car at a rate of speed estimated from twenty-five to forty miles an hour, coming up through a thickly-settled portion of the city at this fearful rate. The faster the car was coming, the more frightful its appearance, the more unusual its surroundings, the greater the duty upon the plaintiff to have turned down into Clay Street and avoided the chance of trouble.

Because the plaintiff sought the proximity of the cars and the dangers attendant thereon, which resulted in his injuries, for the purpose of exhibiting to his companions under just those circumstances the colt which he was driving.

The defendant corporation cannot be made responsible for the

results arising from the plaintiff's endeavoring to ascertain for himself, or demonstrate for another, what the horse would do when driven into a dangerous place. Croswell on Electricity, § 747; *Cornell* v. *Detroit Electric Ry. Co.*, 82 Mich. 499, (46 N. W. Rep. 791); *Pittsburgh Southern Ry. Co.* v. *Taylor*, 100 Pa. St. 306, (49 Am. Rep. 580); *McGee* v. *Consolidated St. Ry. Co.*, 102 Mich. 107, (47 Am. St. Rep. 507).

With his eye upon the horse the motor-man detected the first sign of trouble, and when the horse broke and reared, he set the brake with all his might, setting it so hard that they had to pry the dog out with a switch iron, and bringing the car to a stand within eight feet from the place where it struck the cart.

What more could the employees of this corporation have done? If the court were to sit here and formulate rules for their guidance under just these circumstances, what would it order them to do which they omitted to do or to omit which they did? The car was rightfully on the track and there operated by authority of law. It had a paramount right to the use of that portion of the street occupied by the track. This the plaintiff was aware of and he knew that he was bound to keep clear of the car. The car itself could not turn out for him.

Having the right to operate the car in the street, the company is not liable for fright caused to horses by the reasonable exercise of their right. The company has equal rights with all other travelers in the general use of the road and are under obligations to their patrons to convey them upon reasonable schedule time and to avoid unnecessary delays. Travelers using the car have the same rights to have a reasonable use of the highway made in their behalf by the corporation as the individual traversing the road with his team.

Booth in his work on Street Railways says: "To the extent that travelers, whether in cars, on foot or in private vehicles have the right to proceed without interruption or delay, the rights of all are equal, and the law makes no distinction between the vehicles used or the means employed. No other rule would be reasonable or practicable; for if drivers, motor-men and grip-men were required to stop their cars, slacken their speed or omit or discon-

tinue necessary signals upon which the safety of others depends because timid horses might become frightened or already manifest symptoms of fear not indicating imminent peril, street-railway service would be so materially embarrassed by numerous delays as to defeat the purpose for which such franchises are maintained, and the dangers to the general public for whose protection warnings are given would be greatly enhanced." Booth on Street Railways § 298; Croswell on Electricity § 746.

Whatever the rate of speed may have been it had nothing to do with the frightening of this horse. There is no evidence that the rate of speed had anything to do with the accident. The case is not like one of crossing the track from a side street. The only possible effect which the rate of speed could have had was in producing the fright. So far as causing the collision after the fright is concerned, there is just as much ground to claim that the car if going faster would have gotten by before the horse got on to the track as that he would have gotten over the track in safety if the rate of speed had been slower. Common experience teaches us that it is the steady approach of the car without animals attached to it, until it gets into the close proximity of the horse, rather than the rate of speed, which causes fright. The presumption is against fright having been caused by the rate of speed.

In the case of *Cornell* v. *Electric Ry.*, 82 Mich. 495, (46 N. W. Rep. 791), the negligence claimed was the running of the car at a great rate of speed, and the court say: "It was evidently the sight of the moving cars and not their speed that frightened the horse."

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

PETERS, C. J. We apprehend that electric street cars have, in a qualified way at least, the right of way as against persons on foot or traveling with carriages and teams in the same manner as ordinary steam railroads have. And all persons passing on foot or traveling by the common methods on the highways should care-

fully observe the movements of the street cars and leave them an unobstructed passage as well as they reasonably can.

But great care must also be observed by conductors and drivers, or motor-men, upon the cars to see that no injury be caused by themselves to persons or teams. Street railroads are granted very great privileges out of the public right, and their treatment of the public must be reasonable in return; so that when a person or a team, through accident or misjudgment or for any cause, be caught in a position of any peril by coming in collision or close contact with the cars, it is the duty of those who are managing the cars to use all possible effort, by slackening the speed of a car or stopping it altogether, in order to avoid injury. If a horse driven by a traveler appears to be restive or refractory at the sight of a moving car the movement of the car should be managed in such a way as to relieve, if possible, the traveler in his dilemma. For these reasons, as well as for the general safety of passengers within and persons outside of the cars, the rate of speed should be reasonable according to circumstances.

The city ordinance of Lewiston limits the cars of this road to a speed of five miles an hour.

On both points to be considered, more especially on the second, the case in hand is a somewhat close one. The plaintiff contends that the car, with which his horse and carriage collided, was running at the time with an extraordinary and reckless rate of speed. This position of fact, as maintained by the plaintiff, is strongly contested by the defendant, and whilst there is much testimony bearing on this contention pro and con, we cannot very well assume the decision of the question ourselves and determine that the jury committed a mistake. The implication of the verdict is, that the unreasonable speed of the car caused or increased the fright of plaintiff's horse, thereby causing the accident by which the plaintiff received his very serious injury.

The more doubtful question, perhaps, is whether or not the plaintiff was himself guilty of some recklessness and carelessness which contributed in causing the injury. Any person driving a horse, on the street, especially an uncertain and unbroken animal,

when likely to meet a car, should exercise very great care and prudence so as to cope with the occasion with safety, and, if he fails to do so, he enters on a reckless experiment at his own risk. At the same time he is not to be debarred from reasonable opportunities in a reasonable manner to exercise his horse, young or old, spirited or dull, in the presence of either stationary or moving cars, in order to accustom his horse to them if he can.

The horse driven by the plaintiff when he was injured was but four years old. But his driver was an experienced and fearless horseman, and he says that during the seventeen days he had owned him prior to the accident, he had been driven frequently by the cars without his showing any sign of fear or fright, and was a horse of good natural disposition.

The defense strongly urges that he could have and should have turned off into a cross street when his horse began to misbehave, and that in that way there was an easy opportunity to have avoided the collision; and the plaintiff explains his conduct in that respect upon his theory of the situation.

Although there is force in the position of the defense, still we hardly think we should overrule the implied finding of the jury on this point even, and so we therefore feel constrained, all things considered, to allow the verdict to stand.

Motion overruled.

WARREN P. NEAL *vs.* ALONZO SMITH, and another.

Washington. Opinion February 24, 1897.

Pleading. Declaration. Tort. Malice. Degree of Proof.

In an ordinary action of trespass or case for the wrongful occupation of land, it is not necessary to allege that the act was done maliciously, and, if malice be alleged, it need not be proved; unless in special instances where the allegation is a necessary part of the description of the offense. The allegation of malicious intention in a declaration in an action of tort does not require that the facts alleged be established by any higher degree of proof than a preponderance of the evidence.

ON EXCEPTIONS BY DEFENDANTS.

This was an action on the case to recover for damage to the plaintiff's barn.

The case was heard and tried before the jury at the October term of this court sitting at nisi prius 1895. The defendants pleaded the general issue, not guilty, and a brief statement alleging that they occupied the said barn by leave and license of the plaintiff. The verdict was for the plaintiff, and the jury assessed damages in the sum of $48.00.

At the trial the plaintiff's counsel admitted that the burden of proof was on the plaintiff to show that the barn was carelessly and negligently injured by the defendants; but disclaimed any intention or expectation of satisfying the jury that the defendants maliciously intended and contrived to injure the plaintiff's barn; or that the defendants did maliciously injure it as alleged in the plaintiff's writ. There was no evidence offered by the plaintiff to prove these allegations, but he claimed that the declaration was drawn in the usual form, and that the allegation of intent to maliciously injure the plaintiff should be regarded as surplusage; and that if the jury were satisfied that the defendants were negligent and careless in putting their hay in the barn and were not in the exercise of due care, the plaintiff was entitled to recover.

The defendants' counsel, on the other hand, took the position that as the defendants were charged with a criminal offense, and

as the action was one at common law instead of one brought under the statute, the allegation of intent must be proved beyond a reasonable doubt; that the allegation "contriving and maliciously intending" to injure the plaintiff as set out in the declaration, should not be regarded as surplusage, but being alleged against the defendants must be proved.

The presiding justice, among other things, charged the jury as follows:—

"Although it is alleged that the defendants maliciously and wilfully put the hay into this barn and maliciously contrived to injure the same, I instruct you that there is enough aside from those allegations contained in the declaration to support an action of negligence upon which the plaintiff relies. . . . . It was unnecessary to aver the maliciousness and viciousness on the part of these defendants, because it is for an action of tort and the gist of it being negligence, those averments will be dispensed with as surplusage. . . . .

Something has been said as to the burden of proof. In this case, as in all civil actions, the burden of proof is upon the plaintiff to satisfy you of his case; that he is entitled to recover. He must satisfy you not by evidence that satisfies you beyond a reasonable doubt, as in a criminal case, although the allegations contained in the writ are that it was done maliciously and wilfully, contriving and intending to injure the plaintiff. The rule does not change and throw upon the plaintiff a burden greater than in any other civil action, namely: to satisfy you by a preponderance of evidence that he is entitled to recover."

To these rulings and instructions the defendants excepted.

H. H. Gray, for plaintiff.

Geo. E. Googins, for defendants.

This is claimed to be an action on the case. The plaintiff's declaration substantially alleges that the defendants contriving and maliciously intending to spoil and damage, did maliciously and without leave or license injure the plaintiff's barn or building.

Wilful and malicious injury to a building is a crime under §

17, c. 127, R. S., of Maine. An action of trespass also lies under this statute to the party injured for the amount of injury so done, and for a further sum, not exceeding in all three times such amount, as the jury deems reasonable.

Plaintiff does not claim to recover under the statute, but in an action of case at common law grounded on negligence. The defendants are charged with the commission of a criminal act.

The plaintiff's declaration contains all the averments necessary and essential in an action of trespass upon the statute. Its language conforms more to a declaration of trespass than to one of case for negligence.

The words "contriving and maliciously intending to spoil, etc., did maliciously and without leave or license, injure the plaintiff's barn," is equivalent to those of the statute: "Whoever wilfully and maliciously injures any building, etc., without consent of the owner, etc."

Whenever such averment is made it must be proved. The act is made a part of the issue tried and raised by the pleadings, and the allegation must be proved as set out in the declaration. *Sinclair* v. *Jackson*, 47 Maine, 107; *Paul* v. *Currier*, 53 Maine, 526; *Knowles* v. *Scribner*, 57 Maine, 497.

Says WALTON, J., in the latter case:—"The amount of evidence required must depend, in a great measure, upon the character of the issue to be tried. The proof must be stronger to support a charge of wilful and malicious burning, than one of negligent burning merely. . . .

By dispensing with the averment in this case we destroy the substance of the charge and alter the issue set out in the pleadings. The same evidence would not support trespass that would support case. The defense would be different. The material averments, in a legal sense, would not be the same.

The verdict is equivalent to saying that defendants are guilty of maliciously and wilfully intending to injure the plaintiff's barn, etc., which is a criminal offense under the statute, though no evidence is produced to support it. Judgment is prejudicial to the defendants.

The plaintiff should satisfy the jury of his case. His allegations should be proved.

Compare *Thayer* v. *Boyle*, 30 Maine, 475, with *Knowles* v. *Scribner*, 57 Maine, 495; and with that of *Paul* v. *Currier*, 53 Maine, 526.

See also *Decker* v. *Somerset Mutual Fire Ins. Co.*, 66 Maine, 408, as to amount of evidence required in civil actions.

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

PETERS, C. J. The plaintiff sues the defendants in an action of trespass on the case for forcibly occupying plaintiff's barn, and wrongfully keeping him out of possession of the same, and he avers in the declaration accompanying the writ that the conduct of the defendants was malicious.

On account of this special allegation of malice the defendants contend that the act charged against him must be proved beyond a reasonable doubt. If that ever was the doctrine in this State it is not the law now. While perhaps such a rule was at first inconsiderately allowed, by later and well-considered cases it has been rejected.

Further, the defendants contend that, inasmuch as malice is alleged, it must be proved. That is not so. The averment was an entirely unnecessary one—merely surplusage. If I wrongfully injure your property, real or personal, it matters not what my intention may be about it,—I am liable for the injury. With or without malice the actual damages would be the same. And still it may not be incorrect pleading to allege malice if exemplary damages are claimed, or if the plaintiff desires such a special finding by the jury of malice as will entitle him under a special statutory provision to execution, on his judgment, against the body of the defendant on which he cannot disclose until after an imprisonment of sixty days. But here, however, neither special damages or special execution is claimed by the plaintiff. The averment of malice could be expunged from the declaration without any effect whatever.

The true rule in cases of tort is, that allegations of malicious intent need not be proved unless in special instances where they are a part of the description of the offense, or so connected with material averments that they cannot logically be separated from them. That is not this case. All the authors on pleading assert the principle that bad intention unnecessarily averred need not be proved. It would be difficult to find any reputable authority opposed to this position. See *Lyon* v. *Merrick*, 105 Mass. 71, and cases cited. Also *Decker* v. *Gammon*, 44 Maine, 322.

Exceptions overruled.

LEONARD L. BUSWELL *vs.* EDWARD T. FULLER.

Penobscot. Opinion February 24, 1897.

Taxes. Officer. Negligence. Burden of Proof. Bailment.

In an action by the owner of a horse against a collector of taxes, who had distrained the horse from the collector for a tax subsisting against such owner, in which action it is charged that the collector had been guilty of negligence in allowing the horse to get injured while in his possession between the date of the seizure and the date of the sale, the general burden of proof is on the owner to establish the alleged negligence; and this is so upon the ground that officers of the law are presumed to do their duty and are presumed to have no motive to avoid or neglect any duties imposed on them.

But to throw such burden on the owner or bailor, there is a preliminary duty or burden of explanation cast, from the nature of the relation of the parties, upon the officer or bailee to explain the circumstances of any injury occurring during his custody of the horse, so far as he has any knowledge of them superior to the knowledge of the owner in the matter; and this duty is imposed on the officer because he would naturally be supposed to be possessed of more means of information than the owner would have.

ON EXCEPTIONS BY DEFENDANT.

The case appears in the opinion.

H. L. Mitchell, for plaintiff.

A collector of taxes can justify under the warrant committing the taxes to him in all cases except for his own wrong and negli-

gence. It is also well settled that if a collector abuses his authority in the seizure of property for taxes, or neglects to take due and proper care of the property, or in any way neglects his duty to the injury of the property distrained, he thereby becomes a trespasser ab initio. *Carter* v. *Allen*, 59 Maine, 297; *Blanchard* v. *Dow*, 32 Maine, 557; *Reed* v. *Sibley*, 40 Maine, 356; *Dolbier* v. *Norton*, 17 Maine, 307; *Mills* v. *Gilbreth*, 47 Maine, 324; *Readfield* v. *Shaver*, 50 Maine, 36.

In a question of contract against warehousemen to recover for the failure to deliver goods intrusted to them, admitted or proved to have been received by them and not delivered upon demand, the burden of proof is on them to show that the goods had been lost without their fault. *Cass* v. *Boston & Lowell R. R. Co.*, 14 Allen, 448.

The proof of delivery of goods to a common carrier and of a demand and refusal of the goods, throws the burden of proof upon the carrier to show that the loss of the goods happened by dangers for which he was not liable. *Alden* v. *Pearson*, 3 Gray, 342.

C. A. Bailey and D. F. Davis, for defendant.

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

PETERS, C. J. This is an action of replevin for a horse that was distrained by a town collector for a tax against the plaintiff. The horse, having been kept four days by the collector, while about to be sold by him at auction was replevied by the owner upon the ground that the horse had not been properly cared for during the four days; the owner alleging that the horse was sound when distrained, and had been injured during the time of his detention by the negligence of the collector. The owner claims that the horse's hip got out of joint by some accident caused by the fault of the collector. Upon this issue of negligence the case was tried and a verdict rendered for the defendant.

The only exception, out of several taken, which is now relied on is that relating to the burden of proof. The plaintiff asked the

court to instruct the jury, "that the defendant was bound to produce the distress at the time and place of sale in as good order and condition as when he distrained it, and that if the distress was injured while in his custody, so to render it of less value, the defendant became a wrong doer and the burden was upon the defendant to show that he was not at fault."

The presiding justice ruled that the burden of proof was upon the plaintiff to establish the fact, by preponderance of testimony, that the horse was injured because the defendant did not exercise due and proper care for the distraint while in his custody.

Generally, the burden of proof upon any affirmative proposition necessary to be established as the foundation of a suit does not shift from plaintiff to defendant, while the burden of evidence, or of the weight or preponderance of evidence, or the burden of explanation, may shift from one side to the other according to the testimony. There is a manifest distinction between the burden of proof and the burden of evidence. How far the burden of evidence may bear upon a party to a litigation is usually more for the jury to determine as a matter of fact than for the ruling of the court as matter of law.

Generally, where a plaintiff, as his cause of action, alleges negligence against a defendant, the burden of proof is upon the plaintiff throughout the trial, even though in instances the burden of evidence may change. And very many English and American cases hold the doctrine that the rule, requiring that a plaintiff who alleges negligence must affirmatively prove it, applies in any case of bailment where the bailor sues the bailee for not returning the articles bailed in suitable condition, or does not even return them at all, at the time when the bailee was to turn them over, and that an omission so to do does not of itself establish the bailee's negligence or default. But this doctrine is stoutly opposed by other strong and leading authorities. Judge Story in his book on bailments espouses the doctrine, and Dr. Wharton in several of his treatises bluntly opposes it. The idea on which the doctrine is grounded is that negligence is not to be assumed or presumed, but must be proved, and in the case of an officer the theory is made

stronger, perhaps, because it is aided by the presumption that an officer, who has no motive to commit wrong, is presumed to act correctly.

And still there is really something illogical and unnatural in saying, if a person to whom I commit my property to keep for me neglects to return it to me when demanded of him, that I rather than he must show the cause of his default; that I, knowing nothing of the cause for the neglect of my bailee to return my property must give the explanation rather than he give the explanation who knows all about it. The folly of the rule, if applied literally, is vigorously assailed by Peckham, J., in *Collins* v. *Bennett*, 46 N. Y. 490, in the case of a hired horse returned to the bailor in a foundered condition.

And so it is that many courts have attempted to qualify the rule by annexing exceptions to it. Judge Story thought there might be an exception in complicated cases, and he would apply the rule in the law of bailments and not to common carriers, and that eminent jurist intimates that an exception should obtain in a case where the bailor demands a thing loaned, and the bailee makes a general refusal without offering any special excuse therefor. Story, Bailments, 213, 278. The Pennsylvania Court in *Clark* v. *Spratt*, 10 Watts, 335, places the burden of explanation on the bailee so far as to say that he is required to show that the goods have been lost and the manner they were lost, although the presumption is that a bailee has been faithful to his trust, and that the general burden of proof, after this exposure of facts by the bailee (in court or out of court we assume) rests upon the bailor to show the contrary. This case was approved by this court in *Mills* v. *Gilbreth*, 47 Maine, 320, a case in principle very much like the present.

There are two doctrines, therefore, to be found in the books on this subject,—one that the burden of proof shifts, and the other that it does not. But those who maintain the latter position admit that, while the general burden of proof does not change, if a bailor does not get any account of the loss of, or an injury to, the articles bailed, the proof of the fact of demand and refusal without such

explanation will make out a prima facie case for the bailor, and a conclusive case unless the bailee assumes the burden of evidence and shows facts proving the contrary. Mr. Schouler, in his valuable work on bailments, discusses this vexed and rather intricate question very instructively, and adduces the leading authorities on both sides. In a note he undertakes to construct a test which will be in consonance with the rule and its complicated exceptions. Schouler, Bailments, 22, 23, 24 and note.

The exceptions by the plaintiff cannot be sustained because there is nothing in them indicating that the officer did not disclose all the facts within his knowledge pertaining to the injury. It is presumable that both parties were witnesses.

Exceptions overruled.

INDEX-DIGEST.

ACTION.

See AGENT. ASSUMPSIT. DEEDS.

None on contract forbidden by statute, *Nelson* v. *Beck*, 264.
so of payee v. maker of negotiable note, *Ib.*
stallion not legally registered, etc., *Ib.*

Same principle applied, *Randall* v. *Tuell*, 443.
innholder had no license, *Ib.*

In real, plaintiff relied on lost deed, *Day* v. *Philbrook*, 462.
held; that its contents must be proved by evidence so clear and convincing as to preclude the possibility of mistake, *Ib.*
held; in this case, testimony was not such, *Ib.*

No, of assumpsit on a sealed instrument, *Knight* v. *Trim*, 469.

Assumpsit by grantor in deed, when, *Baldwin* v. *Emery*, 496.
deed accepted subject to mortgage that grantee assumed and agreed to pay, *Ib.*

Of money had and received by assignee to recover proceeds of notes and claims, *Doe* v. *Roe*, 523.
fraudulent transfer by insolvent, *Ib.*

By town to recover for support of truants, *Cushing* v. *Friendship*, 525.
what must be proved: conviction, commitment, expenses paid and pauper settlement, *Ib.*

ADVERSE POSSESSION.

Plaintiff's continued possession interrupted, *Day* v. *Philbrook*, 462.
this fact admitted in his former writ, *Ib.*

AGENT.

See GUARANTY. INSURANCE (LIFE.) SHIPPING.

Cannot be proved against an alleged principal by acts and words of the alleged agent, *Eaton* v. *Prov. Assoc.*, 58.

AGENT (concluded).

third party assumed to be an agent, *Ib.*
his acts and declarations *held* not admissible against alleged principal, *Ib.*

Agents collected over-due assessments, *Williams* v. *Relief Assoc.*, 158.
money received by company, *held*, a ratification, *Ib.*
acts of, may be waived by company, *Ib.*

Architect *held*, to be an, *Coombs* v. *Beede*, 187.

Insurance company bound by agent's knowledge, *Marston* v. *Life Ins. Co.*, 266.

Persons dealing with commercial, *Wood* v. *Finson*, 459.
may presume agency is general, *Ib.*

If, sells goods on terms unauthorized, his principal cannot reject terms and recover for goods sold, *Ib.*
commercial, agreed to insure oil sold, *Ib.*

Unknown principal held for acts of, *Mfg. Co.* v. *Burnham*, 538.
husband was agent of wife, *Ib.*
he bought lumber for her house, *Ib.*
her repudiation of certain acts, *held*, not binding on vendor, *Ib.*

ARCHITECT.

Is not a contractor, but an agent, *Coombs* v. *Beede*, 187.
duties of, defined, *Ib.*
skill, ability and taste implied, *Ib.*
satisfactory result not warranted, *Ib.*
house not to exceed a certain named cost did not prevent, from recovering pay, *Ib.*

ASSAULT.

Intent to do harm is an essential element in criminal prosecutions for an, *State* v. *Carver*, 74.
instruction omitting this, *held* erroneous, *Ib.*
a man assaulted need not cowardly flee but may assert a manly self-defense, *Ib.*
instructions contra, *held* erroneous, *Ib.*

ASSENT.

See INSURANCE (FIRE).

ASSUMPSIT.

None between tenants in common, *Ames* v. *Coffin*, 300.
defendant never expressly promised, *Ib.*
no promise to be inferred, *Ib.*
Will not lie for services when, *Lafontain* v. *Hayhurst*, 388.
rendered in expection of marriage, without expectation of other remuneration, the defendant refusing to marry, *Ib.*
No action of, on sealed instrument, *Knight* v. *Trim*, 469.
Action of, against grantee or obligee, when, *Baldwin* v. *Emery*, 496.
accepted deed subject to a mortgage that he assumed and agreed to pay, *Ib.*
sealed instrument evidence in, when, beneficiary not a covenantee, *Ib.*
Cannot be maintained for chattels wrongfully taken, unless converted into money or its equivalent, *Quimby* v. *Lowell*, 547.
vendor retook bicycle, *Ib.*

ATTACHMENT.

See LEASE.

Not dissolved by insolvency, *Laughlin* v. *Reed*, 226.
mechanic's lien not four months old, *Ib.*
officer may keep property under, *Ib.*
house on leased land in remote township, *Ib.*
Of personal property in unincorporated place, *Grant* v. *Albee*, 299.
to be recorded in oldest adjoining town in county, *Ib.*
Wesley does not adjoin T. 36, *Ib.*
Creditor lost his, by officer's false return, *Remick* v. *Wentworth*, 392.

AWARD.

Objections to an, must be specific, *Bucksport* v. *Buck*, 320.
general objections to an, will be overruled, otherwise; or when no questions of law or fact are resumed, or no exceptions taken before the referee, *Ib.*
when objections to evidence must be taken, *Ib.*

BAILMENT.

See BURDEN OF PROOF.

Defendants were gratuitous bailees, *Dinsmore* v. *Abbott*, 373.
plaintiff failed to prove refusal to deliver, *Ib.*
rules as to burden of proof applied, *Ib.*

BALLOT.

See ELECTIONS.

BANKRUPTCY.

See INSOLVENCY.

Judgment recovered after, may be proved, *Emery, Applt.*, 544.
otherwise in insolvency, *Ib.*

BANKS.

See NATIONAL BANKS.

BENEFIT ASSOCIATIONS.

See INSURANCE (LIFE).

Mortuary fund in, a trust security, *Ins Com.* v. *Prov. Aid Soc.* 413.
and to be apportioned equitably, *Ib.*
proportions of division stated, etc., *Ib.*
company in hands of receiver, and reinsurance acccepted by some, but not all, *Ib.*

BILLS AND NOTES.

Note given for intoxicating liquors, *Wing* v. *Ford*, 140.
indorsee for value, without notice of illegality, gets good title, whether acquired before or after maturity, *Ib.*
purchase of, after maturity not evidence of illegal consideration, *Ib.*
holder makes out prima facie case by proving it was indorsed to him for value, *Ib.*
but general burden of proof may shift to holder, *Ib.*
actual knowledge of illegality by indorsee required to defeat him, *Ib.*
held; plaintiff, in this case, could recover, *Ib.*

No action on, when contract forbidden by statute, *Nelson* v. *Beck*, 264.
payee v. maker,—stallion not legally registered, *Ib.*

Extension of payment of, not binding, *Howe* v. *Klein*, 376.
no consideration, mem. made after signing and delivery, *Ib.*

BOND.

Sureties on official bonds, *Lewiston* v. *Gagne*, 395.
implied authority, *qua* the obligee, to procure additional sureties to make bond sufficient, *Ib.*

BONDS (concluded).

matters not when other sureties are obtained, *Ib.*
sureties not released by representations of principal, *Ib.*
what will release surety after acceptance by obligee, *Ib.*
mutual mistake (1894 for 1893) ordered to be corrected by court when case comes up on report, *Ib.*

Sureties in probate, bound by decree, *Judge of Probate* v. *Quimby*, 574.
principal collected life insurance money and was charged therefor in probate account, *Ib.*

BRIBERY.

Offense of, at common law defined, *State* v. *Miles*, 142.

BURDEN OF PROOF.

See BAILMENT. BILLS AND NOTES. PRACTICE.

In trespass d. b. defendant justified, etc., *French* v. *Day*, 441.
instruction as to, *held*, erroneous, *Ib.*
"clear preponderance of evidence and convincing proof" *held*, equivocal and mischievous, *Ib.*

In trespass and case for wrongful occupation of land, preponderance of evidence only, *Neal* v. *Smith*, 596.

On owner to prove negligence after explanation by bailee or officer, *Buswell* v. *Fuller*, 600.

CANCELLATION.

See INSURANCE (FIRE.)

CASES CITED, EXAMINED, ETC.

Bangor House v. *Brown*, 33 Maine, 309, affirmed, 67
Ames v. *Hilton*, 70 Maine, 36, affirmed, 67
Commonwealth v. *Chase*, 9 Pick. 15, approved, 81
Leighton v. *Leighton*, 58 Maine, 67, affirmed, 129
York v. *Goodwin*, 67 Maine, 260, affirmed, 154
Wormell v. *Me. Cent. R. R.*, 79 Maine, 397, affirmed, 219
Mailhoit v. *Ins. Co.*, 87 Maine, 374, affirmed, 266
Spear v. *Fogg*, 87 Maine, 132, affirmed, 347
Slade v. *Patten*, 68 Maine, 380, overruled, 359
Pease v. *Gibson*, 6 Maine, 81, affirmed, 404
Howard v. *Lincoln*, 13 Maine, 122, affirmed, 404
Burbank v. *Gould*, 15 Maine, 118, overruled, 496
North Yarmouth v. *Portland*, 73 Maine, 108, affirmed, 531
Brooksville v. *Bucksport*, 73 Maine, 108, affirmed, 531

CLAMS.

See FISH AND GAME.

CONSTITUTIONAL LAW.

Adjudication of town-lines under R. S., c. 3, § 67, *Whitcomb* v. *Dunton*, 212.
affects not ownership of private property of persons not parties, *Ib.*
what is not "due course of law," *Ib.*

Indictment for libel, *State* v. *Norton*, 290.
jury determines law and fact, *Ib.*

Judgments recovered after bankruptcy and insolvency as affected by, *Emery, Applt.*, 544.
barred in former and not in latter, *Ib.*

CONTRACT.

See AGENT. ARCHITECT. ASSUMPSIT. BILLS AND NOTES.

Special, for sale of ice, *Milliken* v. *Randall*, 200.
burden of proof as to care until shipped, etc., *Ib.*

No action on, forbidden by statute, *Nelson* v. *Beck*, 264.
stallion not legally registered, *Ib.*

Same principle applied, *Randall* v. *Tuell*, 443.
innholder had no license, *Ib.*

CORPORATIONS.

See INSOLVENCY. NATIONAL BANKS.

Stock of a, a trust fund, *Brockway Mfg. Co.* 121.
creditors have a lien and preference over any stockholder, and may hold agents liable for wasting assets, *Ib.*
treasurer of a, *held*, liable on the facts, *Ib.*
he used funds of the, to purchase its stock, *Ib.*

Fees and tolls on logs, *Machias Boom* v. *Holway*, 236.
"sorting," "rafting" and "boomage," *Ib.*
rule established and held valid, *Ib.*
principle of stare decisis followed, *Ib.*

Suit for unpaid stock in, by creditor of, *Morgan* v. *Howland*, 484.
defendant, *held*, not liable, *Ib.*
defendant held shares by assignment, *Ib.*

COURT.

No power to change entry "N. P., no further action" when made by consent, *Berry* v. *Somerset Ry.* 552.

COVENANT.

See ACTION. ASSUMPSIT. DEEDS.

Suits on, must be debt or, *Baldwin* v. *Emery*, 496.
when between parties to the, *Ib.*
but implied assumpsit, when, *Ib.*
grantee accepted deed subject to mortgage that he assumed and agreed to pay, *Ib.*

CRIMES.

See EVIDENCE. FISH AND GAME. INDICTMENT.

DAMAGES.

See DEEDS.

Value of land taken for a way, *Penley*, *Complt.*, 313.
is not in all cases the measure of damages, *Ib.*
injuries and benefits to be considered, *Ib.*
For breach of covenants of warranty, *Harrington* v. *Bean*, 470.
incumbrance was right of flowage, *Ib.*
rule of, stated, *Ib.*

DEATH.

See NEGLIGENCE.

DECLARATION.

See PLEADING.

DECREE.

See PROBATE.

DEEDS.

See PROBATE. TRUSTS.

DEEDS (concluded).

Land bounded on a highway, *Winslow* v. *Reed*, 67.
it extends to the centre of the way, *Ib.*
but bounded on a private way, it extends only to the side line of the way, *Ib.*
Cannot be made to operate as a will, *Wentworth* v. *Shibles*, 167.
absolute, *held;* there was no implied trust, *Ib.*
case of oral agreement to reconvey, thus void under Stat. of Frauds, *Ib.*
Town-line as a boundary in, *Whitcomb* v. *Dutton*, 212.
adjudication on town-lines under R. S., 3 § 67, affects not private ownership, *Ib.*
monuments in, best evidence, *Ib.*
and courses after monuments, *Ib.*
recognition of line by monuments after original location is question for jury, *Ib.*
Unpaid taxes are breach of covenant in a, *Maddocks* v. *Stevens*, 336.
to maintain covenant broken, plaintiff must prove a lawful assessment of tax, *Ib.*
collector's tax-deed not sufficient for this purpose, *Ib.*
When execution of, must be proved, *Webber* v. *Stratton*, 379.
offered by party as grantee, *Ib.*
acknowledgment and recording not proof of execution.
Sale of trees and bark, *Webber* v. *Proctor*, 404.
with right of entry, etc., for a term of years, sale not absolute, but limited to term named, *Ib.*
Covenants of warranty in, *Harrington* v. *Bean*, 470.
action by grantee v. grantor although he gave back mortgage at same time, *Ib.*
right of flowage, *held*, an incumbrance, *Ib.*
rule of damages stated, *Ib.*
interest from date of deed, *Ib.*
Assumpsit against grantee in, *Baldwin* v. *Emery*, 496.
grantee accepted, subject to a mortgage that he assumed and agreed to pay, *Ib.*

DIVIDENDS.

See National Banks.

DOMICILE.

See Pauper. Taxes.

EASEMENT.

See JUDGMENT.

Husband and wife had an, in a right of way across plaintiff's lot, *Morrison* v. *Clark*, 103.
he justified trespass in right of wife, *Ib.*
held; this defense was open to him, although plaintiff had recovered a former judgment, *Ib.*

ELECTIONS.

Stickers on ballots, *Waterman* v. *Cunningham*, 295.
cannot be placed over printed names on ballots, *Ib.*
blank spaces are left after names on ballots, and in which the voter may insert name of any person, not printed on the ballot, for whom he desires to vote, *Ib.*

ELLSWORTH CITY CHARTER.

See OFFICER.

EQUITY.

See MORTGAGE.

Specific performance decreed, when, *Bennett* v. *Dyer* 17. *Goodwin* v. *Smith*, 506.
oral agreement for sale of land, *Ib.*
part performance in pursuance of contract, damages in law inadequate, fraud and injustice resulting, if agreement be held void, *Ib.*
but evidence must be full, definite and conclusive, *Ib.*
held; plowing a driving park not sufficient, *Ib.*
and equitable estoppel does not apply, *Ib.*

Nuisance may be enjoined in, *Tracy* v. *LeBlanc*, 304.
when prospective and threatened, *Ib.*
but if existing, nuisance must be established at law, *Ib.*
case of second-story circular front, and injunction denied, *Ib.*

Mortgage foreclosed, security deficient, *Flint* v. *Land Co.*, 420.
land bought subject to mortgage and grantee assumed it as part of purchase price, *Ib.*
grantee, *held*, liable in, to mortgagee, *Ib.*
master appointed to report value of property, *Ib.*

Verdicts in, advisory only, *Redman* v. *Hurley*, 428.
motion and exceptions not considered, when, *Ib.*
on appeals in,—case heard anew, *Ib.*
case of fraudulent conveyance and jury trial, *Ib.*

EQUITY (concluded).

Jurisdiction clause in, abolished, *Goodwin* v. *Smith*, 506.
"plain, etc., remedy at law," *Ib.*
specific performance decreed, *Ib.*

ESTOPPEL.

See EQUITY. INSURANCE (LIFE.) JUDGMENT.

EVIDENCE.

See BURDEN OF PROOF. INSURANCE (LIFE). TAXES. WITNESS.

As to town-lines in a deed, *Whitcomb* v. *Dutton*, 212.
adjudication under R. S., c. 3, § 67, *Ib.*
monuments in deed, best; and courses next, *Ib.*
monuments, etc., after original location, *Ib.*

Admissible to show writings void, *Marston* v. *Life Ins. Co.*, 266.
or fraud that establishes estoppel, *Ib.*
that agent wrote answers in application for insurance and applicant gave different answers, *Ib.*
this shows recitals in application are not the applicant's, but those of the insurer, *Ib.*
R. S., c. 49, § 90, makes agent's knowledge the company's, *Ib.*

Collector's tax-deed is not, that an unpaid tax was lawfully assessed, in action of covenant broken for breach of covenant against incumbrances, *Maddocks* v. *Stevens*, 336.

Acknowledgment and recording of deed, *Webber* v. *Stratton*, 379.
not proof of its execution, when offered by party as grantee, *Ib.*

Fraudulent transfer in insolvency, *Stuart* v. *Redman*, 435.
vendee may be asked his knowledge of debtor's financial condition, business, habits, etc., *Ib.*
state of debtor's bank account, deeds, admissible in, *Ib.*

Contents of a lost deed the, must be clear and convincing so as to preclude mistake, *Day* v. *Philbrook*, 462.

Issue as to domicile in tax suit, *Rockland* v. *Farnsworth*, 481.
writ by defendant not admissible in, *Ib.*

Not admissible to show intent, when, *State* v. *Huff*, 521.
act made illegal by statute, *Ib.*

Admissible as res gestae, when, motive of witness material to some act of his own, *Cushing* v. *Friendship*, 525.

Parol, to show what passed into judgment, *Embden* v. *Lisherness*, 578.
record shows several issues, or is silent as to precise issue, *Ib.*

EXCEPTIONS.

Do not lie to abstract propositions when, *Bangs* v. *R. R. Co.*, 194,
they subsequently become immaterial, *Ib.*
e. g. instruction that street railway not bound to repair street between its rails, *Ib.*

Bill of, failed to disclose the facts, *Penley, Complt.*, 313.
and objections resting on inference, overruled for both causes, *Ib.*

Failed to state the testimony objected to, *Stuart* v. *Redman*, 435.
therefore, not sustained, *Ib.*

Same principle applied, *French* v. *Day*, 441.

Indefinite, not considered, *Field* v. *Lang*, 454.
or otherwise not well taken, *Ib.*

Will be overruled, when, *State* v. *Huff*, 521.
papers not made part of bill of, *Ib.*
omissions and irregularities in recognizance, *Ib.*

EXECUTIONS.

See MORTGAGE.

May be renewed, *Belcher* v. *Knowlton*, 93.
one demandant in real action having died, *Ib.*
this power conferred by R. S., c. 104, § 40, *Ib.*

FISH AND GAME.

Prosecutions by complaint, since Stat. 1891, c. 126, *State* v. *Sinnott*, 41.
before police courts and trial justices, *Ib.*
also, before Saco Mun. Court, *Ib.*

Deer killed in Petit Menan park, *State* v. *Parker*, 81.
held, illegal, possession not being actual, *Ib.*
deer was caught alive and killed in close time, *Ib.*

Market-man dealing in game, *State* v. *Lynch*, 209.
may annually kill one moose, *Ib.*
possession of carcass of a moose by him not evidence of illegal taking or killing, *Ib.*

Special law of 1895, c. 28, prohibits taking smelts in Damariscotta River, *State* v. *Huff*, 521.
intent not to violate statute is not admissible in evidence, *Ib.*

Clams taken without town's permit, *State* v. *Gross*, 542.
town failed to fix time and prices, *Ib.*
defendants not liable for taking clams, *Ib.*

FORCIBLE ENTRY AND DETAINER.

See PROBATE.

FRAUD.

See INSOLVENCY. INSURANCE (LIFE.)

Fraudulent conveyance *held* void, *Thompson* v. *Robinson*, 46.
deed made, pending suit against grantor, to protect property against the suit, *Ib.*
grantor so expressed his purpose, *Ib.*
Fraudulent transfer by insolvent to third person, *held*, void, *Doe* v. *Roe*, 523.

FRAUDULENT CONVEYANCE.

See FRAUD.

GIFT.

See TRUSTS.

No causa mortis, of real estate, *Wentworth* v. *Shibles*, 167.

GUARANTY.

To receive a fair and reasonable interpretation, *Granite Co.*, v. *York*, 54.
defendant bound himself by letter, *Ib.*
signed with the addition of Treas, etc., *Ib.*
"about $200 worth" *held*, to be an estimate, and sustains a verdict of $254.70, *Ib.*

HUSBAND AND WIFE.

Wife's title to land, *held*, better than her husband's, *Danforth* v. *Briggs*, 316.
he claimed under a mortgage that he had paid but caused to be assigned to himself, *Ib.*
no presumption that wife held land in trust for husband, *Ib.*
Husband was agent of wife, *Mfg. Co.* v. *Burnham*, 538.
he bought lumber for her house, *Ib.*
vendor charged lumber to him, *Ib.*
her repudiation of certain acts, *held*, not binding on vendor, *Ib.*
payments by him properly appropriated, *Ib.*

INDICTMENT.

See PLEADING.

Irregular conduct of a public officer, *State* v. *Darling*, 400.
subjecting him to a criminal charge must be directly alleged and proved, *Ib.*
nothing is to be left to inference, *Ib.*
Act made illegal by statute, *State* v. *Huff*, 421.
intent of defendant not to violate not admissible in evidence, *Ib.*

INNHOLDER.

Had no license, *Randall* v. *Tuell*, 443.
held; could not recover for board and lodging, *Ib.*

INSOLVENCY.

Fraudulent conveyance *held* void against assignee in, *Thompson* v. *Robinson*, 46.
deed made pending suit against debtor, *Ib.*
he expressed his purpose to protect the property against the suit, *Ib.*
Proof of debts in, governed by equitable principles, *Brockway Mfg. Co.*, 121.
a treasurer had a claim for moneys paid to the use of his insolvent corporation, *Ib.*
held; that his claim was subject to a set off for moneys of his corporation illegally paid out by him, *Ib.*
he used funds of his corporation to buy its stock, *Ib.*
Mechanics' liens protected in, *Laughlin* v. *Reed*, 226.
attachment not four months old, *Ib.*
Fraudulent conveyance set aside, *Redman* v. *Hurley*, 428.
equity case tried to a jury, *Ib.*
Replevin against assignee in, *Stuart* v. *Redman*, 435.
defense, indirect preference and fraud, *Ib.*
plaintiff may be asked as to his knowledge of debtor's financial standing before and after failure, *Ib.*
also of debtor's business, property, habits, etc., *Ib.*
debtor's deeds before and after sale admissible, *Ib.*
statute inhibits two kinds of transfers; first, direct preferences to creditors; and, second, transfers to third persons made to prevent property coming to creditors, *Ib.*
this case comes under second class, *Ib.*
Fraudulent transfer avoided, *Doe* v. *Roe*, 523.
facts that constitute reasonable belief, *Ib.*
Judgment recovered after, not provable, *Emery, Applt.* 544.
claim, *held*, extinguished by judgment, *Ib.*
but otherwise under U. S. bankrupt law, *Ib.*

INSURANCE (ACCIDENT).

See INSURANCE (LIFE).

INSURANCE (FIRE).

Agent may not cancel policy, or place assured in another company, *Clark* v. *Ins. Co.* 26.
valid contract having been effected, and no authority or request of assured, *Ib.*
or giving notice according to policy, *Ib.*
notice by company after loss avails not, *Ib.*
contracts of, how tested, same principles of assent, etc., as other contracts, *Ib.*
property insured must be in existence, *Ib.*

INSURANCE (LIFE).

See BENEFIT ASSOCIATIONS. EVIDENCE. PROBATE.

Fraud in application for, *Cummings* v. *Life Ins. Co.*, 37.
five of eight answers by insured were false, etc., *Ib.*
medical examiner misled thereby, *Ib.*
certificate to be void for concealment, etc., *Ib.*
materiality of statements need not be proved when insured warrants them true, etc., and conceals matters material to the risk, *Ib.*
Defects in proof of loss waived, *Peabody* v. *Acc. Assoc.* 96.
by accepting and preparing second proofs, *Ib.*
notice three days too late, *Ib.*
acts, *held*, to be a waiver, *Ib.*
Defenses, held, to be waived, *Williams* v. *Relief Assoc.* 158.
acceptance of assessments over-due, *Ib.*
company received assessments collected by agent, *Ib.*
ratification thereby *held* to be proved, *Ib.*
Company estopped in action on policy, *Marston* v. *Life Ins. Co.*, 266.
agent wrote answers in application, *Ib.*
actual statements of applicant admissible to contradict the answers written by agent, *Ib.*
R. S., c. 49, § 90, *held*, to apply to life insurance, *Ib.*
company bound by knowledge of its agent, *Ib.*
Bicycle riding on Sunday, *Eaton* v. *Accident Co.*, 570.
avoids not policy of accident, *Ib.*
and falls within fifth-class rates, *Ib.*
was not an occupation, but an occasional vocation, *Ib.*

INTEREST.

Allowed in damages, *Harrington* v. *Bean*, 470.
broken covenants in deed, *Ib.*

INTOXICATING LIQUORS.

See BILLS AND NOTES.

JUDGMENT.

See EASEMENT.

Doctrine of res judicata, *Morrison* v. *Clark*, 103.
identity of parties and issue, *Ib.*
held, that former, was not a personal estoppel, *Ib.*
defendant acted in a different right, *Ib.*

Against logs, *held*, valid, *Plurede* v. *Levassuer*, 172.
in a lien suit against logs, jurisdiction over debtor and log owner not necessary, when, *Ib.*

Adjudication of town lines under R. S., c. 3, § 67, *Whitcomb* v. *Dutton*, 212.
affects not ownership of private property, *Ib.*
not due course of law as to persons not parties, *Ib.*

Valid, in lien claim, *Laughlin* v. *Reed*, 226.
suit against general owner, two counts, *held*, to cover same lien claim and no merger, *Ib.*
no other notice besides to defendant required, *Ib.*

Set off of, allowed by law court, *Howe* v. *Klein*, 376.
but subject to attorney's lien, *Ib.*

Conviction of truancy, *held*, sufficient, *Cushing* v. *Friendship*, 525.
and conclusive until reversed, *Ib.*

Recovered after insolvency, not provable, *Emery, Applt.*, 544.
otherwise, in bankruptcy, *Ib.*

When, is an estoppel, *Embden* v. *Lisherness*, 578.
rendered on merits and same subject matter, *Ib.*
may show what, rendered or when several issues in pleadings, *Ib.*
parol evidence to show same or when record is silent, *Ib.*

JURISDICTION.

See FISH AND GAME. JUDGMENT.

LEASE.

Rent payable monthly cannot be attached until complete expiration of the month, *Mason* v. *Hotel Co.*, 381.

LIBEL.

Whether language is a, question for jury, *State* v. *Norton*, 290.
but for the court on demurrer, *Ib.*
spoken words not actionable, are a, if published, *Ib.*
interrogative form of words may be a, *Ib.*
natural and ordinary meaning to be regarded in determining when words are a, *Ib.*
demurrer overruled, judgment and sentence follow, *Ib.*
Instructions in action for, *held*, correct, *O'Rourke* v. *Pub. Co.*, 310.
and new trial refused, *Ib.*
public officer falsely charged with cruelty.

LICENSE.

See PROBATE.

LIEN.

Statute giving a, on logs, *Plurede* v. *Levasseur*, 172.
is without qualification or limitation, *Ib.*
may be enforced regardless of ownership of logs or residence of debtor, *Ib.*
judgment against logs, *held*, valid, *Ib.*
Protected in insolvency, *Laughlin* v. *Reed*, 226.
mechanic's lien attachment not four months old, *Ib.*
Attorney's, protected in set off of judgments, *Howe* v. *Klein*, 376.

LIMITATIONS.

Express promise required by stat. of, *Johnston* v. *Hussey*, 488.
writing, *held*, not sufficient in this case, *Ib.*
interpretation of writing is for the court, *Ib.*

LOGS.

See CORPORATIONS. JUDGMENT. LIENS.

MASTER AND SERVANT.

See NEGLIGENCE. RAILROADS.

MINOR.

See PAUPER.

MORTGAGE.

Chattel, duly recorded, *held* sufficient, *Cayford* v. *Brickett*, 77.
as to identity of property, condition, etc., *Ib.*
Foreclosed by suit and second execution issued, *Belcher* v. *Knowlton*, 93.
although one demandant having previously died, *Ib.*
this power conferred by R. S., c. 104, § 40, *Ib.*
Assignment of, to husband, who paid the debt, *held*, invalid against his wife, *Danforth* v. *Briggs*, 316.
Land bought subject to a, *Flint* v. *Land Co.*, 420.
and grantee assumed the, as part of purchase price, *Ib.*
statute of frauds not a bar thereto, and
grantee, *held*, liable to mortgagee for the debt, *Ib.*
legal and equitable remedies stated, *Ib.*
foreclosure of, a payment pro tanto, *Ib.*
master appointed to report value of, property, *Ib.*

MUNICIPAL OFFICERS.

See TOWNS.

MURDER.

Verdict of guilty sustained, new trial refused, *State* v. *Getchell*, 326.

NATIONAL BANKS.

National, in liquidation, *Sav. Inst.* v. *Nat. Bank*, 500.
dividends belong to holder of shares whether recorded in books of bank or not, *Ib.*
no notice to, by holder, *Ib.*
rule applies not to current dividends, *Ib.*

NEGLIGENCE.

Physician, *held*, not liable for, *Feeney* v. *Spalding*, 111.
no evidence of want of skill in operating on plaintiff's eye, and verdict set aside, *Ib.*

NEGLIGENCE (concluded).

Master to provide proper place for servant, where he may work in safety, *Haggerty* v. *Granite Co.*, 118.
master, *held*, liable, *Ib.*
rock fell upon workman in a quarry, *Ib.*
Workman injured by elevator, *Nelson* v. *Sanford Mills*, 219.
held; guilty of contributory negligence, *Ib.*
he knew there was a serious defect, *Ib.*
Employee liable to co-employee for, *Atkins* v. *Field*, 281.
when in line of his duty to the common employer, *Ib.*
plaintiff injured by the fall of a derrick furnished by the U. S. and set up by defendant who selected the means and directed the mode of setting it up, *Ib.*
otherwise when common employer directs and controls, etc., *Ib.*
Traveler at railroad crossing at grade, *Giberson* v. *R. R. Co.*, 337.
court restates his duties and holds that he was guilty of negligence, *Ib.*
Plaintiff's mill burned by R. R., fire, *Leavitt* v. *R. R. Co.*, 509.
fire caught from cooking-car of independent contractor, *Ib.*
R. R. Co., *held*, not liable, *Ib.*
relation of master and servant did not exist, *Ib.*
rule of remote cause stated, *Ib.*
act of third party intervening, *Ib.*
Driver collided with street car, *Flewelling* v. *Street R. R.*, 585.
held; he had right to drive on street where street car ran, *Ib.*
but very great care and caution required, and same of motor-man, etc., *Ib.*
Horse distrained for taxes and injured while in custody of collector, *Buswell* v. *Fuller*, 600.
burden of proof of, on owner after explanation by officer, *Ib.*

NEW TRIAL.

See TAXES.

When case was fairly tried a, refused, *Hammond* v. *Phillips*, 70.
Refused in pauper case, on the facts, *Friendship* v. *Bremen*, 79.
None for want of certain witness, *Atkins* v. *Field*, 281.
should move for postponement of trial, *Ib.*
Refused in libel suit, *O'Rourke* v. *Pub. Co.*, 310.
None on defendant's motion, when, damages are nominal, etc., *Field* v. *Lang*, 454.
newly-discovered evidence did not come within the rules to make it effective, *Ib.*

NEW TRIAL (concluded).

Law court may grant, when verdict is clearly and palpably wrong, *Griswold* v. *Lambert*, 534.
refused on the facts, *Ib.*

NONSUIT.

See PRACTICE.

NOTICE.

See INSURANCE (FIRE). LIEN. NATIONAL BANKS. WAY.

Received three days too late in accident insurance case, *Peabody* v. *Acc. Assoc.*, 96.
held; waived on the facts, *Ib.*

In lien claim against general owner, *Laughlin* v. *Reed*, 226.
no notice except to defendant required, *Ib.*

NUISANCE.

See EQUITY.

OFFICER.

See BURDEN OF PROOF. INDICTMENT.

May retain possession of property attached, *Laughlin* v. *Reed*, 226.
house on leased land in remote township, *Ib.*

Liable to attaching creditor, *Remick* v. *Wentworth*, 392.
for false return of a levy, whereby creditor lost his attachment, *Ib.*

Removal of, *held*, a judicial act, *State* v. *Donovan*, 448.
case of Ellsworth city marshal, *Ib.*
was entitled to notice and hearing, and mayor and alderman must act together, *Ib.*
mayor alone attempted to make removal, *Ib.*

Presumed to do his duty, *Buswell* v. *Fuller*, 600.
horse injured while in custody of, *Ib.*

PAUPER.

See TRUANTS.

Legitimate minor takes, settlement of mother, *St. George* v. *Rockland*, 43.
deceased father had none in the State, and mother gains a new one by another marriage, *Ib.*

PAUPER (concluded).

New trial refused in, case, *Friendship* v. *Bremen*, 79.

Emancipated minor gains not, settlement by five years home in a town, *Exeter* v. *Stetson*, 531.

PAYMENT.

See HUSBAND AND WIFE.

Promise to make, to third party, *Coffin* v. *Bradbury*, 476.
when not within statute of frauds, *Ib.*
an original undertaking, *Ib.*
defendant bought land of adm'x and agreed to pay debt of estate due to third party, *Ib.*
and, *held*, liable on such promise, *Ib.*

Established by verdict, *Griswold* v. *Lambert*, 534.
note paid but not surrendered, *Ib.*

PERPETUITIES.

Rule of, stated, *Pulitzer* v. *Livingston*, 359.
applies to both legal and equitable estates, *Ib.*
distinguished from rule against restraint upon alienation, *Ib.*
held, that the powers in the trust deeds, in this case, were not void under the above rule, *Ib.*
Slade v. *Patten*, 68 Maine, 380, overruled, *Ib.*

PHYSICIAN.

See NEGLIGENCE.

PLEADING.

See ACTION. ASSUMPSIT. INDICTMENT LIBEL.

A general demurrer to an indictment, *State* v. *Miles*, 142.
not sustained, there being one good count, *Ib.*

Action of debt to recover a tax, *Wellington* v. *Small*, 154.
that selectmen directed in writing the action to be brought, *held*, a necessary averment, *Ib.*
time and place not traversable facts, *Ib.*
declaration, *held*, sufficient, *Ib.*

Brief statement in, unnecessary, *Milliken* v. *Randall*, 200.
set up no new matter in confession, etc., *Ib.*

PLEADING (concluded).

Special demurrer to account annexed, *Milliken* v. *Waldron*, 394.
held; that time, delivery and price are well pleaded, *Ib.*
Irregular conduct of a public officer, *State* v. *Darling*, 400.
subjecting him to a criminal charge, must be directly alleged and proved, *Ib.*
nothing is to be left to inference, *Ib.*
Pleadings as admissions of parties, *Rockland* v. *Farnsworth*, 481.
when foundation of another suit, *Ib.*
and bearing on material issues, etc., *Ib.*
Declaration in tax-suits must aver written direction of selectmen, *Charleston* v. *Lawry*, 582.
demurrer lies to its omission, *Ib.*
Trespass and case for wrongful occupation of land, allegation of maliciously done, *Neal* v. *Smith*, 596.
held, not needful and surplusage, *Ib.*
degree of proof, preponderance of evidence only, *Ib.*

PRACTICE.

See EXCEPTIONS. PLEADING.

Admissions, to facilitate a trial, must be taken and construed as a whole, *Hunter* v. *Pherson*, 71.
defendant admitted delivery of goods, but claimed they were sold on credit of third party, *Ib.*
held; no confession of a debt, *Ib.*
also, burden of proof had not shifted, *Ib.*
Order of procedure in jury trials, *State* v. *Martin*, 117.
within discretion of presiding justice, *Ib.*
witness allowed to testify after argument began, *Ib.*
held; not open to exception, *Ib.*
Case tried to court, jury waived, *Brooks* v. *Libby*, 151.
no exceptions to a nonsuit, *Ib.*
Immaterial instructions, *Bangs* v. *R. R. Co.*, 194.
Demurrer to indictment for libel, *State* v. *Norton*, 290.
was overruled, judgment and sentence follow, *Ib.*
Cases may be tried together, when, *Field* v. *Lang*, 454.
between same parties and of same nature, *Ib.*
Plaintiff agreed to enter action, "N. P., no further action." *Held;* final disposition, *Berry* v. *Ry.*, 552.
court no power to change entry without consent, *Ib.*

PROBATE.

Decree for distribution, *held*, valid, *Hurley* v. *Hewett*, 100.
$12,000 of bank stock decreed to be distributed, *Ib.*
distribution under R. S., c. 65, § 28, *Ib.*
formal irregularity in decree amendable, *Ib.*

Decrees in, when conclusive, *Lebroke* v. *Damon*, 113.
within jurisdiction of court and not appealed, *Ib.*
license to sell real estate, in such case, not open to collateral attack, *Ib.*
license granted to pay debts, *Ib.*
debt existed in a judgment against estate, *Ib.*
held; grantee of admr. had a good title, *Ib.*

Sureties in, bond bound by decree in, *Judge of Probate* v. *Quimby*, 574.
principal collected life insurance and charged therefor in his, account, *Ib.*

RAILROADS.

See NEGLIGENCE.

Repairs of street between rails, *Bangs* v. *R. R. Co.*, 194.

Decision of R. R. Comrs. as to crossing, *R. R. Co.* v. *St. Ry. Co.*, 328.
will not be reversed unless manifestly illegal, etc., *Ib.*
expense of crossings, how borne, *Ib.*

Travelers at, grade crossings, *Giberson* v. *R. R. Co.*, 337.
court restates their duties and holds in this case that the traveler was negligent, *Ib.*

Plaintiff's mill burned by fire from, *Leavitt* v. *R. R. Co.*, 509.
fire caught from cooking-car of independent contractor, *Ib.*
R. R. Co., *held*, not liable, *Ib.*
rule of independent contractor restated, *Ib.*
rule of remote cause stated, *Ib.*
act of third party intervening, *Ib.*

All highway crossings by, *Me. Cent. R. R. Co.* v. *Street Ry.*, 555.
within jurisdiction of R. R. Comrs., *Ib.*
case of overhead crossing in Veazie, *Ib.*
and relocating highway, *Ib.*

Street, have qualified right of way, *Flewelling* v. *Street R. R.*, 585.
care on part of foot-passengers, etc., *Ib.*
great care on part of motor-men, etc., *Ib.*
persons not debarred from exercising horses, *Ib.*
driver and team collided with street car, *Ib.*

REFORM SCHOOL.

See PAUPER. TRUANTS.

RENT.

See LEASE.

ROCKLAND CITY CHARTER.

See WAY.

SACO MUNICIPAL COURT.

See FISH AND GAME.

SALES.

See AGENT.

Of personal property rescinded, when, *Milliken* v. *Skillings*, 180.
there is a breach of warranty, etc., *Ib.*
conditions to right of rescission, *Ib.*
"tender" and "offer to return," *Ib.*

Special contract for, of ice. *Milliken* v. *Randall*, 200.
burden of proof as to care until shipped, etc., *Ib.*

Of trees and bark by deed, *Webber* v. *Proctor*, 404.
for limited term of years, etc., *Ib.*

Of oil by commercial agent, who, *Wood* v. *Finson*, 459.
agreed to insure it and did not, *Ib.*

Vendor may take possession, when, sale is conditional, *Quimby* v. *Lowell*, 547.
otherwise, when sale is absolute, *Ib.*
in this case, *held*, that vendee may not maintain assumpsit, *Ib.*
tort will lie for conversion, *Ib.*
implied warranty of title, *Ib.*
held, vendor had good title to a bicycle that she retook, *Ib.*

SET OFF.

Of judgments by law court, *Howe* v. *Klein*, 376.
but subject to attorney's lien, *Ib.*

SHIPPING.

Vessel let to master on shares, *Marshall* v. *Boardman*, 87.
part owner not liable for wages although he procured the charter, *Ib.*

SHIPPING (concluded).

"sails," or "hires" or "takes vessel on shares" implies that master has full control, *Ib.*
owner's exemption not to be presumed, *Ib.*
inconsistent to presume master is agent merely when he pays running expenses and has most of the earnings, *Ib.*

SMELTS.

See FISH AND GAME.

SPECIFIC PERFORMANCE.

See EQUITY.

STALLION.

See ACTION.

STATUTE OF FRAUDS.

Promise, *held*, not within, *Flint* v. *Land Co.*, 420.
land sold subject to mortgage and grantee assumed to pay it, *Ib.*
Grantee promised to pay to third person, *Coffin* v. *Bradbury*, 476.
promise, *held*, not within. *Ib.*
case of original undertaking, *Ib.*

STATUTES.

Changes or omissions of words in revision of general, do not indicate a change of legislative will, *St. George* v. *Rockland*, 43.
No action on contracts forbidden by, *Nelson* v. *Beck*, 264.
Same principle applied, *Randall* v. *Tuell*. 443.
Local, not repealed by general, when, *State* v. *Donovan*, 448.
enacted for benefit of particular municipality, *Ib.*
to effect repeal, language must be strong and imperative, *Ib.*
principle applied to Ellsworth city charter, *Ib.*
Intent not to violate, not admissible in evidence, *State* v. *Huff*, 521.

STATUTES CITED, EXPOUNDED, ETC.

STATUTES OF MASSACHUSETTS.

Mass. Stat. 1793, c. 34, Paupers, 43.
Spec. Laws, Feby. 13, 1808, c. 55, Machias Boom, 236.

SPECIAL LAWS OF MAINE.

Spec. Laws, 1885, c. 505, Provident Aid Society, 413.
" " 1887, c. 184, Provident Aid Society, 413.
" " 1889, c. 382, Provident Aid Society, 413.
" " 1891, c. 174, Machias Boom, 236.
" " 1893, c. 387, Provident Aid Society, 413.
" " 1895, c. 28, Damariscotta River, 521.

STATUTES OF MAINE.

Stat. 1821, c. 122, Paupers, - - - - - - - - 43
" 1836, c. 204, Railroad Corporations, - - - - 555
" 1853, c. 41, Railroads, - - - - - - 555
" 1858, c. 36, Railroads, - - - - - - 555
" 1862, c. 131, Mortgages and Liens, - - - - 172
" 1883, c. 167, Ways across Railroads, - - - - 555
" 1885, c. 275, Fish and Fisheries, - - - 41, 542
" 1885, c. 310, Ways across Railroads, - - - - 555
" 1887, c. 22, Children to Attend Public Schools, - 525
" 1887, c. 144, Lobsters, - - - - - - 41
" 1887, c. 132, Insolvency, - - - - - - 435
" 1889, c. 237, Life and Casualty Insurance, - - - 413
" 1889, c. 282, Railroad Crossings, - - - - 555
" 1889, c. 292, Lobsters, - - - - - - 41
" 1891, c. 75, Fish, - - - - - - - 400
" 1891, c. 95, Game, - - - - - - - 209
" 1891, c. 102, § 10, Elections, - - - - - - 295
" 1891, c. 126, Lobsters, - - - - - - 41
" 1891, c. 95, §§ 10, 11, Game, - - - - - - - 81
" 1891, c. 124, Injuries Causing Death, - - - 118
" 1893, c. 206, Truants, - - - - - - 525
" 1893, c. 205, 227, Railroad Crossings, - - - - 555
" 1893, c. 314, Taxes, - - - - - - 336, 384
" 1895, c. 70, Non-Payment of Taxes, - - - - 336
" 1895, c. 72, Railroads, - - - - - 328, 555

REVISED STATUTES OF 1883.

R. S., c. 3, § 10,	Town Records,	320
R. S., c. 3, § 34,	Election of City Officers,	448
R. S., c. 3, § 67,	Town-Lines,	212
R. S., c. 6, § 175,	Taxes,	154, 578, 582
R. S., c. 6, § 205,	Taxes,	336
R. S., c. 18, §§ 4, 14, 16, 65, 75,	Ways,	242
R. S., c. 18, § 8,	Ways,	313
R. S., c. 18, § 27,	Ways across Railroads,	555
R. S., c. 18, § 67,	Ways,	426
R. S., c. 24, § 1, cl. 2 and 3,	Paupers,	43
R. S., c. 24,	Paupers,	531
R. S., c. 27, § 13,	Innholders and Victualers,	443
R. S., c. 30, § 20,	Game,	209
R. S., c. 30, § 21,	Game,	81
R. S., c. 38, § 61,	Stallions,	264
R. S., c. 40, § 21,	Fish and Fisheries,	41
R. S., c. 40, § 25,	Fish and Fisheries,	542
R. S., c. 46, §§ 45, 46, 47, 48,	Corporations,	484
R. S., c. 49, § 67,	Insurance,	413
R. S., c. 49, § 90,	Insurance,	266
R. S., c. 65, § 28,	Distribution,	100
R. S., c. 70, § 25,	Insolvent Law,	544
R. S., c. 70, §§ 33, 34, 35,	Insolvent Law,	226
R. S., c. 70, § 52,	Insolvent Law,	435
R. S., c. 71,	Sales of Real Estate,	112
R. S., c. 73, § 11,	Conveyances,	167
R. S., c. 74, § 16,	Wills,	347
R. S., c. 77, § 25,	Exceptions,	17
R. S., c. 81, § 21,	Civil Actions, Service,	172
R. S., c. 81, § 26,	Civil Actions, Attachment,	226, 299
R. S., c. 81, § 97,	Civil Actions, Limitations,	488
R. S., c. 82, § 98, par III,	Deeds,	411
R. S., c. 82, § 110,	Deeds,	379
R. S., c. 82, § 140,	Executions,	93
R. S., c. 86, §§ 30, 79,	Trustee Process,	65
R. S., c. 86, §§ 55, 61,	Trustee Process,	381
R. S., c. 91, §§ 34, 38, 39, 42, 45,	Liens,	172
R. S., c. 91, §§ 34, 35, 42, 44,	Liens,	226
R. S., c. 104, § 10,	Real Actions,	462
R. S., c. 104, § 40,	Writ of Possession,	93
R. S., c. 111,	Stat. Frauds,	17, 420, 476
R. S., c. 129, §§ 1, 5,	Libels,	290
R. S., c. 124, § 20,	Sunday Law,	570
R. S., c. 133, § 13,	Final Judgment,	41
R. S., c. 142, §§ 3, 5,	State Reform School,	525

STOCKHOLDER.

See CORPORATION. NATIONAL BANKS.

STREET RAILWAYS.

See RAILROADS.

SUNDAY LAW.

Bicycle riding on Sunday violates not, *Eaton* v. *Accident Co.*, 570.
letter carrier rode to a funeral, and returned by another and longer road, *Ib.*

SURETY.

See BOND.

TAXES.

Declaration to recover, *held*, good, *Wellington* v. *Small*, 154.

Where errors and defects of records in action for, are matters of form only, *Bucksport* v. *Buck*, 320.
a new trial should not be granted defendant, *Ib.*

Unpaid tax is a breach of covenant against incumbrances in a deed, *Maddocks* v. *Stevens*, 336.
collector's deed not proof of the assessment of a tax, in suit for covenant broken, *Ib.*

School district tax may be joined in a collector's suit with town, county and state taxes, *Mason* v. *Hotel Co.*, 381.

Proceedings for collecting, by suits at law, to be be construed liberally, etc., *Mason* v. *Hotel Co.*, 384; *Charleston* v. *Lawry*, 582.
objections to irregularities overruled, *Ib.*

Defendant sued for, *Rockland* v. *Farnsworth*, 481.
issue was as to domicile, and his writ in another case not admissible in evidence declaring himself of Rockland, *Ib.*

Distinction between forfeitures and suits for, *Charleston* v. *Lawry*, 582.
lists to collector need not contain exact description of real estate, nor same as in the record of assessment, *Ib.*
written direction of selectmen to sue for, must be averred in declaration, *Ib.*

Horse distrained by collector of, *Buswell* v. *Fuller*, 600.
and injured before sale, *Ib.*
burden of proof on owner after explanation by officer or bailee, *Ib.*

TENANTS IN COMMON.

See ASSUMPSIT.

TOWNS.

See FISH AND GAME. TRUANTS.

Municipal officers are agents of, when, *Getchell* v. *Oakland*, 426.
to alter water course by side of way, and do the work at expense of, *Ib.*
Clams may be taken without permit of, when, *State* v. *Gross*, 592.
had not fixed times and prices, *Ib.*

TREES.

See WAY.

TRIAL.

See PRACTICE.

TRUANTS.

Offense of, none at common law, *Cushing* v. *Friendship*, 525.
towns liable for support of, in reform school, *Ib.*
action by town to recover for support of, *Ib.*
what must be proved to sustain action, *Ib.*
conviction, commitment, expenses paid, pauper settlement, *Ib.*
record is best evidence of conviction of, *Ib.*

TRUSTEE PROCESS.

See LEASE.

Trustee *held* not chargeable, *Steinfieldt* v. *Jodrie*, 65.
no evidence contradicting trustee who testified there was nothing due, etc., *Ib.*

TRUSTS.

See DEEDS. HUSBAND AND WIFE. PERPETUITIES. WILL.

How created, R. S., c. 73, § 11, *Wentworth* v. *Shibles*, 167.
by parol evidence, when, *Ib.*
but not by declarations of grantee, *Ib.*

VERDICT.

See NEW TRIAL.

Unmistakably wrong, set aside, *Cummings* v. *Life Ins. Co.*, 37.
rendered through influence of sympathy, or prejudice, and in flagrant disregard of facts, *Ib.*

When, will not be set aside, *Ellis* v. *Lewiston*, 60.
jury exercised an honest judgment, and evidence sufficient to sustain plaintiff's allegations, *Ib.*

When testimony is conflicting, *Whitcomb* v. *Dutton*, 212.
court disturbs not, unless clearly wrong, *Ib.*

To set aside, must be clearly and palpably wrong, *Griswold* v. *Lambert*, 534.

WAIVER.

See SALES.

Of defects in proof of loss in insurance, *Peabody* v. *Acc. Assoc.*, 96.
company accepted and prepared second proofs, *Ib.*
acts, *held*, to be a, in accident insurance, *Ib.*
notice received three days too late, *Ib.*

Acceptance of over-due assessments, *held* to be, *Williams* v. *Relief Assoc.*, 158.
company received assessments collected by agent, *Ib.*
a, may be inferred from circumstances, *Ib.*

When tort may be, and assumpsit had, *Quimby* v. *Lowell*, 547.
conversion of chattel into money, *Ib.*
vendor may, title under conditional sale, *Ib.*

WARRANTY.

See SALES.

WATER COURSE.

See WAY.

WAY.

See DEED. RAILROADS.

Town *held* liable for defect in, *Ellis* v. *Lewiston*, 60.

WAY (concluded).

shoulders of ice on each side of rail of a horse-railway, on which sleigh was caught, *Ib.*

Repair of street between rails, *Bangs* v. *R. R. Co.*, 194.

Main Street in Rockland, altered, etc., *Wilson* v. *Simmons*, 242.
adjudication by city council, *Ib.*
irregularities by street committee not radically defective, *Ib.*
name of land owner omitted in their return, *Ib.*
street commissioner, *held*, justified in removing trees in, and partly outside street location, *Ib.*

Value of land taken for, *Penley*, *Complt.*, 313.
is not always the measure of damages, *Ib.*
injuries and benefits to be considered, *Ib.*

Laying out, etc., of, held valid, *Condon* v. *Co. Com.* 409.
want of notice no objection,—parties were present, *Ib.*

Selectmen may alter water course, when, *Getchell* v. *Oakland*, 426.
built by side of, so as to incommode, etc., *Ib.*
may do work at town's expense, *Ib.*

Rights of street cars and foot-passengers in, etc., *Flewelling* v. *Street R. R.*, 585.
street car has limited right of, but motor-men must exercise great care, *Ib.*
driver collided with street car, *Ib.*

WILL.

Vested remainder defined, *Woodman* v. *Woodman*, 128.
contingent remainder defined, *Ib.*
case of vested remainder, *Ib*

Case of life estate and contingent remainder, *Hopkins* v. *Keazer*, 348.
life-tenant bound to insure, *Ib.*
executor became a quasi trustee, *Ib.*

WITNESS.

Plaintiff, *held*, incompetent as, *Sherman* v. *Hall*, 411.
defendant sued as admr., *Ib.*

WORDS AND PHRASES.

About $200 worth, - - - - - - - - 54
A new and original undertaking, - - - - - 476
Assert a manly self-defense, - - - - - - 74
By due course of law, - - : . - - - 212
Express acknowledgment and promise, - - - - 488
Liens not obnoxious to insolvent law, - - - - - 226
Liquidation dividends, - - - - - - - 500
Neither party, - - - - - - - - 552
No question of rescission involved, - - - - - 547
On shares, - - - - - - - - 87
Perpetuities, - - - - - - - - 359
Possession, more fictitious than real, - - - - - 81
Sold may mean only bargained - - - - - - 151
Such balance, - - - - - - - - 100
Statutes in pari materia, - - - - - - - 555
Truancy not a common law offense, - - - - - 525
Unconditional acceptance, - - - - - - 158
Verdict advisory only, - - - - - - - 428
Vested and contingent remainders, - - - - - 128

ERRATUM.

After "Stat. 1891," insert "c. 95," 81.
For "act of 1896," read "act of 1869," 450.